

# Setting the Context

This book is about contemporary regulation of consumer markets. It analyses the reasons for consumer law and policy and the different approaches to regulation of the price, quality and terms of consumer products and services. It provides an opportunity to assess the role and limits of consumer law and policy in addressing the pathologies of affluent consumer societies such as overindebtedness and to assess whether consumer law is a progressive form of law or merely a subaltern in the onwards march of neo-liberalism. The growth of a regulatory state in the UK and the EU provides the backdrop to current consumer law and we explore the ideas and institutions associated with this new form of state and their effects on consumer law and policy. Regional (EU) and international developments and institutions increasingly structure consumer law and policy. Consumer law is part of the establishment of the ground rules of the EU internal market and the development of transnational private regulation (Cafaggi, 2011).

‘Consumer law’ could be understood as all laws and regulations affecting consumption and the structuring of consumer markets. This would include most of the legal system—competition law, intellectual property, etc, and we focus primarily on traditional areas of consumer law. However, we use these areas—consumer credit, advertising, product safety—to illustrate some of the difficult economic, political and institutional choices that are embedded in choices of legal framework for markets. Consumer law is an instrumental form of law and requires reflection on the relationship of law to behavioural norms in markets, and the complexities of the relationship between these norms.

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## 1. The development of consumer law and policy

Many assume that the ‘consumer society’ is a recent phenomenon, which developed after the Second World War. For the past two decades historians have, however, argued over the ‘birth’ of the consumer society which may date from at least the eighteenth century (Stearns, 1997; Brewer, 2003; Trentmann, 2006). While this should make us

wary of associating the consumer society with the contemporary era, this is the focus of this text. But what is a consumer society? Benson offers the following starting point:

[T]hey are societies ... in which choice and credit are readily available, in which social value is defined in terms of purchasing power and material possessions, and in which there is a desire, above all, for that which is new, modern, exciting and fashionable. (Benson, 1994: 5)

Avner Offer locates 'affluent' societies in the post-Second World War period, noting that since that time 'the markets of Western Europe and the United States have delivered a flow of novel and compelling opportunities, services and goods. North America and Europe are about three times as rich as they were in 1950. I call that affluence' (Offer, 2006:1). The changing nature of consumption and consumer markets since the Second World War provides the context for understanding present-day consumer regulation in the United Kingdom. During this period, the consumption of durable goods increased enormously, continuing the growth of the mass consumer markets which had developed during the interwar years (Atiyah, 1979; Stevenson, 1984). Margaret Hall, an economist, wrote in 1960 that the consumer sector during the 1950s was marked by several features, including (Hall in Warswick and Ady, 1962: 429, 457)

growth in consumers' real income and the emergence of mass 'middle class' purchasing power ... a rapid growth in the demand for consumer durable goods, such as motorcars, radios and television sets ...the development of hire-purchase ... [and] an explicit recognition of the consumer's interest, evidenced, for example, by the formation of consumers' associations and by legislation against restrictive practices. ...[She concluded that] consumption is becoming more of a social force than production.

The growing affluence of the population during this period, coupled with changes in occupational structure, provided a large and stable consumer market which seemed to presage the development of a 'consumer society' similar to that which existed in North America. The development of a large middle group of technical and administrative occupations, a characteristic of advanced capitalism, might, it was thought, break down traditional class barriers (Halsey, 1986: 32). Some sociologists developed an 'embourgeoisement' argument—that the working class was gradually being assimilated, through consumption of products similar to those of the middle class, to the style and manners of that class (compare Goldthorpe et al, 1969, 1987). Antony Crosland had argued in *The Future of Socialism* that 'the sociological significance of the spread of high consumption ... must weaken the sense, as of course it lessens the fact, of inferior or unequal standards of life, and of class inequality generally' (Crosland, 1956: 286), and Michael Young, a founder of the Consumers Association, argued in 1960 that 'class based on production is slowly giving way to status based on consumption as the centre of social gravity'.

The harnessing of technological developments to large-scale production methods made much more widely available a broad range of relatively sophisticated products which were increasingly marketed through national distribution and retail chains. The growth of nationally branded products advertised through the new mass medium of television changed the nature of traditional consumer markets. The role of the small retailer declined as retailing and distribution became organised in large bureaucratic units in order to take advantage of scale economies. Industry became increasingly concentrated (Hannah, 1976). During this period, a general thrust of government economic

policy was to dismantle wartime controls and trade-protection legislation. It was argued that such restrictions hampered the competitiveness of British industry and jeopardised the central post-war goal of full employment (Craig, 1987: 204–05). The Restrictive Trade Practices Act 1956 was a major assault on the traditions of cartelisation which pervaded much of UK industry. These measures aided the transformation of the market into an effective mechanism for meeting consumer demand.

These developments formed the background to the establishment, in 1959, of the Molony Committee on Consumer Protection. The terms of reference of the Committee included the broad mandate ‘to consider and report what changes if any in the law and what other measures, if any, are desirable for the further protection of the consuming public’. The Committee restricted its focus, however, to the situation of ‘one who purchases (or hire-purchases) goods for private use or consumption’, excluding from its purview the interests both of the ultimate user and of the service sector.

Although the Committee’s report was greeted as being ‘not quite sufficiently radically pro-consumer’ (*The Economist*, 1962: 326), and although its legal recommendations were described as ‘good hearted ... unimaginative’ and ‘insular’ (Diamond, 1963: 66; and see Hilton below at 20), it provides an appropriate historical point of entry to present-day consumer regulation. The report, intended to provide ‘a foundation for policy making for the next twenty years’, stands at the beginning of a series of measures that were taken to protect consumers. It provided, for example, the model for the regulation of advertising and for trade descriptions legislation, and was the source for most of the consumer-protection initiatives of the 1960s. The general philosophy of the Committee was that competition and market forces were the best protections for consumer interests. The Committee members were sensitive, however, to the potential dangers of changes in the structure of the marketplace. In the following extract, they outline the arguments expressed to them concerning the potentially detrimental impact of these changes.

**Board of Trade, *Final Report of the Committee on Consumer Protection* (Molony Committee), Cmnd 1781/1962, paras 40–43, 403, 820–21, 869, 891**

*Alleged inadequacy of system*

40. The essence of the views which many have expressed to us is that the old-established balance between buyer and seller has been seriously disturbed in recent years by the emergence of radically different methods of manufacture, of distribution and of merchandising; and that as a result, the existing system of consumer protection has become inadequate in various respects. ...

*Consumer’s shopping problems*

41. The contention that the consumer now stands in need of greater protection is put forward in this way. Whereas the consumer of fifty years ago needed only a reasonable modicum of skill and knowledge to recognise the composition of the goods on offer and their manner of production, and to assess their quality and fitness for his particular purpose, the consumer of today finds it difficult if not impossible to do so because of the development of complicated production techniques. ... The job of ascertaining and soundly assessing the wide range of alternative choices open to him is more, his supporters aver, than the consumer can possibly be expected to do. It is further argued that the increased sale of branded and nationally

advertised goods has tended to reduce the retailer's function to that of handing over what the customer has already been persuaded to buy before entering the shop; and that partly for this reason, partly because it is almost as difficult for him as for his customer to sort out the merits and shortcomings of the goods he stocks, the retailer is far less able to perform his special and essential function of giving expert advice to the individual customer. This trend is seen in its most advanced form in self-service retailing. For all these reasons, it is said, the further protection of the consumer has become at once more necessary and more difficult to achieve.

*Complexity of goods*

42. Moreover, the ordinary consumer now spends a good deal of money on appliances and equipment of types unknown, or known only to a favoured few, thirty years ago. His car or his motor-scooter, his radio or television set, his vacuum cleaner, washing machine or refrigerator are relatively expensive and complicated assemblies of components, the precise working of which is imperfectly understood by the vast majority of buyers. The quality and relative merit of each can be assessed (if at all) only by a qualified expert using special equipment. Their useful life will depend, to marked extent, on the manner in which they are used and serviced, as well as on their initial quality. The failure of a single small component may put the whole machine out of action. When confronted with the need to make a choice between different models of such goods the consumer is incapable of intelligent discrimination; even price will not provide a sure signpost to the degree of satisfaction he is likely to achieve.

*Vulnerability of consumer*

43. In such a maze, the contention runs, the consumer finds it beyond his power to make a wise and informed choice and is vulnerable to exploitation and deception. On the extent to which the consumer is in fact exploited or deceived, witnesses have expressed or implied divergent views, ranging from those who think such an occurrence to be disgracefully widespread to those who see it as little more than a potential danger. Even if no advantage is taken of his ignorance, his ill-informed approach to the shopping problems arising in an era of plenty and prosperity is likely, it is said, to lead him into purchases unsuited to his needs. At the hands of the advertiser, the artful shop assistant or the ingratiating door-to-door caller, he is liable, it is suggested, to fall victim to the wiles of salesmanship. ...

*Reluctance to pursue claims*

403. There was widespread recognition that the ordinary consumer—devoid of technical knowledge, lacking ready access to independent technical advice, uncertain of the strength of his case, a stranger to the law and its ways—must be reluctant to incur the considerable trouble and appreciable cost of pursuing what he regards as his legitimate complaint. This reluctance is deepened if the outlay on expert investigation and legal proceedings is disproportionate to the price paid for the goods, and especially if satisfaction cannot be obtained short of bringing his case to trial. The consequences are that the less reputable retailer, knowing that the challenge is not likely to be maintained, is not disposed to canvass the idea of a settlement. In the result, it is, said, the rights which the law give[s] to the consumer too often go by default. ...

*Consumer unorganised*

891. The business of making and selling is highly organised, often in large units, and calls to its aid at every step complex and highly expert skills. The business of buying is conducted by the smallest unit, the individual consumer, relying on the guidance afforded by experience, if he possesses it, and, if not, on instinctive but not always rational thought processes. The capacity of sales staff in shops to help the consumer has deteriorated. The manufacturer and the distributor, in a country dependent on exports, speak with a well-organised and powerful

voice in national affairs. The interests of the consumer are sometimes overlooked because he is voiceless. The need for consumers to organise themselves was first expressed in the genesis of the Co-operative movement. When traders combine, or a single trader buys on a large scale, there is no doubt about the capacity of the purchaser to protect himself...

*Call for redesign*

820. ... through many of the submissions reaching us there ran the theme that piecemeal improvement would not ensure that a proper balance between buyer and seller would be wholly restored and permanently maintained; and that this purpose could only be achieved by a fundamental alteration in the structure of the system.

*Argument for redesign*

821. The argument supporting this theme was, in broad terms, that there existed on the side of the manufacturers and distributors effective organisation, providing mutual assistance and potent representation. Their approach to the difficulties of the consumer was one of indifference. The idea of a 'consumers' sovereignty' was fallacious. In truth, it was said, the producer easily prevailed over the welfare of the consumer; and would continue to do so until the consumer was provided with an organisation of equal weight to protect and represent him. ...

*Attention to enforcement*

869. Acts and regulations are of little value unless they are observed. A major cause of consumer weakness in the past has lain in the inadequate enforcement of the many laws in his favour. ...

A major thrust of consumer policies during the early 1970s was to redress the apparent imbalance of power between producers and consumers through the introduction of public regulation and the subsidisation of consumer organisations. These initiatives drew on such documents as the Crowther Committee's report on consumer credit (1971) and on the broad political support for consumer protection that existed in the early 1970s. Public regulation to protect consumers against economic losses was often justified by the diffuse nature of such losses, which although very large in total, were such that any one individual found it uneconomical to seek to redress her own loss through traditional methods. New agencies such as the Office of Fair Trading (1973) and the National Consumer Council (1975) were created. According to Lord Borrie, 'during the main period of advance in consumer protection in the 1960s and 1970s, the common law did not contribute very much' apart from cases such as *Jarvis v Swans Tours Holidays* (1973) which seemed to recognise the distinct nature of experiential loss in consumer contracts for services (Borrie, 1984: 7, 9).

In the area of health and safety, public regulation had existed since Victorian times to protect consumers against adulterated food (Paulus, 1974). The use of complex new technology in the production and distribution process posed new and uncharted risks. The Thalidomide disaster in the early 1960s symbolised the potential dangers of technology and drew attention to the limited public regulation of drug distribution in the United Kingdom. In addition, scientists were beginning to discover the long-term carcinogenic effects of certain food additives, and smoking was being clearly linked with lung cancer. The reduction in Western countries of the risks of being affected by natural diseases and disasters focused greater interest on potential man-made health-and-safety risks.

The period from 1964 to 1979 is viewed by many as the ‘heyday’ of consumer legislation throughout the Western capitalist world (Reich and Micklitz, 1980: 1–12). Elizabeth Cohen described the postwar US economy as a ‘consumer’s republic’ where expanded access to credit for male wage-earners, along with substantial government subsidies to the housing industry, promised the democratic ideal of equal citizenship through greater equality of consumption—rather than through an increased welfare state. This focus on consumption, including equal access to safe consumption, created a growing political constituency (see also Aaker and Day, 1971; Nadel, 1971). In 1960 John F Kennedy made a promise during his presidential campaign that ‘the consumer is the only man [*sic*] in our economy without a high-powered lobbyist. I intend to be that lobbyist’ (quoted in Cohen, 2004: 345). In 1962 Kennedy introduced to Congress a consumer bill of rights (the right to know, to be safe, to choose and to be heard) and a (modest) agenda of consumer bills. This ‘consumer rights’ agenda was an inspiration for developments in other parts of the world and the later international principles of consumer protection (see below at 39).

Cohen (2003) argues that consumerism during this period in the US had three demands: the passage of laws that protected consumers better in the marketplace; a reorientation of regulators towards the public interest rather than industry, reviving the New Deal model of the independent regulatory agency serving the public interest; and giving consumers a permanent voice in government. Public agencies such as the Federal Trade Commission were revitalised, and new social regulatory agencies such as the Consumer Product Safety Commission were created (1972). She comments that least progress was made on the goal of consumer representation in government and that ‘all ... levels of consumer advocacy assumed the viability and desirability of capitalist private enterprise and markets ... overall this was a politics of Americans who banded together as consumers to protest the practice not the ideal of advanced capitalism’ (Cohen 2003: 358–59). It provided the possibility for a populist critique that transcended divisions of class, gender and race; concerns with poverty were translated into ensuring that the poor had access to the same products and services as the middle classes. The US courts, through the development of strict liability in tort, the creation of a law of products liability, and the growth of class actions, were increasingly regarded as a regulator of the marketplace ‘another existing arm of government retooled to curb the influence of exploitative corporations and empower consumers’ (ibid: 361).

US developments are referred to throughout this book because UK capitalism is often viewed as having characteristics closer to the US model than other European countries, and its problems, policies and approaches have often influenced the UK. US ideas (such as class action, strict product liability and a fresh start for consumer bankrupts) have also influenced European developments (see Wiegand, 1991, on early influences) although increasingly the EU has developed a distinctive and competing model of regulation.

Consumer law and regulation during this period was only one example of government response to problems originating in the economic system. There was also a significant growth in environmental protection and in health and safety regulation of the workplace. It was regarded as a legitimate and proper role for government in a mixed economy to protect consumers and others against threats to their quality of life. This could be viewed as part of a movement to protect the new ‘social rights’ in

modern society—rights to health and material security (Cappelletti and Garth, 1978: 7–8). This quest for security is reflected in loss-distribution and risk-spreading policies in several areas of consumer protection, eg consumer credit and products liability and the use of standards and licensing in relation to health-and-safety risks. Such developments reflected a transition in modern law from an emphasis on private rights to an acceptance of public regulation. It would be dangerous, however, to view this period of consumer law as identified with the welfare state or welfarism. Most consumer legislation in the UK was introduced by a Conservative government and was intended to make markets work better.

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## 2. Consumer law, neo-liberalism and the social market

A transformation in ideas about the role of the state and the market has taken place since the 1970s. First, there has been in the UK a transition from producerism to consumerism—from policies being primarily concerned with their impact on the individual as a producer to a pervasive concern about the impact on consumer choice (Whitman, 2009). By 1999 it could be stated that: ‘Old Labour used to champion producers. New Labour crusades for consumers’ (*New Statesman*: 10 January 2000: iv). Contrast the following comments:

From a social perspective, work not only occupies a large proportion of most peoples days, but also provides one of the principal sites where we can construct social relationships and seek meaning for our lives. The consequence of unemployment is often described as ‘social exclusion’. (Collins et al, *Labour Law* 1)

We are all consumers now, consumers first and foremost, consumers by right and by duty. The day after the 11/9 outrage George W Bush, when calling Americans to get over the trauma and go back to normal, found no better words than ‘go back shopping’. It is the level of our shopping activity and the ease with which we dispose of one object of consumption in order to replace it with a ‘new and improved’ one which serves us as the prime measure of our social standing and the score in the life-success competition. To all problems we encounter on the road away from trouble and towards satisfaction we seek solutions in shops.

From cradle to coffin we are trained and drilled to treat shops as pharmacies filled with drugs to cure or at least mitigate all illnesses and afflictions of our lives and lives in common. Shops and shopping acquire thereby a fully and truly eschatological dimension. ... The fullness of consumer enjoyment means fullness of life. I shop, therefore I am. To shop or not to shop, this is the question.

For defective consumers, those contemporary have-nots, non-shopping is the jarring and festering stigma of a life un-fulfilled—and of own nonentity and good-for-nothingness. Not just the absence of pleasure: absence of human dignity. Of life meaning. Ultimately, of humanity and any other ground for self-respect and respect of the others around. (Bauman, 2011)

These contrasting viewpoints on the relative dominance of our identity as consumers or producers should be kept in mind in discussion of the importance of ‘consumer choice’ and ‘empowerment’ in policymaking. This may result in greater pressure on

and regulation of our lives as producers. It also draws attention to the links between consumption and production regimes in society.

Second, it is an era identified with the dominance of neo-liberalism and finance capitalism. These phenomena are associated with the breakdown of trade barriers, and capital controls, increased competition at national, regional and international level and a consequent reduction in labour power. Although sometimes identified with a minimal state, there is often a need for re-regulation of markets and the co-ordination of the international financial system. The state becomes a regulatory state. David Harvey (Harvey, 2005) argues that it is primarily a class phenomenon (Harvey does note the complexity here of identifying class), a reassertion of class hegemony and the restoration of power to a narrow upper class. He identifies the following characteristics: the fusion of the privileges of ownership and management in capitalist enterprises (eg through stock options); and the reduction of the historical gap between finance capital and production and manufacturing. Large corporations become dependent on financial dealings to sustain a profit rather than through production. The increased volatility in the international economy makes the regulation of the integrity of the financial system a central concern.

Harvey argues that 'freedom' has become associated with 'mindless consumerism' and a discourse that constructs a 'neo-liberal market based popular culture of differentiated consumerism and individual libertarianism'. Neo-liberalism constructs freedom and liberty as pitted against the stifling bureaucracy of the state and state regulation. In relation to the UK he argues that

Thatcher forged consent through the cultivation of a middle class that relished the joys of home ownership, private property, individualism and the liberation of entrepreneurial opportunities ... middle class values spread more widely to encompass many of those who had once had a firm working-class identity. The opening of Britain to freer trade allowed a consumer culture to flourish, and the proliferation of financial institutions brought more and more of a debt culture into the centre of a formerly staid British life. (Harvey, 2005: 61–62).

The neo-liberal state views competition as a primary virtue.

Privatization and deregulation combined with competition ... increase productivity, improve quality and reduce costs. ... The neo-liberal state should persistently seek out internal reorganizations and new institutional arrangements that improve its competitive position vis a vis other states in the global market... While personal and individual freedom in the marketplace is guaranteed, each individual is held responsible and accountable for his or her own actions and well being. This principle extends into the realms of welfare, education, health care and even pensions.

In terms of governance

neo-liberals are however, profoundly suspicious of democracy. Governance by majority rule is seen as a potential threat to individual rights and constitutional liberties. ... Neo-liberals therefore tend to favour governance by experts and elites. ... Given that neo-liberal theory centres on the rule of law ... it follows conflicts and opposition must be mediated through the courts. (ibid: 65–66)

Harvey points, however, to contradictions in the role of the state under neo-liberalism, with the need to regulate market failures and ensure the smooth operation of institutions such as the international financial system: the distaste for democratic control leads to

‘the paradox of intense state interventions and government by elites and “experts”’ (eg the IMF) ‘in a world where the state is supposed not to be interventionist’.

To what extent do the developments in regulation of consumer markets at the national, regional and international level which we consider throughout this book reflect these themes of neo-liberalism? Is regulation of consumer markets primarily an exercise in making the world safe for market capitalism? By assuring the conditions for capitalist accumulation, legitimating it through the idea of consumer sovereignty—does the market provide individuals with ‘what they want’—but not subject it to democratic control?

Third, inequality increased during this period. “[F]rom the 1980s onwards, inequalities in British and American societies increased sharply, especially in comparison with Europe (Offer, 2006: 273). There is a paradox therefore that in these affluent societies many individuals experienced a relative decline in their economic position. This was also a period when there was a rise in the two-income earner family in order to maintain the status associated with the earlier model of the single male wage earner. Offer argues that during this period, the US and UK traded off security and equality for greater consumption choices. In his view “the Thatcher Project deliberately set out to emulate the American model, and has been pursued with similar ardor by new Labour” (ibid: 357). He also argues that these societies have developed significant pathologies such as overindebtedness and obesity as a consequence of a general myopic tendency to favour short-term interests so that individual choices sacrifice the future to the present and do not lead to overall social welfare.

Fourth, the Thatcher government generally saw competition as the best consumer policy and did not favour extensive consumer regulation. To the extent that there were consumer law developments during this period (1979–97) they were generally stimulated by the need to give effect to European directives, for example, in the area of unfair terms in consumer contracts.

The emergence of a regulatory state spawned the growth of regulation as an academic area of study. Much initial economic analysis drew attention to the potential failures of government regulation including burdensome compliance costs, and to such potential anticompetitive effects of regulation as the creation of barriers to market entry and the stifling of innovation (Peltzman, 1975). Others argued that governments had often failed to ‘think through’ the rationales for intervention, thus causing a ‘mismatch’ between mischief and remedy (Breyer, 1982: 184). Political theorists argued that the attempt by governments to bring about substantive social objectives through legal regulation—instrumental law—could only be made at the cost of the ‘overlegalization’ (Offe, 1984: 280) of social relations and would be ultimately ineffective. Gunther Teubner articulated his regulatory ‘trilemma’ of ‘circumvention, perversity and negative feedback’ that resulted in a pathology of increasingly elaborate and legalised regulation that was ultimately ineffective (Teubner, 1987; and see Habermas 1998).

Julia Black summarizes these critiques of regulation:

[T]he instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that government has insufficient knowledge to be able to identify the causes of the problems, to design solutions that are appropriate, and to identify non-compliance (information failure), that implementation of the regulation is inadequate (implementation

failure) and/or that those being regulated are insufficiently inclined to comply (motivation failure). (Black, 2001: 106)

These developments stimulated a great deal of rethinking of the role and nature of regulation of markets. These included the idea of 'responsive regulation' where regulation would reflect a mix of instruments (reflecting the 'hybridity' of regulation), and the resources of the regulated would be harnessed to achieve compliance (see below Chapters 2 and 3). At a higher level of abstraction there was a focus on what appeared to be new forms of governance in neo-liberalism which attempt to manage the subject of consumption—the consumer—through education, expert advice and knowledge (eg Rose, 1999). Deregulation and privatisation often imposed greater choices on individuals (eg pensions). Forced to make choices, individuals were invited to regulate themselves according to particular norms of behaviour. Thus in consumer finance markets individuals must learn the appropriate norms of credit and savings behavior and become financially literate. More recently insights from behavioural economics have been harnessed to 'nudge' individuals to change their behavior. Whether these strategies of 'mobilising' or 'responsibilising' the consumer are likely to be successful—consumers seem often to be unmanageable—it draws attention to the very significant role of information as a tool of consumer policy 'and its explicit recognition as a regulatory tool' (Black, 2002).

The arrival of 'New Labour' in government in 1997 in the UK resulted in a new interest in the role of consumer policy as part of a 'The Third Way' approach to rejuvenating civil society and social democracy and as a response to the phenomenon of globalisation. Globalisation was viewed both as a 'challenge and opportunity' by the Blair government (Grant, 2002: 6). The government viewed efficient consumer markets with demanding consumers as a method for achieving global competitiveness for the UK economy. There was a role for the state as a regulator based on market failures (see below Chapter 2). Anthony Giddens, a primary intellectual architect of the Third Way, argued for a new model of welfare that would go beyond traditional approaches of direct transfers and embrace educational, preventive and regulatory measures (Giddens, 1994: 155). Giddens recognises the need for a social market model that shares risks widely, protects the most vulnerable and cultivates social cohesion (Giddens, 2007: ch 1). Greater individual responsibility and risk-taking could take place against a background of social solidarity.

The influences of these general ideas are found in consumer law and policy. In *Modern Markets, Confident Consumers* (1999) the aim of policy is to reinforce the 'virtuous cycle of strong consumers and strong business' and consumer and competition policy are viewed as contributing to national competitiveness in a globalised world. There is the adoption of Porter's thesis developed in *The Competitive Advantage of Nations* (1990) of competitive advantage in a globalised world through continuous upgrading of quality and the idea that demanding consumers in a home market make businesses more competitive internationally. There is also the increasing use of 'international benchmarking' to compare the effectiveness of regulatory regimes. Consider in the following extract the emphasis on increased individual choice in a wide array of public and private services and the need for informed choice.

### ***Modern Markets, Confident Consumers (1999)***

- 1.1 “A Stiff upper lip is not good for upgrading an economy” says Michael Porter in his analysis of international competitiveness, pointing out that the British are reluctant to complain and are less demanding as consumers than many other nations. He links demanding consumers in the home market with the competitiveness of a nation’s suppliers. ... The more informed and demanding we are, the more likely business is to respond, improving its competitiveness in the process and leading to better value for everybody
- 1.2 [Past measures] ... overlooked the contribution that consumers can make to competitiveness. The Government will put consumers at the heart of policy-making to ensure such mistakes are not repeated.
- 1.3 The aim of this White Paper is to reinforce this virtuous circle of strong consumers and strong businesses.

#### *Opportunity and Challenge*

- 1.4 New technologies and the opening of global markets are delivering more choice than ever before as well as falling prices in real terms for many goods and services. The spread of electronic commerce will speed up these trends ...  
... The opening up of utility markets has brought choice but requires more judgement by the individual. People are taking more responsibility for pensions, health and care in old age, involving them in important but complex choices, the success of which may not be known for many years.

#### *Information*

Information on the price and quality of products and services abounds, with IT enabling more and more to be made available. But two-thirds of consumers find the amount of information too hard to handle. A similar proportion do not understand their rights. ...

The information revolution enables business to meet the needs of their customers more precisely. But this creates concerns about privacy and some may lose out if business moves out of less profitable markets.

Consumers are increasingly concerned about health, safety, and the environmental impact of products. They have a vital role to play in tackling these major issues. ...

#### *Social Exclusion*

More complex markets and the growing amount of information needed to make good choices bear particularly hard on those who have low levels of education and skills and on the socially excluded who get limited help from the community. They are particularly vulnerable to the most unscrupulous trader. The poorest in society are least able to afford the consequences of bad purchases.

#### *A Strategic Approach*

- 1.6 This White Paper ... establishes a policy framework. ... The Government will look first for opportunities to make markets work, including through better information and self-regulation, but will not hesitate to regulate when other options have failed to solve problems or the risks to public health and safety are unacceptable. And it will ensure consumers’ concerns are heard in Government ...

These ideas were reiterated by the Department of Trade and Industry (DTI) in 2005 with comments that constitute the New Labour view on the future of consumer policy:

The Government wants Britain's consumer regime to be as good as any in the world. [We want] a regime that will empower and protect consumers, support open, competitive and innovative markets, that is as fair to business as it is to consumers and that has the minimum regulation necessary to achieve these goals. ...

The Government is committed to improving Britain's consumer regime. We want a regime that delivers social justice, economic and environmental progress, and which is as fair to business as it is to consumers. We have set ourselves the target of raising our consumer regime to the level of the best in the world. (DTI, 2005)

In 2003 the DTI conducted an international benchmarking study of UK consumer law and policy, which concluded that

the UK was amongst the best in terms of: consumer rights in regard to sale of goods and services; small claims court procedures; maintaining Product Safety; provision of consumer advice; strength of consumer advocacy at policy making level and sponsoring advocacy; investigating markets that are not working well for consumers.

The UK appears to be behind the best in not having a duty to trade fairly, fragmentation of enforcement and poor consumer information about good and bad traders. (DTI, 2003)

Several of the issues highlighted as weaknesses are addressed in current policies. The implementation of the Unfair Commercial Practices Directive through the Consumer Protection from Unfair Trading Regulations 2008 introduces a duty not to trade unfairly.

There is continuity between *Modern Markets* and the Molony Committee report. Both identify problems of new technology (in the latter the Internet), information deficits and consumer redress as potential problems. They also emphasise the importance of the consumer voice being heard in government. *Modern Markets* introduces the issue of social exclusion (discussed in Chapter 2 below), a term that is wider than traditional definitions of poverty and that emerged in France in the early 1970s to replace Marxist concepts of exploitation (see Boltanski and Chiapello, 2011). *Modern Markets* indicates also that the focus of consumer policy has widened since the Molony Committee report. That report adopted a relatively limited interpretation of the consumer relationship: it excluded both the ultimate user of products and the supply of services, and restricted its focus to the private sector. The growth of services markets is significant in areas such as financial services, leisure and tourism as well as 'services of general interest'. There is increasingly a knowledge and services society with a greater 'individualisation' of life choices for example in relation to pensions.

The most recent coalition government statement on consumer policy (2011) concludes that:

The Government's prime objective for consumer policy is to empower consumers to make wise decisions when purchasing goods and services. Empowered consumers demand choice and by exercising it, stimulate competition and innovation as well as high standards of consumer care ... Empowerment depends upon an underpinning framework of competition and consumer law so that choices are offered fairly. And the law needs to be properly enforced. But it is vital that the law is not too prescriptive otherwise it runs the risk of dampening competition and innovation and of loading costs onto businesses which are then passed on to consumers in the form of higher prices. Excessive regulation may limit consumer

choice and, even if intended to protect consumers, can end up costing them more than the benefit it brings. ([www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes.pdf))

Note the emphasis on choice, fairness and a concern about the costs of regulation. The reduction of social exclusion is not included as a prominent goal. There is a contrast here between general consumer policy and policymaking in financial markets (see below Chapter 7) where the world financial crisis has simulated greater interest in protecting consumers from the market, rather than merely facilitating choice.

A significant change from Molony is the growth of powerful retailers and supermarkets that have challenged the apparent dominance of manufacturers documented by the Molony Committee. Consumer markets no longer fit the arresting description of one US judge who commented that ‘the manufacturer is the father of the transaction ... the dealer is simply a way station, a conduit on its trip from manufacturer to consumer’ (Francis J in *Santor v A & M Karagheusian, Inc*, 1965: 309). Indeed, it has been argued that the leading supermarket retailers dominate suppliers, resulting in an investigation by the Competition Commission of the competitive nature of the grocery supermarket business. Competition policy and the desirability of vigorous competition are also highlighted in *Modern Markets* and a theme in contemporary policy analysis is drawing the links between competition and consumer policy.

The reference to health, safety and environmental risks in *Modern Markets* reflects the increasing preoccupation with issues of risk in contemporary society. Several writers have argued that although many societies are much richer than in the past there is a much greater concern with risks and the management of risk in society. These risks may often be generated by science and technology. They are also increasingly transnational so that ‘unlike the factory-related or occupational hazards of the nineteenth century and the first half of the twentieth century, these can no longer be limited to certain localities or groups but rather exhibit a tendency to globalization which spans ... national borders’, and in this sense brings into being ‘*supra-national and non-class specific global hazards*’ with a new type of social and political dynamism’ (Beck, 1992: 13; see below Chapter 9). These global risks may include health risks, environmental risks, financial crises and economic destabilization (King and Narliker, 2003: 337). The sub-prime mortgage débâcle in the US in the late 2000s triggered the worldwide financial panic and subsequent recession. The management of risk is a central theme in contemporary regulation.

Changes in approaches to consumer law have often been a response to scandal and disaster. The Thalidomide disaster in Europe drove the international development of pharmaceutical regulation in the late 1960s; in the 1990s the BSE scare and concerns about genetically modified organisms stimulated the creation of new regulatory agencies (Food Standards Agency) in both in the UK and the EU; the current credit crunch is stimulating new approaches to credit regulation. These scandals may become national and sometimes transnational political demands for action as well as prompting a search for new forms of regulation. When scandals create a ‘crisis consciousness’ (Habermas, 1996: 442) the loss of trust in politicians creates pressures for regulation and better oversight of regulation that will maintain public trust. Perceptions of government and regulatory failure during the 1990s (see below Chapter 9) resulted in demands for higher and more effective levels of regulation in the area of regulation of health

and safety risks in the UK and Europe. The accompanying decline of trust in expertise also resulted in greater opportunities for consumer representation on utility or financial services regulators.

The relationship between consumerism and citizenship is central to much contemporary work on consumer policy. Consumers are concerned about the processes by which products are made (eg fair trade initiatives) and one question is whether market choices might contribute to social justice and sustainable consumption. This collapse of the public and private sphere is mirrored in government policies that wish to bring the values of the private market—choice—into the public services and welfare state. However, commentators have raised problems with such a strategy. These include the pervasive problems of defining the consumer interest since different groups of consumers may have different interests and demands, and ensuring that services do not simply respond to the voices of the articulate. Moreover the concept of choice may need some probing. There is also the danger that the infusion of consumer values becomes very much a ‘top-down’ affair that is not responsive to the potentially complex needs of individuals in relation to public service. It is, however, equally dangerous to assume that the insertion of consumer values will result in a dystopic consumerisation of life where individuals conceive of all relationships in market terms. Research suggests that individuals conceive of their relationship to the NHS in a different manner to their relationship with a supermarket. Given the permeability of the public/private distinction there may be possibilities of greater cross-fertilisation of ideas between the two sectors.

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### 3. Consumer influence in contemporary society: the politics of consumer protection

Several themes appear to underlie contemporary consumerism: an increasing desire for economic security and for protection from technological risks; a concern about corporate power, and the need to control it and make it accountable; and ideas of participation in social decision-making and of self-determination. Given these themes, a market model of consumerism may not always be appropriate, or effective, in providing real consumer influence over producer decision-making. This belief underlies the argument for greater consumer participation, and a greater consumer ‘voice’ (Hirschman, 1970), in producer and service-provider decision-making, and increased partnership between providers and users. This aspect of consumerism links it to the general societal problem of how to control and make accountable large bureaucratic organisations in both the public and private sector. Notwithstanding the embourgeoisement thesis, there remain large differences between the resources, aspirations and problems of rich and poor consumers, and issues of gender and race may also structure individual’s opportunities and choices. Consumerism has, in part, been concerned with the problems of the poor in the market-place, and a theme running throughout this book is the extent to which it may be part of social policy shaping and correcting market outcomes.

### 3.1 Explaining the existence of patterns of consumer regulation

This seems a simple question. Consumer protection may be conceptualised as a response to countervailing consumer power within a pluralist model of democracy. However, economic and political theorists have suggested that this is an overly simple explanation.

Economists, drawing on the analogy of the competitive market implicit in the pluralistic model, point to certain pervasive ‘failures’ in the political marketplace which undermine the effectiveness of the consumer interest. Michael Trebilcock summarizes these problems.

**M Trebilcock, ‘Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?’ (1975) 13 *Osgoode Hall LJ* 618 at 620–25**

In a heavily regulated society, the doctrine of pluralism envisages competition amongst groups as a self-corrective mechanism analogous to Adam Smith’s ‘invisible hand’ in an unregulated marketplace. Unless consumers as an interest group can find mechanisms for counting themselves in on this process of political decision-making by competition amongst groups, they are likely to have minimal impact on the political process or its regulatory arms. However, some formidable obstacles stand in the way of consumerism sustaining itself as, or developing itself into, a major political force.

*1. Diffusion of the Consumer Interest*

Consumer concerns are diffused across the 50,000 or so products and services that each of us typically consumes in our life-time. An individual consumer’s interest in anyone product or service will usually be so small that it will not be worth his while registering his dissatisfaction with the item to business, government, or a government’s regulatory agencies. At the same time, business interests concerned with the manufacturing or merchandising of that product have a sufficiently concentrated stake in any prospective regulation of it to make their views known very forcefully to government. ...

*2. The Fragmentation of the Consumer Interest*

Unlike the position generally with highly concentrated producer interests, the consumer interest is not homogeneous. Most consumers are also producers, and as producers we will often see things differently from the way we see them as consumers. ... If we work on an automobile production line, we may see questions of public transit, pollution and safety standards, and lower tariffs on imported cars differently from other consumers. As environmentalists, we may favour underground wires but as consumers we may not be prepared to pay the cost. A higher-income consumer may be prepared to pay \$500 for a safer, cleaner car but a lower-income consumer may not be able to afford the ‘luxury’ of more safety and less pollution. ...

There is also a range of ideological issues pertaining ultimately to questions of life-style, such as the role and regulation of advertising, rules governing the availability of credit and product proliferation, and the relationship between expenditures in the private and public sectors about which wide consensus is unlikely to be forthcoming.

The non-materialist ethic upon which the writings of many critics of the modern consumer marketplace, such as Galbraith and Packard, are premised is reflected in Packard’s dedication to his book, *The Waste-Makers*: ‘To my mother and father who have never confused the possession of goods with the good life’, and his idolizing, in the same book, of the life-style of an old woman in a lonely New England coastal cottage, without worldly possessions, who

spends her time making greeting cards out of sea-weed. It is not clear that most consumers share these life-style ambitions, or that if they do they would be prepared to see them imposed on everyone by state fiat, which of course, would call into question the very nature of our existing social and economic order. ...

All of these considerations bear on the fragmentation of the consumer interest and increase the difficulty of achieving a substantial, on-going coalition of consumer support around basic consumer issues. ...

### 3. *The 'Free Rider Problem'*

Even if a group of concerned consumers concert their efforts in order to promote their collective interests, the movement will never be as strong as the number of its potential beneficiaries would imply it should, because a number of potential contributors of money, time and expertise either need, or are able, to take a 'free ride' at the expense of existing members.

Olson points out that the nation state, as the extreme example of a large, latent group, cannot survive on voluntary dues or payments but must resort to coercive taxes. His central thesis is that unless the number of individuals in a group is quite small, or unless there is some other special device or incentive to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests. Olson suggests that, in the absence of coercion, the explanation for membership in existing large pressure group organizations lies not primarily in the collective goods these organizations provide to their members but rather in the non-collective goods they provide to members. The pursuit of collective goods, ie common or group interests, is merely a by-product of the provision of non-collective goods.

The analysis and assumptions made by Trebilcock are similar to those of public choice analysis, a branch of economics which attempts to explain the origins and growth of existing patterns of government regulation in terms of competition among private, self-interested groups. The basic thrust of this theory is that government regulation is not a response to the public interest. Rather, it is a 'commodity' supplied to private interest groups, who therefore 'buy' regulatory protection. The thesis was first developed in relation to the regulation of prices in, and of entry into, a single industry or profession. It was argued that this regulation served industry's interests, rather than those of the public, through the creation of barriers to market entry and monopoly rents for producers. This economic theory of regulation was related to other current theories in political science, which argued that regulators become 'captured' by the regulated industry (Bernstein, 1955).

The economic theory of regulation was generalised to cover all forms of government regulation by Peltzman (1976), who conceptualized the role of government as distributing regulatory benefits to the highest bidders in the political marketplace. Developments of this model suggest that there are a variety of players in the political market—politicians, bureaucrats, interest groups, the media—each pursuing their own self-interest. Thus, bureaucrats are assumed to be maximising their budgets or seeking further powers, and politicians may be assumed to be maximising their chances of re-election. Success for one group may depend upon building temporary coalitions with other groups. It was argued that the information and organisation costs facing diffuse groups such as consumers place them at a disadvantage in this regulatory game, and that, in consequence, politicians tend to bestow merely symbolic benefits on consumers

(eg unenforced legislation), while providing more tangible benefits for small, concentrated groups (see further Mclean, 1996; Ogus, 1994: ch 4; Symposium, 2002).

The economic theory of regulation is a powerful, if somewhat cynical, lens for viewing regulation. However, it fails to explain adequately the fact that there are in existence a broad variety of consumer-protection measures which do not seem to be a product of the power of narrow, private-interest groups (Posner, 1974: 535). Nor does it explain deregulation.

Partly in response to the limitations of the economic approach, JQ Wilson has developed a political theory of regulation (Wilson, 1980: 357). He distinguishes between a variety of policies in terms of the distribution of burdens and benefits: (i) where both the benefits and costs are widely distributed; (ii) where both the benefits and costs are concentrated; (iii) where the benefits are concentrated and the costs widely distributed; (iv) where the benefits are widely distributed and the costs concentrated (eg automobile safety).

**James Q Wilson, 'The Politics of Regulation' in James Q Wilson (ed),  
*The Politics of Regulation* (1980) 366–70**

When both costs and benefits are widely distributed, we expect to find *majoritarian* politics. All or most of society expects to gain; all or most of society expects to pay. Interest groups have little incentive to form around such issues because no small, definable segment of society (an industry, an occupation, a locality) can expect to capture a disproportionate share of the benefits or avoid a disproportionate share of the burdens. Not all measures that seem to offer a net gain to popular majorities are passed: proposals must first get onto the political agenda, people must agree that it is legitimate for the government to take action, and ideological objections to the propriety or feasibility of the measures must be overcome. ...

When both costs and benefits are narrowly concentrated, conditions are ripe for *interest-group politics*. A subsidy or regulation will often benefit a relatively small group at the expense of another comparable small group. Each side has a strong incentive to organize and exercise political influence. The public does not believe it will be much affected one way or another; though it may sympathize more with one side than the other, its voice is likely to be heard in only weak or general terms. ...

When the benefits of a prospective policy are concentrated but the costs widely distributed, *client politics* is likely to result. Some small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy. As we shall see, however, an important organizational change has occurred that has altered the normal advantage enjoyed by the client group in these circumstances—the emergence of 'watchdog' or 'public interest' associations that have devised ways of maintaining themselves without having to recruit and organize the people who will be affected by a policy. Absent such watchdog organizations, however, client politics produces regulatory legislation that most nearly approximates the producer-dominance model. ...

Finally, a policy may be proposed that will confer general (though perhaps small) benefits at a cost to be borne chiefly by a small segment of society. When this is attempted, we are witnessing *entrepreneurial politics*. Antipollution and auto-safety bills were proposed to make air cleaner or cars safer for everyone at an expense that was imposed, at least initially, on particular segments of industry. Since the incentive to organize is strong for opponents of the

policy but weak for the beneficiaries, and since the political system provides many points at which opposition can be registered, it may seem astonishing that regulatory legislation of this sort is ever passed. It is, and with growing frequency in recent years—but it requires the efforts of a skilled entrepreneur who can mobilize latent public sentiment (by revealing a scandal or capitalizing on a crisis), put the opponents of the plan publicly on the defensive (by accusing them of deforming babies or killing motorists), and associate the legislation with widely shared values (clean air, pure water, health, and safety). The entrepreneur serves as the vicarious representative of groups not directly part of the legislative process.

Consumer law and policy may fall into several of Wilson's categories. For example, given the power of financial interests, entrepreneurial politics may be necessary in the areas of consumer finance, whereas a general law on unfair commercial practices might fit majoritarian politics. It is also necessary to separate the enactment from the implementation of a law. Even if an entrepreneur or a coalition succeeds in achieving legislation by using the media to generate awareness of an issue, this success may be undermined in the day-to-day implementation and enforcement of it. Or a highly symbolic 'crackdown' may be promised that wanes in effectiveness over time as groups lose interest and the media moves on to another issue. Producer groups will have incentives to undermine enforcement, and consumer groups may lack the resources to monitor, on a continuing basis, the enforcement process. Consumer groups may exploit the media to create 'information cascades' which create moral panics or 'mass delusions' around issues, particularly those associated with health and safety, with politicians reacting by regulation even though these are minor risks or alternatives to regulation would be more effective (see below Chapter 9).

The insights of public choice and Wilson's theory have informed policymaking. Thus greater efforts (through subsidies and other techniques) have been made to ensure consumer representation in all facets of the policy and implementation process. The supercomplaint process is one example (see below at 109) of policy facilitating consumer groups to insert an issue on the policy agenda. In addition, the fear that agencies would be 'captured' or not be responsive to external goals has stimulated a wide variety of accountability measures in regulation.

These interest-group analyses above are used throughout the text. For example, why are cooling-off periods such a popular form of consumer policy (see below at Chapter 4). Are they primarily symbolic responses? What explains the exceptions to the scope of cooling-off periods where certain transactions are excluded? Which groups will benefit from the implementation of the Consumer Protection from Unfair Trading Regulations?

While most consumer organisations accept what might loosely be termed a 'social-market economy' ideology, in which governments are justified in protecting consumers where they are unable to protect themselves in the market, as Trebilcock indicates there are, potentially, significant ideological divisions within the consumer movement. For example, the political agenda of 'green consumerists' has traditionally differed significantly from organisations concerned to obtain 'value for money' in the market. These groups may also challenge dominant values of the consumer society and may be understood as partly fitting within the model of 'new social movements' (see Tilly, 2004; Touraine, 1974) which emerged in the 1970s. These are movements that in post-industrial societies with the decline of the traditional politics of class, focus on issues of identity and autonomy in the face of the increasing domination by a 'consumer

society'. These social movements, such as environmentalism and feminism, may aim for social transformation. They may also defend 'traditional' values or norms that seem threatened by the encroachment of the market. Middle-class parents may view television advertising to children as threatening middle-class child-rearing values. Ethical consumerism elides the division between consumerism and citizenship. There are also groups organised around single issues such as 'Debt on our Doorstep' or the impact of food advertising on children.

Writers of both the left and the right often seem to suggest that government ultimately serves powerful producer interests. This conclusion gains credence from arguments that business is, of necessity, the most powerful interest group, because governments depend on it to sustain economic growth (Lindblom, 1977: 170) and because of its influence on the media through corporate advertising and so on. Lindblom, for example, argues that business is able to ensure that certain core issues—private enterprise, private property and a high degree of corporate autonomy—are beyond serious public debate (Lindblom, 1977: 205). However, as I have already noted, it is difficult to conceptualise all consumer legislation as simply the product of producer interests or of those of narrow, private-interest groups. Moreover, it is misleading to conceive of producers as a monolithic force. There may be clear conflicts of interest between manufacturers and retailers, and between small and large businesses.

Trumbull argues (Trumbull, 2010) that public choice and existing interest-group theories do not adequately explain consumer policy. He argues that there is substantial consumer protection legislation, 'capture' of agencies is rare, and consumers have been influential in the development of consumer laws. Consumer groups provide legitimacy to the regulatory process and this has driven government subsidies of consumer representation. He also argues that the particular structure of consumer representation and consumer groups in different countries has an impact on regulation. Thus labour groups have been influential in consumer NGOs in France and this is reflected in some scepticism towards the benefits of consumer credit, viewed as undermining the working person's wage. In contrast, consumer groups in the UK, such as Which?, in general supported the extension of consumer credit, a model of informed consumer choice, and opposed measures such as interest rate ceilings which might reduce access to credit.

Recent historical studies argue that construction and promotion of the 'consumer interest' is often dependent on wider national and international interests and ideologies. Hilton, in discussing the relationship of consumerism to other interests argues that it has often been hitched to the star of other, more powerful, interests that have constructed 'the consumer' and the consumer interest according to their own agenda and ideology, while Maclachlan and Trentmann (2004) suggest that the success of consumer politics depends on the conjunctures of specific interests and ideologies which may provide opportunities for consumer groups. The New Labour interest in promoting the consumer interest as a means of achieving global competitiveness and perhaps reinvigorating democracy is an example. Although this renewal of interest was not a response to consumer groups, it provided an opportunity for consumer groups to promote an agenda that fitted with the prevailing ideology. Roberts (1975) suggested that many of the postwar measures protecting the economic interests of consumers in the United Kingdom were introduced because they also served the interests of powerful government players who wished to break down trade restrictions, and that consumer-

protection legislation essentially ‘piggy-backed’ on the achievement of these goals. Thus, where consumer-protection reforms were concerned with social goals unrelated to these economic goals success was less likely to be achieved. Certainly, this explanation appears plausible in regard to some measures, eg the creation of the Office of Fair Trading in 1973. Roberts denies that consumer protection may be explained as a response to consumerism in the same way that, for example, labour legislation was a response to the labour movement.

Mathew Hilton (2003) has charted the development of consumerism in the UK in the twentieth century and suggests a continuing tension between consumerism as a limited force for getting more from the existing market and a movement for social transformation that might be associated with a broader conception of citizenship. He argues that consumer influence in the UK after the Second World War was increasingly dominated by a ‘value for money’ consumerism represented by the professional middle classes and the ‘informed paternalism’ of the best-buy testing instituted by professionals at the Consumers’ Association (Which?) (see below). This ethic appealed to a significant portion of the middle classes where consumption was also becoming more of a male domain as it related more to major durables such as cars and appliances. It is no coincidence that this transition was accompanied by a conception of the consumer as a rational chooser rather than the historical figure of the impulsive and irrational female shopper. The Cooperative movement, which promised an alternative vision of consumer–producer relationships, had meantime fallen by the wayside having failed to engage with the politics of affluence.

Most mainstream consumer-protection measures have, unlike labour legislation, not been associated either with a major attempt to bring about a fundamental redistribution of resources in society or with the conflict inherent in capital–labour relations. Consumer interests may often coincide with government interests or with certain producer interests or with both sets of interests.

### *3.1.1 The structure of UK consumer representation*

In the United Kingdom, mainstream consumer representation was provided by Which? (formerly the Consumers’ Association), a private organisation, and by the National Consumer Council, created in 1975. The former has a mainly middle-class membership of approximately 700,000. It campaigned extensively on a variety of issues, including unfair contract terms, the introduction of Consumer Advice Centres and the abolition of the solicitors’ conveyancing monopoly. It has operated primarily through lobbying (rather than litigation) and the use of the Private Members’ Bill procedure. According to *The Times*, it ‘can claim to have filled more pages of the statute book than any other pressure group this century’.

Its relative success appears attributable partly to its relatively thorough research and professional approach to campaigning, combined with its effective political skills (Gray, 1978: 262). These characteristics have endowed it with legitimacy in the eyes of bureaucrats and politicians, who view it as a ‘responsible’ voice for consumers. Like many interest groups, it is only able to provide the ‘collective goods’ from campaigning as a by-product of the revenues from its commercial operation—selling a variety of information to its members. The Consumers’ Association separated clearly its cam-

paigning wing from its commercial operations in the late 1980s through the creation of a separate charitable trust. The following extract is from Which's application to the DTI to be designated as a specified body empowered to bring proceedings comprising claims for damages before the Competition Appeal Tribunal (CAT) under section 19 of the Enterprise Act 2002 and section 47B of the Competition Act 1998:

CA does not receive funding from government as CA wishes to operate independently of government influence. CA needs funds to conduct its work and these come from the trading company. The profits or surplus of the trading company are only used to further the stated objectives of the charity. Which? Limited incurs the physical production costs of the magazine print run, associated salary expenses and so on and earns revenue from the sale of information material of interest to consumers such as the magazine. Which? Limited gift-aids all of its profits to CA so that CA can conduct its campaigns work. ...

CA actively campaigns on markets, personal finance, consumer markets and trade and competition. In all its campaigns, CA is committed to getting the best deal for consumers. Our campaigns have attracted extensive publicity and led directly to considerable improvements in the rights of consumers. Our biggest successes include ending rip-off car prices, winning compensation for missold endowment holders, getting the Food Standards Agency off the ground, strengthening the Financial Services Authority by lobbying for its additional powers, making inroads into CAP reform and persuading the OFT to investigate and take action on private dentistry, care homes and banking.

CA is invited to consult on hundreds of governmental consultations, steering groups and international forums each year and as such, has played a role in policy formation, draft legislation and information exchange at national and international levels. CA is an active member of BEUC- the Brussels based federation of 38 independent national consumer organisations; ECLG (European Consumer Law Group) within BEUC; the newly formed OECD joint working group on competition and consumer law and various academic networks.

In the United Kingdom CA has sponsored various successful private members' Bills including the Property Misdescriptions Act 1991, Cheques Act 1992, Sale and Supply of Goods Act 1994, Private Hire Vehicles (London) Act 1998 and Health Services Commissioner (Amendment) Act 2000.

CA's legitimate interest in protecting the collective interests of consumers is well recognised by the courts.

In *R v Secretary of State for Trade and Industry ex-p Consumers' Association and Which? Ltd* (Case C-82/96) CA complained that UK legislation implementing the Directive deprived consumer organisations, such as ours, of the right to take action in respect of unfair contract terms. The law was subsequently changed to reflect this. ...

... CA's Council is ultimately responsible for any decisions involving risk and cost assessment.

CA has demonstrated that it is prepared to commence litigation where circumstances point to the necessity of this being done for consumers. CA has also demonstrated that it uses the full spectrum of its range of legal powers. Since 1 October 1999, CA has been a qualifying body entitled to take action under the Unfair Terms in Consumer Contracts Regulations 1999. Indeed, CA promoted the private member's Bill that became the Unfair Contract Terms Act 1977. CA raises concerns about unfair contract terms with companies in various sectors. CA does not have the power to compel the provision of information hence tends to foster contractual improvements by issuing recommendations for modification and emphasising best practice. CA enjoys an open and co-operative relationship with the Office of Fair Trading and

other bodies qualified to enforce the Regulations. CA helps contribute to consumer education worldwide by accepting overseas delegations and explaining how UK consumer law works.

Which? runs a Legal Service consisting of 12 lawyers based in Hertford (and four administrative assistants) who provide general consumer law advice to members. CA has two staff responsible for and familiar with administration of the Consumer Regulations Webpage. ([www.dti.gov.uk/files11956.pdf](http://www.dti.gov.uk/files11956.pdf))

The National Consumer Council (NCC) was established during the era of corporatism to act as a counterpart to the representation of producer and labour interests. It was given a broad mandate to act as a partisan body to promote action for furthering and safeguarding consumers' interests—in particular those of the disadvantaged (see Department of Prices and Consumer Protection, 1974). Hilton notes that:

[M]ajor successes for the National Consumer Council included its contribution to the opening up of the banking system and air transport, the expansion of shop trading hours, and its criticisms of the legal system that saw further developments in the small claims courts ... and in alternative dispute resolutions, such the introduction of the ombudsman to the private sector. ... Today, despite some uncertainties as to its role in the mid to late 90s, the NCC continues to work to educate consumers, regulate markets in the consumer interest, tackle issues of exclusion for those on low incomes, increase consumer representation and develop consumer protection measures. (Hilton, 2003: 294–95)

The NCC was replaced by Consumer Focus in 2007 with a mandate similar to that of the NCC. Citizens Advice is the third primary consumer body in the UK. In addition to supporting the work of individual Citizens Advice Bureaux it includes as its aim 'to exercise a responsible influence on the development of social policies and services, both locally and nationally'. It is funded largely by the DBIS with local CABx funded by local authorities. It also may bring supercomplaints (and has done so on payment protection insurance and door-to-door selling). It highlighted the topic of overindebtedness in the late 1990s.

The UK coalition government proposes to make Citizens Advice the central advocacy and representation body for consumers (DBIS, 2012), conferring on it the existing powers and role of Consumer Focus. Citizens Advice will 'become the publicly-funded voice of consumers, championing their needs and empowering them to make the right choices for themselves ... their role will include research and horizon-scanning about issues that become important in the future' (DBIS, 2012, para 2).

The deregulation and privatisation of services such as gas, electricity and telecommunications posed questions as to consumer accountability for the new regulators in these industries. Privatisation was an attempt to substitute the discipline of the market and market efficiency which should make consumers better off. However, to the extent that industries were natural monopolies and often provided essential services, issues of consumer voice in these industries were raised. Demand for representation for individual consumers was underlined by the apparently high profits and compensation being paid to executives of privatised industries (see Moran, 2003: 112–13). Writing in 1999, Baldwin and Cave document research demonstrating that 'the consumer voice has been said to be weak in British regulation because information and expertise may be limited and because access to important processes [eg license modification negotiations in the utilities] may be incomplete' (Baldwin and Cave, 1999: 303). They outline

several models of 'voice' in regulation: (1) institutionalising representation within the regulator. This is the model of the Financial Services Authority which has a Financial Services Consumer Panel. (2) Independent individual consumer councils for particular industries. This was adopted in the creation of Energywatch established under the Utilities Act 2000 to represent the interests of electricity and gas consumers (but subsequently abolished and folded into Consumer Focus, and to be included within the new role of Citizens Advice). (3) Increasing the resources of existing consumer bodies. (4) Appointment of consumer advocates to regulatory boards.

Established consumer groups have an increasingly important role in the UK.

First, designated groups such as Which? and Citizens Advice may make 'supercomplaints' under section 11 of the Enterprise Act to the Office of Fair Trading which must provide a reasoned response within 90 days concerning the action which it will take. This 'right of initiation' permits a consumer group to have a role in agenda setting (see below discussion Chapter 3 at 109). Second, consumer bodies may be designated enforcers under Part 8 of the Enterprise Act 2002, the Unfair Terms in Consumer Contracts regulations 1999, and bring claims for compensation on behalf of consumers under the Competition Act 1998. Several of these initiatives represent the influence of European directives which, based on practice in several European countries, conceived of private groups as playing an important role in consumer enforcement and implementation.

The institutionalisation of mainstream consumer representation in the UK draws attention to a second model for viewing contemporary consumer representation. This is corporatism. Discussion of corporatism is hampered by a lack of agreement on the meaning of the concept (Grant and Nath, 1984: 21; Schmitter, 1974: 93–94). Corporatism may profitably be viewed as an approach towards policymaking. A feature of corporatism is the lack of a clear distinction between the public and private sphere, the private sphere performing what traditionally have been public functions.

Burgess comments on the incipient corporatist nature of contemporary consumer representation in the UK:

Heading the UK offensive against overpricing and other consumer causes lies a 'movement' of advocacy groups drawn into intimate embrace with the state, most importantly, the influential Consumers Association (CA). ... The CA has frequently set the news agenda in recent years ... representatives of the CA are consulted on a wide array of issues and have influenced government policies in areas as diverse as pensions, health care, legal reform and financial services. Government demand for the consumer group perspective is such that it threatens to outstrip the CA's capacity to provide such advice. ... Organizations like the CA have achieved a semi-official status through participating in government in this way. (Burgess, 2001: 99)

Although corporatism was repudiated by the Thatcher government, "responsible" consumer groups play an important role in contemporary policymaking. In addition to issues of constitutional legitimacy, a danger with a corporatist approach is that it may confine effective policymaking input to established representatives of interest groups.

Much consumer law and policy takes place now at the EU level, providing a further dimension to the politics of consumer lawmaking and implementation. Few studies exist of the political economy of consumer law and policy in the EU. Several writers argue that business interests have a privileged position partly because the complexity

of policymaking at the European level requires a heavy investment in monitoring resources and expertise and the need for the Commission, particularly in areas of specialist expertise to rely on sectoral expertise (see Moran, 2003: 167). Grant comments that ‘Business interests have a close and mutually beneficial relationship with EU institutions. There are few environments that are more conducive to the political expression of the structural power of capital’ (Grant, 2000: 105). ALTER-EU argued that expert committees in financial services are dominated by industry (ALTER-EU, 2009). The need to achieve legitimacy for community policies and to avoid continuing criticisms of the democratic deficit have resulted in significant subsidisation of consumer groups by the EU and perhaps a greater attention to the consumer interest than might be expected.

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#### 4. Markets, consumption and ideology

Beliefs about the role of markets and consumption in modern society affect both general policymaking and individual regulatory decisions. The resurgence of belief in the value of the market may be contrasted with a widespread assumption of the 1960s and 1970s of the need to tame ‘the violence of the market’ (Schonfield, 1965: 66) and of the importance of regulation and planning. Basic assumptions about the value of technology and the media to the quality of life may also influence regulatory decisions. A judge’s ‘inarticulate premises’ on the nature and power of advertising may clinch a decision about whether a ‘mere puff’ gives rise to legal liability. It is impossible ultimately to avoid these issues and it is best, therefore, to face them at the outset.

An initial model of the relative role of markets and government is the market system coupled with natural liberty (Smith, 1904: 184; Nozick, 1974; Friedman, 1962: 7; Friedman, 1979). Within this libertarian model, government has a very modest role—a role limited to defining initial property rights, enforcing contracts, exercising a police power and dealing with the few situations where the market system fails. This view draws a close connection between economic and political freedom. A classic statement of this is chapter 1 of *Capitalism and Freedom* by Milton Friedman (1962). In that chapter, Friedman stresses the following virtues of the impersonal market system: (i) it separates economic from political power—the decentralisation of power implicit in the market model limits the ability of one person to coerce another; (ii) in it, unpopular individuals do not have to convince any central authority of the value of their talents or ideas; (iii) it promotes diversity and innovation, and no individuals or institutions are able to impede progress; (iv) the voluntary nature of private market transactions is likely to enhance the welfare of the participants; and (v) potential coercion of one individual by another is reduced by the presence of market alternatives. Friedman notes that the mutually beneficial nature of markets depends on the transaction being ‘voluntary and informed’ and that markets may need to be regulated in the case of monopoly and third party effects that are not priced in the exchange (Friedman, 1962: 8–9).

Friedrich von Hayek underlined the importance of local knowledge in a market system that it would be impossible for government planners to duplicate.

**Friedrich von Hayek, 'The Use of Knowledge in Society' (1945) 35 *American Economic Review* 519**

If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them. We cannot expect that this problem will be solved by first communicating all this knowledge to a central board which, after integrating all knowledge, issues its orders. We must solve it by some form of decentralization. ... Fundamentally, in a system in which the knowledge of the relevant facts is dispersed among many people, prices can act to coordinate the separate actions of different people in the same way as subjective values help the individual to coordinate the parts of his plan.

Hayek and Friedman were important influences on the resurgence of neo-liberalism since the 1970s. But should we accept the argument that economic freedom is in itself important? Friedman's position on the issue should be compared with an earlier liberal—John Stuart Mill's views on trade regulation:

[T]rade is a social act. Whoever undertakes to sell any description of goods to the public does what affects the interests of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society. ... Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, qua restraint, is an evil; but the restraints in question affect only that part of conduct which society is competent to restrain, and are wrong solely because they do not really produce the results which it is desired to produce by them. As the principle of individual liberty is not involved in the doctrine of free trade, so neither is it in most of the questions which arise respecting the limits of that doctrine, as, for example, what amount of public control is admissible for the prevention of fraud by adulteration. ... Such questions involve considerations of liberty only in so far as leaving people to themselves is always better *caeteris paribus*, than controlling them; but that they may be legitimately controlled for these ends is in principle undeniable. (John Stuart Mill 1974: 164–65)

A consistent economic critique of Friedman's position may be found in the work of JK Galbraith (see discussion below Chapter 4). The main thrust of his work is to argue that, in certain sectors of the modern consumer economy, large corporations have, through the use of advertising, managed to gain power over the market. This undermines the idea of the market as responding to individual preferences—giving individuals what they want. Producer power replaces consumer sovereignty. The major goal of private producers is to sustain continued demand for new forms of private consumption, often at the expense of the provision of public services. This led to Galbraith's description of the USA as a land of 'private affluence and public squalor'. Galbraith's thesis is controversial; however, many economists do agree that corporations operating in oligopolistic markets are less subject to the disciplines of the market than the Friedman model presumes (Williamson, 1985). In addition, the economist Tibor Scitovsky has argued that the modern mass consumer market does not necessarily provide the diversity and choice espoused by Friedman. He argues that economies of scale in production and the continuing need to expand markets lead to the production of items which appeal to the lowest common denominator in public taste (Scitovsky, 1976: 1–11).

In a major restatement of liberalism, John Rawls (1971) rejected the system of

natural liberty and free markets. Market outcomes depend, in his view, on arbitrary factors such as natural talents and abilities. Governments, therefore, have a duty to rectify market failures and to redistribute income. The outcomes of markets are only justified to the extent that they benefit the least-advantaged group in society in the long run (Rawls, 1971: 100–08). In addition, Anthony Kronman has pointed out that in setting the ‘rules of the game’ for voluntary economic exchange, it is impossible to avoid distributional judgements on the extent to which it is legitimate for one person to take advantage of another. For example, should a company with superior information be required to disclose it to a consumer? Rules which regulate the exchange of information between contracting parties will almost invariably have a significant distributional impact (Kronman, 1979).

At a more general level, Kronman’s argument is that there is ‘no natural state of *laissez-faire*’ to be contrasted with state ‘intervention’. The free market is a creation of the state. This point is emphasized in Karl Polanyi’s description of the growth of capitalism in the nineteenth century:

[The] introduction of free markets, far from doing away with the need for control, regulation, and intervention, enormously increased their range. Administrators had to be constantly on the watch to ensure the free working of the system. (Polanyi, 1957: 140–41)

Compare Polanyi’s comments with Harvey’s (above at 8). Both indicate the need for market ground rules. The particular ground rules may shape the nature of the market (see Ramsay, 1995). Markets are not, therefore, simply a neutral mechanism responding to individual demands. This point is underlined both by Edwin Baker (1975–76: 37) and by Rawls (1971: 259):

The starkest failure of the ethical defense results from its necessary assumption of the neutrality of the market vis-a-vis individual values. The supposed freedom exists only if all choices are made by individuals while the structure imposes no values. However, no structure is value neutral; all social structures affect both what people get and also how they interact; that is, affect both end results and processes. Any structure, but more specifically the market and consumer sovereignty, shapes tastes and distributions, organizes the processes of realizing values, and embodies a concept of value and of man.

[A]n economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be.

From this perspective, the issue of markets versus regulation is transformed into a question of what kind of society we desire and what kinds of influence and shaping we wish to be subjected to.

Some historians argue that consumerism is primarily an exercise in social control. Stuart Ewen argues that a major role of advertising in the early days of mass production was to educate the masses into viewing consumption as a desirable way of life (Ewen, 1976).

**Stuart Ewen, *Captains of Consciousness: Advertising and the Social Roots of Consumer Culture* (1976)**

Industrialization, then, was more than a question of producing more goods in a new way. It also entailed a process of socialization which aimed at stabilizing and inculcating fidelity among those whose labor was being conscripted. ... In the early years of the twentieth century, there was widespread working class resistance to industrial capitalism. ... It was within this context that American industry began to produce a cultural apparatus aimed at defusing and neutralizing potential unrest. ... As the notion of control expanded, the ways in which working people might be involved in the industrial process beyond their factory role became increasingly explored. The studies of early twentieth-century social scientists and Progressive social critics began to create a general understanding that the social control of workers must stretch beyond the realm of the factory and into the very communities and structures within which they lived. ...

It was within such a context that the advertising industry began to assume modern proportions and that the institution of a mass consumer market began to arise. Up to that point, much of indigenous working-class culture had resisted capitalist growth in general, and the invasion of capitalism into their work and lifestyles in particular ... advertising was to develop as a tool of social order [to] ... break down the barriers of individual habits. It defined itself as at once the destroyer and creator in the process of the ever-evolving new. Its constructive effort [was] ... to superimpose new conceptions of individual attainment and community desire; to solidify the productive process while at the same time parrying anticorporate feeling. [B] usinessmen ... looked to move beyond their nineteenth-century characterization as captains of industry toward a position in which they could control the entire social realm. They aspired to become captains of consciousness.

Ramsay outlines the development of this critical theme:

**Iain Ramsay, 'Consumer Law and The Search for Empowerment' (1991) 19 *Canadian Business Law Journal* 405**

The starting points in this approach are: (1) consumption and consumption policy are an attempted form of social integration and control in contemporary capitalist societies. They are associated with processes of 'normalization'—of particular forms of social relations. However, this process has never been completely successful in producing 'passive consumers' so that (2) consumption relations may be important sites for political struggle. This extends arenas of conflict beyond capital/labour relations and (3) conflict may often be around differing visions of consumption relations ...

The consumer society did not therefore lead to the end of ideology, the classless or homogenous society. ... In fact, there have developed a large number of 'new social movements' organized around issues of consumption and the relationship of consumption to production. These include urban movements (tenants groups, etc.), ecological, feminist, ethnic and radical media groups and so on. They do not fit the concept of the traditional working class movement and the site for struggle is not the workplace. Their challenge is to an oppressive form of social relations rather than merely to a lack of bargaining power in the market. ...

Consumer politics becomes the politics of consumption—a topic both richer and more complex than existing understanding. Consumerism is a contradictory discourse of oppression and liberation. In its right-wing guise, it promised liberation from traditional class structures and the equation of empowerment with freedom to choose material goods. This is radically different from consumer power as political participation and greater democratic accountability.

Sheila Rowbotham outlines starkly the critique of consumerism in the US:

[I]t was never just a matter of selling goods; advertisers promoted the good life. During the Cold War the superiority of American society in terms of individual consumption was an important ideological weapon. ... The particular pattern of consumption set by this era of optimistic faith in the capacity of the commodity to fulfil human needs was to have an international impact economically, socially and culturally. It has both met needs and generated new wants; made many aspects of life—including housework—more convenient, while creating new forms of inequality and deprivation. On the whole, this approach to consumption has been better at providing things for those who can afford to buy than meeting needs which require social reorganization. It has neglected the well-being and social rights of the poor, devastated the environment and failed to attend to the importance of care and nurture. (Rowbotham, 1999: 189)

A different approach which links consumerism to feminist and sexual politics is outlined by Mica Nava.

**M Nava, 'Consumerism and its Contradictions' (1987) 1 *Cultural Studies* 204**

Conventionally consumerism has been seen to confirm women in their subordination. A good deal of feminist intellectual work has documented the ways in which women have both been targeted as consumers and done a major part of the labour involved (approximately 80 percent of purchasing power in the Western world is wielded by women). ... Rather less attention has been paid to the contradictory way in which the relative status and power of women has paradoxically been enhanced by consumer society. Consumption (as a feature of modern capitalism) has offered women new areas of authority and expertise, new sources of income, a new sense of consumer rights, and one of the consequences of these developments has been a heightened awareness of entitlement outside the sphere of consumption (which may well have contributed to the conditions for the emergence of modern feminism. ... Thus the buying of commodities and images can be understood both as a source of power and pleasure for women (it has indeed given them a 'sense of identity, purpose and creativity') and simultaneously as an instrument which secures their subordination.

I think it is possible to argue that these disparate theories and practices constitute an advance on the cruder certainties of the immediate past precisely because of their more nuanced, complex and contradictory nature. Consumerism is here split from its historic one-to-one relation with production. ...

Consumerism does not simply mirror production. Cultural forms and meanings are not reducible to class and the economic. Consumerism is far more than just economic activity: it is also about dreams and consolation, communication and confrontation, image and identity. Like sexuality, it consists of a multiplicity of fragmented and contradictory discourses. Consumerism is a discourse through which disciplinary power is both exercised and contested. While not negating its relation to capitalism, we must refuse to return it always to questions of production.

## 5. The regional and global dimension

### 5.1 European consumer law and policy: establishing the ground rules of the internal market

Consumer law is increasingly Europeanised as part of the ground rules of the single market; there are the many directives on consumer law that continue to reshape UK consumer law and that we consider throughout the book (see eg below Chapters 4, 6, 7) ( for specialized texts see Weatherill, 2005; Micklitz, Reich and Rott, 2009; Stuyck et al, 2010). Several reasons underline the significance of contemporary EU consumer law.

First, the EU is an important contributor to a variety of techniques of regulation and governance, as it faces the challenge of regulation in transnational space. It provided the ‘new approach’ to standards setting in the area of product safety (see below Chapter 9) and has developed policymaking and enforcement networks. The new approach to standards developed in the 1980s harnesses both private and public actors and creates a system of governance by committees. The increasing role of networks of enforcers and experts in the implementation of EU consumer policy poses the question of the extent to which there is a nascent network governance of consumer policy at the European level. This raises questions of legitimacy and effectiveness concerning the process of European consumer policy making (see eg Scott, 2002; Poncibo, 2011).

Second, there is the question of the vision of social relations embodied in EU consumer law. Two models vie for dominance. There is on one hand a market-oriented vision of consumer law where consumer law is limited to responding to information failures in markets and where the state plays little role in shaping standards in the market. On the other is a vision of consumer protection as recognising norms of fairness, risk spreading and protection of the vulnerable. It may thus from this perspective be viewed as part of the European ‘social market model’ within the Lisbon Treaty vision of a ‘competitive social market economy’.

#### **Iain Ramsay, ‘Regulation and the Constitution of the Single Market; The Role of Consumer Law’ (2010) 50 *Canadian Business Law Journal* 322**

This topic [of EU consumer law] embraces two central themes: the search for better governance in the EU, recognizing the challenges of transnational, multi-level governance; and the tensions between different visions of the ground rules for the internal market—questions of the extent to which one party should look out for the interests of the other, and fairness and risk spreading.

EU developments have relevance beyond the EU. First, they illustrate issues concerning optimal levels of regulation (local, national, regional, international) in supra-national and transnational space. Second, regulation of consumer markets in the EU raises questions about the role of public and private actors in implementation and enforcement. ... Third, the EU provides an international model of consumer regulation, which attempts to balance consumer choice and consumer protection. As consumer protection is internationalized as part

of international economic regulation, there will be increased competition and benchmarking among regional models of consumer protection. The EU, not surprisingly, hopes that exporting its model will provide 'a World competitive advantage to the EU community.'

### I. CONTEXT: CONSTITUTING THE MARKET

Consumer law and policy are almost always framed and developed as part of broader political projects. These include attempts to make economies more competitive, free trade, social solidarity, or the demands of international agencies for 'modernization.' The EU hitches the development of consumer law to the objectives of driving competitive markets while at the same time providing a human face to the internal market, demonstrating citizen responsiveness and perhaps reducing the 'chasm between political elites and citizens.' The EU Commission argues that 'the 493 million EU consumers are central to the three main challenges facing the EU: growth, jobs, and the need to re-connect with our citizens. ... Confident, informed and empowered consumers are the motor of economic change.' To these goals has been added recently the speculation that a consumer contract code, by reducing transaction costs and stimulating consumer confidence, will help Europe to emerge from the current economic crisis. The consumer is therefore an important regulatory subject for these EU wide aspirations.

Consumer law often reflects tensions between the distinct ideas of consumer protection and consumer choice. Lady Hale claimed recently that, '[a]s a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice.'

[After discussing Whitman's distinctions between producerism and consumerism] ... These distinctions may be situated within 'the four clusters' of capitalism in member states: continental social market economy countries, Anglo-Saxon neo-liberal countries, Central and Eastern European countries (neo-liberal), and Nordic (liberal with safety nets) countries. Monti identifies the Anglo-Saxon member states as the 'driving force for the single market, competition policy, encouragement of economic reforms ... and light regulation.' The distinctions between these models of capitalism are finessed in The Lisbon Treaty's reference to the creation of 'a highly competitive social market economy,' a distinction recognized by the Commission in consumer policy where 'consumer interests cannot be exclusively defined in terms of economic efficiency. Citizens expect single market policy to deliver socially acceptable outcomes, sometimes at the expense of economic efficiency. For example, concern for human health, the environment and safety means that consumer products are strictly regulated. There is also a consensus that affordable access to certain essential commercially provided services, vital for economic and social inclusion, should be guaranteed to all, wherever they live.'

This quotation underlines the breadth of consumer policy which includes services of general interest, such as privatized public utilities, where universal access for all at reasonable prices is an important goal. This value may also be significant for aspects of financial services which are necessities in contemporary society.

The distinctions above frame debates within the EU about the extent to which consumer policy reflects neo-liberal rather than social market goals. The concept of a social market should not be equated with socialism, but rather the idea of protection against market risks and insecurity, possibly social solidarity, along with the benefits of a competitive market place. The most significant clashes between neo-liberalism and the social market are in labour law rather than consumer law. However, EU initiatives in consumer contracts and credit regulation do raise contested issues of fairness and 'images of society' implicit in consumer law. It should be added that social democratic governments in Europe have furthered neo-

liberal policies through the mechanism of the EU, transferring unpopular or contentious decisions—and responsibility for these decisions—to the EU level. A study of EU consumer law is primarily a study of the varieties of liberalism.

Consumer law in the EU is best conceptualized as a form of market regulation. This instrumental conceptualization of consumer law cuts across existing boundaries of public and private law as well as distinctions between legal and non-legal norms. Indeed the growth of consumer law in the 1970s symbolized the differentiation, fragmentation and possible disintegration of private law. Private law is a form of market regulation: it establishes and alters bargaining power and may have a patterning effect on risk allocation between

consumers and producers. It may also have an expressive effect as a model of social relationships. Consumer law is also pluralistic, ranging from hard law, through co-regulation, self-regulation and market norms and practices which may exceed the requirements of the law, a theme developed recently by Calliess and Zumbansen where Calliess outlines a nascent transnational *lex consumeria* in online b to c commerce.

There are limits on the resources and formal powers of the EU Commission to act in relation to consumer law, heightening the importance and attractiveness of achieving regulatory objectives through soft law methods of self-regulation, recommendations, moral suasion, benchmarking, naming and shaming, academic common frames of reference, or harnessing private actors in rulemaking. These forms of regulation raise issues of legitimacy, effectiveness and accountability. Legitimacy and accountability are important questions in the EU, the subject of a separate study. The study of EU consumer law, its forms and effects, is inevitably interdisciplinary. Lawyers played an important role in the early development of the EU, but increasingly policy making draws on economic and social science. Behavioural economics dominates contemporary analysis at DG Consumer Policy within the EU Commission.

There was no discrete focus on the consumer in the Treaty of Rome although it was assumed that consumers would benefit from a reduction in trade barriers and increased competition. A preliminary consumer programme was outlined in 1975 which imported the Kennedy principles of the right to protection of health and safety, the right to protection of economic interests, the right of redress, the right to information and education, and the right of representation. The Council resolution seemed to view the consumer as more than merely a market purchaser:

[T]he consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which might affect him directly or indirectly as a consumer.

The Treaty of Maastricht (1992) recognised consumer protection as one of the aims of the Community. Weatherill notes that 'it was as late as 1995 when a separate Directorate General (now known as DG Sanco) within the Commission was created to take charge of consumer policy; and as late as 1997 when the new DG gained sufficient staff to wield real clout, in the wake of the BSE "mad cow" crisis' (Weatherill, 1999: 695). The Treaty of Amsterdam (1999) incorporated changes to Article 153 (now 169) which recognise the concept of consumers' rights—to information, education and to organize themselves in order to safeguard their interests. The combination of Article 153 (now 169) and Article 114 (old 95) underline how completing the internal market and a high level of consumer protection are linked so that writers describe the 'Janus-faced' nature of EU consumer policy 'on the one hand aiming at creating a common internal market,

on the other hand striving at some protective goals as well' (Wilhelmsson, 2004: 319, citing Reich, 1996).

The European Court of Justice has played an important political role in the development of consumer law and policy. This was initially through negative integration where it took an aggressive position on non-tariff trade barriers, such as product standards, partly because of political gridlock in other community institutions. In the famous *Cassis de Dijon* case (*REWE-Zentral-AG Bundesmonopolverwaltung für Branntwein* (1979)) the plaintiff, a French company, wished to import into Germany a liqueur, Cassis de Dijon, and applied to the German Federal Monopoly Administration of Spirits for a licence to do so. This was refused on the basis that the liqueur was not suitable to be marketed in Germany because of its insufficient alcoholic strength. German regulations stipulated a minimum alcoholic strength for specified categories of liqueurs and fruit liqueurs such as Cassis de Dijon required an alcoholic strength of 25 per cent. The alcohol content of the French liqueur was only 15–20 per cent. The plaintiff argued that the German regulations were a measure having equivalent effect to a trade barrier under Article 28 (now 34) of the Treaty. The European Court of Justice held the German regulation to contravene Article 28.

***REWE-Zentral-AG Bundesmonopolverwaltung für Branntwein* [1979] ECR 649**

8. In the absence of common rules relating to the production and marketing of alcohol—a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309/ 2) not yet having received the Council's approval—it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.

...

12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages. This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject. ...

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public. However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and

such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

*Cassis de Dijon* was important in deregulating national consumer protection measures that could not be justified as serving a valid public objective. The Court of Justice adopted an approach not dissimilar to that of economic market failure analysis (see below Chapter 2). Protective rules could be justified if they were a proportionate response to a genuine consumer problem. Consumer protection could not be used to mask protectionism in trade.

A consequence of the generally deregulatory strategy of the court was the need for harmonisation of standards. Moreover by the mid-1980s the development of the internal market had reached somewhat of an impasse with many trade barriers still in existence and there was a sense that the EU as a concept had little broad political appeal. The 'new approach' to standards was adopted in 1985 as an approach to the logjam on standards. We discuss it in Chapter 9 below. A second approach was through a positive harmonisation programme of consumer law that could also be marketed as promoting the benefits of the common market to consumer-citizens.

## 5.2 Conceptions of the consumer in EU law

A recurring theme in consumer law concerns the image of the consumer who is to be protected in consumer law. Is it that of the reasonable consumer or a consumer who makes impulsive judgements? We explore this issue in greater depth in discussion of the Unfair Commercial Practices Directive in Chapter 4. The European Court of Justice addressed this issue in challenges to unfair competition regulations in several states that were argued to constitute barriers to trade under Article 28. The challenged regulations were often justified by the state in terms of consumer protection. Germany, for example, had strict rules on advertising, prohibiting 'eye-catching' price claims even if they were true (see *Yves Rocher*). The Court often had to address the question whether consumers might be deceived or otherwise harmed if the regulation was lifted. Given the political desire to break down trade barriers, the Court often adopted in these cases a relatively robust model of the consumer and a standard of deception of 'an average consumer who is reasonably well informed and reasonably observant and circumspect' (see *Gut Springenheide*, 1998, below). It also used a consumer's 'right' to information as a technique for striking down limits on comparative price advertising (*GB-Inno*, 1990). These techniques helped to justify deregulation of laws which appeared to the Court to be primarily designed to protect competitors and small businesses (viewing the legislation through a public choice lens) rather than consumers. However, the Court, given the differing political pressures on it and concerned to retain legitimacy, has attempted to balance this neo-liberal construction, for example, by limiting the attempts of business to attack national regulations on marketing practices (see *Keck*, 1993), by recognising national 'social and cultural interests' in misleading advertising, and the need to protect the 'vulnerable' (*Buet*, see below 174) and weaker consumer, and limiting the application of Article 28 in the case of Sunday shopping (see generally Everson, 2006: 112). Writers have also noted that the European Court of Justice has often interpreted Directives in a manner furthering consumer protection

objectives, restricting any attempts by states to derogate from a Directive (Heininger, 2001), and that this seems to contrast with the often deregulatory approach in the line of cases starting from *Cassis de Dijon* (Unberath and Johnston, 2010). In addition, the Court has made reference to the fundamental nature of consumer protection in the Community ‘compensating for the imbalance which exists between the consumer and the supplier’ (*Claro*, ECJ C168-05). The implementation of the Unfair Commercial Practices Directive (below Chapter 4) raises squarely the issue of the image of the consumer in European consumer law.

### 5.3 The competence of the EU in consumer policy

Weatherill argues that a generous reading of the ability to harmonise laws under Article 114 permitted the development of EU consumer protection directives. The extent of this power was challenged by the decision of the Court of Justice in 2000 in a case brought by Germany to challenge the competence of the EU under Article 114 to ban all forms of tobacco advertising. The Court held that while certain aspects of the directive could be upheld, such as prohibitions on advertising in periodicals and magazines, other prohibitions, for example on advertising on parasols and ashtrays, could not be justified as facilitating trade in the products concerned. The Court required that a measure adopted on the basis of Article 114 must do more than be based on ‘disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions to competition’ but must actually ‘contribute to eliminating obstacles to the free movement of goods and services’. The Court will verify whether the distortion of competition which the measure purports to eliminate is appreciable. ‘In the absence of such a requirement, the powers of the Community legislature would be practically unlimited (*Germany v European Parliament* [2000] Case C-376/98).

Weatherill argues that ‘consumer confidence’—a demand-side argument—has become significant in Commission documentation on consumer protection and suggests that this might be an argument for harmonisation in a similar manner to attacking supply-side barriers.

#### **Commission of the European Communities Green Paper on European Union Consumer Protection, Brussels COM(2001) 531 final**

It is the cross border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimize their consumption decisions. This cross-border demand increases competitive pressure within the internal market and allows for a more efficient and competitively priced supply of goods and services. This virtuous circle can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross-border trade.

#### **European Commission, *Consumer Policy Strategy 2002–2006*, Brussels, European Commission. COM(2002) 208 final at 7**

Barriers to cross-border trade should therefore be overcome in order that the consumer dimension of the internal market can develop in parallel with its business dimension. EU

consumer policy therefore aims at setting a *coherent and common environment ensuring that consumers are confident in shopping across borders throughout the EU*. (emphasis in original)

### Consumer Policy 2007–2013

EU Health and Consumer policies have three core joint objectives:

1. Protect citizens from risks and threats which are beyond the control of individuals and that cannot be effectively tackled by individual Member States alone (eg health threats, unsafe products, unfair commercial practices).
2. Increase the ability of citizens to take better decisions about their health and consumer interests.
3. Mainstream health and consumer policy objectives across all Community policies in order to put health and consumer issues at the centre of policymaking.

... two priority areas:

- ensuring a common high level of protection for all EU consumers, wherever they live, travel to or buy from in the EU, from risks and threats to their safety and economic interests.
- increasing consumers' capacity to promote their own interests, ie helping consumers help themselves.

Four strands of actions are foreseen:

#### 4.2.1. Better understanding of consumers and markets

This includes:

- Developing and updating its scientific knowledge base and assessment tools on consumer exposure to chemicals, including with respect to general product safety. ...

#### 4.2.2. Better consumer protection regulation

This includes:

- Completing the review of consumer law directives, developing a Common Frame of Reference for European contract law.
- Analysis of the safety aspects of the growing cross-border market in services, full analysis of the General Product Safety directive, and more systematic use of standards.
- Understand better national consumer policies: identify and promote best practice; setting benchmarks and recommendations; training policy makers and enforcers.
- Examining how consumer interests are taken into account in standardisation, identify improvement needs.
- Ensuring consumers are heard in EU policy-making, support effective consumer organisations at EU level and their participation in consultative bodies, forum groups, and specialist panels.

#### 4.2.3. Better enforcement, monitoring and redress

This includes:

- Strengthening cross-border enforcement: implementation of relevant legislation and

coordinating the work of all actors, and in particular customs, including on General Product Safety, RAPEX, and taking into account the international dimension.

- Improving transposition and implementation of EU directives, focusing more resources on monitoring transposition and implementation, to ensure consistent interpretation.
- Improving consumer organisations' ability to assist consumers, act as an early warning system to identify rogue traders, and monitor national policies.
- Improve consumers' means of redress, notably in cross-border cases, including access to Alternative Dispute Resolution; developing the network of European Consumer Centres.

#### 4.2.4. Better informed and educated consumers

This includes:

- Ensuring that consumers, through better information, are able to make informed, environmentally and socially responsible choices on food, the most advantageous products and services, and those that correspond most to their lifestyle objectives thus building up trust and confidence.

To what extent are these goals similar to those outlined in the material on UK policy? Several commentators argue that the current foundations of Community consumer policy primarily construct the consumer as a means to achieving a more competitive market based on the model of the active information seeking consumer who is reasonably circumspect in making shopping decisions (Reich, 1992; Stuyck, 2000; Micklitz, 2002; Howells and Wilhelmsson, 2003).

### 5.4 The move to maximal harmonisation; framework directives

A central issue is when rulemaking at the European level pre-empts national measures. Minimal harmonisation clauses in EU directives permit countries to provide a higher protection than is required by a directive (see Howells, 2006). Minimal harmonisation does not mean, however, that individual states are completely free to establish their own level of consumer protection. It is possible that any measure might be challenged under the *Cassis de Dijon* principle that the measure acts as a non-tariff trade barrier. A maximal directive means that a state may not have a higher or lower level of protection within the area covered by the directive. In recent years there has been a tendency towards the idea of maximal harmonisation for Directives with 'targeted harmonisation' as a variation where some aspects of law are fully harmonised. The Court of Justice has also interpreted the Product Liability directive as maximal (below Chapter 9) so that states may not provide more generous protection in relation to issues covered by the directive. Maximal harmonisation is part of a policy shift in regulatory style within the EU.

**Iain Ramsay, 'Regulation and the Constitution of the Single Market: The Contribution of Consumer Law' (2010) 50 *Canadian Business Law Journal* 322 at 331–35**

III. BETTER REGULATION: FRAMEWORK DIRECTIVES, FULL HARMONIZATION, COMMON FRAMES OF REFERENCE

The 'Better regulation' agenda, developed by the EU in the early 2000s influences consumer policy making. The Commission indicates in 2008 that consumer policy making should shift from a legalistic perspective to one which focused on identifying problems in markets and assessing the most effective method of addressing the problem. In assessing the contribution of consumer policies to the creation of the single market "more attention needs to be paid to the final outcomes affecting EU citizens and not just to the legal tools. Policies need to be more evidence-based and outcome-oriented. Better monitoring and evaluation of outcomes for citizens is a priority for the Commission to move to the next stage of the single market... better monitoring is also essential in itself as a way of demonstrating to citizens that their concerns are taken into account."

The Commission has developed a markets "scoreboard" to identify problems in markets as a prelude to more in-depth study, proposing alternative policies and monitoring their effectiveness. Benchmarking the extent of retail integration and national enforcement might include 'naming and shaming' those states with poor enforcement records.

... Many of the better regulation approaches in consumer policy are hardly novel to Anglo-Saxon policy makers, for example the use of impact analysis, evidence based policy, and recourse to self-regulation. However the shift to this model of lawmaking within the EU is viewed as signaling an Anglo-Saxon shift (coup?) at the Commission where economic analysis may be replacing the hegemony of lawyers in consumer law reform and eroding the concept of a community founded on law.

Framework directives, full harmonization and increased use of varieties of self-regulation, are examples of the application of better regulation in consumer law. Framework directives, a development from the new approach to standards, uses general principles determined at a political level but harnesses experts in elaborating detailed norms and adjusting norms to new developments. A common approach is the creation of a committee of experts which could offer guidelines on interpretation. The objectives were more responsive regulation that can adapt quickly to changing market conditions and avoid the limits of detailed sector specific legislation. ...

The change from minimal harmonization, where member states may have higher national protections, to full harmonization, where a member state may not adopt a higher or lower level of protection, is a significant policy change. Full harmonization was adopted in the Unfair Commercial Practices Directive, and a variant—"targeted full harmonization"—in the Consumer Credit Directive and the proposed Consumer Rights Directive. The strategy of full harmonization is inevitably controversial, and moves the decisive political decision making to Brussels. Business groups generally favour full harmonization while consumer groups oppose. The Commission justify full harmonization by the reduction of transaction costs for business and the creation of consumer confidence in cross border shopping, leading to greater competition and productivity. The development of this ideological image of the confident consumer is attributed by Micklitz to the 1992 Sutherland report of an 'integrated market' with 'confident consumers.' Everson describes it pithily as 'the frontier consumer, the active moulder of the European market.'

Critics of full harmonization argue that (1) the empirical evidence to support the legal transactions cost argument does not exist. Language and culture are more important costs.

(2) The actual measures proposed are unlikely to have much impact on consumer confidence in cross-border transactions. (3) The EU Directives create a false sense of full harmonization because (a) there will inevitably be distinct interpretations of general clauses such as ‘good faith’ (b) directives will be parachuted into a landscape of existing private law rights and remedies. Unless these are harmonized there will remain substantial differences between countries. (c) Directives will be implemented and enforced by a variety of institutions—Ministries, independent agencies etc. Since the law takes shape through implementation there will still be substantial differences. (4) Recognising the heterogeneity of consumer preferences throughout member states consumer law should reflect national preferences. (5) Full harmonization undermines the possibility of learning through diversity and regulatory competition within a market which ensures minimum protections. (6) A regulation rather than a Directive would be a more effective instrument.

This article is not the forum to discuss fully these arguments. There is some evidence that different national regulations do create barriers to trade ... [However] The impact analysis for the Directive on Consumer Rights had difficulty in linking low levels of consumer confidence in cross border shopping to legal regulations. There is unfortunately little empirical study of the effects, if any, of consumer law on consumer behaviour and the relationship of consumer law to other non-legal pressures on market behaviour. This was one critique of the Commission’s impact study for the consumer rights Directive. The confident consumer rationale remains therefore less compelling, convincing some writers to suspect that harmonization is primarily an exercise favouring business interests: a thinly disguised measure of neo-liberalism.

In 2011 the EU adopted a modest Consumer Rights Directive and the Commission introduced a proposal for a Regulation on a common European sales law which would apply to cross-border transactions (2011).

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## 6. International consumer law

Consumer law is increasingly an aspect of international economic regulation. The world financial crisis triggered by problems in US sub-prime mortgage financing illustrated the international significance of weak national consumer protection. The World Bank and the Financial Stability Board have developed best practices for consumer protection in financial services, and the World Bank is addressing issues of personal insolvency. Other international bodies such as the OECD develop influential guidelines (see eg guidelines on electronic commerce) and provide an information exchange and site for networks of experts and regulators (eg ICPEN) which often develop best practices and enforcement norms. There is the increased influence of ‘modelling’ at the international level where particular models of regulation become diffused internationally. International standards in health and safety (see below Chapter 9) are established by a combination of public and private actors which raise starkly issues of ‘expert’ knowledge and democratic accountability. Regions compete for adoption of their model of consumer protection. The EU model of products liability seems to have triumphed as a model in terms of its rate of adoption throughout the world. NGOs operate internationally and may use the media to promote models of regulation. The primary consumer organisation is Consumers International established in 1960. Braithwaite and Drahos (2000) argue that

international NGOs can run campaigns promoting new models of consumer protection since they can be distributed at low cost throughout the international media. These groups function as 'model mongers'. It is not clear what is the overall distributional impact of this increased globalisation. Braithwaite and Drahos conclude that: '[O]ur story of the globalization of business regulation is a story of domination ... the global lawmakers today are the men who run the largest corporations, the US and the EC' (Braithwaite and Drahos, 2000: 629), while David Levi-Faur argues that international 'regulatory capitalism is much more open to collective action' and that 'the growing reliance on regulation as a mode of governance reopens the field for a more balanced approach to the distribution of power and resources' (Levi-Faur, 2005: 28).

The UN Guidelines for Consumer Protection were introduced in 1985 and expanded in 1999 to include principles of sustainable consumption.

### **United Nations Guidelines for Consumer Protection (as expanded in 1999)**

#### **I. Objectives**

1. Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection, these guidelines for consumer protection have the following objectives:

- (a) To assist countries in achieving or maintaining adequate protection for their population as consumers;
- (b) To facilitate production and distribution patterns responsive to the needs and desires of consumers;
- (c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;
- (d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;
- (e) To facilitate the development of independent consumer groups; (f) To further international cooperation in the field of consumer protection; (g) To encourage the development of market conditions which provide consumers with greater choice at lower prices;
- (h) To promote sustainable consumption.

#### **II. General principles**

2. Governments should develop or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Government should set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures.

3. The legitimate needs which the guidelines are intended to meet are the following:

- (a) The protection of consumers from hazards to their health and safety;
- (b) The promotion and protection of the economic interests of consumers

- (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- (d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
- (e) Availability of effective consumer redress;
- (f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
- (g) The promotion of sustainable consumption patterns.

4. Unsustainable patterns of production and consumption, particularly in industrialized countries, are the major cause of the continued deterioration of the global environment. All countries should strive to promote sustainable consumption patterns; developed countries should take the lead in achieving sustainable consumption patterns; developing countries should seek to achieve sustainable consumption patterns in their development process, having due regard to the principle of common but differentiated responsibilities. The special situation and needs of developing countries in this regard should be fully taken into account.

5. Policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic human needs of all members of society, and reducing inequality within and between countries.

6. Governments should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population and people living in poverty.

7. All enterprises should obey the relevant laws and regulations of the countries in which they do business. They should also conform to the appropriate provisions of international standards for consumer protection to which the competent authorities of the country in question have agreed. (Hereinafter references to international standards in the guidelines should be viewed in the context of this paragraph.)

8. The potential positive role of universities and public and private enterprises in research should be considered when developing consumer protection policies. Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, we are building a powerful international consumer movement to help protect and empower consumers everywhere.

### III. Guidelines

9. The following guidelines should apply both to home-produced goods and services and to imports.

10. In applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations.

David Harland argued in 1999 that the guidelines had ‘a significant influence on consumer policy actions by both governments and consumer organizations in many countries with widely varying social, cultural and political traditions’ (Harland, 1999: 16). They influenced the development of consumer laws in Latin America and Central and Eastern Europe and have ‘been especially useful in many countries where consumer law and policy was previously little developed’ (ibid: 17).