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# 1. Consumer law in its international dimension

*Geraint Howells, Iain Ramsay and Thomas Wilhelmsson*

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## 1. WHY A HANDBOOK ON INTERNATIONAL CONSUMER LAW?

Consumer law on its current scale is a relatively modern phenomenon. It is linked to the development of the consumer society and the rise of the regulatory state. One of the intriguing aspects of consumer law is that whilst consumers are often situated in a vulnerable position in the market structure and face similar problems in most market economies, nevertheless consumer law has in its national manifestation to take account of local legal, social and cultural traditions. However, whilst the particular policy responses to the problems consumers face may differ depending on local context, many of the actual problems facing consumers replicate themselves throughout the global economy.

There are also forces promoting the search for common approaches to consumer problems. The consumer markets are in many aspects increasingly globalised: the same products are marketed with similar marketing efforts all over the globe. This is underpinned by the increasing development and diffusion of norms and standards on a regional or international basis and by the growth in cross-border consumer sales spawned by the internet.<sup>1</sup>

Being aware of the possible models of legal response so that an appropriate selection of consumer protection tools can be made is necessary for those creating, administering and studying consumer laws. This book seeks to provide an entry point into the study of a wide array of consumer topics and thus promote awareness of the options for legally protecting consumers. It seeks to throw light on the underlying policy choices that need to be made and to give practical examples of consumer protection regimes.

Consumer law is a relatively international discipline. As the problems are similar and as consumer law, being a new discipline, is less bound by centuries of national legal traditions, legal solutions to consumer problems are often borrowed across borders. In consumer law research, the comparative strands have always been strong. Consumer law, in other words, represents an interesting mix of localism and globalism, as this book demonstrates.

## 2. WHAT IS CONSUMER LAW?

One of the difficulties with consumer law is defining its scope. Most people conceive of consumer law as concerned with consumer goods such as cars, white goods, double

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<sup>1</sup> See generally M. Durovic & H-W. Micklitz, *The Game Changer: The Internationalization of Consumer Law* (Springer, 2017).

## 2 *Handbook of research on international consumer law*

glazing, etc. However, the scope of consumer law is far wider. The service sector is a growing consumer marketplace. Financial services are a whole area of law in their own right – as is the voluminous legislation surrounding food. Indeed, one problem with consumer law is to know where to place its boundaries as a discipline. Many consumer agencies, for instance, also deal with housing matters or social security. Should these be within its scope? Indeed, another question is whether it is appropriate to search for common consumer principles when many areas have their own detailed legal regimes. However, as the consumer faces fundamentally the same problems in all contexts, such as dealing with information and market power asymmetries and difficulties of accessing justice, many of the approaches will most likely be similar across the board. However, whilst we take a broad approach to consumer law and include private, public and self-regulatory techniques, we do not claim in this volume to capture every dimension of consumer law and policy.

A perennial debate is the appropriate balance between different forms of legal protection. Obviously private law rules – that is, contract and tort – may be needed to offer redress, but their content has often to be adapted if it is to be appropriate for consumers. There is also the problem that private law remedies rely on access to justice which can be difficult, especially for small losses, if reliance is placed on going to traditional courts. Some adaptations have been made through small claims procedures, and class actions are increasingly being thought of as a consumer protection strategy. Nevertheless, no solution is without its own problems, and reliance on private law, requiring as it does individual initiative, is inherently a haphazard option.

The limitations of private law are one reason why the state has become involved in setting down norms of behaviour and enforcing them through administrative or criminal law sanctions. The trend has been partially for the state's intervention to be reduced by setting performance rather than design standards so as not to impede the innovativeness of commerce; but equally the state has in some respects become more interventionist by going beyond controlling misleading advertising to require prescribed information, providing rights of cancellation and controlling the content of contacts.

In some areas, the private/public distinction breaks down; for instance, when breach of public law standards gives rights to private redress – most famously in the French *action civile*. Equally, consumer organisations may be granted powers to seek injunctions so they can exercise a market control function. This role for consumer organisations is part of a broader attempt by many states to retreat from the front line in consumer protection matters. Another symptom of this is the reliance on self-regulatory techniques or co-regulatory approaches, whereby the legislator sets out the broad framework but trusts industry to develop satisfactory means of achieving the objectives. Alternative Dispute Resolution (ADR) redress mechanisms are often seen as a potentially more fruitful means of resolving consumer disputes.

Consumer law is now seen as a distinct body of law in most legal orders. Some legal systems find it difficult to categorise, as it straddles private and public law. Indeed, even within private law there is a tension as to the extent to which consumer law values should and can be accommodated within the general law or need special treatment. France, for instance, has a separate Consumer Code, but Germany when implementing the sale of goods directive, sought a solution within its Civil Code. At the European level, this debate is ongoing at the moment as the Union seeks to create both a

horizontal consumer contract law directive and a Common Frame of Reference for contract law.

To the extent that consumers need special rules, this raises the complex and sensitive issue of how the 'consumer' should be defined. Individuals purchasing for private purposes are normally unproblematically treated as consumers; but what about someone who purchases for a dual private and business purpose: a company director buying a car or a law professor purchasing a computer? What about the businessman buying something unrelated to his business, for instance a lawyer buying a coffee machine for staff and client use? Does it make any difference as regards consumer protection whether a business or individual is buying a plane ticket? Should businesses be able to benefit from consumer rules and, if so, should it only be small or medium-sized enterprises? How are such enterprises to be defined? The answer should probably depend upon why one is protecting the consumer – lack of knowledge, lack of bargaining power – but legislators often agonise over these distinctions, which are not infrequently the subject of litigation in the courts. The advent of the sharing economy poses further questions since the service provider is often a private person operating through a digital platform.

Consumer protection policy cannot be viewed in isolation from other policies such as the environment, employment, intellectual property (IP), internal market/trade regulation and competition law. In almost every one of these policy areas, consumer law and the consumer interest can at times run in tandem with the other policies, and at other times or from other perspectives oppose them. Consumption, at least to excess, can of course damage the environment. Equally, schemes like eco-labelling, ecotourism and labelling like dolphin-friendly tuna or taxation schemes that favour low emission cars can engage with consumers and allow them to promote sustainable consumption.

There is a strong potential conflict between consumers and workers. Whilst many consumers are concerned that their products are not produced by child or exploited labour, they are otherwise generally more interested in paying low prices rather than subsidising high labour costs. In a global economy, this favours increased automation and encourages switching production to countries with low labour costs. It places pressure on reducing wages in the few manufacturing sectors left, whilst service industries traditionally rely on low-wage employees.

The interests of intellectual property right owners and consumers largely conflict; consumers want greater access to materials at low prices and the freedom to deal with the materials they have purchased. Only to the extent that there are valid arguments that protection is needed to ensure the future creation of valuable material do the interests of producers and consumers coincide. Intellectual property right may have a significant impact on consumers' access to goods and services in developing economies.<sup>2</sup>

Consumer protection can become a secondary concern to internal market/trade regulation. This is not only a factor within Europe, for the World Trade Organization (WTO) legal order is also exposing national consumer protection rules to scrutiny under trade regulation rules.

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<sup>2</sup> For further discussion see Ch. 3 'Development and Consumer Law'.

Competition law has as one of its concerns the interests of consumers; but there is much debate as to the extent to which competition law serves the consumer interest as well as which tasks are best achieved through competition law and which need special consumer protection concerns. At a practical level, many consumer protection agencies deal with both consumer and competition policy, and there is a danger that consumer protection is viewed as the Cinderella branch of the agency.

### 3. HISTORICAL OVERVIEW

#### 3.1 Factors Influencing the Historical Development of Consumer Law

Ever since humans have traded, there has been a need for the law's involvement, given the propensity of the seller to seek to gain advantage by providing short measures or inferior goods, which in some instances could harm the consumer's health. Historically, adulteration of food was a major concern. Even in the Middle Ages in Europe, there were, admittedly limited and often poorly enforced, regulations of markets, weights and measures and food quality. However, whilst such measures have been improved, the modern image of consumer law reflects the broader body of laws that have sprung up in the post-industrialised world, mainly in the last half century, in response to the more complex challenges facing today's more affluent consumers.

The emergence of the *consumer society* obviously forms the basis of the development of consumer law as a distinct field of law. Consumer law is the reflection of consumer society in the legal sphere. When consumption, above the level of what people need just to survive, becomes an important aspect of life in society, legal rules need to be created to protect those who consume. As noted above, this implies that at least some aspects of consumer protection are typically developed to serve the needs of relatively affluent societies.

Consumer affluence combined with the diversity of offerings in the modern market place have created a new demand for laws that allow consumers sovereignty when making their choice in the market. The consumer options have grown with increasing economic resources. The options at the same time have become more complicated and difficult to assess for the consumer. The range of goods and services offered to consumers is huge and constantly changing, the goods are technologically advanced and are often sold pre-packed. The selling methods, for example through e-commerce, may also lead to new situations in which the choices are difficult to assess. In other words, the growing choices, in combination with poor tools for making the choices, produce demand for legal regulation.

Much of modern consumer law is dominated by rules requiring consumers not be misled and instead be positively informed about the products and services on offer so they can make an informed choice. However, there are still (and indeed increasing) risks of consumers being exposed to danger and fraudulent or unfair practices.

Products are becoming increasingly sophisticated. Many modern consumer products pose dangers simply because they use electricity or are powered by other means. Compare the range of goods today's DIY enthusiast can buy or hire compared to those of his grandfather. Cars and planes are obviously potentially lethal products consumers

use frequently. Moreover, the complex nature of products often poses new risks that are difficult to assess for experts, let alone lay consumers. Recent controversies over genetically modified (GM) food and beef produced using growth hormones are ready examples of the uncertainty consumers face. Modern farm production techniques exposed consumers to the risk of CJD. Moreover, our knowledge of risk has simply become better. Smoking is the classic example of a once commonplace product that is now recognised as a serious risk to health. The increasingly sophisticated nature of products also makes them harder for consumers to assess in terms of both performance and risk.

The way business is conducted has also changed. A typical feature of consumer society is the *massification* of the consumer market. The typical consumer transaction is not an individually tailored transaction, but rather one that is similar to a multitude of other transactions made by consumers. The consumer market is dominated by mass production, mass marketing and mass consumption. In this environment, possible problems are often multiplied as well. They require solutions that can go further than solving an individual problem of an individual consumer. Consumer law often has more of a collective dimension than traditional private law.

Related to the growing massification is the *anonymisation* of the actors confronting the consumer in the marketplace. In the Middle Ages, markets were one of the few trading places, with traders moving from fair to fair. In modern society, the retail store came to dominate. However, nowadays, instead of dealing with the small retailer on the street corner, whom the consumer knows and trusts, consumers usually face an anonymous distribution chain with which they do not have and cannot have any personal relationship. Many of the transactions are based on self-service, which leaves the consumers without any personal assistance in the transaction phase. As the consumer market has become increasingly international, the real decision-maker with regard to problems confronting the consumers may be found far beyond their national borders. Trust in well-known and familiar counterparties plays a shrinking role as a basis for consumer transactions, and the trust that the market requires must therefore be built with the help of consumer protection measures instead. This requirement of trust also appears in the harmonisation discourses: common protective rules are said to be needed to create consumer trust in cross-border purchases.

Traditionally, the seller was seen as the key legal partner owing obligations to his purchaser. It was soon appreciated in some contexts that this was not always realistic. For instance, in Canada, itinerant salesmen roamed that vast country selling farm implements. As these salesmen were hard to track down, let alone seek redress from, the Canadian Provinces, starting with Alberta in 1913, introduced special legislation breaching privity to provide easier redress against higher links in the distribution chain. This debate about apportioning responsibility between seller, distributor and manufacturer continues today as trader networks become ever more complicated, with new actors like franchisors also being considered.

In more recent times, of course, the internet has provided new opportunities, but also posed more challenges, given the trader can choose to trade from anywhere in the world and potentially evade traditional consumer law protection. eBay and similar organisations can turn traditional understandings of the marketplace upside down.

Equally, doorstep selling is another variant which is also changing in character, with the use of party promotions techniques and pyramid-like selling structures.

Although many would say that the consumer society is associated with the post-Second-World-War period, in fact the widespread purchase of mass-produced consumer goods started earlier than that. One feature of many of the post-industrialised consumer products was that they were often too expensive to be paid for in full out of regular wages. This required the development of consumer credit, and in fact the sewing machine was the first consumer product to be sold widely on credit terms, leading to the development of hire-purchase at the end of the nineteenth century. The twentieth century saw the development of ever more sophisticated credit laws, with a major debate being the extent to which interest rates should be controlled. Equally, as access to credit became a key to accessing the consumer society, it became important to ensure fair access to credit; this concern was particularly prominent in the United States. The Great Recession of 2008, triggered by problems in the US sub-prime mortgage credit market, has stimulated reflection on the role of consumer credit and appropriate forms of regulation. The increasing 'financialisation' of life where individuals must increasingly plan their financial future and retirement options has resulted in the emergence of consumer finance law as a distinct aspect of consumer law. Given the high levels of household debt in many economies, personal insolvency law is of increasing importance as a consumer issue when individuals suffer from reduced employment or family breakdown and are unable to maintain repayments.

More broadly, the contract came to be an important element of the consumer transaction. Traders appreciated that they had the upper hand in setting contract terms, and by pre-formulating non-negotiable standard terms they could ensure the relationship was weighted in their favour. Regulation has greatly improved the fairness of such contracts and yet one still sees in the United States, where such regulation is less strict than in Europe, mandatory arbitration clauses being upheld that oust the courts and force consumers to arbitration that is so expensive that it effectively places justice out of reach.

The growth of the service sector should also be noted. This covers whole swathes of the economy – restaurants, hotels, holidays and travel generally, entertainment, hairdressers, dry-cleaners, repairers, health clubs, to name but a few. Professional services such as estate agency and legal advice and representation can give rise to serious protection concerns, as of course can medical and educational services. Most consumers in developed nations would only have to reflect on their own spending patterns to see how important a percentage of their budget is spent on services, and certainly this is increasing with every generation. Services, because of their very diffuse nature, are hard to regulate in a general way and the consumer service sector has generally been less well-regulated than the consumer goods sector. The increased digitalisation of services such as the internet of things indicates the need for further analysis.

In relation to social services like education and health, there has been an increasing mix of public and private provision. At the same time, even in the public sector, the private market economy language of consumerism has become pervasive in terms of promoting choice and information about services.

Some services are essential for engagement in society. Typically, access to utilities – water and electricity – communications – post, telephone – and public transport have been seen as universal rights. This public service element is being strained as the providers are increasingly being privatised and, once competing in the commercial market, are reluctant to shoulder the additional costs of providing services to vulnerable customers or those living in remote areas. This is creating disparities between rural and urban communities and between states lying at the centre and edge of major regional hubs. One particular new challenge is being posed by the question of whether access to the internet and even broadband should be available to all.

The structure and focus of *competition* have changed. The power of large economic actors has grown, which often leaves doubts as to whether competition can enhance the consumer position in the way one in theory could expect. At the same time, the focus of competition has shifted. The importance of various kinds of marketing efforts has increased. Competition is based on marketing images rather than on price and quality. The key word for problems arising from this development is market failure. Self-evidently, this brings different pressures and needs to the consumer law agenda in different countries, depending on their level of development and economic structure. Also, the emergence of the information society and e-commerce in some areas has changed the balance of competition in ways that may increasingly affect the need for regulation.

Most of the above factors can be found to be influencing the growth of consumerism and the development of consumer law in states with developed consumer markets. However, it should be remembered that not all today's consumers are affluent. Poverty exists in every country and ensuring these citizens can have access on fair terms to the benefits of the consumer society is a vital concern. Moreover, we should not forget that large swathes of the world population are still struggling to have clean water, basic food and housing. In an international perspective, it is easy to see that problems related to consumption are to some extent different in less developed countries, and consumer law in such countries, if there is any, is struggling with partially different problems than those in the developed countries where the consumer law discourse originated. Thus, a challenge for consumer law is to provide some help with these basic concerns, whilst at the same time ensuring that as those societies become more affluent, their consumers can make the most of their limited capacity to participate in the consumer society.

Finally, one should not forget the connections between the economic/legal sphere and the political sphere. The development of consumer protection has become an important goal for *political reformism*. In the context of the consumer society, it has been possible to gain political advantage by making demands for consumer protection. The strong position of the moderate left in European societies has contributed to making such demands effective. Again, however, the international picture is not coherent. In some countries, consumer protection protagonists have joined forces with or have even been fostered by societal movements with a more far-reaching agenda. Claims for consumer protection and for democracy may in certain societal contexts walk hand in hand.

### 3.2 Modern Historical Landmarks

Every nation has its own history of the development of consumer law, but there have also been some important regional and international developments. Often the development of consumer policy has been associated with the development of strong consumer protection agencies. Consumer protection is one aspect of the rise of the regulatory state.

The United States was at the forefront of consumerism. In 1962, President Kennedy set out the four basic rights of the consumer: to safety, to be informed, to choose, and to be heard. At the forefront of the consumer movement was the campaigner Ralph Nader, who led a high-profile crusade against unsafe cars and sought to ensure that government agencies like the Federal Trade Commission promoted the consumer interest. His brand of consumerism was always rooted in the belief that markets were the best mechanism to promote the consumer interest and simply had to be made to work for consumers. Nevertheless, the consumer movement did lead to the Federal Trade Commission engaging in consumer protection work and new agencies like the Consumer Product Safety Commission being established in the 1970s.

As an aside, it should be noted that, although this overview will concentrate on the national consumer agencies, in many states local agencies also deliver consumer protection at the regional or local government level. For instance, in the United States, state Attorney Generals play an important role and in the United Kingdom, there are local trading standards officers in every local authority, whilst in Germany, enforcement is constitutionally a function of the *Länder*.

In Northern Europe, the regulatory state was always far more to the fore. In the 1960s in the United Kingdom, the Molony Report was a major influence leading to the first consumer safety legislation and the publicly enforced Trade Descriptions Act 1968. The Fair Trading Act 1973 established the Office of Fair Trading. The 1970s also saw the establishment of consumer ombudsmen in the Nordic countries. In Germany, the state funded consumer organisations and gave them an important role in tackling unfair terms and unfair commercial practices, with the general law on unfair competition being used to protect consumers. In France, the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* (DGCCRF) was established and in the 1990s France went on to establish a Consumer Code, although this is in reality a compilation of the consumer legislation that had accumulated over the years. Southern Europe in general had less developed consumer protection regimes and, like Eastern Europe, its consumer policy has benefited from the impetus given by membership of the European Union.

The European Community adopted its preliminary programme for a consumer protection and information policy in 1975.<sup>3</sup> Since then it has legislated on almost every conceivable aspect of consumer law. Despite introducing a separate legal basis for consumer protection in the Maastricht Treaty of 1992, most European legislation tends to be based on internal market justifications. This has the drawback that whilst the Treaty recognises the need for a high level of consumer protection, the emphasis is on promoting trade. This has manifested itself in recent years in a preference for maximal

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<sup>3</sup> OJ 1975 C92/1.

harmonisation. This risks lowering the level of protection in some states. Nevertheless, for those states without a previous strong tradition, this has ensured they have a systematic consumer protection regime that requires effective enforcement, leading to the establishment of consumer protection agencies. The implications for consumer law of the UK's decision to leave the EU remain unclear. If the UK retains the existing *consumer acquis*, questions will still arise as to the effects of existing and future CJEU jurisprudence on UK law.<sup>4</sup> UK agencies and consumer organisations have played significant roles in the development of EU consumer law and in EU information and enforcement networks, and their influence on future development will obviously be diminished.

Europe co-operates with the United States through the Transatlantic Consumer Dialogue. The Organisation for Economic Co-operation and Development (OECD) also provides a forum for developed countries to co-operate in this area. The United Nations does not have a day-to-day role in consumer protection, but its Guidelines for Consumer Protection of 1985, expanded in 1999 to cover sustainable consumption, and substantially revised and updated in 2015, have been hugely influential in many less developed countries, including in South America and Asia, and even in developed countries like Australia. For the South American countries in particular, consumer law was associated with promoting a positive image of the law as something that can be of tangible benefit to citizens. This echoes the arguments in Europe, where consumer law is promoted as providing a social dimension to the Economic Community and as a means through which the Union can reach out to its citizens. Globally, consumer law is indeed a means of socialising the market. For some, this is an emanation of the welfare state; for others, it is the sanitising and concealing of capitalist power; whilst for many, it is an attempt to make markets (the dominant form of economic organisation in today's world) work in the interest of the general population.

#### 4. THEORETICAL RATIONALES FOR CONSUMER LAW

The complex societal changes described above have put the need for consumer protection on the agenda. Much of consumer law has been developed in a piecemeal fashion, as reactions to such changes and concrete problems emerging in the marketplace. Hardly anywhere, therefore, does consumer law appear as a relatively coherent body of rules. However, in consumer law discourse, there are many attempts to distil some overarching rationales for consumer law. One could describe this as attempts to formulate the basic justification for consumer protection measures.

Firstly, the issue can be looked at from the perspective of an ideal market. In neo-classical economic discourse, *market failure* is often used as the key justification for consumer law measures. For various reasons, consumer markets are considered to work inefficiently. There is insufficient competition, various products and services are tied up in a way that prevents the market working properly, the differentiation of

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<sup>4</sup> For example in relation to the EU Directive 93/13/EEC on unfair terms in consumer contracts. See *Parking Eye Limited v. Beavis* [2015] UKSC 67.

products and services impairs the functioning of the market mechanism and information deficits on the consumer side contribute to market failure as well. As the relative transaction costs for remedying problems are high, the traditional contract law remedies are not able to bring the system into balance. Consumer protection is therefore needed to make the market perform its functions properly.

Secondly, one can approach the problem from the perspective of an ideal contract. In this view, a key justification for consumer protection is the prevailing *asymmetry of information*. As was mentioned, this rationale can be understood as an explanation for market failure in the economic perspective; it may, however, also be used as an independent justification based on the patterns of justice one finds behind contract law in general. As private law is based on the idea of equal parties making contracts through the meeting of (well-informed) minds, information deficits on the part of the consumers are not easy to reconcile with this starting point. Consumer protection, in particular in the form of information requirements, is needed to make the consumer able to perform his role as a contract party successfully.

In a broader form of the contractual justification for consumer protection, one looks at the *inequality of bargaining power* between business and consumer. Asymmetry of information is one element of this inequality, but other elements, related to economic power and expertise, contribute to the picture as well. Consumer protection is then understood as a device to counterbalance such inequality, in order to achieve fair and equal contract practices. Not only information rules, but other measures as well, can be used to achieve this goal.

Thirdly, the information model has been criticised from an empirical perspective. Available empirical knowledge about consumer behaviour tells us that information does not always have the effect on the decisions of consumers that could be expected in theory. For various psychological reasons, consumers are not able or willing to use information given to them, and if information has some impact, it often favours those consumer groups who are well-off anyway, whilst vulnerable consumers are helped less by information rules. More generally, consumers are acting much less rationally in the marketplace than has been assumed. Therefore, in this perspective, a broader variety of protective measures are needed to create a system that corresponds to how consumers actually behave. Some call this 'paternalism'; this pejorative expression is, however, often used without closer analysis of what the elements of a protective legislation really mean. It is associated with the perspective that public decisions are made on behalf of the consumers more or less against their will and without regard to what elements of protection are in fact respecting and supporting the will of the consumers. This concept will therefore not be used here.

The perceptions concerning what need there is for consumer protection largely depend on how one understands the behaviour of consumers. One can speak about *consumer images* as abstract constructions of the qualities of consumers, based on certain perceptions of reality. Such constructions often normatively function as starting points (*Leitbilder*) for the regulation of the consumer area. Consumer law in different countries rests on different consumer images. Some differences may be warranted by differences in reality – the level of education in a certain society certainly is relevant when deciding what behaviour one should expect from a consumer – but others are rather functions of political decisions concerning the goal of consumer protection. For

example, the *active and critical information-seeker* is an image used in the practice of building European consumer policy, as information (transparency) is a central device of this policy. The European Court of Justice in several cases has defined the consumer to be used as a measure for assessment as someone ‘who is reasonably well informed and reasonably observant and circumspect’.<sup>5</sup> On the other hand, the *passive glancer* is one of the images that has been said to dominate, for example, Nordic consumer protection. This Nordic approach is based on the assumption that consumers do not read commercial messages thoroughly, but make their decisions on the basis of the overall impression they get from a short glance at the advertisement. The Federal Trade Commission (FTC) in the United States used to advocate a credulous consumer standard.<sup>6</sup> Other variations of consumer images can also be constructed. Obviously, the more one emphasises the active and critical role of the consumer, the less room there is to focus on the particular needs of *vulnerable consumers*. However, the rise of behavioural economics as an influential framework of policy-making recognises many of the limitations of consumer decision-making and also questions reliance on traditional information policies.

The position of vulnerable consumers is related to a purpose of consumer protection of concern to those looking at the issue from the perspective of distributive justice. One might understand consumer law to have the function of contributing to the *redistribution of benefits* within society to the advantage of less affluent consumers. However, such claims are not put forward very often and empirical analysis of the impact of consumer protection would probably in many cases show that the dominant beneficiaries of the protection are consumers from the middle classes. One can only mention some examples of rules with a certain redistributive purpose or effect, for example concerning consumer bankruptcy and *social force majeure*.

Finally, some consumer law measures may be based on *other values* than those *prima facie* connected with consumer protection. Consumer law may contain elements that attempt to promote gender equality and to counteract all kinds of discrimination; it may be fuelled by concerns related to environmental protection and sustainable consumption; and it may be connected to various kinds of human rights issues, such as the fight against child labour.

In various countries, different perspectives dominate the debate. The variations obviously relate to the societal and ideological background in each society. In countries with a strong market ideology, it might be more productive to use a market failure justification, whilst in countries with a tradition of pragmatic governmental intervention, empirical problem-spotting might provide a sufficient rationale for protective measures. There is also not a very clear connection between rationales and rules. On the basis of different justifications, jurisdictions may even end up with very similar rules. As mentioned above, consumer law is problem-oriented and the cross-border

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<sup>5</sup> See for example, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH* Case C-470/93 [1995] ECR I-1923; *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*. Case C-210/96. See also the Unfair Commercial Practices Directive, Recital 18.

<sup>6</sup> See *Charles of the Ritz Distributors Corporation v. Federal Trade Corporation* 143 F. 2d 676, 39 FTC 657 (1944). It has since adopted a ‘reasonable person’ approach.

movement of legal solutions to similar problems is not necessarily hampered by different approaches to the general justifications of consumer protection.

## 5. INTERNATIONAL CONSUMER LAW

To what extent then is there an international consumer law? If we take a simple model of a legal system – that is, the existence of norms of international consumer law developed by an international legislature and enforced by international agencies – then the answer is that such a system does not exist. However, international guidelines, high-level principles, recommendations and good practices are increasingly influential. The recently revised 2016 United Nations Guidelines now extend to topics such as e-commerce, financial services, data protection and tourism. A significant innovation with the 2016 Guidelines is the creation of an intergovernmental group of experts to exchange information, monitor and conduct peer reviews of the implementation of the guidelines, identify best practice, and promote capacity building.

The OECD Committee on Consumer Policy has published international guidelines on several consumer issues (electronic commerce, dispute resolution). Its objectives include the development of ‘principles that lead to a fair and transparent marketplace’. The OECD provides a forum for comparing policy experience, considering the development of best practice and conducting assessment of the effectiveness of country regimes. It is the host for and catalyst of trans-governmental networks. Individual countries may see the Committee as an opportunity to promote their model of consumer policy. There may be advantages to a country or region if its approach to consumer policy becomes globalised. The OECD currently embraces a paradigm of consumer policy in its policy ‘toolkit’ based loosely on market failure, the findings of behavioural economics, and cost/effectiveness analysis. The OECD remains a significant site for the development of international soft law. Most recently it has initiated discussion on protection of consumers in the digital age.

International institutions have taken much greater interest in consumer financial services since the Great Recession of 2008. The G-20 nations through the OECD developed high-level principles on Financial Consumer Protection in 2011, which its members are committed to implementing. The World Bank through its work in emerging economies published guidelines on Consumer Financial Protection, and an International Network of Financial Consumer Protection agencies (FInCoNet) was formally established.<sup>7</sup> Although the implementation of the high-level principles will inevitably vary between states, increasing international consensus exists on the central ground rules for the constitution and regulation of consumer credit markets.

No international enforcement agency exists in consumer law, but increasing cross-border co-operation exists between agencies, sometimes mandated by law. Regulation 2006/2004 of the EC requires substantial information exchange and co-operation between public agencies within the EU. This should be set within the context of the international networks of enforcers such as the International Consumer Protection and Enforcement Network (ICPEN) – a network of enforcement agencies from over thirty

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<sup>7</sup> See further Ch. 13.

countries established in 1992. This network serves as an information source on emerging issues and develops best practices in enforcement. There are also fora which link EU and US regulators and decision-makers such as the Transatlantic Consumer Dialogue.

The work of the WTO in attacking barriers to international trade focuses often on national product standards as non-tariff trade barriers. Free trade advocates suspect national standards of reflecting vested interests, while consumer protection representatives decry the deregulatory implications of free trade policies. International standards established by the Codex Alimentarius Commission concerning food are taken into account in WTO determinations concerning standards as technical barriers to trade. The burden is on states to justify higher standards by reference to sound science and appropriate risk assessments. The increased significance of these standards draws attention to the process by which Codex standards are developed and the extent to which consumer groups can have influence in the process.<sup>8</sup>

The International Organization for Standardization (ISO) is the largest global standards organisation. It is an industry-sponsored body made up of national standards agencies such as the British Standards Institution. ISO standards may be incorporated in European standards under the new approach to product safety standards.<sup>9</sup> Given the significant role of industry bodies in establishing public safety standards, issues concerning the process of decision-making and the representation of consumer interests become prominent. EU standard-setting attempts to harness private standard-setting bodies and market incentives, while ensuring that this process is legitimate and accountable to stakeholders. The tension between technocratic and democratic decision-making in this process is reflected in the continuing debates on the effectiveness of consumer participation. The EU has contributed to funding consumer participation through ANEC, which provides expertise and advice through a network of about two hundred consumer representatives throughout Europe. Yet there are still concerns that the 'burden of consumer representation' on standardisation bodies is shouldered by a limited number of EU countries. The issue of consumer participation is as acute at the international level; about 40 per cent of EU standards are based on international standards. The interest group Consumers International argues that there is inadequate consumer representation on international standardisation bodies such as the ISO, where representation is by national delegates with a consequent dilution of direct consumer influence.

Consumer interests are represented at the transnational and international level by a variety of groups. Consumers International, an umbrella of consumer groups, financed by consumer groups in the developed world is the best known. Taking a broad approach to the consumer interest, it has campaigned on issues such as information technology and intellectual property rights, rights to water and basic necessities, corporate social responsibility, sustainable consumption and international standard-setting. It brings together the politics of necessity and the politics of affluence in consumer policy. It also acts as a representative of consumers on many international committees. There are

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<sup>8</sup> See Consumers International, *Decision Making in the Global Market: Trade, Standards and the Consumer* (CI, 2005).

<sup>9</sup> See further Ch. 10.

well-known arguments concerning the difficulties of consumer representation at the national level, given the diffuse and fragmented nature of the consumer interest. One might expect these to be exacerbated at the international level, where much governance operates through expert committees and multinational capital is likely to be well organised. However, consumers may through a pooling of resources be able to achieve more at an international level, and there may be greater possibilities for strategic alliances with other groups. International non-governmental organisations (NGOs) now encounter issues of legitimacy and accountability. Consumers International faces the difficulties of representing the concerns of consumers from developing and developed countries and ensuring responsiveness to grassroots concerns.

Recourse to a national legal system may be of little assistance to many consumers with a cross-border problem, however favourable or simplified jurisdiction and choice of law rules may be. The development of international class actions and online dispute resolution might reduce the problem of redress. A transnational perspective on cross-border consumer issues draws attention to the pluralistic nature of law and the role of alternative forms of regulation. The regulation of internet purchases illustrates a spectrum of 'bottom-up' spontaneous forms of regulation as well as top-down methods to ensure consumer protection. Internet sites such as eBay have developed contractual standards, reputation mechanisms and dispute settlement fora that represent spontaneous market regulation. Credit intermediaries may play an important role in cross-border consumer redress and act as gatekeepers to markets. These developments may represent an embryonic *lex mercatoria* for consumers, but one which needs to be framed within international standards (such as the European Convention on Human Rights (ECHR)). Others are more sceptical of the reputation effects of online ratings on sites such as eBay.

The European Union provides the most developed system of regional consumer law, which, as several chapters in this book indicate, also provides a model for countries outside the EU. This role of EU law will continue notwithstanding the exit of the UK from the EU. In establishing the consumer law ground rules of a common market, there may be a tension between distinct visions of consumer law. On the one hand, we have a market-oriented vision of consumer law in which it is limited to ensuring non-discriminatory access, policing information failures and fraud, and where the state plays little role in shaping the norms of the market. On the other hand we have a vision of consumer law as embracing norms of fairness and loss and risk spreading. At the regional level, within the EU these tensions surface in specific topics such as the standard of deception in advertising, discussed above. A concern for fairness in transactions was highlighted by the Great Recession of 2008, which resulted in significant rulings by the European Court of Justice on unfair terms and a strengthened Mortgage Directive intended to address problems of irresponsible lending.

In a world with long supply lines, to what extent are consumers in the developed world agents of social change? 'Fair trade' initiatives include certification and labelling schemes, alternative trading networks and political campaigning. Fair trading represents a spectrum from mainstream to alternative forms of consumerism, and we see here the overlap of and tensions between the 'purchaser consumer' and the 'citizen consumer' – a conception of the responsible consumer who is not purely self-interested. There are differing views on the potential of fair trade initiatives. The benefits include those to

the producers in countries of the South and their contribution to capacity-building in these countries. Critics of certification and labelling programmes designed to ensure fair labour practices point out that consumers in developed countries are often not well informed about the nature of labour practices in countries of the South and that their actions represent a form of imperialism which may make workers worse off. Certification and labelling will only affect export industries and there is the cost of monitoring the certification process. There is also the danger that fair trade initiatives may be more popular during benign economic conditions in developed countries and that the welfare of developing countries' workers should not depend on the changing preferences of consumers in developed countries.

Although there may be a superficial level of convergence in principles of consumer law, there remain significant differences between the EU and the US in consumer law. Examples include the regulation of unfair terms, and product safety. Differences within the EU in approaches to consumer protection and its enforcement exist, and, as indicated earlier, developing countries may take a differing view of consumer policy. We have already suggested that consumer law may be responsive to differing cultural contexts. Consumer law differs therefore from competition policy, where there appears to be an international consensus among policy-makers on its role. Differences in consumer laws may be attributable to cultural differences, levels of economic development or the influences of political interest groups.

## 6. CONCLUSION

The aim of this book is not to promote one view of consumer protection or even to argue in favour of increased harmonisation. Through exposing areas of policy to comparative analysis, it seeks to reveal the models that exist and to throw light on the fundamental issues at stake so that those responsible for consumer policy can make informed choices, with knowledge of the international models available. That said, the impetus towards harmonised standards cannot be ignored and it is important that the perspective and interests of consumers are centre stage in such debates.

It is divided into three parts: the first part addresses trends and challenges in international protection of consumers, while the second part focuses on financial crises and consumer protection and the third part examines national and regional consumer law issues. About the Author.Â Dan Wei, Ph.D. in Law of University of Coimbra, Full Professor of Faculty of Law of the University of Macau, Rapporteur of the Committee of International Protection of Consumers of International Law Association. No customer reviews. 5 star (0%).

International law, also known as public international law and law of nations, is the set of rules, norms, and standards generally accepted in relations between nations. It establishes normative guidelines and a common conceptual framework to guide states across a broad range of domains, including war, diplomacy, trade, and human rights. International law allows for the practice of stable, consistent, and organized international relations. The notion of consumer in EU law does not apply to legal persons, even if they have a non-business character, as would be the case for non-profit associations. This has also been emphasised in the case law of the Court of Justice on several occasions. There is an exception, namely the Package Travel Directive 90/314/EEC, which uses a broader notion of the consumer by including companies and business travellers as purchasers and users of travel services.<sup>7</sup> Because of the minimum harmonisation character of the larger part of the consumer acquis, many Member States extended the scope of their cons...