Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries

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Executive Summary

1.0 Introduction
The objective of this Report is to benchmark the performance of the UK framework supporting consumer empowerment by comparing it with the frameworks existing in other comparative countries, namely: Australia, Canada, Denmark, Germany, Spain and the US.

Consumer empowerment is the theme running through the Report and connecting all its component parts. The term is one which is increasingly used by policy-makers and yet it is difficult to pin down conceptually. We have sought to establish the meaning of consumer empowerment more formally, mindful of the need of a consumer regime to operationalise the concept in practical ways (see Section 1). In summary, our working definition of consumer empowerment is as follows:

- Empowered consumers are capable of making informed choices, which in turn requires a consumer empowerment regime to put in place the tools for consumers to secure the best possible outcome for themselves.

- Consumers should be capable and willing to assert their rights, which requires that a consumer empowerment regime has laws and institutions which are sufficiently transparent, accessible and responsive to their needs.

- To the extent that consumer empowerment is outcome driven, the regime ought to be capable of identifying features of the market which impede the realisation of consumer benefits or cause consumer detriment, and have the necessary tools to deal with such problems.

1 Benchmarking the UK Framework Supporting Consumer Empowerment
Our two-pronged approach to the task of evaluating the level of consumer empowerment is summarised in Figure 1, which shows the level of consumer empowerment in a given jurisdiction as determined by the institutional environment (that is, the consumer protection regime), the subject of Part 1 of this Report, in combination with the market environment, the subject of Part 2 of this Report.

**Figure 1: Benchmarking the UK framework supporting consumer empowerment: a two-pronged approach**

At the core of consumer empowerment is the idea that consumers have the tools to secure the best outcomes for themselves. In terms of the institutional environment, this implies that conditions are such that consumers are sufficiently confident to participate in markets, including a perception that there are realistic redress mechanisms in place should things go wrong. Consumer empowerment requires a mix of policy interventions which are sensitive to market context, consumer psychology and behaviour, distributional issues, and the outcome which is being pursued. It is clear that the translation of consumer empowerment into action has two interrelated dimensions. First, the concept implies that consumers are assertive in the realisation of their rights, which in turn depends partly upon the institutional and legal framework underpinning consumer law and policy. Second, if market discipline is to be exerted on firms, the concept relies upon consumers being confident and active (and sufficiently ‘accurate’ in their decisions). The first aspect of consumer empowerment relies, therefore, upon the laws and
institutions set up being sufficiently transparent, accessible and responsive to the needs of consumers, while the second aspect requires of consumers both the ability and the willingness to participate effectively in markets. The issue of vulnerable and disadvantaged consumers is not a specific benchmarking issue, but it nevertheless deserves explicit attention (see section 2.5 below). A consumer empowerment regime should be aimed at improving outcomes for all consumers, but certain types of measures may have a particularly strong impact on disadvantaged consumers.

1.1 Methodology
Drawing upon the leading academic and policy literature in the area, and after consulting other academics and policy experts, we devised a set of benchmarks against which we can compare the UK’s framework supporting consumer empowerment with our comparator jurisdictions (see Section 2 and Annexe A). Our starting point was to think about broad level principles, such as, for example, transparency, proportionality, effectiveness and responsiveness. With our consumer empowerment concept to hand, and drilling down into the literature, we have defined a set of benchmarking principles which are carried forward into the comparative analysis (see Section 3 and Annexe B). The comparator countries were selected against several criteria: they are all countries at approximately the same stage of economic development (i.e., advanced market economies), they represent the differing types of consumer regimes across all advanced countries, and they display a diversity of legal and constitutional traditions. There is no comparator jurisdiction to act as a yardstick and there is considerable diversity in respect of consumer rights and enforcement models, and a relatively low level of awareness as between regimes. The “consumer culture” also implies different models may be appropriate. We conclude that an overall ranking of countries in a robust manner is not possible. It is our objective, therefore, to identify instances of best practice across the jurisdictions with a view to comparing the performance of UK’s regime.
Descriptive information relating to the consumer protection regimes prevailing in the seven countries under study was collected by means of desk research. These studies were supplemented by data collected via a questionnaire (see Annexe G), and by secondary survey data, including the European Commission's 'Consumer Markets Scorecard'\(^1\) of 2008. The respondents to the questionnaire were key policy experts and practitioners in the area, and addressed issues concerning best practices in promoting consumer empowerment, as well as more specific information on the consumer protection regimes prevailing in their respective countries.

The questionnaire provides a bridge between Parts 1 and 2 of the study and informs, in particular, the market studies by providing respondents with the opportunity to identify those markets that are (or have been) problematic for consumers in the countries under investigation; case studies of these markets would then enable us to investigate the economic issues germane to the issue of consumer empowerment in an empirical setting. While it was not our intention, nor was it within our remit, to conduct a large-numbers survey, the responses to the questionnaire provide a valuable commentary on the strengths and weaknesses of the consumer protection regimes that are the subject of this study.

Part 2 of the Report is focused on market outcomes, in particular, an evaluation of the level of consumer empowerment in the markets we identified via our questionnaire. In order to determine how consumer empowerment might be recognised and evaluated, our starting point was to survey the economic literature to identify the characteristics of markets and consumers which are likely to result in consumer detriment and/or to militate against consumer empowerment (see Section 4 and Annexe C). This survey of the economic literature enables us to formulate 14 theoretically-informed indicators for identifying the level of consumer empowerment, which are taken forward into the market case studies (see Section 5 and Annexe D). Four

product markets have been selected from amongst those that respondents to the questionnaire identified as problematic for consumers; these are: personal current accounts, car repairs/servicing, energy and mobile phone services. For each of the four markets, we undertake cross-country comparisons of consumer transactions set against our 14 theoretically-driven indicators for identifying the extent of consumer empowerment. The case studies enable us to investigate in an empirical setting those economic issues germane to the question of consumer empowerment.

2.0 The legislative and institutional framework
In this section, we offer a brief summary of Part 1 of this Report, in particular, our assessment of the UK’s consumer framework supporting consumer empowerment and the principles forming our evaluative framework. We present the summary under four headings:

1. the legal framework;
2. the consumer interface;
3. redress mechanisms; and
4. public enforcement.

Overall, we find that in respect of the legal framework, and following the implementation of the duty to trade fairly, the UK is on a par with the best. Likewise, in respect of the consumer interface (i.e., the provision of information, advice and consumer advocacy) the UK is on a par with the best.

In respect of redress mechanisms, this is an area where we are of the view that further progress is needed in order for the UK to be on a par with the best. The UK public enforcement system is on a par with the best in respect of sanctions, the use of enforcement resources, and in having powers for agencies to react to market level problems. Coordination is a consistent problem across all seven countries in our study and, while the UK will shortly have robust coordination mechanisms in place, the effectiveness of these measures will require further testing in the future.
A short summary of our findings is presented in Table 1 below.

2.1 The legal framework
We have concluded, first, that consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels. The ability of consumers to enforce their rights does depend logically upon their awareness of those rights, although awareness need not be ex ante. It may well be that a broad duty can send a powerful signal to consumers that certain rights are protected by law, while the precise nature of the right in question can be disseminated to consumers through information and advice systems if and when problems arise.

In terms of the extent and content of rights, the UK appears to be on a par with the best, with the caveat that the amount and complexity of the legislation conferring these rights may be higher than desirable and may potentially render the rights inaccessible to consumers. In most of the countries under study, there is (or will shortly be) a general duty to trade fairly (or a variant) and following the implementation of the EC *Unfair Commercial Practices Directive* in May 2008, the UK will be on a par with these jurisdictions. We are of the view that the duty to trade fairly may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair as against the meaning given to this duty in law, consumers may misunderstand the nature of the rights they enjoy. Nevertheless, the duty has the potential of increasing consumer empowerment since consumers are more likely to be aware of the existence of a broad and single duty rather than a multitude of specific duties.

2.2 The consumer interface
As a broad proposition, an awareness on the part of consumers of the full extent and nature of their rights is unrealistic, and not necessarily desirable, given cognitive and time constraints. Consumer empowerment may nevertheless be strengthened by the provision of consumer information and advice channels, and it is clear that most jurisdictions are increasingly
focusing resources on such provision. In order to be most effective, such advice and information channels should be accessible, strongly branded and based on the one-stop-shop principle. While telephone and the internet appear to be the dominant channels of delivery, some jurisdictions (including the UK) also provide for face-to-face advice which may benefit certain disadvantaged groups in particular. The UK’s Consumer Direct initiative, taken together with the national coverage of Citizens’ Advice Bureaux, appears to be on a par with the best.

Given the disparate and diffused nature of consumers, the provision of strong consumer advocacy groups can contribute to the empowerment of consumers by ensuring the representation of their interests in policy formulation and the setting of agency priorities. Across all the countries under investigation, including the UK, there appear to be mechanisms in place for the representation of consumer interests in policy making and priority setting. We conclude that recent reforms in the UK, aimed at consolidating consumer representative bodies and strengthening and enhancing the role of the National Consumer Council, put the UK’s arrangements for consumer representation on a par with the best.

In addition to consumer information and advice, it appears that more emphasis is being placed on consumer education aimed at raising consumer market skills. We are of the view that this may potentially make an important contribution to the empowerment of consumers. Recent initiatives in the UK, in particular the leadership role played by the OFT in coordinating educational initiatives, and the incorporation of consumer issues into the National Curriculum, place the UK at the forefront of such initiatives as compared with the other countries in our study. There is no direct evidence, however, as to the effectiveness of educational initiatives in raising levels of consumer empowerment, although there does appear to be a broad consensus among policy makers that consumer education should be a priority area.
2.3 Redress mechanisms
Although litigation forms the back-stop for the enforcement of rights, there are a number of formidable barriers to enforcement by litigation, even where court processes are simplified and expedited in line with the relatively low level of monetary harm typically suffered by an individual consumer.

A consumer regime should make provision for alternative dispute resolution (ADR) mechanisms, especially in respect of markets which demonstrate low levels of consumer satisfaction. There is a vast array of ADR mechanisms across the countries under study; but there is no single model common to all countries or to all markets. The coverage of ADR schemes in the UK is patchy, and some markets do not have an ADR scheme at all (and this is true of some markets which display low levels of consumer satisfaction). Looking across the countries in the study, the majority of ADR schemes are privately organised (for example, by industry trade associations), hence the considerable variability between markets. While there are obvious benefits with ADR schemes, we note a level of concern as to the quality of certain schemes and the danger that consumers may be ‘short-changed’. In this regard we conclude that there need to be mechanisms in place to ensure ADR schemes meet minimum standards in terms of independence, accessibility and effectiveness.

In the UK, there are mechanisms in place for approving schemes, but relatively few have been approved. We conclude that the leading country in this regard is Denmark, where there is default ADR mechanism to deal with consumer complaints in sectors where there is no private (approved) scheme in place. This has the benefits of increasing the visibility of ADR to consumers generally and of encouraging industries to put in place their own mechanisms which meet core standards in terms of independence and the quality of decision-making. We conclude that the UK’s provision of ADR schemes is an area where further progress could be made if the UK is to be on a par with the best.²

² Although we note that under the European Consumer Scoreboard the UK is ranked fourth among the EU-25 on ADR provision. See Section 3 of this Report, Figure 3.3.
Litigation may have a limited role to play where individual consumer harm is substantial. Across all of the countries in our study, provision is made for small claims procedures, which enables consumers to pursue their claims through a low-risk, flexible and expedited court procedure. Where this is the case, it is reasonable to expect that consumers will have better access to justice, at a cost and burden which is not disproportionate to the value of their claim. The provision of such mechanisms varies from country to country. In respect of the UK, we note that it can take around six months to use the small claims procedure. The permitted threshold for a small claim across the countries under study ranges from approximately £400 up to £23,000, with the UK at the lower end, with a threshold of £5,000. We conclude that, on balance, the UK’s small claims procedure is average.3

The third mechanism for facilitating redress for consumers is collective enforcement. Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law (especially where there is weak public enforcement). There is a great diversity internationally when it comes to the provision of collective action and it is difficult to evaluate the UK’s position vis-à-vis the other countries, not least because of the apparent lack of empirical data of its effectiveness coupled with no real consensus over its efficacy. Moreover, the relative importance of collective enforcement depends upon other features of the enforcement regime, and should not therefore be taken in isolation from other types of redress provision and public enforcement. The UK does make provision for group litigation and representative actions, but its procedures are more restrictive than is the case in other countries (in particular the US and, to a lesser extent, Denmark). Whether the law should be changed to facilitate more group litigation is an issue which is beyond the scope of this study.

3 Although we note that under the European Consumer Scoreboard the UK is ranked second among the EU-25 on accessibility of the courts. See Section 3 of this Report, Figure 3.3.
2.4 Public enforcement
As a broad proposition, administrative enforcement is important in correcting for the under-use of redress mechanisms. All of the jurisdictions in this study (with the exception of Germany) have an administrative enforcement system for consumer laws. The norm is that public enforcement is before the courts, however, and this is currently the case in the UK. Court-based enforcement may have a number of advantages, including securing transparency and fairness for firms. The downside, however, is that it attracts significant litigation costs for the agencies, and to this extent the deterrent effect of the law is undermined. Agencies are also limited in their capacity to employ a layered approach to enforcement, tailoring interventions to the severity of infringement. While fairness and transparency are important features of a public enforcement regime, agencies should ideally have a hierarchy of sanctions which can be escalated in the face of non-compliance by firms. In the UK, there are forthcoming legislative changes under the *Regulatory Sanctions and Enforcement Bill* which will give the OFT and Local Authority Trading Standards Services powers to impose both fixed and discretionary penalties on businesses who fail to comply with key consumer protection laws. Once in place, there will be an ability to escalate the level of a sanction according to, for example, recidivist law-breaking on the part of a firm. We conclude that once these powers are in place, the UK will be on a par with the best in respect of its provision of enforcement powers.

In line with principles of good regulation, we are of the view that effective public enforcement should be targeted appropriately and, in particular, in respect of markets displaying high levels of consumer detriment. There is evidence across all seven countries of the monitoring of complaints data, and there is some further evidence of the use of this data in identifying particular areas of concern. In some countries, consumer organisations play a particularly important role in bringing to the attention of either the agencies or the courts particular consumer problems. A number of regimes have challenging targets against which their performance or market interventions can be measured, and there is evidence that agencies do clearly set their enforcement priorities in response to a high volume of complaints in respect of
particular sectors. Overall, the UK performs well against this measure and comparative jurisdictions. Mechanisms are in place to identify and target resources to deal with specific market problems, and challenging targets are in place to measure agency performance.

Beyond monitoring, effective targeting does depend upon having the right tools to address consumer detriment. While there is evidence that several jurisdictions monitor markets, and use resources and the enforcement tools that they have in a responsive way, the UK is unique in having the ability to impose remedies at the market level (even where there has been no infringement of the generic consumer laws). The need for specific market intervention in the light of systematic consumer detriment is important for several reasons. It may provide a mechanism for dealing with specific issues pertaining to disadvantaged consumers (where the consumer regime generally is based on the needs of the average consumer). It can deal with market level problems, where there is no specific breach of consumer law, but where consumer detriment can be remedied by targeted remedies. While the OFT only envisages using its referral power (to the Competition Commission) in respect of three markets per annum, it is nevertheless an important complement to its other enforcement powers, has a level of transparency and due process safeguards, ensures that remedies can be targeted effectively, and its threat may act as a deterrence.

Turning to the issues of coordination and consistency, this has clearly been an issue in most countries (including the UK) where enforcement functions overlap or are split between different agencies. Much of this is a largely unavoidable consequence of the constitutional arrangements of the country in question, and in this respect the UK has a comparative advantage given that consumer laws are harmonised across the UK and the OFT has a remit for the UK (excluding Northern Ireland). There is, however, both an overlap and a split of powers and functions as between the OFT and local authority TSSs. Recent initiatives, including legislative measures, are likely to facilitate greater coordination and cooperation, thereby reducing burdens for firms and encouraging the more efficient use of scarce public resources. We conclude
that in the UK, robust mechanisms are in place to ensure that there is coordination and consistency of approach in enforcement, although how effective such measures are in practice requires further investigation.

Finally, we take the view that, as with ADR and redress, self-regulatory mechanisms can be a cost-effective means of securing compliance. Self-regulation should, however, be underpinned by effective and credible threats of intervention in the event that it fails to perform in the interests of consumers.

In Australia, the Government encourages development of industry codes of practice, which are seen as light-handed, market sensitive ways of securing compliance with the Trade Practices Act, and can be made mandatory in certain circumstances. In Canada and Germany there are no legal consequences of not following guidelines outlining best practice. By way of contrast, in Denmark non-compliance with guidelines may breach the Marketing Practises Act.

In the UK, businesses can sign up to a code of practice that has been approved by the OFT under the Enterprise Act 2002. An approved scheme must meet certain minimum requirements, for example, there must be mechanisms to deal with traders who break the codes. The UK appears to be on a par with the best in terms of the provision and management of these mechanisms, although how much additional consumer empowerment these provide in practice is an issue that needs empirical testing and is beyond the scope of this Report.

One question is how many consumers need to be empowered (by whatever definition) for a market to work well (in the sense that it provides good outcomes for consumers). In general we would expect that not every consumer needs to be empowered (or active) to exert sufficient discipline on providers, though all consumers are likely to benefit from the effect of that discipline. The proportion of empowered consumers necessary to make a
market work well varies according to the nature of the product, supply side conditions, size of the market and other factors.

Even though consumers as a whole are likely to benefit from the beneficial effects from those who are empowered, some vulnerable consumers may still be at a disadvantage in some circumstances.

2.5 Vulnerable and disadvantaged consumers
The issue of vulnerable and disadvantaged consumers is not a specific benchmarking issue, but it is nevertheless a matter which we think should be given explicit attention. A key policy dilemma exists in respect of how a consumer regime should support such consumers. The protection of disadvantaged consumers may be at the cost of reducing the utility of everyone else; for example, in order to protect a small class of disadvantaged consumers, it may be necessary to impose more stringent regulation on a product which may increase the costs, or reduce the choice, faced by all consumers.

As a general proposition, a consumer empowerment regime should be aimed at improving outcomes for all consumers, but certain types of measures may have a particularly strong impact on disadvantaged consumers. For example, improving the accessibility and visibility of redress and advice mechanisms may be expected to benefit the disadvantaged consumer in particular, and strong consumer advocacy groups can ensure that the needs of disadvantaged consumers are reflected in the formulation and application of consumer policy. Moreover, informational remedies which increase market transparency and reduce complexity can particularly help those who have low levels of literacy, and educational initiatives which are targeted at such consumers may further empower them.
<table>
<thead>
<tr>
<th>Principle</th>
<th>UK on a par with the best?</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LEGAL FRAMEWORK</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 Consumer rights</td>
<td>Yes</td>
<td>UK does well on extent and content of rights; accessibility could be made easier.</td>
</tr>
<tr>
<td>2 Duty to trade fairly</td>
<td>Yes</td>
<td>A new duty implementing an EC directive was introduced in May 2008 and brings the UK to the level of the best.</td>
</tr>
<tr>
<td><strong>CONSUMER INTERFACE</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Consumer advice channels</td>
<td>Yes</td>
<td>Good range of channels available, including national coverage of face to face advice and single gateway for consumer advice.</td>
</tr>
<tr>
<td>4 Provision of information</td>
<td>Yes</td>
<td>National coverage of Consumer Direct and Citizens Advice score well by international standards.</td>
</tr>
<tr>
<td>5 Consumer education</td>
<td>Insufficient evidence</td>
<td>UK is at the forefront of education initiatives though there is a lack of evidence on effectiveness in all countries.</td>
</tr>
<tr>
<td>6 Consumer advocacy</td>
<td>Yes</td>
<td>Strong consumer representation by international standards through bodies such as the NCC, Which and Citizens Advice.</td>
</tr>
<tr>
<td><strong>REDRESS MECHANISMS</strong></td>
<td>Progress Needed</td>
<td></td>
</tr>
<tr>
<td>7 ADR</td>
<td>Progress Needed</td>
<td>Mechanisms in place to ensure ADR schemes meet min standards and UK does well on the EU scorecard, but we consider coverage is patchy, and progress needed to match leading countries like Denmark.</td>
</tr>
<tr>
<td>8 Small claims procedures</td>
<td>Progress Needed</td>
<td>UK is average. Main deficiency is time taken to conclude a claim.</td>
</tr>
<tr>
<td>9 Collective enforcement</td>
<td>Not assessed</td>
<td>UK procedures are more restrictive than in some other countries though not clear whether further measures would be beneficial.</td>
</tr>
<tr>
<td><strong>PUBLIC ENFORCEMENT</strong></td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>10 Sanctions</td>
<td>Yes</td>
<td>UK compares favourably on range of sanctions. RES Bill will further strengthen the sanctions available.</td>
</tr>
<tr>
<td>11 Use of enforcement resources</td>
<td>Yes</td>
<td>Mechanisms are in place to target resources e.g. through use of complaints data and targets are challenging.</td>
</tr>
<tr>
<td>12 Agency powers</td>
<td>Yes</td>
<td>UK is unique in giving competition authorities power to impose remedies at market level.</td>
</tr>
<tr>
<td>13 Co-ordination</td>
<td>Progress Needed</td>
<td>Greater coordination needed amongst local enforcement bodies in most countries. New measures underway may lead to the UK being at the level of the best.</td>
</tr>
<tr>
<td>14 Self-regulation</td>
<td>Insufficient evidence</td>
<td>UK on a par with the best in terms of provision and management of ‘soft-law’, though the impact on empowerment needs further testing.</td>
</tr>
</tbody>
</table>
3.0 Market outcomes
As a broad proposition, when the benchmarking principles are met, consumer empowerment can be expected to lead to good quality outcomes for consumers. It follows that a consumer regime which is on a par with the best will be pro-active in monitoring and evaluating the level of consumer empowerment (Principle 11). Yet, as we have observed, consumer empowerment is a term which is difficult to pin down conceptually: hitherto, it has lacked both formal definition and the specification of theoretically-informed parameters which would allow us to measure it.

3.1 Indicators of consumer empowerment
Our review of the economic literature has enabled us to identify 14 theoretically-driven indicators with empirical 'grip' on consumer empowerment. We would suggest that, given adequate data, these can be applied to markets in order to identify those in which consumers are most likely to be empowered and those in which they are most likely to be disempowered. These indicators which relate to the [dis]empowerment of a consumer or group of consumers can be grouped under a number of themes, as follows. The numbering of the indicators is based on the order of their derivation, as detailed in Section 4 of the main report (and Annexe C).

Consumers need to have good information about the product and market with which they are engaging; thus
An empowered consumer is a well informed consumer (Indicator 1);
Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes (Indicator 5);
A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods (Indicator 7);
Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information (Indicator 10).

The way in which consumers process and act on information affects empowerment, leading to:
**Indicator 9:** For a given market:

(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
(ii) when acting under the constraints of bounded rationality, consumers may attain 'reasonable' outcomes (one behavioural conclusion);
(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion);

**Indicator 11:** As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase;

and **Indicator 13:** Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

Supply conditions in the market will affect consumer empowerment, leading to:

**Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power;

**Indicator 2:** Where a choice set exists, the consumer is empowered if:

(i) the choice set includes the 'good' quality outcome;
(ii) the options are 'reasonably' far apart in product characteristic space (that is, they are sufficiently different from one another in a market where differentiation is important); and
(iii) there is the choice not to engage in a transaction;

**Indicator 6:** A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

Conversely, under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers (**Indicator 4**).
More generally we find that the impact of price discrimination on consumer empowerment in a given market is ambiguous (Indicator 12); and that the level of consumer empowerment in a market may be defined by reference to one or more other markets (Indicator 8).

And, crucially for the current study, we observe that for a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests (Indicator 14).

It is important to note that, where one or more indicators identifies a market as one in which consumers are likely to be disempowered, it cannot be assumed that consumers will, as a result, necessarily experience detriment. Indeed, it is possible for disempowered consumers to achieve good outcomes where there is effective regulation; and, conversely, empowered consumers may achieve poor outcomes in the face of coordinated effects on the supply side. Thus, application of the indicators points to those markets where, as a result of a degree of disempowerment, there is the potential for detriment.

3.2 Market case studies
To exemplify the method, we have undertaken four market case studies across the seven countries in our study. These case studies are complementary to the analyses undertaken in Part 1 of the Report. The markets selected have been identified by respondents to our questionnaire as raising issues germane to the question of consumer empowerment. The benchmarking principles enable us to compare and evaluate consumer regimes in the different countries under study. Set against these principles, a given consumer regime may appear to be effective in protecting consumer interests and enhancing consumer empowerment; for example, consumers may be well provided with relevant information (Principle 4), their interests may be well represented by consumer advocacy groups (Principle 6), and a variety of mechanisms may exist for dealing expeditiously with complaints in the event that problems arise (Principle 7). But the ultimate test of a regime is
whether those attributes which appear positive on paper translate into good outcomes for consumers. Thus, where the data permit, the market case studies enable us to comment on the effectiveness of the general consumer protection regime in a given country but also on the level of consumer empowerment prevailing in a particular market where there may (or may not) be sector-specific regulation. Briefly stated, our findings for three of the case studies are given below. In our case study on car repairs and servicing, there was insufficient evidence to make a robust assessment of consumer empowerment in the UK relative to other countries. Our analysis of this market is, however, given in Annexe D of this report.

Personal current accounts
When the evidence is set against our indicators, we find that the market for personal current accounts is characterised by a number of different issues germane to the question of consumer empowerment, and in all of the countries under study. The market is not one in which we are likely to find fully informed consumers. It is a market characterised by complex tariff structures and a lack of price transparency, making it difficult for consumers to compare products and identify the one which is optimal for them. Thus, when the evidence is set against Indicators 1, 5, 7 and 11, we may say for all countries that the market environment does not provide for a high level of consumer empowerment.

Yet against this backdrop, the UK appears to perform better than most in some key respects. UK consumers benefit from a higher level of transparency than their counterparts in Canada, Australia, Germany, the US and Denmark. Although UK and US consumers may incur similar levels of costs, UK consumers arguably receive greater benefits. The UK performs better than Denmark, Germany and Spain in terms of the proportion of consumers perceiving a current account to be affordable. And, compared to Australia, Canada, France, Finland, Germany, Ireland, Italy, the Netherlands, Sweden and the US, UK consumers have among the broadest range of services available to them, with relatively easy and cheap access to an overdraft, and access to cash overseas using debit cards. UK consumers also seem to be
reasonably well supported by institutional mechanisms, for example, through the Financial Ombudsman Service.

Energy
Consumer empowerment in the UK energy market appears to be among the highest, matched only by some parts of Australia. Compared with other comparator Europeans, UK consumers have more choice between suppliers and tariffs; they have lower satisfaction levels, make more complaints, but are just as well satisfied with how their complaints are dealt with. However, this is a market in which a reasonable level of consumer empowerment may to some extent be offset by supply-side issues. While consumer activity is crucial in overcoming incumbent power, it cannot address a softening of competition, if suppliers choose not to compete vigorously in the market. Such behaviour requires vigilance and possible intervention by the authorities to exercise their general competition powers in this, as in other markets. Thus, set against Indicator 3, it is not obvious that a UK consumer who is free to choose from several suppliers is necessarily more empowered than one who buys in a regulated market. However, given the regulatory activity taking place under general competition law, consumers in the UK should be as empowered as those in other, more explicitly protected, markets.

Mobile phone services
Data on the European countries amongst our comparators suggest that the market for mobile phone services shares several characteristics with the market for personal current accounts. In particular, this is not a market in which we are likely to find fully informed consumers because of the complexity and lack of transparency attached to tariff structures. Against this backdrop, UK consumers would appear to be more empowered than their counterparts in Germany, Denmark and Spain with respect to the ease with which they can compare products, the affordability of mobile phone services, their positive perceptions of how well their interests are protected, and their positive perceptions of how well complaints are handled. The UK performs less well with respect to the level of consumer satisfaction with the market. UK consumers tend to make more complaints in this market compared to their
counterparts which might be indicative of confident, active market participants – or it may signal that there is more to complain about.

Conclusions
It is important to note that our case studies constitute examples of how the method we have devised for evaluating the level of consumer empowerment may be applied. A different set of markets can be expected to lead to a different set of findings. Markets are not homogeneous; they have idiosyncratic features with respect to the nature of transactions, the supply side, and the institutional environment in which consumer transactions take place. These features, together with the attributes of consumers themselves, such as their cognitive abilities, are all functionally related to the level of consumer empowerment.

But whichever market is at issue, a strong imperative to emerge from our case studies is the need for evidence. While the measurement of consumer empowerment may never be a precise science, it does require data which can be set against the indicators we have proposed. In conducting the market studies, we have found that, in some cases, there is a dearth of data (in particular, for the car repairs and servicing sector). Thus, there are some limits on the extent to which cross-country comparisons can be made against all relevant indicators and for all countries individually. We note in this respect that a central finding of the European Commission's 'Consumer Markets Scoreboard'\(^4\) is that "complete, harmonised and comparable data on consumer outcomes are largely absent" and that an important forward task must be to develop such data. This finding underlines a point made in our discussion of benchmarking under Principle 11: the ability to identify and deal with consumer detriment calls in the first instance for evidence against key consumer indicators acquired through systematic monitoring of outcomes.

4.0 Conclusions

Consumer empowerment has been examined both in the context of the relevant legislative framework and in particular markets across the countries which are candidates for engendering the most empowered consumers.

Overall, we conclude that the UK is on a par with the best in respect of the legislative framework (with the caveat that the volume and complexity of the legislation could be simplified). The UK is on a par with the best in terms of its provision of consumer information and advice, and consumer advocacy. In respect of redress mechanisms, the UK’s position on ADR could be further improved and likewise the small claims procedure (which currently takes a year on average) could be enhanced. The UK’s system is underpinned by a strong public enforcement regime. In the light of forthcoming legislative changes, the key enforcement agencies will have a number of different types of enforcement powers which will enable them to regulate business in a responsive way. There is also evidence that the UK does focus its enforcement resources to deal with systemic market problems, and has challenging targets against which performance is measured. The regime also has the ability to impose remedies at a market level, which has a number of important advantages. There are also robust mechanisms to facilitate the coordination of policy and enforcement. From these factors taken together we conclude that the UK’s public enforcement regime is on a par with the best.

We nevertheless conclude that the UK regime could be further improved through more systematic and targeted data collection and analysis. This is not a problem peculiar to the UK. Indeed, one issue which came to light during the course of this investigation was the dearth of comparative data on the performance of key consumer markets. Despite the limitations of data, when our 14 theoretically-informed market indicators were applied to specific markets, we found that, whilst there are some areas in which there is room for improvement, in general, UK consumers are at least as empowered as their counterparts in comparator countries. We infer from this that our findings in respect of the legal and institutional framework supporting consumer empowerment are robust.
1 Introduction

1.0 Objectives
The objective of this report is to benchmark the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries. Our approach to this objective is two-pronged, with 'consumer empowerment' as the unifying theme.

Part 1 of the Report attends to the consumer protection regime prevailing in the UK and in each of six other countries where our aim has been to evaluate the effectiveness of the mechanisms (both public and private) by which consumer empowerment is promoted. The focus of our investigation has been the extent to which the law and institutions in those countries support consumer empowerment (as defined below). To this end, we have sought to establish a robust and credible set of benchmarks which would allow investigators to make an assessment of these regimes (see Section 2 and Annexe A).

Yet however well a given regime performs 'on paper' when set against the benchmarks for its assessment, the ultimate test of the effectiveness of that regime lies in the quality of the outcomes realised by consumers. Thus, Part 2 of the Report attends to market outcomes where our aim has been to evaluate the level of consumer empowerment in an empirical setting and taking into account the characteristics of the supply side, consumer transactions and consumers themselves. To this end, we have sought to devise a theoretically-informed set of market indicators which can be applied to markets in order to identify those in which consumers are most likely to be [dis]empowered.

The relationship between the two parts of the study is summarised in Figure 1.
The comparator countries in this study are Australia, Canada, Denmark, Germany, Spain and the US. These countries were selected against several criteria: they are all countries at approximately the same stage of economic development (i.e., advanced market economies), they represent the differing types of consumer regimes across all advanced countries, and they display a diversity of legal and constitutional traditions. There is no single comparator jurisdiction to act as a yardstick. As the previous DTI study concluded, there is considerable diversity in respect of consumer rights and enforcement models, and a relatively low level of awareness as between regimes (in contrast to the position for competition regimes).1 The “consumer culture” also implies different models may be appropriate. We conclude that an overall ranking of countries in a robust manner is not possible. It is our

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objective, therefore, to identify instances of best practice across the jurisdictions with a view to comparing the performance of UK’s regime.

The benchmarks which we have devised are informed by the academic and policy literature in this area. They provide the key tool for the comparative analysis that is summarised in Section 3 (and presented fully in Annexe B) where our objective has been to position aspects of the effectiveness of the UK consumer protection regime vis-à-vis the regimes of the other jurisdictions under the study. Given the diversity of regimes (no one model fits all), it has been necessary to assess regimes against qualitative benchmarks which may be satisfied by different means.

The analysis in Part 1 takes a ‘top down’ approach to the issue of consumer empowerment, and is centred on the laws and institutions of consumer protection. Part 2 is complementary in that it takes a more 'bottom up' approach by focussing on market outcomes. It is motivated by the need of an effective consumer protection regime to be able to evaluate the level of consumer empowerment and to identify those markets in which consumers are particularly susceptible to detriment. This part of the study draws on the economic literature for evidence of how consumer empowerment might be recognised and evaluated (Section 4 and Annexe C). With a theoretically-informed framework in place, we conduct cross-country comparisons of four markets in which consumer empowerment has been limited due to market characteristics, firm and consumer behaviour and/or the lack of intervention or effective remedies (Section 5 and Annexe D). The markets have been selected from amongst those that respondents to our questionnaire identified as problematic for consumers; these are: personal current accounts, car repairs and servicing, energy and mobile phone services. The motivation for these studies is to develop an understanding of the nexus between market characteristics on the one hand, and consumer characteristics on the other, and from there, to identify examples of best practice and lessons for the design of consumer protection regimes.
In the rest of this section, we explain the scope of our study, give an overview to the methodologies employed in Parts 1 and 2, including a description of the questionnaire. We then go on to describe briefly the core conceptual apparatus that we are using, namely the concept of consumer empowerment.

2.0 The scope of the study
Both consumer empowerment – and the mechanisms (public and private) by which it might promoted – can be interpreted expansively. We have therefore defined the scope of Part 1 of the study in the following ways:

(a) We are concerned with measures which govern business-to-consumer transactions and relationships, and not business-to-business interaction. Furthermore, we are concerned with final consumers.

(b) We focus on the laws and institutions (both courts and administrative agencies and, where appropriate, self-regulatory bodies) concerned with the ex post monitoring and enforcement of consumer rights, providing consumer advice, and promoting the interests of consumers (in particular, consumer representative bodies, both statutory and non-statutory).

(c) We generally exclude competition law and policy from the ambit of our study. While competition law can be, and is often, used as a vehicle to promote the interests of final consumers, it is addressed primarily at dealing with problems of market power, whereas consumer protection applies generally irrespective of market structure.

(d) Similarly, we exclude the substantive content of contract law generally from our study, except where the general principles of contract law are mitigated to address the particular position of final consumers (for example, to correct for inequality of bargaining power).\(^2\)

\(^2\) In line with point (b), however, the institutional context for the enforcement of contractual rights by consumers specifically is relevant.
(e) For the purposes of Part 1 of the study, we focus on the general consumer protection regime rather than sector-specific measures.

(f) Finally, we focus on final consumers as economic actors. Furthermore, the principal parameters of consumer detriment (against which consumer laws and institutions guard) we interpret as being:

- price detriment: consumers may not choose the product / service at the lowest price available to them, having regard to their preferences;

- appropriateness detriment: consumers may not buy the most appropriate product / service, given their particular tastes and preferences;

- quality detriment: consumers may purchase a product / service which is not of the quality they assumed before-hand.

The scope of Part 2 is slightly different. Part 2 explores the purpose and effect of interventions seeking to reduce consumer detriment / promote consumer empowerment, rather than the types of the institution / laws under which the interventions are made. We considered it sensible, therefore, to broaden the scope of our inquiry to include sector-specific case studies where necessary. To exclude such markets from our study would have a number of unfortunate consequences. First, as a general proposition sector specific regulation is normally a response to the impediments to consumer empowerment (outlined below). Secondly, we considered that the use of sector-specific regulation (in particular the need for such regulation) may inform our analysis of the effectiveness of the general consumer protection regime in a given country. Furthermore, we considered that there might well

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4 To exclude such markets (for example, retail telecommunications or the financial sector(s)) would impede seriously our ability to investigate the economic issues germane to the issue of consumer empowerment.
be important lessons which can be learnt from regulatory case studies for the design of consumer protection regimes.

3.0 Methodology

3.1 Benchmarking
Drawing upon the leading academic and policy literature in the area, and after consulting other academics and policy experts (including representatives from BERR), we devised a set of benchmarks against which we can compare the UK’s framework supporting consumer empowerment with our comparator jurisdictions. Our starting point was to think about broad level principles, which included the following:

- Transparency;
- Proportionality;
- Efficiency;
- Effectiveness;
- Accessibility;
- Accountability and responsiveness.

With our consumer empowerment concept to hand, and drilling down into the literature, we have more tightly defined these principles and these principles were carried forward into the comparative analysis in Section 3 and Annexe B.

3.2 Comparative analysis of regimes
Descriptive information relating to the consumer protection regimes prevailing in the seven countries under study is derived from key practitioners' texts in respect of each jurisdiction, together with previous comparative studies, annual reports of the various agencies, and information made available to end-users and consumers by private sector organisations and NGOs. Questionnaire data (see Section 1.3.3 below) has been used to collect information not otherwise in the public domain.
3.3 The questionnaire
The questionnaire provides a bridge between Parts 1 and 2 of the study and informs, in particular, the comparative analysis of consumer protection regimes and the market studies (see Annexe G). The respondents to the questionnaire were key policy experts and practitioners in the area, and addressed issues concerning best practices in promoting consumer empowerment, as well as more specific information on the consumer protection regimes prevailing in their respective countries. The motivation for the questionnaire was to acquire information which could not be attained by means of desk research and which would serve four key purposes, as follows.

First, we wanted to move beyond mere description of the regimes under consideration in order to make an assessment of how those regimes actually work in practice. Second, we wanted to elicit respondents' views on some of the potential strengths and weaknesses of the consumer protection regime in their jurisdiction. Third, we wanted to collect information from the different agencies and organisations involved in the promotion of consumer interests on issues relating to the benchmarking of consumer empowerment. Finally, the questionnaire provided an opportunity to identify those markets that are (or have been) problematic for consumers in the countries under investigation; case studies of these markets would then enable us to investigate the economic issues germane to the issue of consumer empowerment in an empirical setting.

It was not our intention (nor was it within our remit) to conduct a large-numbers survey and we do not claim statistical significance for any findings. However, we would suggest that responses to the questionnaire provide a valuable commentary on the strengths and weaknesses of the consumer protection regimes that are the subject of this study.

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5 There is a full description of the respondents in Annexe G.
3.4 Market outcomes
Part 2 of the report is motivated by the need for an effective consumer protection regime to be able to evaluate the level of consumer empowerment and to identify those markets in which consumers are particularly susceptible to detriment.

Section 4 and Annexe C survey the economic literature to identify the characteristics of markets and consumers which are likely to result in consumer detriment and/or to militate against consumer empowerment. To this end, we look not only at standard (neoclassical) theory but also beyond it to the propositions supplied by behavioural and institutional economics, together with empirical findings, in order to determine how consumer empowerment might be recognised and evaluated. This survey of the economic literature enables us to formulate fourteen theoretically-informed indicators for identifying the level of consumer empowerment.

For the case studies in Section 5 and Annexe D, four markets have been selected from amongst those that respondents to the questionnaire identified as problematic for consumers; these are: personal current accounts, car repairs/servicing, energy and mobile phone services. The case studies enable us to investigate in an empirical setting those economic issues germane to the question of consumer empowerment which we identified in Section 4 and Annexe C. Thus, for each of the four markets, we undertake cross-country comparisons of consumer transactions set against our fourteen theoretically-driven indicators for identifying the extent of consumer empowerment. Annexe F provides a short statistical overview of the seven countries under study, providing the backdrop to the sector-specific case studies.

In the next section, we turn to a discussion of the concept which provides the unifying theme to this report: consumer empowerment.
4.0 Consumer empowerment

A working definition of consumer empowerment

Empowered consumers are capable of making informed choices, which in turn requires a consumer empowerment regime to put in place the tools for consumers to secure the best possible outcome for themselves.

Consumers should be capable and willing to assert their rights, which requires that a consumer empowerment regime has laws and institutions which are sufficiently transparent, accessible and responsive to their needs.

To the extent that consumer empowerment is outcome driven, the regime ought to be capable of identifying features of the market which impede the realisation of consumer benefits or cause consumer detriment, and have the necessary tools to deal with such problems.

Consumer empowerment is a term which is increasingly used by policy makers, but in conceptual terms it does not appear to have solid theoretical underpinnings. In this section we briefly explore a working definition of the concept of consumer empowerment which we can operationalise for the purposes of our study. For these purposes we draw partly upon the literature review presented in Section 4 and Annexe C, which seeks to conceptualise the market environments in which consumer transactions take place, and the

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6 The concept has been used widely in the health and psychology literature, associated in particular with how to develop more patient-centric services. It has also been explored in the marketing literature, but the emphasis there is upon enhancing the consumer's experience of consumption. See L Wathieu et al. ‘Consumer Control and Empowerment: A Primer’ (2002) 13(3) Marketing Letters 297-305.
characteristics of such markets which affect the quality of outcomes for consumers.\textsuperscript{7} That survey considers models in the neoclassical tradition, but it also draws upon alternative models (in particular, those of behavioural and institutional economics), which can be used to analyse and explain the behaviour of consumers in real-world markets.

As a starting point, it is useful to consider some of the notions of consumer empowerment which have been proffered so far. The term is difficult to pin down precisely, but the context in which it is used should yield some useful clues as to its interpretation. In its 2005 White Paper on a consumer strategy,\textsuperscript{8} the DTI articulated a vision of what empowering consumers entailed. The White Paper recognised the importance of empowered consumers in delivering benefits not just to individuals themselves, but to consumers and markets as a whole.\textsuperscript{9} In other words, consumer empowerment comprises a set of conditions which have positive externalities and, as this implies, it will not be optimised without some form of policy intervention designed to internalise those externalities. At the same time, consumer empowerment appears to embrace an acceptance of respect for consumer preferences: the Government will not and should not intervene to change consumer preferences directly, but seeks to ensure that consumers are in a position to make informed choices.\textsuperscript{10} As this implies, consumer empowerment is about ensuring that consumers have the tools to secure the best possible outcomes for themselves, a point we find reiterated by respondents to our questionnaire.\textsuperscript{11} In terms of consumer perceptions, it is useful to consider consumer views on which features of a consumer protection regime they perceive to best serve their interests. Table 1.1

\begin{itemize}
\item \textsuperscript{7} We abstract, however, from any discussion of how consumer empowerment can drive productivity. For a discussion see J Bush, \textit{Consumer empowerment and competitiveness} (NCC London 2004).
\item \textsuperscript{8} DTI, \textit{Extending Competitive Markets: Empowered Consumers, Successful Business}, URN 05/1303 (DTI London 2005).
\item \textsuperscript{9} DTI, \textit{Extending Competitive Markets: Empowered Consumers, Successful Business} (n 8) [5.2].
\item \textsuperscript{10} “[The Government] will not attempt to substitute our judgement for that of an individual over how they spend their money. This inevitably means that if an individual makes an informed choice, but willingly chooses to make a bad deal, Government should not and will not protect them from the results of that choice” (DTI, \textit{Extending Competitive Markets: Empowered Consumers, Successful Business} (n 8) [5.4]).
\item \textsuperscript{11} Responses to Q15.
\end{itemize}
reproduces the results of a Eurobarometer survey. When asked the question “what do you think are the best ways to protect consumers”, 42% of respondents (EU25) indicated that clear and transparent pricing was the most important. Other issues were also prominent, ranging from substantive rights and legal requirements on sellers, information and advice, and powers for public authorities to investigate and prosecute sellers.

Table 1.1: Consumer perceptions on consumer protection regimes

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Turning to policy interventions which can seek to promote more informed consumers, emphasis is placed on advice and education mechanisms, strengthened consumer advocacy, and agency approved codes of practice. Similarly, the BERR’s PSA target states that:

Empowered consumers are aware of their rights or where to find out about them, are prepared to take action to enforce their rights to obtain redress and know how and when to seek assistance from government and other agencies. They play a key role in driving up the performance of business.\(^{13}\)

Consumer empowerment implies a mix of policy interventions, sensitive to market context, consumer psychology and behaviour, distributional issues, and the outcome which is being pursued. It is clear that the translation of consumer empowerment into action has two inter-related dimensions. First, the concept implies that consumers are assertive in the realisation of their rights, which in turn depends partly upon the institutional and legal framework underpinning consumer law and policy. Second, the concept relies upon consumers being confident and active in markets, exerting market discipline upon firms. The first aspect of consumer empowerment relies, therefore, upon the laws and institutions set up being sufficiently transparent, accessible and responsive to the needs of consumers, while the second requires of consumers both the ability and the willingness to participate effectively in markets.

As we point out in Section 4 and Annexe C, measuring consumer empowerment is by no means a simple task. For example, economic theory points to price as the most obvious indicator, but stable prices over time may be indicative of either a competitive and well-functioning market, on the one hand, or supra-competitive prices, on the other (perhaps resulting from consumer inertia). An alternative measure for some markets may be the level of switching activity. Again, though, a low level of switching may be indicative

\(^{13}\) See [http://www.berr.gov.uk/about/strategy-objectives/PSA-Targets/page14308.html](http://www.berr.gov.uk/about/strategy-objectives/PSA-Targets/page14308.html).
of a dynamic market where price is converging upon the competitive equilibrium or it may be indicative of high search costs.

4.1 The legal and institutional framework supporting consumer empowerment

When considering the first aspect of consumer empowerment, reference is often made to the ‘consumer empowerment triangle’:\(^{14}\) the importance of consumer education, the availability of information, and the accessibility of advice. In respect of the substantive law, we would expect the rights which consumers enjoy and their ability to enforce them to be dependent to some degree upon the transparency of those rights, although mediation of this information through advice channels is capable in principle of reducing informational problems on the part of consumers. An effective consumer empowerment regime should also be transparent in respect of the legal obligations imposed upon consumers in the course of conducting transactions with firms.

The provision of effective redress mechanisms is also an important element of consumer empowerment. Although litigation forms the back-stop for the enforcement of rights, there are a number of formidable barriers to enforcement by litigation, even where court processes are simplified and expedited in line with the relatively low level of monetary harm typically suffered by an individual consumer. An effective consumer empowerment regime should, therefore, make provision for other means of dispute resolution which are both efficient and effective alternatives to litigation. It should also place an emphasis on encouraging and securing compliance. There are two points here. First, information and advice should be made available to business, especially where the requirements of compliance are complex. Second, the formal rights enjoyed by consumers by law are a minimum: we would expect a high level of consumer empowerment to lead to competition

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among firms in respect of levels of consumer satisfaction which may require firms doing more than the law requires.\footnote{15}

To this we would add a further requirement for an effective consumer empowerment regime: to the extent that the concept is outcome driven, where there are features of the market, either on the demand- or supply-side, which impede the realisation of consumer benefits or cause consumer detriment, then some form of market intervention should be possible. In other words, the law and institutions supporting consumer empowerment need to be sufficiently responsive and dynamic as problematic markets or practices are identified. This in turn relies in part upon a strong consumer voice, facilitated through well-resourced consumer advocacy groups, both public and private.

\subsection*{4.2 Confident, active consumers}
Drawing upon the indicators in Section 4 and Annexe C, the following features may be said to be conditions of empowered consumers. Confidence: this has a number of dimensions. It denotes certain subjective characteristics of consumers, such as the consumer’s confidence in having the necessary skills to interact with the market. In this respect a consumer empowerment regime must go beyond the mere provision of information for consumers. Further, it implies that the consumer is assertive in respect of both their rights and in bargaining with suppliers. This is something which is far more dependent upon contextual factors. Confidence also signifies the degree to which a consumer believes that there are effective redress mechanisms to deal with suppliers who do not fulfil their contractual obligations.

Consumer empowerment also requires that markets display certain characteristics which facilitate self-help. First, an empowered consumer is an appropriately informed consumer. In other words, the conditions of the market must be such that the consumer is appraised of the range of products on offer, their prices and attributes, and the location of outlets in order that she is

\footnote{15 Many retailers, for example, have returns policies which exceed the statutory rights enjoyed by consumers.}
capable if she applied her mind to the situation to make a choice which best fits with her tastes and preferences.\textsuperscript{16}

Consumer empowerment appears to imply that consumers have choices open to them. As a broad proposition, where consumers have the rights of exit (i.e., the right to switch supplier), this exerts a discipline upon the firm which may, where reputational concerns are high, be more powerful than any scheme of legal rights and redress mechanisms. As is clear from the literature, however, more choice does not necessarily lead to enhanced outcomes for consumers. Increasing the number of firms or products in a market is not synonymous necessarily with increased competition, indeed the opposite may be true, particularly where a product is particularly complex and/or consumers are boundedly rational.\textsuperscript{17} In order for consumer empowerment to be enhanced by choice, the following conditions are necessary: the choice set must include a good outcome (for example, the mere existence of choice does not enhance consumer welfare if all firms are colluding); in a market where differentiation is important, there must be sufficient diversity given the range of consumer tastes and preferences;\textsuperscript{18} and there must be choice not to engage in a transaction (which may imply the control of pressure selling or coercion). Furthermore, it may be the case that consumer choice be positively restricted by the imposition of restraints on suppliers (for example, where the consumption of a good is harmful to a consumer or creates externalities which are harmful to society).

\textsuperscript{16} As Waterson observes, however, there is mixed evidence on whether increasing information leads to lower prices to all, but it would certainly seems to lower average prices (M Waterson ‘Research to analyse the links between consumer empowerment and competition/productivity and to scope further work which could be undertaken to quantify these effects’ \textit{mimeo} (2004) 19).

\textsuperscript{17} Intensification of competition may make vulnerable consumers worse-off (M Armstrong ‘Interactions between competition and consumer policy’ MPRA Paper 7258 (University Library of Munich Germany 2008) available: \texttt{http://ideas.repec.org/e/par85.html} 31-32). Indeed, it may well be that an increased number of competitors can lead to higher average prices because of diseconomies of scale (Waterson (n 16) 7). See also CM Wilson and C Waddams Price ‘Do Consumers Switch to the Best Supplier?’ CCP Working Paper 07-6 available: \texttt{http://www.ccp.uea.ac.uk/default.asp?id=workingpapers2007}.

\textsuperscript{18} Armstrong asserts that increased choice can lead to lower quality as firms focus on price, and can even lead to relaxed competitive pressure as between firms where quality is the key parameter of competition (n 17) 42).
As a general proposition, an effective consumer empowerment regime must recognise that it may not be rational to search to the level implied by standard economic theory predicated upon full information. The acquisition of information bears a positive cost with the consequence that rational actors will only engage in search up to the point where the marginal cost of so doing equals the expected marginal benefit of the information acquired. In respect of search goods, it may be that the role of policy is to reduce the costs of searching (for example, through the requirement of price transparency on firms or the use of intermediaries). In respect of experience goods, where quality can only be discerned post-transaction, searching alone cannot prevent consumer detriment. In such circumstances, specific policy interventions may be necessary (for example, the provision of public or private accreditation schemes). Similarly, in the case of credence goods, where product attributes may not be discernable even after purchase, policy may reasonably dictate the need for some form of regulation. Such interventions, however, need to be used with circumspection. There are dangers that interventions such as the setting of minimum standards may reduce choice inappropriately (for example, the setting of quality standards at too high a level may result in those who wish to purchase at a lower price being prevented from so doing). From the foregoing we conclude that consumer empowerment may require that certain markets be regulated to reduce the information asymmetries between consumers and firms. As a general proposition, increased transparency aimed at reducing search costs is sufficient. Regulatory intervention may be needed in respect of experience or credence goods, but only where the reputational effects are insufficient to guard against detriment and/or informational remedies are an insufficient policy tool.

Consumer empowerment must embrace some notion of autonomy consistent with the traditional notion of consumer sovereignty – that the consumer knows

19 For a somewhat sceptical view of the potential of informational remedies to address consumer detriment see G Howells 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) Journal of Law and Society 329. Paradoxically, increased transparency may lead to less price dispersion which may in turn reduce the incentives for consumers to search (Armstrong (n 17) 37).
20 Armstrong (n 17) 37.
best what is in her own interests (as against the government or regulator). To
put it somewhat differently, consumer empowerment should not be used as a
policy tool which cuts across the core benefits of what markets can deliver
without government interference. There are inherent dangers associated with
too much intervention. First, there is the danger that markets are being
distorted by the preferences of policy-makers, rather than guided by the
preferences of consumers.\(^{21}\) Second, too much protection can result in a
moral hazard problem (i.e., high levels of protection can result in consumers
not taking responsibility for their own actions).\(^{22}\) Third, a related point, too
much protection may run counter to the need on the part of consumers to
develop market skills (termed ‘cognitive hazard’).\(^{23}\) From this we conclude
that an empowered consumer is a responsible consumer, and one that does
not need to rely on policy interventions except where the supply side is
problematic and/or where an inherent collective action problem works against
the efforts of an individual consumer.

\(^{21}\) For a useful discussion in the context of financial markets and consumer financial literacy
see T Williams ‘Empowerment of Whom and for What? Financial Literacy Education and the
\(^{22}\) See J Klick and G Mitchell ‘Government Regulation of Irrationality: Moral and Cognitive
\(^{23}\) Klick and Mitchell (n 22) 1626.
2 Benchmarking consumer empowerment regimes

In this section we present a set of benchmarking principles against which we assess the UK’s consumer regime supporting consumer empowerment. The benchmarks are derived from an extensive literature review (in Annexe A) which draws on leading academic and policy literature in the area, and our definition of consumer empowerment (presented in Section 1 of this Report).

The rationale behind each of the benchmarking principles is presented in summary here, and the discussion is organised around four key headings:

1. The legislative framework for consumer rights;
2. The consumer interface: advice, information, education and advocacy;
3. The mechanisms for consumer redress; and
4. The framework for public enforcement.

Given the comparative nature of the exercise, we also considered the extent to which there is an international consensus over the characteristics of a “good” consumer regime, drawing upon the work of international organisations in the area. We conclude that there is significant convergence in this area, and the results from the exercise (presented fully in Annexe E) add further support and weight to the conclusions offered here.

1.0 The legislative framework for consumer rights\(^1\)

The legal framework of the consumer regime in a country can be thought of as the backbone of its consumer empowerment. Although the existence of consumer rights and corresponding duties on firms in a country do not automatically mean that consumers are empowered, the absence of such rights and duties would strongly suggest that consumers are not empowered. Thus, the duties imposed on firms for the purpose of protecting consumers and the rights enjoyed by consumers constitute the starting point of consumer empowerment.

\(^1\) See A.2.1.
empowerment. The ability of consumers to enforce their rights does depend logically upon their awareness of those rights, although awareness need not be ex ante. So long as consumers’ rights are not transparent, they will not be accessible by consumers. In turn, having rights that are not accessible can be tantamount to not having any rights at all. Therefore, for consumer empowerment, not only should consumers have the necessary rights, but they should also be aware of these rights and be able to access these rights when they need to.

** Principle 1: Consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels. **

In the 2003 benchmarking exercise, the DTI concluded that the UK’s consumer protection could be improved by the adoption of a broad duty on firms to trade fairly. With the imposition of the EC Unfair Commercial Practices Directive by the Consumer Protection from Unfair Trading Regulations that came into effect on 26 May 2008, the UK has adopted such a duty. There are potential advantages and disadvantages of a duty to trade fairly. The key advantage is the potential it provides for the law to be dynamic and future proof. However, such a general duty to trade fairly brings forth the necessity to make a trade-off between transparency/certainty and flexibility. In other words, although such a general duty may increase the flexibility of the regime due to its general wording and broad scope, it may at the same time reduce the transparency and certainty of the regime due to its vagueness. It may well be that a broad duty can send a powerful signal to consumers that certain rights are protected by law, while the precise nature of the right in question can be disseminated to consumers through information and advice systems if and when problems arise.

Whether or not such a duty would enhance consumer empowerment depends upon whether there is an alignment of the consumers’ understanding of what is ‘(un)fair’ with that of the court/agency enforcing the provision. Thus, to the extent that the possible disincentives the duty gives rise to in firms’ arranging
their businesses are outweighed by the benefits to consumers as a result of increasing their awareness of their rights, the duty on the whole may be efficient and effective.

**Principle 2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.**

### 2.0 The consumer interface: advice, information, education and advocacy

The main barriers (both perceived and actual) to consumers obtaining advice could be reduced by providing consumers with strongly branded, clearly identified and trustworthy sources of advice, as well as ensuring that information is presented in a language which is readily accessible.

Consumers have differing needs and expectations, and no single delivery channel will reach all. While the telephone is likely to be the preferred channel for most consumers (because it is near-universal, typically receives very high satisfaction ratings, and improves accessibility), some consumers, in particular the disadvantaged, may prefer “face-to-face” advice. Nevertheless, the telephone does provide a single point of contact, which may be particularly important where there are multiple providers of information and advice.

There is a growing acceptance of the importance of the “one-stop shop” principle in the provision of advice due to the problem of “referral fatigue”. Experience has demonstrated where there are multiple advice providers, the strong branding of a single “gateway” to such providers is crucial.

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2 See A.2.2.
3 *i.e.*, the more times a person is referred on, the less likely they are to act upon the referral.
Principle 3: Consumer advice channels should be accessible, strongly branded and based on the one-stop shop principle.

The provision of information and advice to consumers is a key plank of an effective consumer empowerment regime. While we take it as given that increased information will generally increase empowerment, there are important issues concerning the amount of information and the way it is presented. The over-provision of information can be harmful to consumers by, for example, obscuring key decision parameters. Regulatory disclosure requirements have a number of potential advantages, however, in particular when used as an alternative to other (more interventionist) forms of regulation. While information disclosure is a low-cost intervention, it is not costless (to either firms, government, or consumers), and badly designed information can be counter-productive, leading to worse decisions, and even deterring consumers from entering into transactions altogether.

Principle 4: The provision of information is an important plank of consumer empowerment. Appropriate information should be presented to consumers in a clear and accessible manner.

An empowered consumer is equipped with the knowledge and the skills to make informed choices, assert their rights, or seek advice, when things go wrong. While the provision of information is an important plank of consumer empowerment, information alone may not be sufficient.

Formal education provision is seen as having an increasing role to play in the empowerment of consumers. It is plain that consumer education is a task which consumer agencies cannot deliver alone. Agencies (including consumer organisations) can, however, seek to coordinate and contribute to consumer education initiatives with other partners (for example, the media and schools).
Principle 5: Consumer education aimed at raising consumer market skills may make an important contribution to the empowerment of consumers.

Consumer advocacy – alongside information and advice – plays an important role in empowering consumers, and it enables governments and regulators to respond to the disparate and diverse nature of consumers at the policy level and in setting enforcement priorities. Consumer complaints to advocacy/representative groups may provide agencies with important intelligence on markets. Evidence shows that consumer groups are the ‘first port of call’ for dissatisfied consumers. Consumer advocacy groups can highlight the especial problems of disadvantaged consumers.

Principle 6: The provision of strong consumer advocacy groups can ensure the representation of consumer interests in policy formulation and the setting of agency priorities.

3.0 Consumer redress mechanisms

Consumer empowerment relies upon consumers having the confidence that they will have access to redress should things go wrong. The provision of simple, low-cost Alternative Dispute Resolution (ADR) mechanisms can promote confidence among consumers in their purchasing of goods and services. Furthermore, ADR mechanisms can create important feedback effects for self-regulatory mechanisms (e.g., industry codes of practice).

There is broad agreement on the principles which should underpin ADR provision, in particular, visibility, accessibility, and independence. Since disadvantaged consumers are least likely to complain, making redress mechanisms more accessible will assist disadvantaged consumers in particular.

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4 See A.2.3.
**Principle 7: ADR mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.**

Given the relatively small monetary value associated with consumer claims, there is a need for flexible and expedited small claims procedures for consumers. These procedures represent a trade-off between efficiency concerns, on the one hand, and the need for due process, on the other hand. The flexibility of such procedures varies between jurisdictions, and the provision of alternative arbitration and mediation schemes can be viewed as close substitutes.

**Principle 8: Provision should be made for flexible and expedited small claims procedures (although ADR mechanisms may fulfil this role).**

Small claims procedures are not appropriate for very small claims affecting a large number of consumers, and so mechanisms for group litigation may be more appropriate in such instances. There are two main justifications for facilitating group litigation:

- providing compensation for those harmed by infringements of the consumer protection laws (but who would not have an incentive to litigate individually);
- to deter infringement (which is particularly important if there are insufficient resources available for public enforcement).

In respect of compensation, class actions increase the leverage of consumers to obtain settlements from defendants, while also providing an efficient means of redress for consumers.
Group litigation mechanisms have the disadvantage, however, of taking the litigation out of the hands of the plaintiffs, and it is generally accepted that mechanisms need to be in place to ensure that plaintiffs' interests are protected. Furthermore, where there is a strong public enforcement regime, the role and significance of group litigation is less important.

**Principle 9:** Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counter-balance weak public enforcement. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.

### 4.0 The framework for public enforcement

Redress mechanisms are unlikely to be sufficient to secure firm compliance with the law – consumer transactions tend to be small relative to the costs of redress, consumers may suffer harms which are incapable of being compensated by a monetary award, and the harmful behaviour of the firm may produce externalities for society.

Penalties should be aimed at securing compliance which depends upon having the right enforcement tools and using them responsively. In line with the principles of better regulation, firm compliance is likely to be optimised if penalties are seen as proportionate and fair. The use of tough but blunt and inflexible punishment devices can be counter-productive: such a strategy will undermine the goodwill of firms when they are motivated by a sense of responsibility, and lacks credibility in all but the most serious cases of infringement. Conversely, a strategy based purely on persuasion and self-regulation may be exploited by firms. As has been argued convincingly, a successful strategy of enforcement depends upon both “speaking softly” and

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5 See A.3.

45 | Benchmarking the UK Framework Supporting Consumer Empowerment |
“carrying big sticks”, and crucially a *hierarchy of sanctions* which regulators can escalate in the face of non-compliance by firms.\(^6\)

Court-based enforcement powers can be expensive to impose, and criminal penalties have been seen to be ineffective because the penalties have been insufficient to deter infringement. A system of administrative penalties (which can be imposed without the sanction of the court) can play an important role in securing compliance.

**Principle 10: Administrative enforcement has an important role by correcting for the under-use of redress mechanisms.** Penalties should be used to change the behaviour of the offender, and should be transparent, proportionate and fair. Enforcement agencies should have a hierarchy of sanctions, with the ability to escalate sanctions in the face of non-compliance by firms.

In any policy context in which resources are finite, one might expect a policy-maker or regulator to allocate resources to where the risk of harm is greatest, and that the cost and the benefits of a regulatory (non-)intervention be taken into account, including any attendant costs to business and the wider economy. The Hampton review\(^7\) made a number of recommendations on how to focus resources best, including: ensuring that the regulatory burden falls most on the highest-risk business and conversely least on those with the best records of compliance, and making better provision of advice to business in order to promote compliance. In respect of the latter point, we know that punishment is expensive whereas persuasion is cheap.\(^8\) An effective consumer regime is dependent crucially upon traders being aware of their obligations. In many instances, reputation will assert a powerful (perhaps the most powerful) incentive upon firms to comply with consumer legislation.

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\(^7\) P Hampton *Reducing administrative burdens: effective inspection and enforcement* (London: HM Treasury, 2005).

\(^8\) Aires and Braithwaite (n 6) 19.
Both Hampton and the Macrory review\(^9\) placed emphasis on the need for transparency in the form of monitoring outcomes. As a general proposition, one would expect data on consumer complaints to provide important intelligence on the possibility of systemic market problems. It should be noted, however, that the use of raw data on complaints may be an important indicator of consumer dissatisfaction in a particular market, while at the same time being an indicator of high levels of consumer empowerment (consumers being aware of their rights and of redress mechanisms). Enforcement agencies should have targets and mechanisms in place for the measuring of outcomes of interventions. Measuring outcomes is “essentially concerned with the expected consequences and goals of the regulator’s enforcement activity rather than an account of the amount and type of enforcement activity it undertakes”.\(^{10}\) Transparency in enforcement – in particular monitoring of outcomes – increases the accountability of public agencies, and ensures that enforcement resources are being targeted to where harm to consumers is greatest.

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**Principle 11: Enforcement resources should be targeted appropriately.**

*Transparency both in terms of enforcement policy and in terms of monitoring outcomes can increase both compliance and the efficient use of enforcement resources.*

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An effective consumer empowerment regime requires that there are mechanisms in place to deal with systemic market issues. There are several strong justifications for this. First, the cause of consumer detriment may be at a market level rather than a firm level (and there may be no specific breach of the consumer laws). Second, the use of tightly defined and focused ex ante remedies (consequent upon a market inquiry) may avoid the problem of business uncertainty associated with more general ex post duties. Third, most jurisdictions are designed around the needs of average consumers, and

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\(^{10}\) Macrory review (n 9) [5.20].
specific market issues which impact on disadvantaged consumers may not be covered by generic consumer law.

**Principle 12: The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets.**

As a general proposition, regulatory tasks should be allocated to those best placed to make decisions, and local enforcers may enjoy significant informational advantages over central agencies. Some diversity of enforcement may be desirable, but these benefits should be balanced carefully against the needs to conserve scarce enforcement resources (for example, by avoiding duplication), target such resources appropriately, and avoid the imposition of unnecessary costs on business (through, for example, being subject to more than one agency in respect of the same activity).

**Principle 13: In a multiple-agency setting, mechanisms should be in place to ensure that there is coordination and consistency of approach.**

There are a number of potential benefits to self-regulation, including the reduction of agency costs, a more responsive regime (assuming that self-regulatory bodies have greater informational advantages than do public agencies), and the possibility of providing more accessible redress mechanisms for consumers. There are, however, a number of potential disadvantages, for example, self-regulation can lead to excessively high standards which act as barriers to entry.\(^{11}\) Self-regulation requires the credible threat of state intervention should the self-regulatory mechanisms fail or under-perform.

Insofar as soft-law mechanisms provide clarity and guidance to firms and consumers regarding the interpretation of the law, they may be effective tools of consumer empowerment. As such, they would increase transparency.

\(^{11}\) Armstrong (n 120) 36 – 37.
However, it must also be borne in mind that adopting and monitoring compliance with these will entail costs. For these mechanisms to be *efficient*, such costs should be outweighed by the benefits which can only arise when these are complied with by the undertakings and/or they provide clarity and awareness of the law when this cannot be achieved in any more efficient way. If the soft-law mechanisms do not provide any of these benefits, then they may actually be counter-productive by adding more rules to an already complicated body of law and by increasing the cost of the regime.

**Principle 14: Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.**
3  A comparative analysis of the consumer empowerment regimes

In this section we present a summary of our comparative analysis of the countries in our study (the full assessment is presented in Annexe B).¹

Following each benchmarking principle are summaries of the pertinent aspects of the UK’s regime, the comparative jurisdictions, followed by our assessment of the UK’s performance as compared with best practice elsewhere. We draw on our questionnaire responses throughout.

1.0 The Legislative Framework for Consumer Rights²

Principle 1: Consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels.

In this section we discuss the legislative framework for consumer rights. First, we evaluate legislative objectives, the definition of ‘consumer’, and the substantive rights enjoyed by consumers.

1.1 Legislative Objectives³

The legislative objectives of consumer protection rules are expressed differently across the countries under study. At a general level, this difference appears to depend mainly on whether consumer law and competition law are regulated in different pieces of legislation and whether consumer law is primarily treated as a separate body of law or as part of, for example, contract law. At a specific level, the legislative objectives naturally differ depending on

¹ The organisation of this Section closely mirrors that of Annexe B.
² See B.1 for a full discussion.
³ See B.1.1.
whether the legislation is aimed at addressing consumer protection in general or whether it regulates a particular aspect of it.

Falling into the category of jurisdictions in which consumer law is treated as a separate body of law are the United Kingdom, Denmark and Spain. A peculiar case is that of Germany where a single consumer protection law does not exist, nor does an exact definition of what belongs to consumer protection law. Instead, duties and rights concerning consumer protection are to be found in numerous pieces of legislation, in both civil and public law, pursuing a variety of objectives, and not necessarily the direct protection of consumers' interests.

Falling into the category of jurisdictions where consumer law and competition law are regulated in the same piece of legislation are Australia, Canada and the United States. In these jurisdictions the legislative objectives are expressed in terms of the protection of both competition and consumers, which may have more than semantic or systematic implications. In the United States, for example, the relation between competition law and consumer law can in effect imply a choice between regulation to protect consumers and trusting the operation of the markets. In the UK, although consumer law is regulated separately from competition law, there nevertheless is a high level of trust in the free market, especially under the current consumer law reform aiming at minimum government intervention targeted at rogue traders.

1.2 Nature of Rights Enjoyed By Consumers

Consumer rights lie at the heart of consumer empowerment. However, to be effective, consumer rights have to be transparent, so that consumers are aware of their rights ex ante or failing that, consumer rights should be

5 For example, under Section 5(n) of the Fair Trade Commission Act, countervailing benefits to consumers or competition can trump 'unfairness' to consumers.
6 In this respect, it is also important to note that in the UK both competition law and consumer law are enforced by the same authority, namely the Office of Fair Trading, save for local enforcement of consumer law by Trading Standards Services.
7 See B.1.2.
disseminated effectively through consumer advice channels that consumers can have recourse to ex post.

**Definition of ‘consumer’**

The definition of ‘consumer’ varies and is broader in scope in some jurisdictions as compared to others. For example, in Australia, the definition of ‘consumer’ does not appear to be limited to ‘end-users’ or ‘final consumers’, unlike most European counterparts. The common definition of ‘consumer’ in EC consumer law is ‘any natural person who is acting for purposes which are outside her trade, business or profession’.

Broadly speaking, the consumer protection rules in the jurisdictions studied are designed for the ‘average consumer’ and where it is deemed necessary, the law provides additional protection for those who might be deemed ‘vulnerable’. Some type of direct and additional protection for ‘vulnerable’ consumers is provided by law in Denmark, Spain and the UK. The factors that result in the consumer being identified as ‘vulnerable’ are to a large extent common in all jurisdictions: age; income; physical/mental disability; level of literacy; and some cultural characteristics, such as language, ethnicity and religion which result in the consumer’s belonging to a minority in the jurisdiction.

In the other jurisdictions under study, even if the legislation does not directly provide additional protection for the vulnerable, the system appears to nevertheless show some recognition of the issue. In the United States, federal law does not foresee any formal special protection mechanisms for certain classes of consumers, although the FTC as a policy gives priority to consumers who are most vulnerable to deception when designing its enforcement agenda and planning mechanisms for consumer advice.

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**Rights enjoyed by consumers**

In all jurisdictions, consumers have a variety of rights arising from a variety of legal instruments. In most jurisdictions consumers have a right of private action to include damages, injunctions, refunds and revocation of contract, as well as the right to complain to an administrative body. In some jurisdictions, for example Germany, the private action rights arise from contract law. Some jurisdictions, like Denmark, require the consumer to first try to resolve the problem with the business before she can use her right to complain. Most jurisdictions provide specific protection for ‘vulnerable’ consumers. A summary is presented in Box 1.
Box 1: The key rights enjoyed by consumers in the comparative jurisdictions

Consumer rights arise from a range of legislation in the UK. For example, *Sale of Goods Act 1979* sets out the law governing contracts for the sale of goods and governs a wide range of matters such as formation of contract, implied terms, the parties’ rights including remedies for breach of implied terms and other breaches of contract, transfer of ownership in the goods and performance of the contract. Similar rights arise from *Supply of Goods (Implied Terms) Act 1973* and *Supply of Goods and Services Act 1982* as well. *Unfair Terms in Consumer Contract Regulations 1999* [amended by *Unfair Terms in Consumer Contract (Amendment) Regulations 2001*] implementing an EC Directive provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. An unfair term in a contract concluded with a consumer by a seller or supplier is not binding on the consumer. *Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987* [as amended] protects the consumer in respect of contracts made at the doorstep or otherwise concluded away from business premises. Where the Regulations apply, they provide a cooling-off period of seven days enabling a consumer within that period to cancel the contract by giving a notice of cancellation.

In Australia, the (Trade Protection Act) (TPA) confers private rights and imposes private obligations. Under the TPA, the consumer has the right to a refund if goods are defective, not fit for purpose, do not match the sample shown to the consumer or are not of merchantable quality. In Canada, the provincial governments are responsible for regulating individual transactions, contract and sales of goods and services, and most industry specific issues. Such provincial legislation may establish the basis for a private right of action against a trader.

In Denmark, consumers have the right to complain via the administrative system with several opportunities. They can complain to the Consumer Complaint Board (CCB); one of the private independent complaint boards; and any other specialised complaint board. Before complaining to the CCB, the consumer must have tried to resolve the problem directly with the business. Besides action via the administrative system, consumers can take private action before the civil courts. Concurrent action before a civil court and an administrative complaint board is excluded.

In Germany, the duties imposed on firms do not necessarily grant corresponding rights for damages, injunction or remedial action for consumers in case of an infringement. The majority of rights including damages, withdrawal, injunction and revocation stem from the area of civil law. Breaches of public consumer protection law are not normally pursued by consumers, but by public authorities. Consumers may defend their rights and claim redress under the law of obligations forming part of the *Civil Code*. Consumers have a right of revocation in loan contracts and in doorstep agreements. The *German Act Against Unfair Competition (UWG)* also arranges for actions for injunction, damages claims and actions to skim the excess profit (which has to be passed on to the federal budget). Although the Act aims at consumer protection, consumers do not have the right to pursue violations of the Act’s provisions. The vast majority of enforcement actions are taken by competitors or consumer organisations.

In Spain, according to Article 2.1 LGDCU consumers are entitled to the basic rights of: protection against risks that may affect their health and security,\(^9\) protection of their social and economic legitimate interests, in particular as a result of abusive clauses in contracts,\(^10\) redress or reparation against the harm suffered,\(^11\) correct information on the different goods and services.

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\(^9\) For a detailed picture see B.1.2.

\(^10\) Articles 3-6bis LGDCU as modified by Article 1.1 LMPCU.

\(^11\) Articles 7-12 LGDCU as modified by Articles 1.2-1.6 LMPCU.

\(^12\) Articles 25-31 LGDCU as modified by Article 1.9 LMPCU.
The responses to our questionnaire show that, even if the average consumer does not know about the legislation in place, she may know ‘where to go’ when she has a problem. This seems to be the opinion in the UK and Australia. Nonetheless, the complexity of the regime and the consumers’ difficulty with understanding their rights have been acknowledged by respondents from the UK, Australia, Canada, Germany and to an extent Denmark. Still, an overwhelming majority of respondents agree that consumers are provided with adequate information relating to the consumer protection regime.

Insofar as the complexity of the regime reduces the consumers’ awareness of their rights and their chances of learning about their rights, all the regimes may be suffering from a lack of transparency to a degree. Overall, it appears that in most jurisdictions, the rights of consumers are not clear to most consumers, but there exists an overwhelming perception on the part of agencies that most consumers know how to find out about their rights. Nonetheless, this perception may be a challengeable one since, as one of the respondents from Denmark points out, the agencies only become aware of the consumers who have been able to find out about their rights. Thus, the proportion of consumers who genuinely know ‘where to go’ in case of a breach of their rights remains unclear. It appears that there may also be the issue of consumers’ believing they have rights that they do not actually have.

There similarly seems to be a dominant belief that arrangements for the protection of consumers work well for the ‘average consumer’, whereas this belief does not seem to hold true for how well the arrangements work for those consumers who find it difficult to get the best outcome when making a market transaction in a specific market. Hence, the perception appears to be

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13 See response to Q5, Q8.
14 See response to Q3, Q5, Q8.
15 Response to Q8.
16 Response to Q8.
17 The responses to our questionnaire from Canada, the UK and to an extent Spain point at this confusion; responses to Q3, Q4, Q8.
18 Response to Q31 and Q32.
that ‘vulnerable’ consumers are not adequately protected by the regime, even if this is vulnerability in a specific market, rather than general vulnerability.

In terms of consumers’ perceptions of the rights they enjoy and their trust in the consumer protection regime, we note from the European Consumer Scoreboard that the UK performs well as compared with the EU25.

**Figure 3.1: Trust in the national consumer protection system**

![Image of a bar chart showing trust in national consumer protection systems across different countries.]

**Assessment**

Although the extent and reach of the rights enjoyed by consumers differ across jurisdictions, in that some jurisdictions like the UK have an extensive body of law conferring rights on consumers, whereas some jurisdictions like Canada have much less legislation, this alone cannot signify whether consumers are empowered or not. This is because how empowered consumers are depends not only just on the rights enjoyed by them, but also

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on the consumers’ awareness of those rights, their ability to find out about their rights and the clarity of those rights. All these factors can be thought to make up the ‘transparency’ of the regime from the viewpoint of consumers. Moreover, these factors can have a complementary effect in that the lack in one area, for instance, the consumers’ awareness of their rights, can possibly be mitigated by the strength in another area, for instance, the ease with which consumers can find out about their rights even when they are not aware of them ex ante.

In terms of the extent and content of rights, the UK appears to be on a par with the best, with the caveat that the amount of legislation conferring these rights may be higher than desirable and may potentially render the rights inaccessible to consumers.

1.3 Nature of Duties Imposed on Firms for the Purpose of Protecting Consumers

Principle 2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.

We now go on to evaluate the duties placed on firms in the UK and the comparative jurisdictions. In this regard, we specifically discuss the implications for the UK of the duty to trade fairly under the EC Unfair Commercial Practices Directive\textsuperscript{21} which has been transposed into national law

\textsuperscript{20} See B.1.3.
\textsuperscript{21} Unfair Commercial Practices Directive (n 8).
by Consumer Protection from Unfair Trading Regulations that came into effect on 26 May 2008.

In many cases, it is not possible to clearly demarcate duties imposed on firms for the purpose of protecting consumers from rights enjoyed by consumers, especially when breach of duties gives rights of enforcement to consumers. This sub-section will first broadly set out the duties imposed on firms and then provide an assessment including an examination of the general ‘duty to trade fairly’.

Duties imposed on firms
The duties imposed on firms are of either a general nature or a specific nature. One common general duty is usually expressed as a variant of a ‘duty to trade fairly’ or a ‘duty not to trade unfairly’. This duty exists in Denmark in the Marketing Practices Act and in the United States as regulated in the FTC Act. The duty does not exist in Canada and the EC Member States that did not previously have a general duty to trade fairly and/or are running late in implementing the EC Unfair Commercial Practices Directive, namely Spain. The UK has very recently transposed the Directive into national law. Germany has a prohibition of unfair business practices in the Act Against Unfair Competition, although consumers do not have the right to pursue violations of the Act’s provisions. However, once the Directive is transposed into national law, all EC Member States will have to have a general duty not to trade unfairly if they are to comply with the Directive. As for Australia, even though the DTI Study from 2003 appears to interpret the TPA as imposing a general duty not to trade unfairly, the respondents to our questionnaire from Australia do not seem to agree with this view in that they do not treat the Australian prohibition of misleading and deceptive practices as imposing a general duty to trade fairly.22 This response is very interesting since although a duty not to mislead or deceive can be differentiated from a general duty to trade fairly, the duty not to engage in ‘unconscionable’ conduct regulated in Section 51AB of

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the TPA seems very similar, if not identical to the duty not to engage in ‘unfair’ practices as envisaged by the EC *Unfair Commercial Practices Directive*.

Other than the general duty not to trade unfairly, the most common duty imposed on firms is the duty not to mislead or deceive the consumers, thus the provision of accurate and sufficient information to consumers. The jurisdictions also differ in terms of whether breach of duty by firms gives rise to a criminal offence or not. In Australia, for example, the breach of the prohibition on misleading or deceptive practices does not give rise to criminal sanctions, whereas in the UK the breach of most consumer protection related duties gives rise to an offence.

In the UK, various pieces of legislation impose duties on firms for the purpose of protecting consumers. The duties include not to give misleading price indications; to clearly display price of products; not to demand or accept payment from prospective tenants or landlords under certain conditions; not to coerce another person to pay money claimed from the other as a debt due under a contract, by harassment and various types of false representation; not to engage in misleading advertising; certain information disclosure duties and so on. These and similar duties are, however, imposed in more or less all the jurisdictions under study.

In Germany, the duties imposed on firms by consumer protection laws can arise from either public or private law. The *Act Against Unfair Competition* prohibits false and misleading advertisements and other unfair business practices. Thus, the Act imposes a general duty to trade fairly, although consumers do not have the right to pursue violations of the Act’s provisions. It bans acts contrary to honest business practices, including acts which are against ‘public morals’, and arranges for injunction and damages claims. Some violations of the *Act Against Unfair Competition* are regarded as a criminal offence.

In Spain, obligations on the part of sellers of goods or providers of services work as counterparts of the rights of the consumers. They are imposed at
different stages of the contractual path, including pre-contractual, contractual and post-contractual obligations.\textsuperscript{23}

In the United States, Section 5 of the FTC Act imposes a general duty to trade fairly by declaring ‘unfair methods of competition’ as well as ‘unfair and deceptive acts or practices’ unlawful. Any firm violating the FTC Act and other federal consumer protection statutes may face administrative penalties, restitution and other monetary remedies to make good any harm done to the consumer, and even criminal charges depending on the nature of the violation.

The only jurisdiction under study that does not have, and to our knowledge is not planning to introduce, a general duty to trade fairly is Canada. In Canada, regulation exists under the \textit{Federal Competition Act} and \textit{Provincial Trade Practices Acts}. The \textit{Federal Competition Act} covers such consumer issues as misleading advertising, deceptive telemarketing, and multi-level marketing and pyramid schemes, as well as such competition issues as price discrimination and predatory pricing. There is no general duty to trade fairly in Canada, but several provinces have broad prohibitions on misleading and unconscionable acts and practices.

\textit{The pros and cons of the general duty to trade fairly}

Regarding the discussion of the nature of duties imposed on firms for the purposes of consumer protection, the most important distinction appears to be that of having a general, broad duty covering all aspects of commercial practices, as opposed to having specific duties concerning specific types of commercial practices. The latter has been the predominant approach of the UK (and to an extent Canada) amongst the jurisdictions under study. However, with the transposition of the EC \textit{Unfair Commercial Practices Directive}, such a general duty has been included in the UK legal system as well. Thus, the \textit{Unfair Commercial Practices Directive} deserves further elaboration.

\textsuperscript{23} A León Arce and LM García \textit{Derecho de los Consumidores y Usuarios} (2nd ed Tirant Lo Blanch Valencia 2007)191-192.
The EC *Unfair Commercial Practices Directive* introduces a general prohibition of all ‘unfair commercial practices’.\(^{24}\) According to Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. Other than this general prohibition, the Directive specifically prohibits ‘misleading unfair commercial practices’ (Article 6) and ‘aggressive unfair commercial practices’ (Article 9). In its Annex I, it also contains a list of practices which are deemed unfair *per se*.

The general prohibition can thus be seen as a ‘safety net’ applying to all of those practices which are covered neither by Annex I nor the prohibitions of misleading and aggressive practices.\(^{25}\) The special prohibitions of Articles 6 and 9, along with the list of practices prohibited by Annex I, arguably delineate fairness in business practice and as such limit the residual function of the general clause.\(^{26}\) According to one view, cases of misleading and aggressive practices which are not regulated cannot be subjected to a review of fairness through the backdoor by reference to the general clause; the general clause only applies in extreme and evident circumstances to bridge gaps.\(^{27}\) Thus, the Directive arguably takes a liberal approach, in that everything that is not explicitly prohibited is allowed.\(^{28}\) Still, given the very broad scope of the general clause, it should not be easily circumvented even by the most imaginative rogue traders.\(^{29}\)

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\(^{24}\) Article 5.


\(^{26}\) Micklitz (n 25) 119-120.

\(^{27}\) Micklitz (n 25) 120.

\(^{28}\) Abbamonte (n 25) 14-15.

\(^{29}\) Abbamonte (n 25) 15.
It has been commented that although the Directive presents itself as a consumer protection measure aiming at establishing a high level of protection for consumers across the EC, this is not entirely true since the aim of the Directive is basically that of liberalisation and enhancement of open markets.30 The fundamental idea behind the Directive is to create a common level playing field for advertising and marketing throughout the EC; hence, the risk of lowered consumer protection standards (compared to the situation before the Directive) which led to Denmark and Sweden being the only countries that voted against its adoption.31 In any case, even before the adoption of the Unfair Commercial Practices Directive, most continental systems have used a general clause to control unfair commercial practices.32

Our questionnaire responses regarding the general duty to trade fairly are mixed. On the one hand, it was stated that the advantages of having a general duty to trade fairly were that such a duty was timeless, very good at regulating industry, flexible and future proof to new legislation.33 On the other hand, it has been commented that such a general duty to trade fairly was too loose a term to be able to apply sanctions and it was difficult to see how the law could characterise this concept.34 Moreover, it was seen likely to lead to litigation to explore the limitations due to its vagueness.35 Yet, the exact opposite has also been suggested: that a general duty would take away uncertainty; the process could therefore be more easily understood and better enforced.36 It is striking that whereas all respondents from the UK and Canada – where currently/until very recently there is/has been no general duty to trade fairly – responded positively to the question of whether there are any advantages to such a duty, the remaining respondents – in whose jurisdictions there already existed a general duty – predominately responded negatively to the question.

31 Bernitz (n 25) 37.
33 See response to Q19.
34 Response to Q19.
35 Response to Q19.
36 Response to Q19.
**Assessment**

In almost all jurisdictions under study, there is a general duty to trade fairly or a variant of it and with the imposition of the EC *Unfair Commercial Practices Directive* in May 2008, the UK is now on a par with these jurisdictions.

The effects of this general duty on consumer empowerment will mainly depend on how well the balance can be struck between certainty and flexibility. This in turn will depend on how closely aligned the consumers’ perception of ‘(un)fairness’ is with that of the law. The more closely aligned these are, the more potential the duty has for increasing consumer empowerment since consumers are more likely to be aware of the existence of a broad and single duty than a multitude of specific duties.

### 2.0 The Consumer Interface: Consumer Advice, Information, Education and Representation

#### 2.1 Consumer Information and Advice

**Principle 3: Consumer advice channels should be accessible, strongly branded and based on the one-stop shop principle.**

**Principle 4: The provision of information is an important plank of consumer empowerment. Appropriate information should be presented to consumers in a clear and accessible manner.**

The provision of information and advice to consumers is an important plank of consumer empowerment. While it may often be inevitable that consumers will not ex ante have a full awareness of their rights nor how to obtain redress, the

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37 See B.2.1.1.
provision of accessible and visible advice mechanisms can significantly support the empowerment of consumers.

In the UK, the central consumer advice and information channel is Consumer Direct, based on a policy of simple branding and the one-stop shop principle. It is operated by the OFT (in partnership with Local Authority Trading Standards Services (TSSs)), and coordinates with other agencies.\(^{38}\) Consumer Direct has both a telephone helpline and a web presence. The other major outlet for consumer advice is the local network of Citizen’s Advice Bureaus which, unlike Consumer Direct, makes provision for face-to-face advice. Independent research shows high levels of consumer satisfaction with the Consumer Direct service (for example, 86 per cent of users said they were satisfied with the service).\(^{39}\) In terms of value to customers, of the 878 callers surveyed who had successfully resolved their complaint after calling Consumer Direct, 52 per cent had managed to save over £100 through refunds, repairs and replacements and nine per cent had saved over £1000.\(^{40}\)

The other jurisdictions in our study offered similar services in varying degrees. Denmark and Australia were most closely aligned. Provision appeared to be somewhat fragmented in Germany, with advice provision at the Länder level being the most important and subject to charges. Most of the respondents in our survey underlined the importance of accessible information and advice channels, especially in the light of the often complex nature of the legislative framework.

\(^{38}\) Consumer Direct has concluded protocols with all TSSs under which referred advisees are contacted by TSSs within 5 working days.

\(^{39}\) Consumer Direct customer satisfaction survey in Consumer Direct Annual Review 2006-7 available at: http://www.consumerdirect.gov.uk/shared_cd/medialibrary/157296/398018/CDannualreview.pdf. Interviews for the first survey took place between November and December 2006; the second survey was conducted between February and March 2007. In total, around 2,200 users took part in each survey, with around 200 people chosen at random from each region.

\(^{40}\) Consumer Direct Annual Review (n 39) 10.
Assessment

It is clear that most jurisdictions are increasingly focusing resources on the provision of consumer information and advice channels. While telephone and the internet appear to be the dominant channels of delivery, some jurisdictions also provide for face-to-face advice which may benefit certain disadvantaged groups in particular.

The UK’s system for consumer information and advice clearly performs well in a number of key respects. Consumer Direct provides a single gateway for consumer advice with referral mechanisms where a complaint requires further agency action. This is underlined by research which shows high levels of consumer satisfaction with the service, leading to considerable consumer benefits in a significant proportion of cases. The national network of CABx also provides for face-to-face advice – which may be particularly important for disadvantaged consumers.

We conclude that the UK’s Consumer Direct initiative, taken together with the national coverage of CABx, appears to be on a par with the best in respect of consumer advice and information delivery.

2.2 Consumer Education

Principle 5: Consumer education aimed at raising consumer market skills may make an important contribution to the empowerment of consumers.

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41 See B.2.1.2.
During the course of our investigation, and in consequence of respondents’ comments, we noted the increasing weight that policy makers were putting on consumer education. The term is used in a number of different ways. In its broadest sense, it encompasses the provision of information and advice channels to consumers (as discussed above). It is, however, increasingly seen as requiring more formal interventions through, for example, incorporation into the curricula for schools, and consumer agencies are increasingly playing a supportive role in the development of such initiatives.

In the UK, the OFT is the ‘strategic leader’ of an alliance to promote consumer education and awareness. The OFT also undertakes an educative function for business and consumers, coordinating the national consumer education strategy and leading the consumer education Alliance of public, private and voluntary sector organisations. Recent innovations include a pilot series of modules aimed at ‘delivering consumer education alongside basic skills learning, within a further education (FE) environment’. Examples of more general consumer awareness campaigns include: the ‘OFT-Save Xmas campaign’, a consumer education campaign helping consumers to decide how best to save for Christmas, ensuring they can afford to pay for Christmas; and a consumer information campaign on how best to avoid internet scams. In terms of more formal provision, the National Consumer Education Partnership has a generic ‘Framework for Developing Consumer Skills and Attitudes’, supported by one for the National Curriculum, and one for adult education lifelong learning. The UK Trading Standards Agency is active in provision of materials for teaching in schools and provides detailed lesson plans.

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44 See [http://www.ncep.org.uk/pdfs/framework.pdf](http://www.ncep.org.uk/pdfs/framework.pdf). According to key stages 1 and 2 of the National Curriculum, pupils should learn how to spend and save money, and about pocket money and charities, through citizenship classes. At citizenship key stage 4, this progresses into a specific unit on consumer rights and responsibilities. In respect of the National Curriculum, see DfES Standards site for further information: [http://www.standards.dcsf.gov.uk/schemes2/ks4citizenship/cit09/09q1](http://www.standards.dcsf.gov.uk/schemes2/ks4citizenship/cit09/09q1).

45 See [http://www.tradingstandards.gov.uk/schools/181271.cfm](http://www.tradingstandards.gov.uk/schools/181271.cfm).
In respect of the comparative jurisdictions, we found evidence of increased efforts to educate consumers in Australia, Canada, Germany, Spain and in the US. Furthermore, international organisations such as the UN, OECD and the EU place increasingly an emphasis on the need to educate consumers.\textsuperscript{46}

\begin{boxedquote}
Assessment

It appears that the more formal provision of consumer education is seen as having an increasingly important role in consumer policy (a point confirmed by our respondents). While there is no direct evidence that consumer education contributes directly to consumer empowerment, there is a consensus among policy makers that increased resources should be focused on such programmes.

Recent initiatives in the UK, in particular the leadership role played by the OFT in coordinating educational initiatives, and the recent incorporation of key consumer issues into the National Curriculum, places the UK at the forefront of such initiatives.
\end{boxedquote}

\subsection*{2.3 Provision of Formal Advocacy Mechanisms for Consumer Representation\textsuperscript{47}}

\begin{boxedquote}
Principle 6: Given the disparate and diffused nature of consumers, the provision of strong consumer advocacy groups can contribute to the empowerment of consumers by ensuring the representation of their interests in policy formulation and the setting of agency priorities.
\end{boxedquote}

\textsuperscript{46} See Annexe E for a detailed discussion.

\textsuperscript{47} See B.2.2.
Consumer advocacy is viewed as an important plank of an effective consumer empowerment regime. The representation of consumer interests in the formulation of consumer policy and enforcement priorities may be particularly important to the extent that it highlights emerging problems in markets and the needs of vulnerable and disadvantaged consumers.

In the UK, there are a number of statutory and non-statutory bodies in the UK with responsibility for the representation of consumer groups. The leading institution is the National Consumer Council (NCC) (which will merge shortly with Postwatch and energywatch to form a new, enhanced consumer representation and advocacy body).48 The new NCC results from the Government’s decision to streamline and strengthen the UK’s consumer representation regime,49 which has been criticised as being fragmented, and lacking coherence and public presence. The new NCC has considerably enhanced powers and duties, for example, it now has general powers to investigate and gather information from firms and regulatory bodies. Its core functions will be to act as consumer advocate, to research into consumer matters, and to provide information to consumers. The NCC has the status of super-complainant, which requires the OFT, upon receipt from it, to respond with reasons stating whether or not it has identified a problem, and how this problem can be remedied.

A number of other non-statutory bodies exist for the representation of consumers, including Which? and Citizens Advice (supporting a charitable network of Citizens’ Advice Bureaus).50

In most of the jurisdictions, there was provision for consumer representation and advocacy, although there was some variation. Denmark appears to have a strong tradition of consumer representation, whereas in Canada provision

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48 Under the Consumer, Estate Agents and Redress Act 2007 (CEARA), expected implementation October 2008. The NCC is supplemented by territorial committees in Wales, Scotland and Northern Ireland, which share with the NCC some of its powers and duties.
49 DTI, Strengthen and streamline consumer advocacy: Consultation on consumer representation and redress (DTI London 2006).
50 Citizens Advice is partly funded by BERR, as well as by local authorities. For further information see http://www.berr.gov.uk/consumers/fact-sheets/page38097.html.
was fragmented, especially at the federal level. In Spain, certain consumer organisations are recognised in law as having formal rights to be consulted in respect of consumer matters. Most of our respondents were of the view that consultation and engagement with consumer organisations would significantly enhance the effectiveness of consumer policy (an assumption which underpins this benchmarking principle). This appears to be confirmed by the European Consumer Scoreboard which (see Figure 3.2 below) which indicates that UK consumers have a high degree of trust in independent consumer organisations' abilities to protect their rights as consumers.

Figure 3.2: Trust in consumer organisations (%): Do you trust independent consumer organisations to protect your rights as a consumer?

Assessment

Across all jurisdictions (including the UK) there appear to be mechanisms in place for the representation of consumer interests in policy making and priority setting, and our questionnaire data appears to underline the importance of this in improving policy. Recent reforms in the UK, in particular streamlining and enhanced powers for the NCC, can reasonably be expected to strengthen and improve consumer representation in the formulation of consumer policy.

We conclude that the UK's arrangement for consumer representation are on a par with the best.

51 Consumer Markets Scoreboard (n 19) 69.
3.0 Consumer Redress Mechanisms

Consumer empowerment relies upon consumers having the confidence that they will have access to redress should things go wrong. There are, however, a number of formidable barriers to a consumer obtaining relief in the face of a supplier who is unwilling to fulfil its commitments, in particular, the relatively small value of the claim as compared with potential litigation costs. There are a number of different ways in which a consumer empowerment regime may seek to assist consumers in asserting their rights: there may be provision of simple, low-cost Alternative Dispute Resolution (ADR) mechanisms; court processes can be simplified to reduce the costs, risk and time involved in making a claim; and, in respect of claims involving a large number of consumers, collective enforcement may provide an effective mechanism for compensation and deterrence.

3.1 Ombudsman Schemes and other Alternative Dispute Resolution Mechanisms

**Principle 7:** ADR mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.

ADR mechanisms are characterised by greater flexibility, shorter duration, and lower costs as compared to ordinary court procedures. Most ADR mechanisms are self-evidently more accessible to consumers than actions through the ordinary courts, and are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.

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52 See B.3.
53 See B.3.1.
All of the jurisdictions covered by this study provide ADR mechanisms for consumers. ADR mechanisms differ from country to country, but the aim of the ADR mechanisms is the same: to provide an easily accessible, cost-efficient, prompt dispute resolution procedure for consumers in their disputes with businesses. There is a large number of ADR schemes available in the reviewed jurisdictions, and they vary greatly. Indeed, as one UK respondent observed, as economies are converging, ADR mechanisms are diverging.\footnote{Response to Q56.}

In the UK, there is a plethora of ombudsman/ADR schemes, dealing with an estimated 150,000 cases in 2006/7.\footnote{S Brooker Lessons from Ombudsmania (NCC London 2008) available at: \url{http://www.ncc.org.uk/nccpdf/poldocs/NCC198ft_ombudsmania.pdf}.} As a recent report by the NCC reveals, the coverage of ADR schemes is patchy, and indeed some markets which appear particularly problematic do not have an ADR scheme at all.\footnote{Brooker (n 55) 6. For a recent study of ADR provision in the UK see M Doyle K Ritters and S Brooker Seeking Resolution: the availability of consumer-to-business alternative dispute resolution in the UK, URN 03/1616 (DTI London 2004) available at: \url{http://www.berr.gov.uk/files/file11557.pdf}.} We note, however, European Consumer Scorecard data (reproduced in Figure 3.3 below) which appear to indicate that UK consumers consider it relatively easy to pursue complaints via ADR schemes.

The Consumer, Estate Agent Redress Act (CEARA) provides for the establishment (with the approval of the relevant sectoral regulator) of new consumer redress schemes in the gas, electricity and postal services markets, with the hope that this will improve consumers’ access to out-of-court resolutions in the case of complaints with their service providers.\footnote{Similar powers already exist in respect of the sectoral consumer bodies which are being merged with the NCC under the Act.} In respect of other sectors, it is a requirement under the CEARA that residential estate agents belong to an OFT approved redress scheme. In the estate agency sector, therefore, the OFT has powers to ensure that the provisions of redress schemes are appropriate, and that they operate satisfactorily.

The picture is similar in the comparative jurisdictions: since ADR schemes tend to emerge by sector, provision is patchy and standards vary. One
notable exception is Denmark. The Consumer Complaint Board is a public ADR scheme which acts as a stop-gap where there is no (approved) private ADR provision.

In respect of quality, respondents in our survey were asked to identify the advantages and disadvantages of turning to specifically identified ADR mechanisms. Redress schemes were seen as having advantages for firms, who also have an interest in avoiding costly litigation. They may also have the benefit of creating performance standards for the sector in question. Nevertheless, some concerns were noted, in particular the potential of a ‘race to the bottom’ where provision was voluntary. Some concerns were also expressed in terms of the quality of ADR provision; in particular that they only provide approximate justice for consumers and there are possibly dangers of capture where the scheme is industry-based.

Figure 3.3: Percentage of consumers who agree that it is easy to resolve disputes with sellers/providers through an arbitration, mediation or conciliation body

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58 Responses to Q55.
59 Consumer Markets Scoreboard (n 19) 63.
Assessment

There are a variety of ADR mechanisms across the countries under study. The coverage of ADR schemes in the UK is patchy, and some markets do not have an ADR scheme at all (and this is true of some markets which display low levels of consumer satisfaction). There are obvious benefits to ADR, but we note a level of concern among respondents as to the quality of certain schemes and the danger that consumers may be ‘short changed’. In the UK and Denmark, there are mechanisms in place for approving schemes, but in respect of the former, relatively few schemes have been approved. In Denmark, the Consumer Complaints Board acts as a default mechanism where there is no private (approved) scheme in place. This has the benefits of increasing the visibility of ADR to consumers generally, and this is reflected in the respondents from Denmark who view ADR in that country as being very accessible. It also has the benefit of encouraging industries to put in place their own mechanisms, and provides a model for ADR which may avoid some of the potential problems over independence and quality of decision-making.

We conclude that the UK’s provision of ADR schemes is an area where further progress could be made if the UK is to be on a par with the best.

3.2 Small Claims Procedures

Principle 8: Provision should be made for flexible and expedited small claims procedures (although ADR mechanisms may fulfil this role).

The aim of the small claims procedure is to provide a flexible, cheaper, faster and less formal procedure than ordinary civil court procedures. In

\[60\] See B.3.2.1.
Benchmarking the UK Framework Supporting Consumer Empowerment

consequence, consumers have better access to justice to resolve small disputes and obtain redress at a cost and burden which is not disproportionate to the value of their claim.

In the UK, consumers can take action in the civil courts when the law gives individual rights of redress or when there is a breach of contract. Consumers can seek civil redress in a County Court or the High Court. If the amount in dispute (the value of the claim) is £5000 or below, it can be dealt with through the County Court’s small claims procedure. The average duration of the procedure is around six months, which is an average period when compared to the other countries, and consumers have to pay £30–120 for filing a claim.\(^{61}\) Certain claims can be made via the an internet portal maintained by Her Majesty’s Court Service. As can be seen from the summary table below, the UK has a relatively low level threshold value for small claims, together with one of the longest average duration times. We note, however, European Consumer Scoreboard data (see Figure 3.4 below) which appears to indicate that UK consumer perceive it to be relatively “easy”, as compared with the EU25, to resolve dispute through the courts.

\[\text{Figure 3.4: Percentage of consumers who agree that it is easy to resolve disputes with sellers/providers through courts}^{62}\]

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\(^{62}\) Consumer Markets Scoreboard (n 19) 64.
### Summary of small claims procedure in comparator countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Threshold</th>
<th>Duration</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia (variation between territories)</td>
<td>AUD25000–50000 (c.£11500–23000)</td>
<td>c.35 days</td>
<td>c.£20</td>
</tr>
<tr>
<td>Canada (variation between provinces)</td>
<td>Up to CAD7000 (c.£3500)</td>
<td>c.6 months</td>
<td>CAD50</td>
</tr>
<tr>
<td>Denmark (from Jan 2008)</td>
<td>Dkr50000 (c.£5000)</td>
<td>No information</td>
<td>Dkr500 (c.£50)</td>
</tr>
<tr>
<td>Germany (with discretion of the court)</td>
<td>EUR 600 (c.£400)</td>
<td>c.6 months</td>
<td>EUR 75 to 105  (c.£50–75)</td>
</tr>
<tr>
<td>Spain</td>
<td>EUR 3000 (c.£2000).</td>
<td>5 months</td>
<td>No fee</td>
</tr>
<tr>
<td>US (variation between States)</td>
<td>$2000–15000 (c.£1000–7500)</td>
<td>10–90 days</td>
<td>Normally</td>
</tr>
</tbody>
</table>
**Assessment**

Given the relatively small monetary value associated with consumer claims, there is a need for flexible and expedited small claims procedures for consumers. All the countries covered by this study have a small claims procedure, although in Germany it is for the courts to decide whether such a procedure is appropriate. All the countries have certain threshold values, which vary markedly. One of the deficiencies with the UK is the time that it takes to conclude a claim (around six months).

In all the countries except Spain, consumers have to pay a fee to access the procedure. In low cost transactions this may act as a barrier and discourage consumers from claiming all together. While all the jurisdictions include some simplification of the ordinary court procedures when dealing with small claims, the threshold for the value of the claim is very different. It ranges from approximately £400 to £23000, with the UK at the lower end with a threshold of £5000.

We conclude that, on balance, the UK’s small claims procedure is average.
3.3 Collective Enforcement

Principle 9: Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counterbalance weak public enforcement. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.

Collective actions for individual damages offer great opportunities for judicial economy by gathering claimants with similar claims against the same defendant(s). The possibility of handling large groups of claims potentially enhances consumer protection. It is perceived as increasing access to justice, and may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counter-balance weak public enforcement. According to Eurobarometer data, 74 per cent of European citizens polled have expressed that they would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same issue. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.

The UK currently does not recognise the existence of class actions, but the Civil Procedure Rules do allow for group litigation and for representative

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63 See B.3.2.2.
65 Accordingly, a ‘Group Litigation Order’ (GLO) means an order providing for the case management of claims which give rise to common or related issues of fact or law (GLO issues). Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues, that judgment or order is binding on the parties.
claims where more than one person has the same interest in a claim. Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under this rule is binding on all persons represented in the claim. It may only be enforced by or against a person who is not a party to the claim with the permission of the court. In private law cases there are no procedures for representative organisations, such as a consumer group, to bring proceedings on behalf of people whose collective interests they support or on behalf of an unnamed individual.

There is a great diversity between the countries when it comes to collective redress. Collective action exists in different forms. For example, Denmark has introduced (from January 2008) group actions which have some but not all of the characteristics of US type class actions, whereas Germany puts an emphasis on consumer associations taking actions on behalf of consumers. Even within these categories considerable heterogeneity exists. Essential features of collective actions are regulated in diverging ways, for example, the persons who can initiate the claim and the opt-in or opt-out nature of the collective action. We note from the European Consumer Scorecard data (reproduced in Figure 3.5 below) an apparent willingness on the part of UK consumers to use collective action procedures.

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66 Representative actions in the UK have suffered from the limitation since Markt & Co Ltd v Knight Steamship Co Ltd where the English Court of Appeal interpreted the requirement of ‘same interest’ for parties in representative actions to mean that individuals with different contracts and individual damage claims could not be aggregated within a common representative claim (I Ramsay Consumer Law and Policy: Text and Materials on Regulating Consumer Markets (Hart Publishing Oxford 2007) 259).

67 Such claims are possible by certain designated bodies before the Competition Appeal Tribunal for harm or loss suffered as a result of an infringement of UK or EC competition law (Competition Act 1998, s 47B).
Assessment

It is difficult to evaluate the UK’s position vis-à-vis the other countries, not least because of the apparent lack of empirical data on the effectiveness of collection actions generally. Moreover, the relative importance of class actions depends upon other features of the enforcement regime, in particular the strength of the public enforcement regime. In a country like Germany, for example, where there is a lack of public enforcement, collective redress mechanisms are more important than in countries, like the UK, where there are core public agencies responsible for enforcement. It should be noted, however, that public enforcement does not provide redress to individual consumers.

Overall, the UK does make provision for group litigation and representative actions, but its procedures are more restrictive than is the case in other countries (in particular the US and, to a lesser extent, Denmark). Whether the law should be changed to facilitate more group litigation is an issue which is beyond the scope of this study.

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68 Consumer Markets Scoreboard (n 57) 65.
4.0 Public Enforcement
In this section we assess the UK’s public enforcement regime with those of the comparator jurisdictions against several principles which we believe will best promote consumer empowerment. We focus here on several issues, including deterrence and the targeting of resources.

4.1 Securing Compliance: Penalties\textsuperscript{69}

Principle 10: Administrative enforcement has an important role by correcting for the under-use of redress mechanisms. Penalties should be used to change the behaviour of the offender, and should be transparent, proportionate and fair. Enforcement agencies should have a hierarchy of sanctions, with the ability to escalate sanctions in the face of non-compliance by firms.

A consumer regime which is based on consumer empowerment may require more than simply providing consumers with the appropriate rights and accessible redress mechanisms. There is an important role for public regulation and its success in promoting consumer empowerment depends upon three key factors: \textit{intervening where necessary}; \textit{having the right tools to intervene}; and \textit{using tools responsively and intelligently}. There are a number of types of enforcement powers including:\textsuperscript{70}

- criminal penalties (agency prosecution, judicial enforcement);
- civil orders and penalties (agency standing, judicial enforcement);

\textsuperscript{69} See B.4.1.

administrative orders and penalties (agency enforcement, judicial oversight).

In the UK, the OFT is responsible for enforcement at the administrative level together with Local Authority Trading Standards Services (TSSs) and, in certain respects, other designated bodies, for example, the National Consumer Council (NCC). In respect of civil orders, under the Enterprise Act 2002, Enforcement Orders can be obtained from the court to stop infringements which harm the collective interests of consumers. The Regulatory Enforcement and Sanctions Bill (RESB), which is likely to pass into law shortly, will potentially augment significantly the enforcement powers of the OFT and the TSSs in respect of criminal infringements of consumer law by allowing them to seek to impose administrative penalties. If and when they do so successfully, the OFT and TSSs (among others) will have the power to issue fixed and variable penalties to firms who break the law as an alternative to prosecution. There is no involvement of the court, save for the right of an appeal against a penalty. In terms of criminal powers, Local Authority TSSs (and the Department of Trade and Investment in Northern Ireland) can investigate and prosecute criminal offences, and the OFT has the power to prosecute in relation to unfair commercial practices.

All of the jurisdictions in this study (with the exception of Germany), have an administrative enforcement system for consumer laws, and all regimes provide for criminal penalties in respect of serious infringements of the law. None presently provides for administrative penalties (i.e., the imposition of penalties without the court’s intervention). The norm is that enforcement is before the courts, and this is currently the case in the UK. Court-based enforcement may have a number of advantages, including securing transparency and fairness for firms. The downside, however, is that it attracts significant litigation costs for the agencies, and to this extent the deterrent effect of the law is undermined. Agencies are also limited in their capacity to

71 There are around 40 consumer protection statutes, the infringement of which invokes the penalty power.
employ a layered approach to enforcement, tailoring interventions to the severity of infringement.

Assessment

The UK’s current regulatory framework compares favourably with the other jurisdictions in the study. Forthcoming changes under the RESB will give the OFT and TSSs the right to seek powers to impose both fixed and variable penalties against businesses who commit criminal breaches of consumer protection laws. In this latter regard, agencies will have the ability to escalate the level of a sanction according to, for example, recidivist law-breaking. Furthermore, such penalties do not require resort to the courts.

We conclude that if and when these powers are in place, the UK will be on a par with the best in respect of its enforcement powers.

Nevertheless, there are important innovations elsewhere which the UK could examine with a view to further augmenting the regulatory ‘tool-kit’. The use of orders which put an emphasis on changing the behaviour of firms (as is the case in Australia in respect of probation orders), appears to be another useful means of encouraging compliance.

We note also the split of competencies as between the OFT and the TSSs, with the latter having powers to take criminal cases. In principle, this does not mean that enforcement powers cannot be used in a responsive way (to maximise compliance), but it does depend crucially upon the importance of mechanisms for coordination of enforcement (discussed below).
4.2 Do the Agencies Monitor Systematically Consumer Enquiries/Complaints?\textsuperscript{72}

Principle 11: Enforcement resources should be targeted appropriately. Transparency both in terms of enforcement policy and in terms of monitoring outcomes can increase both compliance and the efficient use of enforcement resources.

Targeting resources according to where the need is greatest is an important characteristic of a responsive enforcement regime. In order to target resources, agencies should have mechanisms in place to monitor market conditions, with a view to identifying if and how to intervene. The transparency of these mechanisms is likely to increase the accountability of the agencies.

In the UK, the OFT uses a number of indicators to identify potentially problematic traders or markets, including levels of complaints: Consumer Direct and consumer organisations regularly collect complaint information and data. The OFT regularly conducts market studies which, according to the nature of the problem identified, may result in a number of different types of interventions. In addition to complaints data, the OFT uses a wide range of sources to identify candidates for market studies. Certain consumer groups are recognised as ‘super-complainants’, which requires the OFT, upon receipt of a complaint from such a body, to respond with reasons stating whether or not it has identified a problem, and how this problem can be remedied. To the extent that consumer bodies play an important role in representing the interests of consumers, this may be an important mechanism for increasing the responsiveness of the enforcement regime.

The OFT has published an enforcement strategy which sets out the criteria under which it will use its various enforcement tools, and this is supplemented

\textsuperscript{72} See B.4.2.
normally by more detailed guidance. For the purposes of external accountability and internal management, the OFT (in particular, its policy committee and board), seeks to systematically evaluate its performance against the Public Service Agreement (PSA) it has agreed with HM Treasury. In respect of monitoring the outputs of TSSs, comparative performance information based on regular monitoring by BERR is collected and published on an annual basis.

In respect of the comparative jurisdictions there is evidence of monitoring of complaints data and, in varying degrees, its use in identifying potentially problematic markets. In respect of the timeliness of responses, Australia, Spain and Denmark appear to perform particularly well. Targets driving performance were evident in all countries with the exception of Canada. Performance targets varied. In Denmark the use of the Consumer Conditions Index (CCI) facilitates the targeting of resources and the ex post measurement of success. In Germany, benchmarking occurs on a biannual basis by the Federation of German Consumer Organisations, applying a ‘Consumer Protection Index’ by which it measures and compares levels of consumer protection in the Federal States. In the UK, respondents made reference to two ‘challenging’ targets in particular: the PSA target, according to which the UK is committed to have one of the best consumer protection regimes in the world by 2008, and the OFT’s own target of providing consumers with benefits totalling five times its expenditure. This latter target was described as a ‘good driver’ for the OFT.

The OFT has agreed to deliver measurable benefits to UK consumers of five times its annual budget over the financial years 2008–11, and 3.5 times the budget for Consumer Direct.
**Assessment**

There is evidence across all jurisdictions of the monitoring of complaints data, and some further evidence of its use in identifying particular areas of concern. In some jurisdictions, consumer organisations play a particularly important role in bringing to the attention of either the agencies or the courts particular consumer problems. A number of regimes have challenging targets against which their performance or market interventions can be measured. A number of regimes have clearly set their enforcement priorities in response to a high volume of complaints in respect of particular sectors.

Overall, the UK performs well against this measure. Mechanisms are in place to identify and target resources to deal with specific market problems, and challenging targets are in place to measure agency performance.

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**4.3 Is there Evidence of Investigations and Policy Interventions in the light of Evidence of Consumer Detriment?**

**Principle 12: The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets.**

We turn now to consider the extent to which the UK and comparator jurisdictions have the necessary tools in order to deal with systemic market problems. The types of tools we have identified differ from jurisdiction to
jurisdiction, and we have sought evidence, in particular, of markets where interventions have been made.

In the UK, the OFT (and certain sectoral regulators) have the power to refer a market to the Competition Commission for it to consider, among other things, whether there is consumer detriment, and if so whether and how it can be remedied. Remedies cannot generally be imposed directly by the OFT, but are consequent upon an investigation by the Commission. Examples of such cases include a recent inquiry into store cards which demonstrated that consumers in the UK generally paid more in interest on their store cards as compared to credit cards, that there was a lack of transparency in respect of relevant charges and fees, and a general price insensitivity among consumers to interest rates. The Competition Commission imposed a remedy which required, among other things, lenders to warn cardholders that cheaper credit may be available elsewhere (where APRs were 25% or above) and to give more and clearer information on statements. Likewise, in respect of Home Credit, the Commission identified impediments to switching, the lack of clear information for consumers, and a lack of price transparency. A number of informational remedies were imposed upon suppliers, including a requirement on lenders to publish prices on a website (to increase price transparency for consumers), and a requirement on lenders to pay a fair rebate to those consumers (around a third) who settled early.

A number of market studies have been conducted into the estate agency market, identifying structural problems in the market which caused consumer detriment. The OFT responded by launching informational campaigns for consumers, and by advocating regulatory change. The latter led to the strengthening of redress schemes, and an enhancement of the powers of the OFT and the TSSs to take action against suspected unlawful activity by estate agents.75 The OFT is investigating a number of suspected consumer detriment problems in the bank accounts market, and is currently taking legal

75 Under the Consumers, Estate Agents and Redress Act 2007.
action to establish whether it has the power to intervene against the banks in respect of alleged unlawful unauthorised overdraft charges.\textsuperscript{76}

In terms of court-based interventions, the OFT and the TSSs have the power under Part 8 of the Enterprise Act to intervene against specified traders where a practice has the potential to harm the collective interests of consumers.

In most of the comparative jurisdictions there are powers to intervene, with the sanction of the court, where harm to the collective interests of consumers is demonstrated. Agencies use a variety of other tools to address consumer harm (for example, ‘naming and shaming’ in Australia and educational programmes in the US).

Assessment

The need for specific market intervention in the light of systematic consumer detriment is important for several reasons. It may provide a mechanism for dealing with specific issues surrounding disadvantaged consumers (where the consumer regime generally is based on the needs of the average consumer). It can deal with market level problems, where there is no specific breach of consumer law, but where consumer detriment can be remedied by targeted remedies. While there is evidence that several jurisdictions monitor markets, and use resources and the enforcement tools that they have in a responsive way, the UK is unique in having the ability to impose remedies at the market level (even where there has been no infringement of the generic consumer laws). While the OFT only envisages using its referral power in respect of three markets per annum, it is nevertheless an important complement to its other enforcement powers, has a level of transparency and due process safeguards, and ensures that remedies can be targeted effectively. In this regard, we conclude that the UK is on a par with the best.

\textsuperscript{76} The legality of these fees is being challenged under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) which requires that the charges meet the test of fairness. The High Court ruled in favour of the OFT on 24/4/08 – see: http://www.oft.gov.uk/news/press/2008/55-08.
4.4 Institutional Arrangements

Principle 13: In a multiple-agency setting, mechanisms should be in place to ensure that there is coordination and consistency of approach.

The constitutional arrangements of the country in question have important potential implications in terms of consistency, cooperation and coordination. Where there is a shared legislative competence as between the Federal and State levels (as is the case in the US) or divided competence (as is the case in Canada), there are potentially dangers in terms of fragmentation. Whether or not it is desirable for a divergence to exist depends upon a number of factors, including the size of the economy, the disparity of market conditions and consumer behaviour. Furthermore, the division of institutions as between a central and local level may well be desirable if there are important informational advantages of local level enforcement. Fragmentation, both of laws and institutions, may therefore be the product of the relevant country’s constitutional arrangement, or a positive policy choice. Nevertheless, fragmentation can be addressed through the provision of strong mechanisms for the coordination of policy (including initiatives for harmonisation where appropriate) and of enforcement. In accordance with the above principle, we would expect an effective consumer empowerment regime to display evidence of strong mechanisms for cooperation and coordination of policy (at the political and agency level) and in respect of enforcement (at the agency level).

In the UK, BERR has overall responsibility for consumer law and policy. BERR also has primary responsibility for the legislative framework. The

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77 See B.4.4.
78 Of course, in respect of the latter, much depends upon whether the system is based on public enforcement.
79 Legislation on consumer matters is a reserved matter for the UK Parliament in respect of England, Scotland and Wales. Consumer protection (other than safety in relation to goods) is a transferred matter in relation to Northern Ireland, but in most cases Northern Ireland offers equivalent protections to those given by legislation applying to Great Britain.
Better Regulation Executive (BRE), which is part of BERR, has overall responsibility for the Government’s ‘better regulation’ commitments, and is currently involved in reviewing the UK’s consumer protection regime. The OFT is responsible for enforcement of consumer law and policy.\footnote{In England, Wales and Scotland the enforcement of consumer law is undertaken by the Office of Fair Trading, local authorities and some specified designated bodies. In Northern Ireland most consumer policy (except in relation to consumer safety) is implemented and enforced through the Department of Enterprise, Trade and Investment (DETI) which is responsible for economic development. Enforcement of consumer legislation is by the Trading Standards Service.} There are a number of other regulators which protect the interests of consumers, for example, Ofgem for energy and Ofcom for telecommunications. The Financial Services Authority (FSA) has overall responsibility for financial services, although there is some overlap and considerable complementarity of the powers enjoyed by it and the OFT. In order to reduce administrative burdens and deliver risk-based regulation, the OFT and FSA have published a Joint Action Plan which is regularly updated to reflect changing priorities.

Much of consumer protection legislation is enforced by Local Authority Trading Standards Services (TSSs). In recent times, there has been a number of initiatives to promote cooperation as between TSSs and between them and the OFT. In respect of the inter-TSS cooperation, LACORS (the Local Authorities Coordinators of Regulatory Services) provides advice and guidance to help support local authority regulatory and related services, including trading standards. The Regulatory Enforcement and Sanctions Bill also contains important provisions which providing for coordination between local authorities in respect of businesses which are subject to more than one local authority in respect of trading standards (the ‘primary authority’ principle). The OFT has powers to coordinate enforcement under Part 8 of the Enterprise Act, which has led to collaborative working, a better understanding of respective priorities, and a joint programme of action. The Local Better Regulation Office (LBRO) has been set up in order to secure effective performance of local authority regulatory services in accordance with the Hampton principles. LBRO’s objective is to ensure that local authorities carry out their functions effectively, including their trading standards powers. LBRO will have significant powers in order to promote these principles,
including the power to issue statutory guidance and the power to specify
enforcement priorities to local authorities. One recent example of increased
coordination and cooperation is the Retail Enforcement Pilot, essentially
providing for a network between regulatory agencies, facilitating information
exchange.

In Australia, Canada and the US, responsibility for consumer policy is split
between the federal and state levels. Denmark follows more closely the UK
model, with all consumer matters being dealt with either by the central
government or centralised public agencies. In Germany, responsibility for
consumer law and policy at Federal level is dispersed among a number of
Ministries, and given the diversity of ministries and agencies responsible for
consumer law and policy, the Federation of German Consumer Organisations
(VZBV) plays an important consumer representation role across the Federal
government, and a number of other consumer bodies play an important role at
the Länder level. In Spain, central government does not enjoy exclusive
competence in respect of both legislative and enforcement of consumer laws.
A number of Autonomous Communities (ACs), but not all, have enacted their
own laws.

There are a number of coordinating bodies in Australia. At the high policy
level, the Ministerial Council on Consumer Affairs (MCCA) comprises
consumer ministers from the Federal and State and Territory levels, as well as
from the New Zealand government. It meets annually to develop a consistent
approach to consumer issues, and is supported by the Standing Committee of
Officials of Consumer Affairs (SCOCA) comprising the CEOs of the various
consumer protection agencies.\textsuperscript{81} There appear to be some mechanisms for
coordination in Canada, for example, the Consumer Measures Committee,
comprising representatives from the Federal and Provincial levels, dealing
with issues such as harmonisation of consumer laws. There has also been
ministerial level cooperation on issues such as enforcement cooperation. The

\textsuperscript{81} The Commonwealth is represented by both Treasury and the Australian Competition and
Consumer Commission (ACCC). Four advisory committees report to the SCOCA on different
consumer matters.
Federal German Government generally enacts legislation governing consumer protection within the scope of its constitutional competencies, while the Länder are generally responsible for the enforcement of laws including Federal legislation.\textsuperscript{82} A central supervisory authority for consumer protection does not exist as such. There have been recent initiatives to coordinate consumer protection issues with a new committee being formed comprising Ministerial representatives at both Federal and Länder level. In Spain, the Sectorial Conference on Consumption (CSC) coordinates institutional aspects of consumer policy between the Central government and the Autonomous Communities. In the US, States also have their own consumer protection legislation, which are typically enforced by States Attorneys General (State AGs). State AGs coordinate their activities in respect of interstate issues under the auspices of the National Association of State Attorney General (NAAG). Since the 1990s, there have been increased efforts between State AGs and the FTC to develop a greater understanding of work division and partnership.

Asked whether the different agencies involved in the protection of consumer interests interact with one another, the vast majority of respondents answered yes to this question.\textsuperscript{83} In Australia, mention was made of the importance of the MCCA and the SCOCA, together with more informal day-to-day liaison between agencies. There appeared to be less visible mechanisms in Canada. In Denmark and Germany, liaison between different agencies appeared to occur through less formal (but not necessarily less effective) means. In the former, mention was made of the Consumer Taskforce charged with a coordinating function. In Spain, formal mechanisms for coordination between the central and regional governments exist, and ad hoc working groups are regularly created to deal with specific legislative and enforcement policies. In the UK, respondents were generally of the view that coordination and cooperation occurs regularly and at multiple levels. Mention was made of

\textsuperscript{82} Despite the general rule that laws are executed by the \textit{Länder}, in some areas federal agencies have taken over enforcement activities (e.g. in relation to financial services).

\textsuperscript{83} Response to Q11.
regular contact between the OFT and TSSs, and the sectoral regulators (via the Senior Level Regulatory Forum).

**Assessment**

The constitutional arrangements of the jurisdictions under study vary greatly, and in this respect the UK has a comparative advantage given that consumer laws are harmonised across the UK, and the OFT has a remit for the UK (excluding Northern Ireland). There is, however, both an overlap and a split of powers and functions as between the OFT and local authority TSSs. In the past, there have been criticisms of a lack of coordination of activities of the TSSs, both as between themselves and between them and the OFT. Recent initiatives, including legislative measures, are likely to facilitate greater coordination and cooperation, thereby reducing burdens for firms and encouraging the more efficient use of scarce public resources.

We conclude that in the UK, mechanisms are now in place to ensure that there is coordination and consistency of approach. While the UK leads in respect of having a robust set of arrangements in place (or soon to be in place), there is insufficient evidence to comment on the impact such arrangements will have on levels of consumer empowerment.
4.5 Soft-law and Self-regulation

Principle 14: Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.

Soft-law rules cover a wide array of instruments whose unifying characteristic is that they are not binding, at least until a party formally agrees to be bound. In the area of consumer policy, they usually consist of guidelines provided by the agencies and/or ‘codes of practice’ adopted by the businesses themselves. As such, soft-law mechanisms can enhance consumer empowerment by either providing additional rights for consumers or by clarifying the existing duties of firms/rights of consumers and thus making the system more transparent.

In the UK, businesses can sign up to a code of practice that has been approved by the OFT under the Consumer Codes Approval Scheme (CCAS) set up in accordance with the power given to the OFT by Section 8 of the Enterprise Act 2002. A code of practice is a set of rules that businesses agree to follow and is usually operated by a trade association or similar body, known as the ‘code sponsor’. Code sponsors are expected to develop codes that offer consumers benefits beyond the protection provided by law. It is a requirement of the CCAS that all eligible members of the code sponsor’s organisation sign up to the code in order to ensure a consistency of message to consumers. Code sponsors should also establish a procedure for

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84 See B.4.5.
87 OFT Consumer Codes Approval Scheme (n 86) 5.
handling non-compliance by members with the code which should include independent disciplinary procedures and reasonable timescales for action.  

In Australia, the Government encourages development of industry codes of practice, which are seen as light-handed, market sensitive ways of securing compliance with TPA and alternative dispute resolution schemes are incorporated in these codes. The TPA allows for codes of conduct to be prescribed in which case compliance becomes mandatory, making breach unlawful and enforceable through the courts. In Canada, the Office of Consumer Affairs (OCA) has published a Guide on the Development and Implementation of Voluntary Codes; an Evaluative Framework for Assessing Voluntary Codes and various research papers on the subject. In Denmark, the Danish Consumer Ombudsman publishes guidelines regarding, for example, marketing activities, sales promotions, marketing towards children, and payment cards. The Consumer Council and the Consumer Taskforce also adopt guidelines on consumer issues. In Germany, voluntary self-commitments by enterprises do not have an important part in protecting consumer rights. In practice, voluntary self-commitments are criticised for not being effective.

According to the responses to our questionnaire the degree of compliance with ‘soft-law’ varies. In Canada and Germany there are no legal consequences of not following guidelines outlining best practice since following them is a voluntary matter. By way of contrast, in Denmark non-
compliance with guidelines may breach the *Marketing Practises Act*. Even where there are no formal sanctions, there do seem to be other mechanisms in place, such as naming and shaming the concerned undertakings and recommendations that their products not be bought (for example in Germany and to an extent the UK). The main reasons for guidelines not being followed appear to be a lack of incentives and awareness of them on the part of the undertakings.

**Assessment**

Insofar as soft-law mechanisms provide clarity and guidance to firms and consumers regarding the interpretation of the law, they may be effective tools of consumer empowerment. However, it must also be borne in mind that adopting and monitoring compliance with codes of conduct will entail costs. For these mechanisms to be *efficient*, such costs should be outweighed by the benefits for consumers. If the soft-law mechanisms do not provide these benefits, or if these benefits can be achieved in a more efficient way, then they may actually be counterproductive by adding more rules to an already complicated body of law.

The UK appears to be on a par with the best in terms of the provision and management of these mechanisms, although how much additional consumer empowerment these provide in practice is an issue that needs empirical testing and is beyond the scope of this Report.
4 Evaluating the Level of Consumer Empowerment and Explaining Consumer Detriment from the Perspective of Economic Theory

1.0 Introduction
This part of the report focuses on market outcomes. The benchmarks established in Part 1 provide the backdrop to our analysis of market outcomes, in particular, Principle 11 which points out that the ability to identify and deal with consumer detriment calls in the first instance for evidence against key consumer indicators acquired through systematic monitoring of outcomes. But what are those indicators, and on what grounds can they be justified?

Fourteen indicators are derived by means of a systematic approach to consumer empowerment. That is, we survey the economic literature in order to identify the characteristics of consumer engagement in the market which are likely to result in consumer detriment and/or to militate against consumer empowerment. The fourteen indicators are as follows:

Box 1: Indicators of consumer [dis]empowerment

- **Indicator 1:** An empowered consumer is a well informed consumer.
- **Indicator 2:** Where a choice set exists, the consumer is empowered if:
  (i) the choice set includes the 'good' quality outcome;
  (ii) the options are 'reasonably' far apart in product characteristic space (that is, they are sufficiently different from one another in a market where differentiation is important); and
  (iii) there is the choice not to engage in a transaction.
- **Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.
- **Indicator 4:** Under certain clearly specified conditions, the 'good' outcome is
realised by imposing restrictions on what can be supplied to consumers.

- **Indicator 5**: Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

- **Indicator 6**: A consumer, or group of consumers, is disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

- **Indicator 7**: A consumer, or group of consumers, is disempowered if they are unable to access information relevant to the purchase of goods.

- **Indicator 8**: The level of consumer empowerment in a market may be defined by reference to one or more other markets.

- **Indicator 9**: For a given market:
  (i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
  (ii) when acting under the constraints of bounded rationality, consumers may attain ‘reasonable’ outcomes (one behavioural conclusion);
  (iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion).

- **Indicator 10**: Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

- **Indicator 11**: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

- **Indicator 12**: The impact of price discrimination on consumer empowerment in a given market is ambiguous.

- **Indicator 13**: Consumer (dis)empowerment is greater the [higher]lower are transaction costs.

- **Indicator 14**: For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.
While the characteristics described by the indicators are not all directly observable, each indicator points to one or more 'symptomatic states' which are observable and which potentially give rise to concern with respect to the level of consumer empowerment. For example, we cannot directly observe whether consumers are fully informed with respect to a given market (Indicator 1); but we can observe the extent to which prices are transparent and/or the ease with which consumers can compare products.

For a given market, it is unlikely to be the case that the level of consumer empowerment is given by a single indicator. For example, a robust set of institutional arrangements serving consumer interests (Indicator 14) may ameliorate the difficulties faced by vulnerable consumers in gaining access to a particular market (Indicator 6).

In the next section we describe the theoretical underpinnings of each of the indicators. Then in Section 4/Annexe D, the indicators are applied to cross-country comparisons of four markets as the necessary complement to the comparative analysis of consumer protection regimes undertaken in Section 3/Annexe B.

2.0 Derivation of the set of consumer indicators
Standard economic theory tells us that the fully informed consumer is an 'effective' consumer in a competitive market: being fully apprised of the range of products on offer, their prices and attributes, and the location of outlets, it is assumed that the consumer will make the utility-maximising choice (in that the chosen product will provide the best possible fit with the consumer's tastes and preferences given their budget constraint). Given these attributes of the outcome of a transaction, we may say that an empowered consumer is a well informed consumer:

Indicator 1: An empowered consumer is a well informed consumer.
The principle of consumer sovereignty – or that consumers know best what is in their own interests (as against government or some other agency) – is one of the cornerstones of standard economic theory applied to a market-based economy. At first sight, the principle would seem to imply that choice is essential to a good outcome. This being the case, it might be argued that an empowered consumer is one who is able to exercise choice, implying that a choice set necessarily exists. However, choice has several dimensions that impact on the quality of outcomes. A review of these leads to the conclusion that the existence of a choice set is not sufficient to guarantee a good outcome for the consumer.

First, it may be the case that a choice set exists but that none of the options would generate a good quality outcome for the consumer. For example, there may be a reasonably wide choice of suppliers in a particular market, but if all suppliers are colluding such that price is above that of a well-functioning market, we may say that the 'good' – that is, competitive – outcome is not contained within the choice set.

Second, in a market in which differentiation is important, it may be the case that a choice set exists but that the contents of the set are so similar in terms of their characteristics that there is insufficient diversity given the range of consumer tastes and preferences.

Third, we may say that a necessary dimension of choice in a modern market society is the freedom to choose not to engage in a transaction, which is to exclude transactions undertaken under coercion, for example, pressure selling.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:
(i) the choice set includes the 'good' quality outcome;
(ii) the options are 'reasonably' far apart in product characteristic space (that is, they are sufficiently different from one another in a market where differentiation is important); and
(iii) there is the choice not to engage in a transaction.

**Indicator 3**: The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

To add to the complexity of the relationship between choice and empowerment, economic theory identifies two situations in which a good outcome requires the imposition of limits on what can be supplied to consumers and, hence, which implicitly limit consumer choice.

First, it can be argued that some consumers, given free reign, will make choices that are 'inappropriate', either with respect to their own welfare (for example, choosing to consume demerit goods such as cigarettes or fatty foods), or with respect to the welfare of society in the aggregate (for example, choosing to consume guns to the extent that a negative externality is imposed on society\(^1\)). Hence, there are grounds for over-ruling consumer sovereignty by imposing restrictions on the supply of demerit goods.

Second, in cases of natural monopoly (for example, a rail network), the cost of providing a choice of products is likely to exceed the benefits. Under these conditions, efficiency in the allocation of resources requires a limit to be placed on the number of suppliers.

**Indicator 4**: Under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers.

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\(^1\) My awareness that some people are consuming guns imposes a negative externality on me if I believe that the practice leads to violence on the streets and, as a consequence, I am afraid to walk home at night.
For completeness, we note that consumers may democratically choose to restrict the choices available to them, for example, by electing a government with a mandate to remove refrigerators containing chlorofluorocarbons (CFCs) from the market. Thus, somewhat paradoxically, being able to choose to restrict one's choices through the ballot box constitutes a modality of empowerment.

For a wide range of markets, it is recognised that consumers will have a good deal less than the information assumed under Indicator 1. Thus, it is axiomatic within *optimal search theory* that because information bears a positive cost, rational economic agents will only engage in search up to the point at which the marginal cost of doing so equals the anticipated marginal benefit of the information so acquired. Consumers are thereby exposed to an information gap and the potential for poor quality outcomes. The likelihood of a poor quality outcome can be expected to be larger the greater are the informational demands on consumers of transactions; for example, a market that is subject to frequently changing prices and/or complex tariff structures is particularly demanding with respect to the amount of search required to identify the 'right' product.

Novel products, and products that are purchased only rarely or infrequently, are informationally demanding. But for three categories of goods, the information gap is recognised as particularly problematic. In the case of *experience goods* (goods whose attributes cannot be discerned until they have been consumed\(^2\)), no amount of search can plug the information gap. In the case of *credence goods* (goods with attributes that may not be readily apparent even after purchase\(^3\)), there is the potential for the consumer's choice of the quantity to purchase (at any given price) to be inappropriate to

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\(^2\) Examples of experience goods include novel food products and television programmes.

\(^3\) Examples of credence goods include professional services (such as private medicine or veterinary services) and repair and maintenance services (such as car repairs), where the buyer is dependent upon the seller for advice as to exactly what, and how much, should be consumed.
their needs. And in the case of distress purchase, the need for immediacy may rule out search altogether.

**Indicator 5:** Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

Economic theory recognises cases where social goals, (for example, justice or equity) cannot be satisfied by the market, even one that is perfectly competitive. *Merit goods* are goods and services that government believes should be consumed in adequate quantities but that may be under-consumed due to inability-to-pay or ignorance of the benefits of consumption, for example, education and health care. It can be argued some of these goods have externalities in consumption; for example, I benefit if my neighbour is immunised against infectious diseases and has adequate sanitation. Under these conditions, intervention in the market (say, through subsidy, social tariffs or free provision) is often regarded as justified. But while intervention can clearly be empowering for low-income consumers and/or those who are ignorant of the benefits of consumption, the costs and benefits are often as difficult to identify and measure as the concept of ‘merit good’ is to define.

There would seem to be no consensus in the literature with respect to the range of goods and services that might fall under the heading of merit goods in contemporary times or of new kinds of detriment to which society (or particular consumers) may be exposed as social and economic conditions change. Personal bank accounts are a case in point. Whilst a bank account is not a merit good, it can be argued that access to banking should be considered essential given that many goods and services can only be paid for by means of direct debit or debit cards, and because bank accounts are a prerequisite for most forms of legal employment and for access to the property rental market. Accordingly, low-income consumers and consumers with poor

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4 Examples of distress purchases include plumbing and car windscreen repairs.

5 In support of this argument, the European Commission includes banking in the category of ‘services of general interest’. These are services considered to be in the general interest by the public authorities and accordingly subjected to specific public-service obligations. Thus, services of general interest should be of good quality and accessible to all at affordable
credit ratings suffer a detriment beyond its immediate effect when they are denied access to bank accounts. More generally, the above analysis reveals that consumer empowerment may not be uniquely defined in any one market, without reference to levels of access and cognitive competence in others.

**Indicator 6:** A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

**Indicator 7:** A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

**Indicator 8:** The level of consumer empowerment in a market may be defined by reference to one or more other markets.

Models of behaviour in the behavioural tradition recognise the limits imposed on behaviour by bounded rationality. This is to say that consumers with limited information and computational abilities, and facing complex transactions, are susceptible to poor quality outcomes relative to fully informed and rational utility maximisers. However, while such consumers may make errors of judgement in decision making, the use of ‘fast and frugal’ decision rules can lead to quite ‘reasonable’ or ‘sensible’ paths of action for individuals who are trying to do the best that they can for themselves in the face of limited time and computational ability, cognitive illusions, and problems that are computationally intractable. Thus, there are now three possibilities with respect to the outcomes of consumer decision-making that can be summarised as follows:

**Indicator 9:** For a given market:

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6 People who do not pay by direct debit generally pay more for utilities (National Consumer Council, 2004, ‘Why do the poor pay more … or get less?’, NCC Consultation Pack.)
(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
(ii) when acting under the constraints of bounded rationality, consumers may attain ‘reasonable’ outcomes (one behavioural conclusion);
(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion).

The institutional approach within economics is motivated by the observation that economic actors are socially/culturally embedded and, hence, that factors beyond those described in neoclassical models can influence behaviour. Two strands of this approach are particularly relevant to the notion of consumer empowerment.

The transaction costs model of exchange addresses behaviour in the face of the informational asymmetries that characterise a wide array of real-world transactions. At the heart of the model are two elements. First, there is the observation that positive costs are incurred in undertaking transactions; these include the costs of discovering the valued attributes of various goods and/or of the agents supplying those goods, but also the real or perceived costs of switching to another product. And second, there is the underlying behavioural assumption that incentives must be in place for ‘agents’ to behave in the interests of ‘principals’.

For many transactions, the cost of acquiring all relevant information is so high as to be prohibitive and so consumers (or principals) may defer to agents with specialist expertise for assistance or to undertake transactions on their behalf. Markets that can be characterised in this way include second-hand car sales and various professional/technical services such as appliance repairs and veterinary services. These markets raise the issue of the potential for detriment as a result of opportunistic behaviour, that is, that where there is a divergence of interests, the agent cannot be relied upon to act in the
principal’s best interests. Two hazards associated with opportunistic behaviour are that actions can be hidden (moral hazard) and information can be hidden (adverse selection). For example, a heating engineer may charge the consumer for services that have not been undertaken or for an unnecessary repair (hidden action); or a second-hand car dealer may hide information from a potential consumer about the quality of a car (hidden information).

Indicator 10: Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

The institutional approach draws attention to the way in which many areas of consumption are characterised by habit and/or are the product of social norms and relations rather than rationality. Habit can be treated as the product of a trade-off between the desire for the best possible outcome and the desire to minimise cognitive effort. This being the case, it may be expected that as the complexity/opacity of transactions increases, the gap between the realised outcome and the best possible outcome increases in size. So, for example, in a market characterised by high search and switch costs, and complex tariff structures, the result may be a high level of ‘inertia’ as large numbers of consumers adhere to arrangements that historically may have been adequate to their needs rather than engaging at frequent intervals in a fully deliberative evaluation of whether such arrangements do, indeed, offer the best deal. Moreover, once consumers are ‘locked in’ to an existing set of arrangements by their own inertia, firms' prices become independent of market share; that is, higher prices can be charged to 'old' customers relative to 'new' customers. This might lead to more intense competition to acquire new consumers, from which consumers would benefit. But in some circumstances, which need to be identified on a case by case basis, consumers may be susceptible to poor quality outcomes.
Indicator 11: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

The situation described above raises the question of the distributional implications of a firm being able to differentiate prices between different consumers and/or products. Where such differentials reflect cost differences, total welfare and efficiency are likely to increase, although there will be some distributional consequences. Where firms are able to price discriminate, that is, to charge different prices to consumers who impose similar costs (or enforce similar prices for those imposing different costs), there may also be gains in efficiency, but regulators are reluctant to sanction such discrimination. However, the impact on consumer empowerment is ambiguous, since greater access to the market is achieved for those consumers for whom price falls, while there is the reverse effect on those for whom price rises. Many markets exhibit price discrimination, and in some cases this factor may be relevant, in conjunction with other factors and with consumer characteristics, in determining whether some consumers are disempowered.

Indicator 12: The impact of price discrimination on consumer empowerment in a given market is ambiguous.

Transactions costs (for example, searching and switching costs) can act as a disincentive to engage in the market. One might then say that the lower are transactions costs, the greater is consumer empowerment.

Indicator 13: Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

Institutional economics recognises the role of a range of institutional mechanisms that may potentially support consumer interests. These include formal/'hard' institutional mechanisms (the law and its enforcement agencies) and voluntary organisations (e.g. Citizens' Advice Bureaux), but also 'softer'
institutional mechanisms such as broadly accepted standards of conduct and the conventions to emerge from repeated interactions.

*Indicator 14:* For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

3.0 Summary Discussion
Extrapolating from the analysis above, it can be seen that consumer empowerment has connotations both of the *process* of decision making and of its *outcome:* it captures both the sense of some degree of ‘control’ within the consumption relationship, and of an outcome that is beneficial (the ‘good’ outcome). Both of these ideas can be interpreted either for an individual consumer, or for the consumer body (as relevant in a particular market) as a whole.

It should be noted that where one or more of the above indicators identifies a market as one in which consumers are disempowered, it cannot be assumed that consumers will, as a result, necessarily experience detriment. Indeed, it is possible for disempowered consumers to achieve good outcomes where there is effective regulation; and, conversely, empowered consumers may achieve poor outcomes in the face of coordinated effects on the supply side. Thus, application of the indicators points to those markets in which, as a result of a degree of consumer disempowerment, there is the potential for detriment and for consumers to experience poor quality outcomes in terms of:
- the choice of products available to them;
- the quality of the goods which they buy;
- the prices which they pay;
- and other measures of outcome as appropriate to a given market.

‘Consumer empowerment’ is a slippery concept. Most of us would claim to have an intuitive grasp of the term and yet, hitherto, it has lacked both formal
definition and the specification of theoretically-informed parameters. While it is unlikely that the measurement of consumer empowerment will ever amount to a precise science due to the idiosyncrasies of markets, economic theory can supply some theoretically-driven indicators with empirical 'grip' on consumer empowerment. *Given adequate data*, these indicators can be applied to markets in order to identify those in which consumers are most likely to be empowered and those in which they are most likely to be disempowered.
5 Market Studies

1.0 Introduction
This section summarises the findings of three of our four market case studies: retail banking; personal current accounts; energy; and mobile phone services. In our case study on car repairs and servicing, there was insufficient evidence to make a robust assessment of consumer empowerment in the UK relative to other countries. Our analysis of this market is, however, given in Annexe D of this report, alongside the complete set of findings. The markets selected for study have all been identified by respondents to our questionnaire as raising issues germane to the question of consumer empowerment.

The findings from the market studies complement the findings from the comparative analysis of consumer protection regimes, as follows.

As a broad proposition, when the 14 benchmarking principles (described in Section 2) are met, consumer empowerment can be expected to lead to good quality outcomes for consumers. Thus, when the evidence is set against the benchmarks, a given consumer regime may appear to be effective in protecting consumer interests and enhancing consumer empowerment; for example, consumers may be well provided with relevant information (Principle 4), their interests may be well represented by consumer advocacy groups (Principle 6), and a variety of mechanisms may exist for dealing expeditiously with complaints in the event that problems arise (Principle 7). But an important check on a regime is whether those attributes which appear positive on paper translate into good outcomes for consumers. Our review of the economic literature in Section 4 has enabled us to identify 14 theoretically-driven indicators with empirical ‘grip’ on consumer empowerment and the outcomes it may generate. Given adequate data, these can be applied to markets in order to identify those in which consumers are most likely to be empowered and those in which they are most likely to be disempowered. Thus, market studies supplement and extend Section 3’s comparative analysis of the effectiveness
of the general consumer protection regime by providing an assessment of the particular level of consumer empowerment prevailing in each specific market.

It is important to note that, where one or more indicators identifies a market as one in which consumers are likely to be disempowered, it cannot be assumed that consumers will, as a result, necessarily experience detriment. Indeed, it is possible for disempowered consumers to achieve good outcomes where there is effective regulation; and, conversely, empowered consumers may achieve poor outcomes in the face of coordinated effects on the supply side. Thus, application of the indicators points to those markets where, as a result of a degree of disempowerment, there is the potential for detriment.

In conducting the market studies, we have found that, in some cases, there is a dearth of data (in particular, for the car repairs and servicing sector). Thus, there are some limits on the extent to which cross-country comparisons can be made against all relevant indicators and for all countries individually. We note in this respect that a central finding of the European Commission's 'Consumer Markets Scoreboard'\(^1\) is that "complete, harmonised and comparable data on consumer outcomes are largely absent" and that an important forward task must be to develop such data. This finding underlines a point made in our discussion of benchmarking under Principle 11: the ability to identify and deal with consumer detriment calls in the first instance for evidence against key consumer indicators acquired through systematic monitoring of outcomes.

In summary form, our findings for the three case studies are as follows.

### 2.0 Retail banking: personal current accounts
The market for personal current accounts is characterised by a number of different issues germane to the question of consumer empowerment, and in

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all of the countries under study. In particular, the market is not one in which we are likely to find *fully informed consumers*.

The indicators relevant to the relationship between information and empowerment are as follows:

*Indicator 1*: An empowered consumer is a well informed consumer.

*Indicator 5*: Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

*Indicator 7*: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

*Indicator 11*: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

The market for personal current accounts is characterised by complex tariff structures and a lack of price transparency, making it difficult for consumers to compare products and identify the one which is optimal for them. 'Price' can be comprised of several different fees and charges (account management fees, closing fees, excess borrowing charges, fees for ATM withdrawals and fees for credit transfers), and some banks charge for a package whereas others charge for the different current account transactions separately. Thus, when the evidence is set against Indicators 1, 5, 7 and 11, we may say for all countries that the market environment does not provide for a high level of consumer empowerment. Yet against this backdrop, the UK appears to perform better than most.

*Transparency and switching*

UK consumers benefit from a higher level of price transparency than their counterparts in Canada, Australia, Germany, the US and Denmark. Compared to the UK, the degree of transparency of German bank charges is more limited: information on charges is often not available on banks' websites, and
there is no single source of information on charges. The level of transparency in Australia is mixed: while most fees are disclosed, the complexity of products and charging structures is not matched by clear explanations of when certain charges apply. In the case of Canada, despite the complexity of the product offerings from some banks, there is a high level of transparency of fees and charges, enabling consumers to work out in advance what type of account may be optimal for them. In the US, limited price data is available from the websites of banks and credit unions, although this is often made available by telephone when requested. In Denmark, consumers find it particularly difficult to assess and compare bank products: even if a consumer can identify their needs, finding the bank with the best price-quality combination is not likely to be easy.

One facet of the costs of running a current account which may elude consumers is 'float'; this occurs when money reaches the beneficiary's account some time after it leaves the paying customer's account. The Office of Fair Trading estimates that the cost for consumers in terms of float interest is £30 million per year.\(^2\) In the UK, the revised Banking Code effective from 2003 provides for the first time that financial institutions will inform customers of the length of the clearing cycle, which should improve the level of transparency in this regard. However, it is not clear to what extent the lack of transparency with respect to float is a feature of the market in countries other than the UK.

With respect to switching, the UK performs less well, with a lower level of switching activity than Germany, Denmark and Spain.

Switching current accounts can be a complex operation for consumers imposing a costly administrative burden arising from: filling in the necessary forms for opening a new account and closing the old one, transferring balances, transferring direct debits, and setting up payment instructions. In addition, there is the risk that direct debits or other transactions may be lost in


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the process. Given this burden, together with the widespread complexity of tariffs and lack of transparency in pricing, it is not surprising to find that account switching in the European Member States is extremely limited: data suggest that in the majority of Member States, annual switching rates for current accounts are low and stable at five to ten per cent per year. However, evidence on the level of switching by itself is difficult to interpret: a low level of switching may be a reflection of high consumer satisfaction rates; but it may indicate high real/perceived costs to searching and switching and/or a poor awareness of alternative suppliers.

UK consumers tend not to shop around much before choosing a current account supplier. Then, once a supplier has been chosen, the consumer will typically hold it for a long period of time, the median in a sample surveyed being 11.1 years. Similarly, in Denmark, most consumers do not seem to move their banks accounts; this may be due to customer loyalty and locational convenience, but it may indicate that the perceived costs of doing so outweigh the perceived benefits: switching banks is seen by Danish consumers as complicated, time-consuming, and with possible disruptions to payment activities. In Australia, approximately 50% of consumers surveyed mentioned being worried about security as a reason for not switching to online banking channels.

Three practices are understood to exacerbate the low level of switching in the market for personal current accounts.

First, there is evidence that many of the leading banks in the European Member States practice 'product tying'; that is, consumers are forced to buy one or more extra products in order to secure their desired product (for example, access to a loan/mortgage may require consumers to sign up for a

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4 Cruikshank D, 2000, 'Review of Banking Services in the UK'. Available at: www.hm-treasury.gov.uk/documents/financial_services/banking/bankreview
current account with the same supplier). This practice can exacerbate the difficulty for consumers of comparing suppliers and identifying whether or not a switch would be advantageous. Moreover, the practice results in consumers being locked in to a particular supplier and becoming vulnerable to being charged higher prices than those offered to new consumers.

Second, the largest Danish banks make use of the related practice of 'product bundling'. This involves wrapping current accounts, pension insurance and mortgage or other loans into one package, where the price of the bundle is less than the total price of its component parts were they to be purchased separately. Bundled products may also be separately available, and there is no compulsion to buy them (which distinguishes bundling from tying), but, again, the effect it to make it difficult for consumers to compare prices and to reduce consumer mobility.

A third practice, related to the above, is cross-subsidisation of products that are tied or bundled together. Thus, suppliers can exploit myopic consumers through marketing schemes that advertise the virtues of their accounts but which shroud the high prices of add-ons, such as bounced cheque fees and ATM usage fees.

A further factor which may be affecting switching behaviour, given the complexity of tariff structures, is the cognitive skill base of consumers and the level of their financial sophistication. Where consumers are limited in computational ability, the capacity to identify the optimal product is restricted, particularly where the parameters of decision making are complex.

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6 European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.
7 Banks are concerned with both consumer retention and consumer acquisition, but the latter has tended to dominate in the UK, which is why new customers often receive more favourable prices and conditions than existing customers (Farquhar & Panther, 2008).
8 More generally, it may be the case that consumers have good reasons for wanting bundled or tied products, even when the prices of individual components are less visible as a result. For example, one could buy an 'unbundled' car component by component, but it will then be more difficult to compare prices between end results from different options. Thus, it is not a general principle that bundling/tying necessarily works against the consumer interest.
Choice
The indicators relevant to the relationship between choice and empowerment are as follows:

Indicator 2: Where a choice set exists, the consumer is empowered if:
(i) the choice set includes the 'good' quality outcome;
(ii) the options are 'reasonably' far apart in product characteristic space (that is, in a market where differentiation is important, they are sufficiently different from one another); and
(iii) there is the choice not to engage in a transaction.

UK consumers benefit from amongst the broadest range of services, with relatively easy and cheap access to overdrafts and to cash overseas using debit cards. Although US and UK consumers may incur similar levels of costs, UK consumers arguably receive greater benefits. The fees on UK current accounts, and the total consumer costs of using current accounts, are consistently among the lowest when compared to those prevailing in Australia, Canada, France, Finland, Germany, Ireland, Italy, the Netherlands, Sweden and the US.

The extent to which consumers are failing to attain good outcomes might be given by level of complaints. But the evidence for the UK is difficult to interpret. UK consumers tend to complain more than their counterparts in Germany, Denmark and Spain, but it is not clear if this is, indeed, due to a poorer product, and/or if it signals more awareness of complaint mechanisms and greater confidence in using them (and, hence, greater empowerment).

Low-income/vulnerable consumers
The market for personal current accounts is deemed to be essential for social and economic inclusion and, hence, there are potential concerns with respect to the level of access of low-income/vulnerable consumers. The relevant indicators under this heading are:
Indicator 6: A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

Indicator 8: The level of consumer empowerment in a market may be defined by reference to one or more other markets.

The UK performs better than Denmark, Germany and Spain in terms of the proportion of consumers who perceive a current account to be affordable.

Consumers living in rural locations can be disadvantaged with respect to access to the market, particularly if transport is an issue. At least two UK banks offer mobile banking services for consumers in remote rural areas, although the extent of their geographic coverage is not clear. No comparative data is available for other countries in this respect.

Other groups of consumers identified by respondents to our own survey as potentially vulnerable in relation to the market for current accounts include immigrants and the elderly in Denmark, and consumers with limited literacy and numeracy in the UK. There is insufficient evidence to conduct a cross-country comparison in this regard. But we note that the UK’s Financial Services Authority has devised a programme to develop financial capability amongst UK consumers, which includes the provision of education and advice in schools, higher education organisation, organisations that help the young and often excluded adults, and the workplace.

Institutional support for consumers
UK consumers appear to be reasonably well supported by institutional mechanisms. There is evidence to suggest that the UK’s Financial Ombudsman Service is a source of consumer empowerment. The Financial Ombudsman Service itself reports in their Annual Review for the financial year 2006–2007 that they have resolved 111,673 cases of which 94% were settled informally, without the need for formal ombudsman decisions (the data relate to all complaints addressed to them and not just banking-related cases). Moreover, they report a 20% increase in the number of people visiting their
website compared to the previous year, which suggests improved awareness of the service on offer. Further information is required in order to evaluate the level of consumer empowerment afforded by the wider range of redress mechanisms for each country. However, we note that the UK has a higher proportion of consumers than Denmark, Germany and Spain who perceive their interests to be ‘very well’ or ‘fairly well’ protected.

Summary conclusions: the market for personal current accounts
In summary, our investigation of the level of consumer empowerment in the market for personal current accounts points to a mixed picture for UK consumers. This is a market characterised by a number of different issues germane to the question of consumer empowerment – and in all of the countries under study. But against this backdrop, the UK appears to perform better than most.
### Table 5.1: Summary findings from market studies: Personal current accounts

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Market characteristics</th>
<th>Cross-country comparisons</th>
</tr>
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<tbody>
<tr>
<td>Indicator 1: An empowered consumer is a well informed consumer.</td>
<td>A market which is informationally and cognitively demanding, characterised by complex tariff structures and a lack of price transparency, making it difficult for consumers to compare products and identify the one which is optimal for them.</td>
<td>(i) Transparency: UK consumers benefit from a higher level of transparency than in Canada, Australia, Germany, the US and Denmark.</td>
</tr>
<tr>
<td>Indicator 5: Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.</td>
<td>(ii) Switching: The UK has a lower level of switching activity than Germany, Denmark and Spain.</td>
<td></td>
</tr>
<tr>
<td>Indicator 7: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.</td>
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<tr>
<td>Indicator 9: For a given market: (i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption); (ii) when acting under the constraints of bounded rationality, consumers may attain ‘reasonable’ outcomes (one behavioural conclusion); (iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural</td>
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**Conclusion.**

**Indicator 11:** As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:

(i) the choice set includes the 'good' quality outcome;

(ii) the options are 'reasonably' far apart in product characteristic space (that is, in a market where differentiation is important, they are sufficiently different from one another); and

(iii) there is the choice not to engage in a transaction.

A wide choice of products is available in all seven countries, although the lack of transparency means it may be difficult for consumers to identify the 'right' product. The choice not to engage in a transaction may be impeded by consumer lock-in.

(i) **Choice:**

Insufficient information for cross-country comparison. However, UK consumers benefit from amongst the broadest range of services, with relatively easy and cheap access to overdrafts and to cash overseas using debit cards. Although US and UK consumers may incur similar levels of costs, UK consumers arguably receive greater benefits. UK consumers also seem to be reasonably well supported by institutional mechanisms.

(ii) **Complaints**

UK consumers tend to complain more than their counterparts in Germany, Denmark and Spain – although it is not clear if this is due to greater confidence and awareness of complaint mechanisms and/or a poorer product.

**Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

Large established suppliers have been able to sustain an advantage over new and smaller rivals. But there is no evidence to suggest that monopoly power is being exploited.

Insufficient information for cross-country comparison

**Indicator 6:** A consumer, or group of consumers, is/are A market which is essential for participation in society

(i) **Perceptions of affordability:**

The UK performs better than Denmark, Germany and Spain in terms of
disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

**Indicator 8:** The level of consumer empowerment in a market may be defined by reference to one or more other markets.

and, hence, where there are potential concerns with respect to low-income/vulnerable consumers.

Consumers in rural locations can be disadvantaged, particularly if transport is an issue.

**Indicator 10:** Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

Asymmetric information is potentially an issue.

**Indicator 12:** The impact of price discrimination on consumer empowerment in a given market is ambiguous.

There is the potential for ‘old’ customers to be denied access to the advantageous terms offered to ‘new’ customers.

**Indicator 13:** Consumer [dis]empowerment is greater the [higher] lower are transaction costs.

Real and/or perceived search and switching costs raise issues for consumers

**Indicator 14:** For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

(i) Perceptions of the level of protection:

The UK has a higher proportion of consumers than Denmark, Germany and Spain who perceive their interests to be well protected.

UK consumers appear reasonably well supported by institutional mechanisms but there is insufficient information for cross-country comparison.
3.0 Energy  
*Supply side issues*

Consumer empowerment in the UK energy market appears to be among the highest, matched only by some parts of Australia. Compared with other comparator Europeans, UK consumers have more choice between suppliers and tariffs; their satisfaction levels are at the level of the average for the European Union, they make more complaints, but are just as well satisfied with how their complaints are dealt with. However, this is a market in which a reasonable level of consumer empowerment may to some extent be offset by supply side issues. Many comparator countries retain (formal or informal) retail regulation. Where this is removed, as in the UK, consumer activity is crucial in overcoming incumbent power, but it cannot address a softening of competition, if suppliers choose not to compete vigorously in the market. Such behaviour requires vigilance and possible intervention by the authorities to exercise their general competition powers in this, as in other markets. The pertinent indicator in this regard is Indicator 3:

*Indicator 3:* The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

When the evidence is set against Indicator 3, it is not obvious that a UK consumer who is free to choose from several suppliers is necessarily more empowered than one who buys in a regulated market. It depends on whether regulation or competition provides a better protection against market power, which in turn depends on how good the competition, as compared with regulation, is in constraining companies’ actions. The current enquiry by the UK energy regulator into these issues, albeit, after some public and political pressure, provides comfort that the institutions are prepared to investigate and, if necessary remedy, the possible existence and effects of lackadaisical competition in the energy market. Given this regulatory activity under general competition law, and their greater degree of choice, consumers in the UK seem to be at least as empowered as those in other, more explicitly protected, markets.
Choice

Indicator 1: An empowered consumer is a well informed consumer.

Indicator 2: Where a choice set exists, the consumer is empowered if: the choice set includes the 'good' quality outcome.

Indicator 5: Markets that are informationally demanding leave consumers exposed to poor quality outcomes.

Indicator 7: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

Indicator 11: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

Indicator 13: Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

In terms of the choices which consumers can exercise in a competitive market, consumers can obtain full information, including a 'good outcome' for them, through comparison websites (since energy is homogeneous it is only price, and perhaps service, which are relevant for choice). Questions about the quality of information provided are addressed in the UK by a confidence code approval scheme; while the existence of competitive commercial sites may confuse consumers, competition among them should bring them to consumers' attention. Thus while the reliability of information (and more importantly the consumers’ trust of it) may be less good than if provided by a public authority as in some other countries, consumers are more likely to be aware of their existence and function.

There is some evidence that consumers may not be achieving the best possible outcomes for themselves in the competitive UK market, but there are not comparable studies from other countries to suggest that the situation is
worse in the UK than elsewhere. The provision of information in well publicised and well trusted forms is the best remedy for this problem.

*Low-income/vulnerable consumers*

*Indicator 6:* A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

*Indicator 12:* The impact of price discrimination on consumer empowerment in a given market is ambiguous.

Although energy is not generally regarded as a merit good in the sense that it generates benefits for those who are not immediate consumers, it is the focus of considerable policy attention because it is seen as a basic necessity. There are concerns in all countries about the effect of sharp increases in price levels, or removal of cross subsidies (price discrimination) which may adversely affect low income households and their ability to consume sufficient energy. More UK consumers believe that energy is affordable than their counterparts in other European countries. There is considerable publicity and campaigning about the problems of fuel poverty, and the UK government has threatened to mandate social tariffs if the industry is unable or unwilling to provide these adequately on a voluntary basis.

*Institutional support for consumers*

*Indicator 14:* For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

There are a variety of statutory and other institutions in energy markets in all the countries considered. The UK retains an energy sector regulator who has monitored the market, and intervened more formally, sometimes after pressure from less formal institutions. Of the interventions cited by respondents to the questionnaire, the only ones judged to have been completely effective are in the UK (comparison websites and media pressure). Support for energy consumers from UK institutions, both statutory and
voluntary, therefore seems to be at least as good as those of the comparator countries.

**Summary conclusions: the market for energy**

UK energy consumers are expected to take a more active role in energy markets than those who are protected by continuing regulated prices. Concerns remain about the effect of high prices on vulnerable consumers; and this discussion has not addressed whether the outcome (for all consumers or for individuals) is necessarily better than in a regulated market. Compared with their counterparts in Europe, UK consumers have more choice between energy suppliers and tariffs; they have average satisfaction levels, make more complaints, but are just as well satisfied with how their complaints are dealt with. More believe that their energy is affordable. Their decision making is supported by an appropriate range of information and institutions. On this basis, their empowerment in this market is among the highest, matched only by some parts of Australia.
Table 5.2: Summary findings from market studies: Energy

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Market characteristics</th>
<th>Cross-country comparisons</th>
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<tbody>
<tr>
<td>Indicator 3: The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.</td>
<td>A market in which there has been some new entry following liberalisation but where there is the potential for unilateral or multilateral market power.</td>
<td>Given the level of regulatory activity under general competition law, consumers in the UK should be as empowered as those in other more explicitly protected markets.</td>
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</table>

**Indicator 1:** An empowered consumer is a well informed consumer.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:
(i) the choice set includes the 'good' quality outcome.

**Indicator 5:** Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

**Indicator 7:** A consumer, or group of consumers, is disempowered if they are unable to access information relevant to the purchase of goods.

**Indicator 11:** As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely

Price comparison websites are widely available – although there may be issues relating to the quality of the information where these are commercial sites, as in the UK.

Some evidence that UK consumers may not be achieving the best possible outcomes, but there are not comparable studies from other countries to suggest that the situation is worse in the UK than elsewhere.
to increase.

**Indicator 13:** Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

<table>
<thead>
<tr>
<th>Indicator 6: A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.</th>
</tr>
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<tbody>
<tr>
<td>A market which is the focus of considerable policy attention because energy is seen as a basic necessity.</td>
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<tr>
<td>More UK consumers believe energy is affordable than their counterparts in other European countries. There is considerable publicity and campaigning about the problems of fuel poverty, and the UK government has threatened to mandate social tariffs if the industry is unable or unwilling to provide these adequately on a voluntary basis.</td>
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<tr>
<th>Indicator 12: The impact of price discrimination on consumer empowerment in a given market is ambiguous.</th>
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<tbody>
<tr>
<td>Concerns in all countries about the sharp increases in price levels, or removal of cross-subsidies (price discrimination) which may adversely affect low-income households and their ability to consume energy.</td>
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</table>

<table>
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<tr>
<th>Indicator 14: For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.</th>
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<tr>
<td>There are a variety of statutory and other institutions in energy markets in all the countries considered.</td>
</tr>
<tr>
<td>The UK retains an energy sector regulator who has monitored the market, and intervened more formally, sometimes after pressure from less formal institutions. Support for energy consumers from UK institutions, both statutory and voluntary, seems to be at least as good as that of comparator countries.</td>
</tr>
</tbody>
</table>
4.0 Mobile phone services
Data on the European countries amongst our comparators suggest that the market for mobile phone services shares several characteristics with the market for personal current accounts. In particular, this is not a market in which we are likely to find fully informed consumers because of the complexity and lack of transparency attached to tariff structures, and little standardisation in the specification of tariffs. To add to the complexity, mobile phone services may be supplied in a bundle with fixed-line telephony services, broadband and/or digital television services. As we observe in our discussion of personal current accounts, when several products are bundled together, product comparison becomes difficult. Moreover, there is the potential for unsophisticated consumers to only compare the price of the one of the goods in the bundle (the 'base' good) across suppliers, instead of comparing total prices; under these conditions, suppliers have an incentive to obscure the (less competitive) prices of other products in the bundle.¹

The indicators pertinent to the relationship between information and empowerment are as follows:

*Indicator 1:* An empowered consumer is a well informed consumer.

*Indicator 5:* Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

*Indicator 7:* A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

*Indicator 11:* As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

Transparency and switching

The evidence suggests that, in the case of the European countries, the market environment does not provide for a high level of consumer empowerment. But against this backdrop, UK consumers would appear to be more empowered than many of their counterparts. Thus, UK consumers are more empowered than their counterparts in Spain, Germany and Denmark in terms of how easy they find it to compare products, with Danish consumers finding it particularly difficult to compare products. And they are at least as empowered as their counterparts in Spain, Germany and Denmark with respect to how easy they find it to switch supplier.

Choice

Indicator 2: Where a choice set exists, the consumer is empowered if:

(i) the choice set includes the 'good' quality outcome;

(ii) the options are 'reasonably' far apart in product characteristic space (that is, in a market where differentiation is important, they are sufficiently different from one another); and

(iii) there is the choice not to engage in a transaction.

UK consumers are reasonably well served with respect to choice of operator and they have the advantage of a more diversified market than exists in some comparator countries. This may account for the lower call charges in the UK compared to those in comparator countries. The complexity of tariffs may act against the ability of consumers to identify the optimum package. But there is no reason to suppose that UK consumers are less empowered in this regard than consumers in comparator countries.

UK consumers are more satisfied with the market than their counterparts in Germany and Denmark, but less so than those in Spain. They tend to make more complaints than their counterparts elsewhere in Europe – although, as we have observed before, it is not clear if this is due to greater confidence and awareness of complaint mechanisms and/or a poorer product.
Issues of market power

Indicator 3: The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

While there is no evidence to suggest that suppliers are able to exercise market power to the detriment of consumers in any of the countries under study, we note that prices may be more transparent to suppliers than they are to consumers and, hence, that there is the potential for collusion. Significant multimarket contact may give further cause for concern since it is an important factor in explaining non-competitive prices.

As we have already observed, the UK market for mobile phones is more diversified when compared with most of the other countries. Moreover, UK consumers benefit from the presence of a national regulator, which would appear to be pro-active in defending consumer interests. On these grounds, it can be argued that UK consumers are at least as empowered as those in comparator countries.

Low income/vulnerable consumers

Indicator 6: A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

Indicator 8: The level of consumer empowerment may be defined by reference to one or more other markets.

Indicator 12: The impact of price discrimination on consumer empowerment in a given market is ambiguous.

It can be argued that telephony (whether fixed-line or mobile) constitutes an essential service on the grounds of social and economic inclusion.\(^2\) However, very high levels of market penetration across all seven countries would suggest that access is not a major issue for consumers. The UK performs better than Denmark, Germany and Spain with respect to consumer empowerment.

\(^2\) In support of this view, the European Commission includes telephony in the category of ‘services of general interest’; these are goods and services that should be widely available to consumers in good quality and at affordable prices (European Commission, Europa website glossary: http://europa.eu/scadplus/glossary/general_interest_services_en.htm)
perceptions of affordability, suggesting that UK consumers are reasonably empowered in this regard. There is an issue of whether low-income consumers gain access to the market on less favourable terms; but there is insufficient data to evaluate the size of the problem and to make cross-country comparisons.

A striking feature of this market is the level of engagement by children and young adults who may be making daily use of mobile phones. One Canadian and one Spanish respondent to our survey pointed to young consumers as constituting a group which is particularly prone to detriment with respect to their transactions in the market for mobile phone services. At issue is the potential for over-consumption and access to inappropriate content. However, insufficient information is available to evaluate the size of any detriment and to make cross-country comparisons.

Indicator 13: Consumer [dis] empowerment is greater the [higher] lower are transaction costs.

Search/switching costs are an issue in this market, given the complexity of tariffs and the lack of standardisation and, on these grounds, it can be argued that consumer empowerment is impaired in this respect.

Institutional support for consumers

Indicator 14: For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

All European consumers stand to benefit from interventions in the market by the European Commission (for example, in curbing roaming charges). However, the UK performs better than Denmark, Germany and Spain with respect to consumer perceptions of how well their interests are protected. And the UK performs better than Spain, Germany and Denmark with respect to how well complaints are handled. On these grounds, it can be argued that UK
consumers are more empowered than consumers in these three other countries.

*Summary conclusions: the market for mobile phone services*

The market for mobile phone services is characterised by factors which work against consumer empowerment – and in all seven comparator countries. But where we have been able to make comparisons, UK consumers would appear to be at least as empowered as consumers in other countries against most of our indicators. The UK performs less well with respect to the level of consumer satisfaction with the market. UK consumers tend to make more complaints in this market compared to their counterparts, which might be indicative of confident, active market participants – or it may signal that there is more to complain about.
### Table 5.3: Summary findings from market studies: Mobile phone services

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Market characteristics</th>
<th>Cross-country comparisons</th>
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<tbody>
<tr>
<td>Indicator 1: An empowered consumer is a well informed consumer.</td>
<td>A market characterised by the complexity and lack of transparency attached to tariff structures, making it difficult for consumers to compare products and identify the optimum package.</td>
<td>(i) <strong>Transparency:</strong> UK consumers are more empowered than their counterparts in Spain, Germany and Denmark in terms of how easy they find it to compare products.</td>
</tr>
<tr>
<td>Indicator 5: Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.</td>
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<td>(ii) <strong>Switching:</strong> UK consumers are at least as empowered as their counterparts in Spain, Germany and Denmark with respect to how easy they find it to switch supplier.</td>
</tr>
<tr>
<td>Indicator 7: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.</td>
<td></td>
<td></td>
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<tr>
<td>Indicator 9: For a given market:</td>
<td></td>
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</tr>
<tr>
<td>(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii) when acting under the constraints of bounded rationality, consumers may attain ‘reasonable’ outcomes (one behavioural conclusion);</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural</td>
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Conclusion).

**Indicator 11:** As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:
(i) the choice set includes the 'good' quality outcome;
(ii) the options are 'reasonably' far apart in product characteristic space (that is, in a market where differentiation is important, they are sufficiently different from one another); and
(iii) there is the choice not to engage in a transaction.

**(i) Choice:**
UK consumers are reasonably well served with respect to choice of operator and they have the advantage of a more diversified market than exists is some comparator countries. This may account for the lower call charges in the UK set against those in comparator countries. The complexity of tariffs may act against the ability of consumers to identify the optimum package. But there is no reason to suppose that UK consumers are less empowered in this regard than consumers in comparator countries.

**(ii) Satisfaction/complaints**
UK consumers are more satisfied with the market than their counterparts in Germany and Denmark, but less so than those in Spain. They tend to be more inclined to make complaints than their counterparts elsewhere in Europe - although it is not clear if this is due to greater confidence and awareness of complaint mechanisms and/or a poorer product.

**Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

- Prices may be more transparent to suppliers than they are to consumers and, hence, there is the potential for collusion.
- No evidence to suggest that suppliers are able to exercise market power to the detriment of consumers.
**Indicator 6:** A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

**Indicator 8:** The level of consumer empowerment in a market may be defined by reference to one or more other markets.

**Indicator 4:** Under certain clearly specified conditions, the ‘good’ outcome is realised by imposing restrictions on what can be supplied to consumers.

Telephony constitutes an essential service on the grounds of social and economic inclusion.

There is a potential issue of whether low-income consumers gain access to the market on less favourable terms. Daily use of mobile phones by minors raises the issues of the potential for over-consumption and access to inappropriate content.

High levels of market penetration across all seven countries suggest that access is not a major issue for consumers.

**(i) Perceptions of affordability:**
The UK performs better than Denmark, Germany and Spain with respect to consumer perceptions of affordability.

**(ii) Low income consumers:**
Insufficient information to evaluate the size of any detriment and to make cross-country comparison.

Insufficient information to evaluate the size of any detriment and to make cross-country comparison

**Indicator 12:** The impact of price discrimination on consumer empowerment in a given market is ambiguous.

There is a potential issue of whether low-income consumers gain access to the market on less favourable terms.

Insufficient information to evaluate the size of any detriment and to make cross-country comparison

**Indicator 13:** Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

Real and/or perceived search and switching costs raise issues for consumers, given the complexity of tariffs and the lack of standardisation.

Consumer empowerment may be expected to be impaired by search and switching costs; but there is insufficient information to make cross-country comparison beyond the observation (as above) that UK consumers are at least as empowered as their counterparts in Spain, Germany and Denmark with respect to how easy they find it to switch supplier.

All European consumers stand to benefit from interventions by the European Commission on roaming charges.

The UK performs better than European comparator countries with
both formal and informal institutions serving consumer interests.

respect to consumer perceptions of how well their interests are protected.

The UK performs better than Spain, Germany and Denmark with respect to how well complaints are handled.
Annexe A Benchmarking consumer empowerment regimes

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4.0 Vulnerable and disadvantaged consumers
1.0 Introduction
In this section – building upon our definition of consumer empowerment in Section 1 – we present the principles against which we will consider the effectiveness of the UK’s consumer empowerment regime. These principles were devised by drawing upon a wide range of academic and policy literature in the area, and were finalised following a workshop attended by academics and policy experts (including representatives from BERR).

Our starting point was to think about broad level principles, which included the following:

- **Transparency** (to both firms and consumers), in respect of rights and duties, and institutions, including the provision of advice and information and redress mechanisms;
- **Proportionality**, in respect of both procedures and penalties;
- **Efficiency**, in respect of enforcement costs, complaints-handling, and resolution of complaints;
- **Effectiveness**, focusing on deterrence, the targeting of resources, the need for interventions to deal with systemic market issues, and institutional coherence;
- **Accessibility**, in particular in relation to information and advice provision; and
- **Accountability and responsiveness**, the need for participation of consumers (through consumer advocacy mechanisms), clear standards and targets of performance, and the need to measure outcomes.

With our consumer empowerment concept to hand, and drilling down into the literature, we have more tightly defined these principles as follows:

- Principle 1: Consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels.
- Principle 2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the
responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.

- Principle 3: Consumer advice channels should be accessible, strongly branded and based on the one-stop shop principle.
- Principle 4: The provision of information is an important plank of consumer empowerment. Appropriate information should be presented to consumers in a clear and accessible manner.
- Principle 5: Consumer education aimed at raising consumer market skills may make an important contribution to the empowerment of consumers.
- Principle 6: The provision of strong consumer advocacy groups can ensure the representation of consumer interests in policy formulation and the setting of agency priorities.
- Principle 7: ADR mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.
- Principle 8: Provision should be made for flexible and expedited small claims procedures (although ADR mechanisms may fulfil this role).
- Principle 9: Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counterbalance weak public enforcement. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.
- Principle 10: Administrative enforcement has an important role by correcting for the under-use of redress mechanisms. Penalties should be used to change the behaviour of the offender, and should be transparent, proportionate and fair. Enforcement agencies should have a hierarchy of sanctions, with the ability to escalate sanctions in the face of non-compliance by firms.
- Principle 11: Enforcement resources should be targeted appropriately. Transparency both in terms of enforcement policy and in terms of
monitoring outcomes can increase both compliance and the efficient use of enforcement resources.

- Principle 12: The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets.
- Principle 13: In a multiple-agency setting, mechanisms should be in place to ensure that there is coordination and consistency of approach.
- Principle 14: Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.

These principles are presented as conclusions throughout the literature review which follows.

The issue of vulnerable and disadvantaged consumers, and how consumer laws should protect such consumers is discussed in section 4. As we conclude there, there are potential problems in designing a consumer regime specifically to meet the needs of the disadvantaged, in particular the danger of over-intervention. Nevertheless, a regime which is designed to support consumer empowerment will often possess features which benefit these consumers in particular.

2.0 An empowered consumer is an informed consumer who has access to appropriately designed advice and redress mechanisms

In this section we focus on the following:

- the nature and extent of consumer rights;
- the delivery of consumer advice;
- the provision of information to assist consumers in transacting with firms;
- the provision of consumer advocacy mechanisms; and
- the potential role of consumer education.
2.1 The legislative framework for consumer rights

The legal framework of the consumer regime in a country can be thought of as the backbone of its consumer empowerment. Although the existence of consumer rights and corresponding duties on firms in a country do not automatically mean that consumers are empowered, the absence of such rights and duties would strongly suggest that consumers are not empowered. Thus, the duties imposed on firms for the purpose of protecting consumers and the rights enjoyed by consumers constitute the starting point of consumer empowerment.

In this section we consider the issue of transparency of consumers’ substantive rights. In the 2003 benchmarking exercise, the DTI concluded that the UK’s consumer protection could be improved by the adoption of a broad duty on firms to trade fairly. This raises issues over the optimal design of rules. In a seminal work on rule design, Diver posits three “dimensions” of rule precision:\(^1\)

“A rational rulemaker will... be attentive to the probable effect of his choice of word upon the rule’s intended audience. First, he will want to use words with well defined and universally accepted meaning within the relevant community. I refer to this quality as ‘transparency’. Second, the rulemaker will want his rule to be ‘accessible’ to its intended audience – this is, applicable to concrete situations without excessive difficulty or effort. Finally, of course, a policymaker will care about whether the substantive content of the message communicated in his words produces the desired behaviour. The rule should, in other words, be ‘congruent’ with the underlying policy objective.”

As he recognises, the three dimensions are achieved in different ways, and there may well be inherent trade-offs in the design of an optimal rule. In the consumer protection context, for example, the imposition of a broad duty to trade fairly may promote congruence, in so far as it allows for flexibility in interpretation and application. This may well be at the expense of transparency and accessibility, especially where there is a lack of case law: firms may be uncertain about the precise requirements of the rule and risks of

litigation may be increased (relative to more prescriptive rules) deterring consumers from enforcing their rights. Furthermore, in the private law context, where considerable discretion is left in the hands of the court, questions over congruence may be raised if the court lacks sufficient expertise. From the perspective of consumers, so long as consumers’ rights are not transparent, they will not be accessible by consumers. In turn, having rights that are not accessible can be tantamount to not having any rights at all. Therefore, for consumer empowerment, not only should consumers have the necessary rights, but they should also be aware of these rights and be able to access these rights when they need to. For this reason, awareness does not have to exist before or at the time of the accrual of the cause of action, but can be ex post.

**Principle 1: Consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels.**

The EC *Unfair Commercial Practices Directive* brings with it a duty on firms to trade fairly, prohibiting all unfair business-to-consumer commercial practices, and with the transposition of the Directive this duty has been introduced to UK law which until now has mainly been based on the imposition of more specific duties on firms. Such a general duty to trade fairly brings forth the necessity to make a trade-off between transparency/certainty and flexibility. Whether a duty to trade fairly results in increased transparency, or is more likely to lead increased transparency, depends upon whether there is an alignment of the consumers’ understanding of what is fair with that of the court/agency enforcing the provision.

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2 This may be the case in particular where little is known about consumer behaviour.
One of the criticisms of such general clauses is that they are ambiguous and leave consumers and traders uncertain as to the content of the obligations.\textsuperscript{4} It has, however, been suggested that the importance of the actual wording of the general clause should not be overstated, so long as there is a catch-all provision to which the authority can refer, at least as a last resort.\textsuperscript{5} The use of general, abstract terms opens a wide scope of interpretation to the courts whereby a system of case-law evolves.\textsuperscript{6} Whereas more specific doctrines tend towards calculability, more general doctrines tend toward flexibility.\textsuperscript{7} Where a legal regime relies on an overarching general standard or a mix of that with more specific doctrines, it is easier for litigants to bring forward novel claims or defences and for judges to handle such points compared to a regime relying on specific doctrines only.\textsuperscript{8} The dominant objection to adopting general flexible standards is that these would be too vague and uncertain to assist those who are subject to them to organise their dealing in accordance with their requirements.\textsuperscript{9} On the other hand, it is recognised that the law needs to avoid becoming too rigid in its rules and remain sufficiently flexible to respond to changing needs and situations.\textsuperscript{10} Thus, a balance needs to be struck between certainty and flexibility and the difficulty lies in achieving this balance.\textsuperscript{11}

Whilst a general standard covers a vast array of different situations, minimises the risk of creating loopholes and allows the law to be applied in accordance

\textsuperscript{8} Bradgate Brownsword and Twigg-Flesner (n 7) 15.
\textsuperscript{9} Bradgate Brownsword and Twigg-Flesner (n 7) 66.
\textsuperscript{10} Bradgate Brownsword and Twigg-Flesner (n 7) 66.
\textsuperscript{11} Bradgate Brownsword and Twigg-Flesner (n 7) 66.
with the perceived merits or justice of the case, the flexibility of a general standard is in a way its disadvantage as well.\textsuperscript{12} Moreover, with such a duty, it becomes particularly important who enforces the duty since if it is enforced only by private parties - for example by competitors - in civil disputes, then this may lead to strategic exploitation without bringing with it the possible benefits of public agency-based enforcement. Possible benefits of public enforcement in this sense can be the clarification of the nature and scope of the duty both by enforcement and by \textit{ex ante} guidance.

The general standard may positively impact the awareness of consumers and work to encourage them to pursue the perceived breaches of their rights. This is because knowing that there exists a general duty not to trade unfairly on the part of the firms is perhaps much easier for consumers to become aware of than a set of piecemeal legislation with many specific duties. For jurisdictions such as that of the UK, it has been found to be extremely difficult for consumers to have a detailed knowledge of their rights in different circumstances as consumer law is highly dispersed.\textsuperscript{13} In such circumstances, there may be an advantage to a general duty against more specific duties.\textsuperscript{14} Even though the scope of the general duty may be unclear and vague, the average consumer may have a perception of what is ‘unfair’ and what is ‘fair’ which could lead her to pursue a claim that she might not otherwise pursue due to her lack of knowledge of a specific duty. Whether or not the claim will be successful would of course depend on the legal interpretation of the general duty, but from the consumer’s viewpoint, a general duty may actually increase the transparency of the regime, in contrast to the firm’s viewpoint. The efficiency and effectiveness of the outcome would then depend on how closely the average consumer’s perception of ‘(un)fairness’ aligns with that of the court’s. When this is more likely the case than not, a general duty to trade fairly may enhance consumer empowerment to the extent that the possible

\textsuperscript{12} Bradgate Brownsworth and Twigg-Flesner (n 7) 66-67. Hence, a general clause merely delegates the law-making power to the decision-maker with no guarantee that the objective will be pursued (H Collins ‘EC Regulation of Unfair Commercial Practices’ in H Collins (ed) \textit{The Forthcoming EC Directive on Unfair Commercial Practices} (Kluwer Law International The Hague 2004) 26).


\textsuperscript{14} DTI Report (n 13) 28.
disincentives it gives rise to in firms’ arranging their businesses are outweighed by the benefits to consumers as a result of increasing their awareness of their rights. Thus, the overall effect of such a general duty is likely to depend on many factors and is to a considerable extent impossible to foresee before the adoption and implementation of it.

Principle 2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.

2.2 Empowering consumers: Information, advice, education and advocacy

In this section we consider the importance of accessible consumer advice channels, the provision of appropriate consumer information, the role of consumer advocacy, and the importance of consumer education.

2.2.1 Accessibility of information and advice

In respect of the financial services sector, Wallis has argued that the main barriers (both perceived and actual) to consumers obtaining advice could be ameliorated by: providing consumers with strongly-branded, clearly identified and trustworthy sources of advice, as well as ensuring that information was presented in a language which was readily accessible.\(^{15}\) With consumers having differing needs and expectations, it was recognised that “no single delivery channel will reach all”\(^ {16}\).

\(^{15}\) V Wallis Advice and the best way of delivering it (FSA London 2005), 9. This applied not only to agencies but to private sector bodies as well, for example, financial advisers.

\(^{16}\) Wallis (n 15) 11.
Despite the fact that many commentators are of the view that “face-to-face” advice is the most superior method of advice delivery, this is not supported by the research in this area. While vulnerable and low income consumers are thought to prefer a face-to-face context, some consumers may be too embarrassed or confused to seek help in such a setting, and the lack of other provision may result in their not receiving advice at all.\textsuperscript{17} It may also be less convenient than other channels of advice because, for example, face-to-face advice is typically only available during working hours.\textsuperscript{18}

The telephone provides the “cornerstone” of most advice services for a number of different reasons:\textsuperscript{19}
- the telephone is near universal;
- telephone services typically receive very high satisfaction ratings;
- the technology makes the provision of advice highly efficient as compared with other channels of delivery; the telephone improves accessibility: advice can be made available outside of normal working hours and improves access in rural areas; and
- even where there are multiple advice providers, consumers can still be presented with a “single” point of contact.

The DTI’s research into the use of the Consumer Direct helpline concluded that it was crucial to keep branding as simple as possible.\textsuperscript{20} In respect of the internet, research indicates that, while this may well be very cost effective, provision is far from universal and tends to be concentrated on higher socio-economic groups, those who are likely to be better informed and more confident in respect of seeking advice.\textsuperscript{21}

\textsuperscript{17} Wallis (n 15) 11. The research in question was in respect of legal advice: Legal Services Commission \textit{Improving access to advice in the Community Legal Service – Report on the Evaluation Research on Alternative Methods of Delivery} (Legal Services Commission London 2004).
\textsuperscript{18} Wallis (n 15) 11.
\textsuperscript{19} Wallis (n 15) 11.
\textsuperscript{20} Wallis (n 15) 13. See Department of Trade \textit{Consumer Helplines Study Final Report} (DTI London 2002).
\textsuperscript{21} Wallis (n 15) 15.
There is a growing acceptance of the importance of the “one-stop shop” principle in the provision of advice. In respect of potentially actionable consumer complaints, consumers may turn to a number of different sources of advice. There is the danger, however, of “referral fatigue”, i.e., the more times a person is referred on the less likely they are to act upon the referral.\textsuperscript{22} As experience in NHS Direct and Consumer Direct has shown, where there are multiple advice providers, the strong-branding of a single “gateway” to such providers is crucial.\textsuperscript{23}

Where referral is used it is necessary to have in place effective mechanisms to ensure that the individual does not get “lost in the system”.\textsuperscript{24} The use of protocols in a multiple agency setting governing how referrals are made and handled has been cited as best practice.\textsuperscript{25}

\textbf{Principle 3: Consumer advice channels should be accessible, strongly branded and based on the one-stop shop principle.}

\subsection*{2.2.2 The quality of consumer information}\textsuperscript{26}

While we take it as given that increased information will generally increase empowerment, there are important issues concerning the amount of information and the way it is presented. The issue of consumer information has two key aspects. First, the over-provision of information can be harmful to consumers. Such over-provision may be either as a result of regulatory requirements, stem from firms’ incentives to impair vigorous competition by obfuscation, or a combination of the two. Second, in many cases, the problem is not the information itself, but the manner in which it is presented.

\begin{itemize}
\item \textsuperscript{22} M George, C Graham and L Lennard \textit{Complaint handling: Principles and Best Practice} (energywatch London 2007) 15 citing P Pleasance \textit{Causes of action: Civil and Social Justice} (2nd ed TSO London 2007).
\item \textsuperscript{23} George et al (n 22) 15.
\item \textsuperscript{24} George et al (n 22) 16.
\item \textsuperscript{25} George et al (n 22) 16.
\item \textsuperscript{26} For a discussion of the behavioural economics aspects of information see section 4 and Annexe C of this Report.
\end{itemize}
As a broad proposition, in competitive markets, firms have an incentive to disclose information to consumers about the features of their offering which may be aligned with consumers' preferences. Furthermore, regulatory disclosure requirements can often obviate the need for other forms of intervention: for example, by ensuring that consumers are given information on a product’s potential disadvantages, the choice to purchase rests with the consumer, rather than the alternative which might be a product ban or direct regulation of the product’s attributes. Both these options reduce consumer choice and attract compliance costs. Disclosure requirements can therefore be used as an alternative to (other forms of) direct regulation and has the benefit that it does not deter firms from innovating, nor result in potentially harmful barriers to entry.

Regulatory requirements may require that in the course of concluding a transaction, firms are required to specify certain aspects of the agreement, for example, price, key terms of the agreement, default charges, and the consumer’s obligations. The over-provision of such information and the inappropriateness of its presentation may have significant impact on its impact and effectiveness. This is illustrated by the case study presented in Box 1.

Box 1: Case study on consumer credit disclosure requirements

Recent research conducted on consumer credit requirements on behalf of BRE/NCC underlines the importance that information is not over-provided and is presented in an appropriate fashion. That research found consumers’ aversion to small print across all consumer groups, including the financially literate. Consumers tended not to look beyond the headline APR or interest-free windows on offer, with brand being a driving factor between different offerings. There was the broader perception among consumers that the contract did not contain any useful information for them, but was there for the protection of the firms’ interests rather than for theirs. Strikingly the citing of a statute actually deterred consumers.

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27 Such information is provided to persuade consumers to purchase a particular offering, and to distinguish particular features of a firm’s offerings against those of the firm’s rivals. Generic rather than firm-specific information concerning a product is unlikely to be optimal given the free-rider problem. In a market where there are both “high” and “low” quality products, suppliers at the higher end have incentives to distinguish themselves from suppliers at the lower end by, for example, providing extended warranties and “no-quibble” returns policies.


29 APC (n 28) 205.


from reading the “small print”, even though the statute (Consumer Credit Act) is there to protect and secure their rights.

Some of the potential problems with inappropriate information disclosure requirements include:\(^{32}\)

- consumer errors potentially creating strong incentives for consumers to take responsibility for the assessment of risks associated with consumption, and mandatory disclosure requirements may blunt such incentives;
- too much information may distort or prevent consumers from using simple rules of thumb (or heuristics) in their decision-making which may have led to a superior result;
- while disclosure may assist most consumers, those who are cognitively impaired may not benefit directly;\(^ {33}\)
- while information disclosure is a low-cost intervention, it is not costless (to neither firms, government, nor consumers), especially if it is done well;
- badly designed information can be counter-productive, it can potentially lead to worse decisions, and even deter a consumer from entering into a transaction at all.

BRE/NCC have suggested that the design of information disclosure requirements should be informed by three principles: before providing information, the behavioural outcomes which the information is seeking to achieve should be clearly identified; the information should seek to simplify a choice for consumers; and before imposing the information requirement, regard should be had to existing information requirements.\(^ {34}\) Similarly, the Australian Productivity Commission has recommended increased consumer

\(^{32}\) For a discussion see Howells (n 30); APC (n 28) 206 – 207.

\(^{33}\) Though they may benefit indirectly. For example, in respect of increased provision of information to facilitate searching, those who search create positive externalities for the benefit of those who do not.

\(^{34}\) BRE/NCC, Warning: too much information can harm (BERR London 2007).
testing, and the use of layering (whereby firms are permitted to tailor information to the individual needs of the consumer).\textsuperscript{35}

**Principle 4: The provision of information is an important plank of consumer empowerment.** Appropriate information should be presented to consumers in a clear and accessible manner.

2.2.3 The importance of consumer education

An empowered consumer is equipped with the knowledge and the skills to make informed choices, assert their rights, or seek advice, when things go wrong. While the provision of information is an important plank of consumer empowerment, information alone may not be sufficient. While most consumer protection regimes place an emphasis on consumer education, the term is often used in a very broad sense. A recent attempt has been made to define consumer education, with a particular emphasis on skills:

“Consumer education is a planned intervention to raise consumer skill levels, improve consumer knowledge, and modify consumer attitude and behaviour in making purchase decisions, conducting transactions, managing relations and seeking redress.”\textsuperscript{36}

Consumer education was seen as encompassing a number of different types of initiatives which varied from the mere provision of information to “fully planned, proactive and integrated consumer education programmes”.\textsuperscript{37} As has been observed, however, consumer education may not be an appropriate response to dealing with market problems where the timescale is short or where information cannot be adequately targeted or accessed.\textsuperscript{38} Furthermore, it is important to identify the appropriate channel.\textsuperscript{39}

It is plain that consumer education is a task which consumer agencies cannot deliver alone. Agencies (including consumer organisations) can however

\textsuperscript{35} APC (n 26) 208.
\textsuperscript{37} COI (n 36) 5 – 7.
\textsuperscript{38} APC (n 28) 400.
\textsuperscript{39} APC (n 28) 213 – 217.
seek to coordinate and contribute to consumer education initiatives with other partners (for example, the media and schools).

**Principle 5: Consumer education aimed at raising consumer market skills may make an important contribution to the empowerment of consumers.**

2.2.4 The importance of consumer advocacy
Considerable importance has been attached to the role of “advocacy” as part of the “triumvirate” of consumer representation (the other two being redress mechanisms and information and advice). Consumer advocacy (or voice) has been seen as particularly important in markets where consumers either lack the ability to switch supplier (or exit), and/or where regulation of a market is required. In respect of final consumers, consumer advocacy may be particularly important in the policy-making context because of the disparate nature of consumer interests. Governments and regulators may find it easier to notice and respond to the interests of highly organised interest groups rather than those which are diverse and disparate, such as final consumers, and this may well be the justification for Governmental intervention in the form of statutory bodies charged with representing such interests.

As the UK Government put (in the context of communications regulation):

‘Industry lobbies the regulator hard in pursuit of its interests. That is to be expected, but it should be balanced by proper and full representation of consumers’ concerns.’

Consumer advocacy may be particularly important in order to protect the interests of disadvantaged consumers. Even in the context of apparently well-functioning markets, intervention may still be necessary due to the particular

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43 DTI, *A New Future for Communications* (DTI London 2000) [7.5.3].
problems vulnerable or disadvantaged consumers may face (see section 5 below for further discussion).\textsuperscript{44} Consumer complaints may provide advocacy agencies with important intelligence on markets (although, as is discussed below, there are potential dangers in this approach).

**Principle 6: The provision of strong consumer advocacy groups can ensure the representation of consumer interests in policy formulation and the setting of agency priorities.**

2.3 Redress mechanisms
Consumer redress draws attention to the limitations of the market and of private litigation in a mass-consumption economy where harm is often individually small, but large in aggregate.\textsuperscript{45} There are instances where a breach of consumer protection legislation affects a number of consumers in a similar way, where these consumers are unlikely to pursue damages individually due to the perceived complexities of the legal system, their relatively low individual losses compared to potentially high legal fees.\textsuperscript{46} These problems can be alleviated in a number of different ways.

First, by the provision of alternative redress mechanisms. Second, by simplified, low-cost small claims procedures, as is the case in the UK and many other jurisdictions. The third possibility is the provision of group lawsuits, which raise more ambiguous questions in terms of benefits and costs.

\textsuperscript{44} The UK Competition Commission investigation into the market has found that the customers of home credit are predominantly low-income consumers and that they are overcharged compared to the cost of providing the service and other types of credit. However, by virtue of their low income status they were unable to switch to lower cost credit (UK Competition Commission ‘Home Credit Market Investigation’ 2006 Final Report [5], [6]).


2.3.1 Alternative dispute resolution

Alternative dispute resolution (ADR) covers a wide range of different redress mechanisms which are used in the alternative to private enforcement by individual (or group) litigation through the ordinary courts. It can be expressed as a spectrum or continuum ranging from bilateral consumer-business negotiation, mediation through third-party intermediaries, to full-scale adjudication. It may be further sub-divided according, for example, to whether it is voluntary or compulsory, or binding or non-binding. In many ways, from the point of view of the end user, the labels attached to ADR processes are unimportant, in contrast to the accessibility of the process. In markets which are broadly competitive, there is an alignment of the interests of firms and consumers in seeking to avoid and resolve disputes without recourse to law, with all of its attendant costs and delays. Furthermore, firms in such markets have an interest in protecting their reputation, seeing the resolution of complaints as an important parameter of competition.

There is broad consensus internationally as to the need for ADR procedures, although the models of ADR differ greatly as between different markets and between countries. Direct bilateral negotiations, while being the most efficient means of redress for consumers, cannot be relied upon in respect of certain practices which involve bad faith or fraud. Nevertheless, there is clear evidence that consumers are far more likely to approach a trader directly to resolve than be willing to approach a third party. In recognition of this fact, many larger firms have internal complaints handling systems, and the use of such systems is often a precondition of the use of external schemes.

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That study defined ADR in a broader sense than we do as including small claims procedures and collective actions for damages.

48 Or indeed as an alternative to taking no action at all.

49 Stuyck et al. (n 47) 23.

50 Stuyck et al. (n 47) 24 – 25.

51 Stuyck et al. (n 47) 25. [42]

52 Stuyck et al. (n 47) 26.

53 See the studies reported in Stuyck (n 47) chapter 2.

54 Stuyck et al. (n 47) 28.
choice of ADR schemes is also sensitive to other factors, including the organisation and effectiveness of the judicial system.\textsuperscript{55} The absence of a formal industry scheme (whether statutory or non-statutory) should not be taken as indicative of a lack of consumer empowerment: as was noted above, in broadly competitive markets, where reputation is particularly important, both consumers and firms have strong incentives to resolve disputes satisfactorily. What is problematic, however, is the lack of any such scheme where market surveillance (in the form of complaints data in particular) indicates that there are low levels of consumer satisfaction. The use of such schemes can help to serve the collective interests of firms supplying experience or credence goods, especially where reputational concerns on an individual firm level may be low, but can be high for the industry as a whole. Not only can it promote confidence among consumers in purchasing such goods and services, it can also have important feedback effects for self-regulatory mechanisms, for example, by influencing the content of industry codes of practice.\textsuperscript{56}

\textit{2.3.1.1 Best practice in complaints-handling}\textsuperscript{57}

There is broad agreement on the principles which should underlie both internal and external complaints-handling.\textsuperscript{58} In a recent study, the following were identified in both the management literature and in practice internationally as being the core principles which any external scheme should meet.\textsuperscript{59}

1) Information: clear information about a consumer’s entitlement to a good or service, as well as clear information about complaint processes

\textsuperscript{55} Stuyck et al. (n 47) 27.
\textsuperscript{57} The following draws on M George, C Graham and L Lennard \textit{Complaint handling: Principles and Best Practice} (energywatch London 2007).
\textsuperscript{58} George et al (n 57) 9.
\textsuperscript{59} M George, C Graham and L Lennard \textit{Future Services: Putting Things Right: complaints handling and dispute resolution in the utilities} (Consumer Action Network / University of Leicester 2005).
2) Accessibility: complaint handling systems should be free of charge and fully accessible to all consumers, including people in vulnerable situations.

3) Consumer support and empowerment: the ability to call on third party help when making a complaint.

4) Fairness: processes and decisions need to be fair and based on publicly available rules and criteria.

5) Effectiveness and performance: dealing with complaints in a timely fashion, ensuring positive improvements in service delivery and performance monitoring and auditing.

6) Resolution and redress: the ability to resolve the problem, a range of remedies, including financial compensation and the ability to tackle systemic issues.

7) Independence: independent of those complained against.

8) Accountability: publicly available information on how the service works and how it is governed.

9) Resources: adequate resources and flexibility to deal with present and future demands.

10) Consumer involvement: complaint handling systems need to be informed by consumers’ views and experiences.

The British Standards Institution (BSI) has published a guideline for the handling of internal complaints based on nine principles (see Box 2).

<table>
<thead>
<tr>
<th>Box 2: BS ISO Principles for complaint handling</th>
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<tbody>
<tr>
<td><strong>Visibility:</strong> Information about how and where to complain should be well publicized to customers, personnel and other interested parties.</td>
</tr>
<tr>
<td><strong>Accessibility:</strong> A complaints-handling system should be easily accessible to all complainants. Information should be made available of the details of making and resolving complaints. The complaints-handling process and supporting information should be easy to understand and use. The information should be in clear language. Information and assistance in making a</td>
</tr>
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60 BSI Quality management – Customer satisfaction – Guideline for complaints handling in organizations (BS ISO 10002: 2004). This guideline applies primarily to how complaints should be handled by the organisation against whom the complaint is made (cited by George et al (n 57) 9). New draft guidelines are under consultation.
complaint should be made available in whatever languages or formats that the products were offered or provided in, including alternative formats, such as large print, Braille or audiotape, so that no complainants are disadvantaged.

**Responsiveness:** receipt of each complaint should be acknowledged to the complainant immediately. Complaints should be addressed promptly in accordance with their urgency. The complainant should be treated courteously and be kept informed of the progress of their complaint through the complaints-handling system.

**Objectivity:** Each complaint should be addressed in an equitable, objective and unbiased manner through the complaints-handling process.

**Charges:** Access to the complaints-handling process should be free of charge to the complainant.

**Confidentiality:** personally identifiable information concerning the complainant should be available where needed, but only for the purposes of addressing the complaint within the organization and should be actively protected from disclosure, unless the customer or complainant expressly consents to its disclosure.

**Customer-focused approach:** the organization should adopt a customer focused approach, should be open to feedback including complaints and should show commitment to resolving complaints by its actions.

**Accountability:** the organization should ensure that accountability for and reporting on the actions and decisions of the organization with respect to complaints handling is clearly established.

**Continual improvement:** the continual improvement of the complaints-handling process and the quality of products should be a permanent objective of the organization.

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2.3.1.2 *Factors which influence whether or not consumers complain*

As with advice provision, the individual circumstances of consumers in the complaints handling system will have an impact on both how they interact with the complaints handling procedure and possibly the outcome of the procedure. There is evidence – albeit relatively limited – that consumers from lower social groups are less confident about making a complaint.⁶¹

The Eurobarometer study on consumer protection offers some interesting evidence. In response to the question whether in the last 12 months “have you made any kind of formal complaint to a seller/provider in writing, by telephone or in person”, the figures suggest that consumers in the Nordic

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⁶¹ George et al (n 57) 20 citing research conducted by Synovate on behalf of the OFT in 2005.
states (Sweden-24%, Denmark-22% and Finland-19%) as well as in the Netherlands (26%), the UK (22%), Germany (19%) and Austria (19%) are more likely to launch a formal complaint than the average EU consumer (14%). In respect of socio-demographic factors, it would appear that persons at an economically active age (25-39 years old (19%) and 40-54 years old (16%), with higher educational levels (meaning they ended their studies at age 20 or later – 21%) and the more highly ranked professions (managers - 21%, the self-employed -20%, other white collar workers -20%) tend to be more assertive once they are not satisfied with a purchased item.62 Research conducted by the Scottish Consumer Council made similar findings: that factors such as income, education and skills can exert powerful influences on consumers in the complaints context.63 Under the Eurobarometer study, when consumer were asked what they did in the event of the complaint not being dealt with in a satisfactory manner, most respondents (51%) stated that they took no further action (51%). For most citizens that decided to take further action, their first point of call were consumer associations.64

In a recent study for the OFT, Lunt argued that consumer detriment needs to be viewed not merely as having an economic dimension, but a psychological dimension too.65 In respect of complaints handling, he concluded that, while detriment in terms of economic harm may be significant, people may nevertheless be persuaded from complaining because of the potential attendant negative psychological effects.

The cultural and historical context in which a consumer protection regime operates may also have an important influence on the likelihood that a consumer will pursue a legitimate grievance. A comparative report by Consumers International into this issue uncovered some interesting findings: for example, Spanish consumers in particular displayed a reluctance to

63 George et al (n 57) 21.
64 EC Commission, Consumer Protection in the Common Market, 33.
65 P Lunt The psychology of consumer detriment: A conceptual review (OFT 792 London 2006).
complain which the report suggested could be explained by reference to the history of authoritarian government in that country.\textsuperscript{66}

**Principle 7: ADR mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.**

2.3.2 Efficient and proportionate litigation: small claims
There is a broad consensus that consumer redress through the courts requires an expedited procedure, reflecting the relatively small monetary value associated with consumer claims.\textsuperscript{67} These procedures represent a trade-off between efficiency concerns, on the one hand, and the need for due process, on the other hand. The flexibility of such procedures vary between jurisdictions, and the provision of such mechanisms is sometimes obviated by the provision of consumer specific arbitration and mediation schemes, which can therefore be viewed as close substitutes.\textsuperscript{68} Indeed, in many jurisdictions such procedures often involve the judge engaging in conciliation of the parties.\textsuperscript{69}

Small claims are not appropriate for very small claims affecting a large number of consumers.\textsuperscript{70} Mechanisms for group litigation may be more appropriate in such instances, as is discussed below.

**Principle 8: Provision should be made for flexible and expedited small claims procedures (although ADR mechanisms may fulfil this role).**

\textsuperscript{66} Consumers International *Balancing the Scales* (Consumers International 1999). The research suggested that 64\% of the population had a legitimate cause for complaint which they had not taken forward. However, it was also shown that younger people were much more likely to take part in representative or campaigning organisations.

\textsuperscript{67} For a comparative study, see Stuyck et al. (n 47) chapter 4, and CJ Whelan (ed), *Small claims courts: A comparative study* (Clarendon Press Oxford 1990).

\textsuperscript{68} Stuyck et al. (n 47) 30.

\textsuperscript{69} Stuyck et al. (n 47) 31.

\textsuperscript{70} Stuyck et al. (n 47) 26.
2.3.3 Collective action

One way of tackling the above issues is allowing ‘group lawsuits’. One of these, namely the ‘class action’ is a procedure which permits representatives of a group who have the same or a common interest in a claim to sue on behalf of the group for damages or an injunction.\(^{71}\) The class action is a procedural device that expands a court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims; a class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as is normally the case.\(^{72}\) From an economic point of view, such actions may be an effective method of requiring firms to internalise the costs of failures in contract performance, ensuring that private costs equal social costs.\(^{73}\) This can be achieved either through the judicial economy of a single damage decree for multiple claims or through a class settlement achieved between the representative plaintiff and the defendant.\(^{74}\) In the latter case, the class action reduces transaction costs and if appropriate incentives are provided, a class action will overcome the problems of organising large groups of individuals.\(^{75}\)

Class actions are involuntary or non-consensual group lawsuits; they begin and end without class members’ consent.\(^{76}\) Other group lawsuits straddle the consensual/non-consensual divide and these are called ‘consolidations’.\(^{77}\) Consolidation occurs when pending cases are routed to a single court for coordinated management and this usually occurs when lawsuits involve common facts.\(^{78}\) Consolidations begin consensually, but after the plaintiffs

\(^{71}\) Ramsay (n 45) 254.
\(^{73}\) Ramsay (n 45) 254.
\(^{74}\) Ramsay (n 45) 254.
\(^{75}\) Ramsay (n 45) 254.
\(^{76}\) Silver (n 72) 200.
\(^{77}\) Silver (n 72) 200.
\(^{78}\) Silver (n 72) 200.
employ attorneys and authorise them to file lawsuits, they lose control.\textsuperscript{79} Hence, other than an individual consumer initiating the claim in the name of a group of consumers (\textit{i.e.}, class actions as in the US model), there are also other group actions.\textsuperscript{80} In some countries consumer organisations also have the authority to initiate class actions, as is the case in Germany, Greece, Spain, Italy, Luxembourg, Netherlands, Belgium and Portugal.\textsuperscript{81} In other countries, such as the UK, Denmark, Belgium and Ireland, administrative authorities (such as consumer bodies) have the power to sue in the interest of consumers.\textsuperscript{82}

There are two main reasons for laws permitting class actions. First, to do justice: to compensate consumers harm that is done to them by better resource firms. Secondly, to deter infringement. Illegal activity might either escape the attention of law enforcement agencies, or be committed because the expectation of penalties administered by government agencies is insufficient.\textsuperscript{83} Furthermore, it may be that class actions can promote or solve free-rider problems when no individual has a sufficient incentive to take corrective action that will benefit many other citizens.\textsuperscript{84}

Class actions may provide both compensation and deterrence and have also been justified as providing true participation and self-determination to consumers, making up for any limitations of consumer representation in the political process and the failures of regulatory agencies.\textsuperscript{85} Furthermore, public enforcement agencies may have limited resources, and class actions may, therefore, compensate for under-enforcement by public agencies.\textsuperscript{86}

\textsuperscript{79} Silver (n 72) 201.
\textsuperscript{81} Deutch (n 80) 181.
\textsuperscript{82} Deutch (n 80) 181.
\textsuperscript{84} Scherer (n 83) 1.
\textsuperscript{85} Ramsay (n 45) 255.
\textsuperscript{86} Ramsay (n 45) 264.
Litigation groups offer plaintiffs several important advantages; such as economies of scale in litigation costs, greater leverage in settlement negotiations, and conservation of defendants’ assets, all of which can increase plaintiffs’ recoveries. There is reason, however, to also believe that the phenomenon of group litigation may create a situation where companies faced with large, well-organised groups of claimants and the prospect of extremely expensive and lengthy legal battles with attendant bad publicity and loss of customer goodwill, may calculate that it makes commercial sense to settle even quite doubtful claims at relatively generous compensation levels.

The concentration of economic interest and managerial control in the hands of the class counsel counts for both the attractiveness of and the risks associated with class actions. As is generally accepted, there need to be mechanisms in place to regulate the role of lawyers in class actions.

As is clear from the foregoing, the provision of group litigation procedures may have both advantages and disadvantages. The relative importance of private enforcement (be it individual or collective) depends upon the overall enforcement picture. In a consumer protection regime where public enforcement plays a lesser role (either because of a lack of resources or powers), then private mechanisms are likely to be more important. It should not be inferred, therefore, that a weaker group litigation system is necessarily an indication of a weaker consumer protection regime. One needs to take into account the effectiveness of other enforcement mechanisms.

The position of group litigation in the UK is summarised in Box 3.

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87 Silver (n 72) 201.
88 P Cane Atiyah’s Accidents, Compensation and the Law (7th ed Cambridge University Press Cambridge 2006) 277. In a case where the costs are likely to be very high and any damages awarded very modest, the court may prevent the action proceeding if the defendant so requests – AB v John Wyeth & Bother Ltd [1994] PIQR P109. For example, although more than US$3 billion is being paid in the world-wide silicone breast implant litigation, the evidence of causal link between implants and the more serious symptoms complained of was very weak (ibid, 278). Similarly in the US, the tobacco industry has agreed to pay about US$360 billion over 25 years to public health authorities to cover the costs of treating smoking-related illnesses, despite the lack of any clear basis for legal claims against cigarette manufacturers and the general lack of success of claims by the smokers in courts (ibid).
89 Silver (n 72) 200, 230; Scherer (n 83) 2-4.
90 Silver (n 72) 200.
Box 3: Group litigation procedures in the UK

In the UK, group claims are rare, tend to be complex both due to the numbers involved and especially if they raise difficult issues of fact or law. As such, they demand a higher level of organisational skill and efficiency than individual claims. Solicitors representing groups have made creative use of the courts in assisting the settlement process. Until recently, the only formal mechanism for dealing with group actions was the ‘representative action’ in which one party sues as representative for a group and the court’s decision binds all the represented parties even though there is no mechanism for ensuring that all those parties are notified of the action or wish to be represented in it. Since the court can only decide issues common to the claims of all the represented parties, the representative action is of limited use. This is because the requirement of the English Court of Appeal in Markt & Co Ltd v Knight Steamship Co Ltd (1910) that parties in representative actions have the same interest has been interpreted to mean that individuals with different contracts and individual damage claims could not be aggregated within a common representative action. The US ‘class action’ is thus more flexible than the ‘representative action’. The representative action has now been supplemented by the mechanism of the ‘group litigation order’ (GLO) under Civil Procedure Rules Part 19.III and such an order can be made in relation to claims that give rise to ‘common or related issues’. Once the order is made, a register of claims is established and the judgments/orders of the court in relation to ‘group issues’ are binding on all parties to the claim on the register. Before the introduction of the GLO procedure, English lawyers had developed strategies to deal with group claims, such as choosing one or more cases from the group as ‘lead’ or ‘test’ cases for submission to trial in order to have disputed issues resolved with a view to using the result as a basis for settling other similar cases.

Principle 9: Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counter-balance weak public enforcement. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.

91 Cane (n 105) 274-275.
92 Cane (n 105) 275.
93 Cane (n 88) 276.
94 Cane (n 88) 276.
95 Cane (n 88) 276.
96 Cane (n 88) 276.
97 Ramsay (n 45) 259.
98 Cane (n 88) 276.
99 Cane (n 88) 276.
3.0 Public enforcement

A consumer regime which is based on consumer empowerment may require more than simply providing consumers with the appropriate rights and accessible redress mechanisms. As is discussed in this section, there is an important role for public regulation and its success in promoting consumer empowerment depends upon three key factors: *intervening where necessary; having the right tools to intervene; and using tools responsively and intelligently.*

In order for consumers to be empowered, they need to be able to transact with confidence, which means that consumers’ reasonable expectations of transactions are met, and where they are not, effective redress mechanisms are available.100 Redress mechanisms, however, are unlikely of themselves to be sufficient and public regulation has an important role in securing compliance with consumer laws. Regulatory strategies aimed at securing compliance should be used in a responsive way, which implies a mix of strategies with “persuasion” at one end of the scale, and punishment at the other.101

Broadly speaking, regulation can be directed towards two possible situations. First, intervention may be necessitated in order to correct for market failure of a number of different types. In many cases, market failure may be self-correcting, especially where there are repeat purchases and important reputational effects.102 If intervention is required, the first line of defence should generally be (well-designed) information disclosure requirements. In other instances, further intervention may be required, as is discussed below.

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102 Armstrong asserts that reputation is a more powerful constraint than any information remedy (M Armstrong 'Interactions between competition and consumer policy' MPRA Paper 7258 (University Library of Munich Germany 2008) 5 available: [http://ideas.repec.org/e/par85.html](http://ideas.repec.org/e/par85.html)).
Second, intervention may be required where redress mechanisms are failing. We discuss each of these in turn.

3.0.1 Market failures requiring intervention
In certain situations, the market may not provide firms and consumers with right incentives for self-correction. For example, where a good is such that repeat purchase is rare, reputational effects are unlikely to be strong. This may be especially important in respect of an experience good, where consumers will not be able to assess the product attributes upfront. Credence goods also present problems because by definition consumers lack the ability to assess quality even after substantial consumption experience. Behavioural economics also underlines the potential limitations of consumers exerting sufficient constraints on firms. As a consequence of bounded rationality, some consumers may make mistakes. The case for intervention here is less clear cut, but appropriately scoped remedies do have the potential to play an important role.

3.0.2 Where redress mechanisms are insufficient
An effective consumer regime relies first and foremost upon the provision of efficient and accessible redress mechanisms. This serves two key benefits: consumers are more confident in the course of transacting with firms, and firm’s incentives to comply with the law are strengthened by the credible threat of having to provide redress. There are, however, a number of potential limitation to redress mechanisms (even where the mechanisms in question are designed optimally).

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103 We abstract here from discussion of dangerous goods or those which produce negative externalities for society (such as the guns and illicit drugs).
105 Note the interplay between public enforcement and redress, e.g., where a court can award compensation order or where infringement finding is binding upon a court in civil proceedings (reducing the potential costs and risks faced by the litigant in question).
transactions tend to be small relative to the costs of redress.\textsuperscript{106} This produces the problem of under-enforcement: individual consumer harm may be small but in aggregate can be very significant. It is precisely in such circumstances that public enforcement has an important role to play. Second, while redress is underpinned by the compensation principle, it maybe that the harm suffered is incapable of being redressed by a monetary award. Furthermore, the harmful behaviour of the supplier may create externalities for society, for example, a firm may undermine confidence in the market in which it is operating.

3.0.3 The dangers of too much / inappropriate intervention
There are, however, dangers in too much / inappropriate intervention. First, in the light of resource constraints, intervention should only occur where there are insufficient incentives (acting on consumers, firms or both) for market-based solutions. Second, interventions may have distorting effects, reflecting the preferences of policy makers rather than consumers, and may have unintended consequences. Minimum standards, for example, can result in higher barriers to entry and reduced choice.\textsuperscript{107} The over-regulation of advertising (say to protect cognitively impaired consumers from being misled) may result in less dissemination of otherwise useful (potentially empowering) information. The over provision of information may be disempowering for consumers. Third, providing too much consumer protection can result in moral hazard and possibly reduce the incentives and benefits of the development of cognitive skills among consumers.

3.0.4 Principles of better regulation
There is a vast literature which focuses on regulatory principles. The academic study of regulation has been central to the research of those from a

\textsuperscript{106} This may be the case even in respect of ADR schemes which, at the very least, involve time costs.
\textsuperscript{107} Armstrong (n 102) 35.
number of different disciplines for a number of decades. This literature has increasingly gained currency in practice. In the UK, the better regulation initiatives – starting in the 1990s – has resulted in the emergence of a core set of regulatory principles of general application. The Better Regulation Task Force has devised five simple principles of good regulation: proportionality, accountability; consistency; transparency; and targeting. As part of the Better Regulation initiative, the Government has commissioned two reports, Hampton (on inspection and enforcement) and Macrory (on penalties). The findings of these reports have largely been accepted by the Government, indeed many of the regulatory principles emerging from Hampton and Macrory are now given expression in a statutory code of practice for regulators. The detailed findings are outwith the scope of this Report but the guiding principles identified may well be useful in the devising of benchmarks.

3.1 Agency enforcement and remedial powers
Effective regulation relies upon regulators having an appropriate set of enforcement and remedial tools. Consumer regimes typically rely on a number of different enforcement mechanisms (or combination of them):

- criminal penalties (agency prosecution, judicial enforcement);
- civil orders and penalties (agency standing, judicial enforcement);

\[\text{footnotes}\]

109 P Hampton Reducing administrative burdens: effective inspection and enforcement (London: HM Treasury, 2005) (hereafter “Hampton review”). The report considered the work of 63 national regulators (including the OFT) and 468 local authorities (including 203 trading standard offices). While the review was addressed to “cutting red tape”, there was a prescription that the affect of so doing should at least be neutral on regulatory outcomes.
110 RB Macrory Regulatory Justice: Making Sanctions Effective, Final Report (London: Cabinet Office, 2006) (hereafter “Macrory review”). As a result of Hampton, the use of regulatory penalties were further investigated in the Macrory review. While it had a very broad scope – considering the work of 56 regulators and 468 local authorities – both the OFT and trading standards fell within its purview.
- administrative orders and penalties (agency enforcement, judicial oversight).

Some jurisdictions will rely primarily on consumer complaints to ombudsmen for enforcement, while others self-regulatory mechanisms and private enforcement.

3.1.1 Enforcement strategies depend upon how empowered are consumers and how responsible are firms
No one model is necessarily superior. However, reliance on self-regulatory and private enforcement does depend upon a level of trader “benevolence” and/or consumer “activism”.\(^\text{113}\) As is argued here, in most cases this is insufficient in to secure high levels of compliance and, therefore, levels of consumer confidence consonant with empowered (confident) consumers. Indeed, as we argue here, what is required is a hierarchy of sanctions which can be (de)escalated depending upon the willingness of firms to cooperate.

3.1.2 The optimal use of penalties
The Hampton review made a number of recommendations on the design and use of penalties.\(^\text{114}\) As a starting point, it was observed that a penalty regime should aim to have an effective deterrent effect against non-compliance.\(^\text{115}\) Across the varied regulatory contexts considered by the review, it was found that penalties did not provide effective deterrence for two key reasons.\(^\text{116}\) First, penalties handed down by the courts reflected neither the seriousness of the offences in question nor the economic benefit to the firm resulting from non-compliance.\(^\text{117}\) Secondly, regulatory penalty powers were slow and can

\(^{113}\) Ogus et al. (n 112) 6 and section II.C (a discussion of the Netherlands which largely relies on self-regulation and private enforcement).

\(^{114}\) Hampton review (n 109) [2.71] et seq.

\(^{115}\) Hampton review (n 109) [2.73].

\(^{116}\) Hampton review (n 109) [2.74]. The report also point to structural problems, particularly at the local government level, but these are dealt with separately.

\(^{117}\) Hampton review (n 109) [2.78 – 2.81].
be ineffective in targeting persistent offenders.\textsuperscript{118} The review, however, did note the potential benefits of administrative penalties, subject to due process safeguards.\textsuperscript{119} The broad recommendations included increasing criminal penalties for non-compliance, and increased use of administrative penalties.\textsuperscript{120} It also recommended increased use of positive incentives to encourage compliance, in particular, the use of compliance award schemes, most useful for businesses with a “consumer presence” such as the second-hand car market.\textsuperscript{121}

The Macrory review devised six “penalties principles” which seek to define what penalties should be aimed at achieving and how (see Box 4).\textsuperscript{122} These principles are replicated in the statutory code for regulators.\textsuperscript{123}

\begin{center}
\begin{tabular}{|l|}
\hline
\textbf{Box 4: Macrory’s six penalty principles} \\
\hline
1. Aim to change the behaviour of the offender; \\
2. Aim to eliminate any financial gain or benefit from non-compliance; \\
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; \\
4. Be proportionate to the nature of the offence and the harm caused; \\
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and \\
6. Aim to deter future non-compliance. \\
\hline
\end{tabular}
\end{center}

In explaining the need for these principles the review opined that they would help “build a common understanding” of what sanctions ought to achieve both among regulators and within the regulated community, with a view to providing safeguards that the penalties would be used “fairly and consistently”.\textsuperscript{124}

\begin{footnotes}
\item[118] Hampton review (n 109) [2.82 – 2.86].
\item[119] Hampton review (n 109) [2.86].
\item[120] Hampton review (n 109) 40-41.
\item[121] Hampton review (n 109) [2.89 – 2.91].
\item[122] Macrory review (n 110) 10.
\item[123] Regulators’ Compliance Code (n 111) [8.3].
\item[124] Macrory review (n 110) [2.3].
\end{footnotes}

168 | Benchmarking the UK Framework Supporting Consumer Empowerment |
3.2 Strategies to promote compliance
As a broad proposition, an enforcement regime should be aimed at securing compliance. In many instances, compliance can be secured without formal recourse to law; as we argue below, agencies need to ensure that sufficient resources are focused upon appropriately targeted information and advice, together with other techniques of persuasion.

3.2.1 Deterrence and compliance strategies
It goes without saying that it is unrealistic to assume that all infractions of the law will be detected, let alone be subject to redress/enforcement. Some have argued that for optimal deterrence, penalties ought to reflect the likelihood of detection and punishment.\textsuperscript{125} There are possible dangers with this approach.\textsuperscript{126} Where detection rates are low, such an approach would imply severe penalties even for relatively minor infractions of the law, and where detection rates are high, relatively low penalties for serious wrong-doing. The danger is that the enforcement regime will be “too out of step with the intuitive conceptions of fairness and justice” and will not, therefore, command the support of the public and the regulated community.\textsuperscript{127}

Indeed, as has been convincingly argued, the use of tough but blunt and inflexible punishment devices can be counter-productive.\textsuperscript{128} This proposition is based upon a number of different assumptions, including: a strategy based on punishment will undermine the good will of firms when they are motivated by a sense of responsibility; whereas a strategy based on persuasion and self-regulation will be exploited when firms are motivated by economic rationality. Firms, and actors within firms have “profit-maximizing selves and law-abiding selves, at different moments, in different contexts, the different selves prevail”.\textsuperscript{129}

\textsuperscript{125} Broadly speaking this is the theoretical approach underpinning the study by Ogus et al. (n 112) [181 – 188].
\textsuperscript{126} MCA (n 100) 12.
\textsuperscript{128} I Aires and J Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate} (OUP Oxford 1992), chapter 2.
\textsuperscript{129} Ayres and Braithwaite (n 128) 19.
A successful strategy of enforcement depends, therefore, upon both “speaking softly” and “carrying big sticks”, and *crucially a hierarchy of sanctions*. Paradoxically, the bigger and more various are the sticks, the greater will be the success in securing compliance through persuasion. Moreover, too much of a focus on punishment will waste resources on litigation, while also fostering a culture of resistance to regulation “whereby firms defy the spirit of the law by exploiting existing loopholes, and the state writes more and more specific rules to cover the loopholes”. Furthermore, if a regulator has only a severe means of punishment, it may well lack credibility because it may be “politically impossible and morally unacceptable to use it with any but the most extraordinary offences”. All of this is captured in the various versions of Braithwaite’s well-known enforcement pyramid, which depicts a hierarchy of sanctions, the most (least) severe and least (most) frequently used at the top (bottom).

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130 The inspiration for this contention derives from game theory and Scholz’s tit-for-tat (TFT) enforcement strategy. In brief, the regulator refrains from a punishment (deterrence) strategy for as long as the firm cooperates, but where the firm “defects”, the regulator retaliates. If retaliation secures a return to compliance, then the regulator should be forgiving, exploiting the benefits of mutual cooperation in place of the lower pay-offs of mutual defection (J Scholz ‘Deterrence, cooperation and the ecology of regulatory enforcement’ (1984) 6 Law and Policy Review 385; see discussion in Aires and Braithwaite (n 128) 21 and MCA (n 100) 14). It is underpinned by a number of assumptions, in particular, that the regulator has adequate sanctions and resources available to it.

131 Aires and Braithwaite (n 128) 20.

132 Aires and Braithwaite (n 128) 36.

133 Aires and Braithwaite (n 128) 35 (using the example of licensing powers). For a discussion in the context of consumer protection see Cartwright (n 101).
- **Principle 10:** Administrative enforcement has an important role by correcting for the under-use of redress mechanisms. Penalties should be used to change the behaviour of the offender, and should be transparent, proportionate and fair. Enforcement agencies should have a hierarchy of sanctions, with the ability to escalate sanctions in the face of non-compliance by firms.

3.2.2 Targeting resources: risk assessment

In any policy context in which resources are finite, one might expect a policy maker or regulator to allocate resources to where the risk of harm is greatest and that the cost and the benefits of a regulatory (non-) intervention be taken into account by the policy maker or regulator in question, including any attendant costs to business and the wider economy. Two key techniques have emerged to achieve these ends: cost benefit analysis (CBA) and risk assessment.\(^{134}\) Such appraisal techniques may be seen as a means of

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\(^{134}\) There is a vast literature on these techniques. The following draws primarily on the literature explained in Baldwin and Cave R Baldwin and Martin Cave *Understanding Regulation: Theory, Strategy and Practice* (OUP Oxford 1999) and BM Hutter *The Attractions*
promoting the achievement of a number of important substantive and procedural regulatory goals.\textsuperscript{135} It may sharpen and focus regulatory action in a manner which forwards the mandated policy objectives, promote accountability by subjecting rule-makers to objective appraisal, encourage openness and transparency, promote expertise by exposing potential gaps and areas for further policy learning, and of course promote efficiency. On the other hand, there is the potential for distortion of the policy- and rule-making process. Tensions may emerge, in particular, where the legislation in question includes non-efficiency goals.\textsuperscript{136} Often business will be aiming to reduce cost, whereas a “risk-averse” public (or constituency thereof) will demand greater intervention.\textsuperscript{137} Faced with such tensions, risk-based models may be seen to serve as a “seemingly objective means of adjudication between increasingly vocal interest groups”.\textsuperscript{138} There are a number of measurement issues. There may well be an inherit bias in favour of business given that costs are normally far easier to quantify than are benefits.\textsuperscript{139} There will often be a bias in favour of hard data.\textsuperscript{140} The potential disadvantages of “adaptive responses” are difficult to predict or quantify.\textsuperscript{141} The tendency to evaluate regulators according to indices such as the number of prosecutions initiated or the number of inspections conducted may be problematic “as one might argue that the very essence of success may be invisibility, that is the number of risks averted and prevented”.\textsuperscript{142} In other words, the lack of intervention(s) may well be the result of policy success rather than bureaucratic deficiencies. Overly cumbersome appraisal techniques can be particularly problematic where timely intervention is needed in order to respond to crises.\textsuperscript{143}

\textsuperscript{135} Baldwin and Cave (n 134) 89.
\textsuperscript{137} Hutter (n 134) 13.
\textsuperscript{138} Hutter (n 134) 13.
\textsuperscript{139} Baldwin and Cave (n 134) 91; Hutter (n 134) 8 (and the references cited therein on environmental regulation).
\textsuperscript{140} Baldwin and Cave (n 134) 92.
\textsuperscript{141} Baldwin and Cave (n 134) 91.
\textsuperscript{142} Hutter (n 134) 11.
\textsuperscript{143} Baldwin and Cave (n 134) 93.
The Hampton review placed considerable emphasis on the use of risk assessment, defined in the following way:

“The fundamental principle of risk assessment is that scarce resources should not be used to inspect or require data from businesses that are low-risk, either because the work they do is inherently safe, or because their systems for managing the regulatory risk are good.”\textsuperscript{144}

It also noted that the principle was embedded in some though not all regulatory practices, and used by the EC Commission and other international organisations in various contexts.\textsuperscript{145} Hampton asserted that the principle needed to be applied pervasively, informing all aspects of the “regulatory lifecycle”, from policy formulation, the design of policy instruments through to compliance and enforcement.\textsuperscript{146} The Hampton review made a number of recommendations which it claimed would lead to “greater excellence in regulatory outcomes” with a substantial increase in efficiency.\textsuperscript{147} This virtuous circle was said to be achievable in a number of ways, those most relevant to us being:

- ensuring that the regulatory burden falls most on the highest-risk business and conversely least on those with the best records of compliance;\textsuperscript{148}
- making better provision of advice to business in order to promote compliance;\textsuperscript{149} and
- applying tougher and more consistent penalties where these were deserved.\textsuperscript{150}

\textsuperscript{144} Hampton (n 109) [2.13]. The review noted the importance of the risk assessment in the academic literature, citing Braitwaite’s enforcement pyramid in particular (ibid [2.14]).
\textsuperscript{145} Hampton (n 109) [2.15-2.17, 2.18] respectively.
\textsuperscript{146} Hampton (n 109) [2.22]. Risk assessment should: be open to scrutiny; be balanced in including past performance as well as potential future risk; use all available good quality data; be implemented uniformly and impartially; be expressed simply, preferably mathematically; be dynamic, not static; be carried through into funding decisions; incorporate deterrent effects; and always include a small element of random inspection (ibid., [2.31]).
\textsuperscript{147} Hampton review (n 109) [24].
\textsuperscript{148} Hampton review (n 109) [8-11].
\textsuperscript{149} Hampton review (n 109) [12-14].
\textsuperscript{150} Hampton review (n 109) [16-17].
Of relevance here, the review criticised local authority trading standards in particular for not targeting appropriately compliance monitoring activities according to levels of risk.\textsuperscript{151} More broadly, the Macrory report stressed the importance that regulators should be as transparent as possible, avoid perverse incentives and “measure outcomes and not just outputs.”\textsuperscript{152}

A number of initiatives have been used by the Government to ensure greater use of risk assessments by regulators.\textsuperscript{153} Most recently, BERR have issued a statutory code of practice for regulators which gives further effect to the Hampton principles, including the requirement of risk assessment.\textsuperscript{154}

The foregoing discussion has important implications for benchmarking. That resources should be focused according to where harm (consumer detriment) is greatest is seemingly uncontroversial and, at first sight, ought to be an important principle of consumer empowerment. Furthermore, when considering whether (or not) to intervene, it seems sensible to require a full assessment of costs and benefits, and a consideration of whether there are less interventionist or costly means of achieving an outcome. Two contextual issues appear to be particularly relevant. It may be that the nature of an enforcement regime militates against coherent risk-assessment techniques. In a regime underpinned by private enforcement, there is the obvious problem of case selection: agencies have no overall control of cases litigated. Nor is risk assessment a panacea. It has an important place in the regulatory landscape, but should not be used to obscure distributional issues.\textsuperscript{155}

One issue in evaluating an agency’s work is to consider the extent to which complaints and outcomes are systematically monitored to see if there are any

\textsuperscript{151} Hampton review (n 109) [2.26-2.28]. These criticisms were based on 2004 data.  
\textsuperscript{152} Macrory review (n 110) [2.3].  
\textsuperscript{153} The first major initiative was the “Enforcement Concordat”, between the Cabinet Office and the Local Government Association in 1998 (for background see: http://bre.berr.gov.uk/regulation/reform/enforcement_concordat/enforcement_background.asp (accessed 20 December 2007)). The concordat was criticised by the BRE on the basis of inconsistent and patchy implementation, and failing to “place sufficient weight on risk-based enforcement, a key necessity to ensure that enforcement activities are proportionate and targeted.” (ibid.)  
\textsuperscript{154} Regulators’ Compliance Code (n 111) 12-13.  
\textsuperscript{155} Baldwin and Cave (n 148) 95.
issues requiring intervention (for example, through a market study by the OFT). As a general proposition, one would expect data on consumer complaints to provide important intelligence on the possibility of systemic market problems. It should be noted, however, that the use of raw data on complaints may be an important indicator of consumer dissatisfaction in a particular market, while at the same time being an indicator of high levels of consumer empowerment (consumers being aware of their rights and redress mechanisms). There is also the inherent danger of case selection bias: those who are best placed to remedy the situation for themselves may well be the most likely to complain, and conversely there is evidence (discussed above) that those who are most vulnerable might be least likely to complain. If consumer bodies become too reactive to the complaints they receive, this may be at the expense of concentrating on underlying causes of market failure requiring intervention.\textsuperscript{156} The National Audit Office, in scrutinising the work of energywatch, argued that relying on consumer complaints to prioritise work is not necessarily a means by which the overall nature of consumer problems can be identified.\textsuperscript{157} This is underlined by the findings in Annexe E: both the OECD and EC Commission have placed considerable emphasis on the need for research into consumer behaviour and the systematic monitoring of markets.

3.2.3 Promoting compliance: education, information, advice for firms
Persuasion can be a very cost-effective approach to enforcement.\textsuperscript{158} In other words, “punishment is expensive; persuasion is cheap”\textsuperscript{159} An effective consumer regime is dependent crucially upon traders being aware of their obligations. In many instances, reputation will assert a powerful (perhaps the most powerful) incentive upon firms to comply with consumer legislation.

\textsuperscript{157} NAO \textit{Energywatch and Postwatch: Helping and protecting consumers} (TSO London 2004) [1.23]. Under the Consumers, Estate Agents and Redress Act 2006 energywatch is to be merged with the NCC.
\textsuperscript{158} Cartwright (n 101) 70; Aires and Braithwaite (n 128) 19.
\textsuperscript{159} Aires and Braithwaite (n 128) 19.
As has been observed elsewhere, in order to target agency resources appropriately, it is important to gain an understanding of the risk profile of different types of firms.\textsuperscript{160} This is a difficult task, but some broad propositions can be made. First, large firms operating in broadly competitive markets, are likely to both have a knowledge of the legislative requirements acting upon them (given their resources) and are likely to comply given the importance of their brand (reputation). Subject to some caveats, such firms are likely to be low-risk and are not good targets for information and advice. This assumption may not hold where, for example, there are high search costs, consumer lock-in or where a firm is dominant. Second, smaller firms may be at risk of non-compliance because they do not have the requisite degree of awareness of the legislative requirements (given resource constraints). The question here is whether the firm would have sufficient incentives to comply if they had access to appropriately targeted information and advice, which again turns on a number of different factors, including the type of good in question.\textsuperscript{161} Such firms are good candidates for targeted information and advice.

This is underlined by the findings of the Hampton review which placed considerable emphasis on the need for advice to business.\textsuperscript{162} The provision of accessible and targeted advice in turn reduces the risk of non-compliance.\textsuperscript{163} This was particularly true of SMEs.\textsuperscript{164} Indeed, the review identified trading standards in particular as putting an emphasis upon enforcement over advice provision.\textsuperscript{165} The report concluded that regulators tended to prioritise inspections over advice.\textsuperscript{166} The latter was viewed as important by regulators, but not a priority area for funding, especially given budgetary constraints.\textsuperscript{167} The review concluded:

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{160} MCA (n 100) 18.
\item \textsuperscript{161} Where, for example, the good is a repeat rather than a one-off purchase, the firm will have incentives to comply.
\item \textsuperscript{162} Hampton review (n 109) [2.49] et seq.
\item \textsuperscript{163} Hampton review (n 109) [2.53].
\item \textsuperscript{164} Hampton review (n 109) [2.55].
\item \textsuperscript{165} Hampton review (n 109) [2.57].
\item \textsuperscript{166} Hampton review (n 109) [2.59].
\item \textsuperscript{167} Hampton review (n 109) [2.59].
\end{enumerate}
\end{footnotesize}
“...[A]dvice is a central part of the regulators’ function. The recommendations on risk assessment in the previous section should enable some regulators to release resources from unnecessary inspections to improve advice services. Where this is not possible, the review believes that there is a case for greater central funding for advice services, as has happened (in consumer advice) with the DTI’s Consumer Direct programme.”\textsuperscript{168}

It identified two key categories of advice: broad-reach advice, information of general concern and made available, for example, through web-sites and firm-specific advice, tailored to the specific needs and capabilities of the firm in question.\textsuperscript{169} Hampton’s recommendation are now given expression in the statutory code for regulators.\textsuperscript{170}

3.2.4 Transparency as a means to secure compliance

Transparency in enforcement is viewed as being key to securing compliance, and has a number of different dimensions:

“Being transparent is necessary to ensure that business knows what consequences it could face for failure to comply with regulatory requirements. Transparency can be achieved in several different areas, for example transparency in procedural decision-making also ensures high standards when the regulator makes its enforcement decisions. Broadly speaking, regulators should be able to outline the process by which decisions are arrived at, the types of factors that may influence a regulator’s enforcement decisions, and what types of enforcement action could be taken in what circumstances.”\textsuperscript{171}

The key tool identified by Macrory for achieving transparency in enforcement is the drafting of agency enforcement policies setting out: what action the public and the regulated community can expect in the light of non-compliance, the range of enforcement options and the circumstances which the regulator will take into account in choosing the appropriate tool, and should include the regulator’s policy on risk-based assessment.\textsuperscript{172} While such policies should be flexible, they must not be expressed in “over-generalised terms”.\textsuperscript{173} Published

\textsuperscript{168} Hampton review (n 109) [2.61].
\textsuperscript{169} Hampton review (n 109) [2.63 – 2.70].
\textsuperscript{170} Regulators’ Compliance Code (n 111) 13-14.
\textsuperscript{171} Macrory review (n 110) [5.7].
\textsuperscript{172} Macrory review (n 110) [5.10].
\textsuperscript{173} Macrory review (n 110) [5.11]. “Flexibility remains the cornerstone of a good enforcement policy” (ibid., [5.12]).
enforcement policies would facilitate consistency in decision-making and provide safeguards for “stakeholders”.\textsuperscript{174}

Transparency would also be maximised through reporting outcomes, for example, the number of remedies imposed.\textsuperscript{175} While this information was important, Macrory found that there was “very little evidence” on the outcomes of interventions.\textsuperscript{176} Measuring outcomes is “essentially concerned with the expected consequences and goals of the regulator’s enforcement activity rather than an account of the amount and type of enforcement activity it undertakes”.\textsuperscript{177} Among a number of examples, he suggested that “evaluating the extent to which non-compliant businesses become compliant” could form an outcome measure.\textsuperscript{178} While accepting that devising outcome measures and methodologies were “challenging tasks”, it was “only by measuring outcomes that regulators, the regulated community, and the public will begin to know what impact enforcement actions are having”, in particular whether compliance has been improved.\textsuperscript{179} It would also provide the regulator with an opportunity to reflect on the enforcement policy.\textsuperscript{180}

3.2.5 Securing accountability by measuring outcomes
Both Hampton and Macrory lauded the potential benefits of increased accountability in terms of securing better regulatory outcomes. In addition to the traditional modes of accountability, Hampton found that regulators were not generally “accountable for the way in which they carry out their work” with the result that incentives for regulators to act in a consistent and joined up

\textsuperscript{174} Macrory review (n 110) [5.13 – 5.14]. In respect of the detail which Macrory recommended each policy should contain see [5.15]. The OFT have recently published their enforcement policy: OFT, \textit{Statement of consumer protection enforcement principles}, OFT964 (London: OFT, 2007).
\textsuperscript{175} Macrory review (n 110) [5.18].
\textsuperscript{176} Macrory review (n 110) [5.18] and [5.21].
\textsuperscript{177} Macrory review (n 110) [5.20].
\textsuperscript{178} Macrory review (n 110) [5.20].
\textsuperscript{179} Macrory review (n 110) [5.20]. Policy statements of the OFT in this regard were cited approvingly (OFT, \textit{Office of Fair Trading Annual Plan 2007-08}, HC 339 (London: TSO, 2007), cited at ibid., p.90). For an example of one such exercise see OFT, \textit{Review of impact on business of Consumer Codes Approval Scheme}, OFT 870 (London: OFT, 2006).
\textsuperscript{180} Macrory review (n 110) [5.20].
way were reduced.\textsuperscript{181} Similarly, Macrory was of the view that, in addition to Parliamentary channels of accountability, it was equally important that regulators were “clearly accountable to those that they regulate, and those on whose behalf they are regulating”.\textsuperscript{182} While the mechanisms to increase transparency that Macrory recommended would also serve to strengthen regulator’s accountability, the review also underlined the importance of participation of “stakeholders”, including consultation processes and the provision of “[c]omprehensive and easy to use websites”.\textsuperscript{183}

The new code for regulators now gives expression to the Hampton and Macrory principles, stipulating that, in addition to creating and maintaining effective consultation and feedback opportunities,\textsuperscript{184} regulators should identify and explain the principal risks against which they are acting, and set clear standards and targets for their performance.\textsuperscript{185} Box 5 replicates what the code prescribes as to what should be included in the standards.\textsuperscript{186}

\begin{table}[h]
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\hline
\textbf{Box 5: Standards of performance} \\
\hline
- regulatory outcomes (capturing the principal risks); \\
- costs to regulated entities of regulatory interventions; and \\
- perceptions of regulated entities and other interested parties about the \\
  - proportionality and effectiveness of regulatory approach and costs. \\
\hline
\end{tabular}
\caption{Standards of performance}
\end{table}

Regulatory outcomes is defined as the “end purpose” of the regulatory activity.\textsuperscript{187}

- **Principle 11:** Enforcement resources should be targeted appropriately. Transparency both in terms of enforcement policy and in terms of monitoring outcomes can increase both compliance and the efficient use of enforcement resources.

\begin{flushright}
\textsuperscript{181} Hampton review (n 109) [4.115]. \\
\textsuperscript{182} Macrory review (n 110) [5.30]. \\
\textsuperscript{183} Macrory review (n 110) [5.31]. \\
\textsuperscript{184} Regulators’ Compliance Code (n 111) [9.1]. \\
\textsuperscript{185} Regulators’ Compliance Code (n 111) [9.2]. \\
\textsuperscript{186} Regulators’ Compliance Code (n 111) [9.2]. \\
\textsuperscript{187} Regulators’ Compliance Code (n 111) fn.2.
\end{flushright}
3.2.6 Dealing with systemic market problems
An effective consumer empowerment regime requires that there are mechanisms in place to deal with systemic market issues. This is important in three key respects. First, given that most jurisdiction are designed around the needs of average consumers, specific market issues which impact on disadvantaged consumers may not be covered by generic consumer law. Bespoke remedies aimed at such consumers in respect of certain markets may be appropriate, without the danger of over-regulating to the detriment consumers generally. Second, the cause of consumer detriment may be at a market level rather than a firm level. Consider a market, for example, where consumers are particularly risk-averse or where the serious nature or size of the transaction is such that a cooling-off period can have demonstrable benefits for consumers. Specific market-based remedies can be used to deal with such problems. Third, the use of tightly defined and focused ex ante remedies (consequent upon a market inquiry) may avoid the problem of business uncertainty associated with more general ex post duties.

**Principle 12:** The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets.

3.3 Institutional issues

3.3.1 The use of public enforcement agencies
There are a number of well rehearsed explanations for the emergence of administrative agencies in the UK. In the British context, they can be viewed as constitutionally awkward because, for example, they exercise powers which traditionally have been kept separate and they act on behalf of central government, but are not central departments of state. Their increased use has paralleled an increase in the size of government and its competencies.

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The alternative is to allocate the work to existing government departments or to place enforcement functions in the hands of the courts at the exclusive behest of private individuals. One reason why government may delegate functions to administrative agencies is to develop specialisation and expertise.\textsuperscript{189} The development of required expertise is sometimes only to be found in combination with rule-making and decision-making responsibilities, with the consequence that central government and the courts may be neither appropriate nor able to exercise the full range of functions necessary.

Agencies are often viewed as having significant advantages over the courts in a number of significant respects, for example, speed and economy of decision-making and freedom from technical rules of evidence and precedent, the latter allowing for more responsive policy making.\textsuperscript{190} In respect of central government, agencies are often said to have the advantage of being more responsive to the changing policy context, having both more flexibility and informational advantages over the government.\textsuperscript{191} Furthermore, in respect of certain decisions, it may well be preferable for an independent agency to be in place to, for example, provide credibility to the policy which the agency is charged to pursue.

3.3.2 Co-ordination between agencies
A number of issues emerge in a multiple agency enforcement setting. There are a number of benefits to ensuring that tasks are allocated to those best placed to make decisions. It is often suggested that local enforcers enjoy significant informational advantages over central agencies, for example, having a better knowledge of consumer needs or local market conditions in their respective areas. While some diversity of enforcement approach may be desirable, these benefits should be balanced carefully against the needs to conserve scarce enforcement resources (for example, by avoiding duplication), target such resources appropriately, and avoid the imposition of

\textsuperscript{189} Baldwin and McCrudden (n 134) 4 - 5.

\textsuperscript{190} Baldwin and McCrudden (n 134) 5. For a detailed discussion of the problems of imposing judicial norms on agencies in the context of electricity regulation see: C Scott ‘Regulatory discretion in licence modifications: the Scottish Power case’ [1997] PL 400-409.

\textsuperscript{191} Baldwin and McCrudden (n 134) 5.
unnecessary costs on business (through, for example, being subject to more than one agency in respect of the same activity). The Hampton review made a number of important recommendations on how the regulatory landscape in the UK could be improved by looking to questions of institutional co-ordination. The report identified a “fundamental problem” of unnecessary complexity due primarily to institutional fragmentation.\textsuperscript{192} Such fragmentation led to: duplication,\textsuperscript{193} a lack of coordination between regulators,\textsuperscript{194} and diseconomies of scale.\textsuperscript{195} These problems led to an inability of agencies to undertake comprehensive risk assessments in respect of overall (aggregated) enforcement patterns.\textsuperscript{196}

Of interest for our purposes, consumer protection and trading standards were identified as one particularly problematic area in many of these respects.\textsuperscript{197} Noting recent policy developments in this area,\textsuperscript{198} the review recommended that there be the creation of a new body at the “centre of Government” charged with overseeing the work of trading standards officers.\textsuperscript{199} Particular emphasis was placed on the co-ordination of local authorities’ enforcement powers (including in respect of trading standards), to deal with problems concerning a lack of effective priority setting, difficulties in central and local coordination, and inconsistencies in standards and enforcement activities.\textsuperscript{200} A set of proposals were made to ameliorate some of these problems which are in the process of being implemented.\textsuperscript{201}

\begin{footnotesize}
\begin{enumerate}
\item Hampton review (n 109) [4.9 – 4.11]. A detailed list of example was offered at [4.19] et seq.
\item Hampton review (n 109) [4.12], [4.43 – 4.44].
\item Hampton review (n 109) [4.12].
\item Hampton review (n 109) [4.12]. This criticism was levelled against the arrangements for trading standards in particular (ibid., [4.28]).
\item Hampton review (n 109) [4.12] and [4.39 – 4.40]. The Better Regulation Task Force (BRTF) had previously made a similar point in respect overlapping regulatory functions: Better Regulation Task Force, Avoiding regulatory creep (London: BRTF, October 2004)
\item Hampton review (n 109) [4.47] et seq.
\item In particular, increased attempts at better coordination led by DTI and the Local Authorities Coordinators of Regulatory Services (LACORS).
\item Hampton review (n 109) [4.48].
\item Hampton review (n 109) [4.86]. Hampton also recommended increased use of data sharing [3.35-3.37], subject to clarification of data protection rules.
\item On the implementation of the Hampton proposal on local authorities which includes the setting up of the Local Better Regulation Office (LBRO) and the Regulatory Enforcement and Sanctions Bill see: http://bre.berr.gov.uk/regulation/reform/lbro/index.asp (accessed 20
\end{enumerate}
\end{footnotesize}
Principle 13: In a multiple-agency setting, mechanisms should be in place to ensure that there is co-ordination and consistency of approach.

3.3.3 Alternatives to agency regulation: self regulation
There are a number of potential benefits to self-regulation, including the reduction of agency costs, a more responsive regime (assuming that self-regulatory bodies have greater informational advantages than do public agencies), and the possibility of providing more accessible redress mechanisms for consumers. There are, however, a number of potential disadvantages, for example, self-regulation can lead to excessively high standards which act as barriers to entry. As has been observed elsewhere, self-regulation is not sufficient unless firms are predominantly “benevolent”. While firms are for the most part likely to comply with the law simply because it is the law, and out of a sense of responsibility, there are countervailing forces acting upon firms which are likely to result in non-compliance where there is a lack appropriate sanctions. According to the literature, self-regulation where, for example, industry associations encourage compliance with the law (and perhaps more), requires the credible threat of state intervention should the self-regulatory mechanisms fail or under-perform. A credible and effective threat of intervention is normally a precondition for securing compliance through self-regulation.

December 2007). These initiatives fall short of Hampton’s proposals which had as a first-best option the transfer of the OFT’s consumer protection powers to this new body (ibid., [4.50]). Hampton stated that as a general proposition self-regulatory responses should be considered more widely (Hampton review (n 109) [4.5]).

Armstrong (n 102) 36 – 37.
Aires and Braithwaite (n 128) 19 – 20.

Returning to the pyramid metaphor, a flat pyramid with a truncated range of escalations of sanctions, will exert less pressure to keep regulation at its base, whereas a tall pyramid can “apply enormous pressure from the heights of its peak to motivate ‘voluntary’ compliance” (J Braithwaite, Regulation, Crime, Freedom (Dartmouth Aldershot 2000) 105; MCA (n 100) 15 – 16).

Cartwright (n 101) 222.
**Principle 14**: Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.

4.0 Vulnerable and disadvantaged consumers
The issue of vulnerable consumers is not a specific benchmark, but is nevertheless a matter which we think should be given explicit attention. Disadvantage can be defined as a set of individual characteristics which increase the risk of consumer detriment and/or intensify its impact. Such characteristics include poverty, low levels of education and disability. Vulnerability is a broader term based on a consumer’s susceptibility to detriment resulting from their personal characteristics (which may include, but is not limited to, disadvantage) and the specific market context concerned. Disadvantage and vulnerability are distinct. A consumer may well be disadvantaged but may be empowered (and vice versa). While the scale and significance of vulnerability will depend upon the market at issue, in general, we may say that a group of consumers is vulnerable if they are prevented as a result of their characteristics from realising the full potential of competitive markets with respect to certain essential commercially provided services that are vital for economic and social inclusion.

A key policy dilemma exists in respect of how a consumer regime should support such consumers. As a general proposition, a consumer empowerment regime should be aimed at improving outcomes for all consumers, but certain types of measures may have a particularly strong impact on disadvantaged consumers. Given that there is evidence of low-levels of participation in redress mechanisms among consumers:

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208 The definitions of disadvantage and vulnerability given here are inspired by the APC (n 28), chapter 12.
209 See section above.
– Redress mechanisms can be strengthened by the provision of accessible and visible ADR schemes, which may increase participation in such schemes of disadvantaged consumers;

– Complexity in advice provision is likely to deter disadvantaged consumers from seeking assistance and redress, with the consequence that simplification should promote accessibility (although as was noted above, regard should be had to disadvantaged consumers’ particular needs);

– Agencies can target resources to address consumer detriment in markets which impacts on disadvantaged consumers in particular; and

– Strong advocacy groups can ensure that the needs of disadvantaged consumers is reflected in the formulation and application of consumer policy, again especially important given their low participation in advice and redress mechanisms.

Other types of intervention which are general in nature may deliver particular benefits for the disadvantaged:

– Consumers who are cognitively impaired are more at risk to suffer detriment in markets which lack transparency and/or are subject to complex transactions. The use of appropriate informational remedies (particularly where information is layered) can facilitate the greater empowerment of such consumers; and

– Consumer education initiatives appropriately targeted have the potential to further empower disadvantaged consumers.

There are dangers, however, in intervening too far. The protection of disadvantaged consumers may be at the cost of reducing utility of everyone else, for example, in order to protect a small class of disadvantaged consumers, it may be necessary to impose more stringent regulation on a
product which may increase the costs, or reduce the choice, faced by all consumers. Furthermore, as was discussed above, inappropriate levels of protection may lead to moral hazard and stifle cognitive development on the part of all consumers, including the disadvantaged, as well as stifling innovation on the part of firms.

The extent to which a consumer regime takes into account, or gives priority to, the position of disadvantaged consumers is essentially a political choice and one possibly bound up in notions of fairness and distributional justice. Looking briefly at the position internationally, we can see that there is no clear answer to this question (see Box 6).

As was noted above, it is important to distinguish between disadvantage and vulnerability, the latter refers to a broader set of consumer characteristics which increase the risk of consumer detriment. To take the simple example of a low-income consumer. Low-income consumers, for example, can be said to suffer greater detriment than average consumers because the economic loss represents a greater proportion of their income. On the other hand, it is arguable that by reason of being on low-income, a consumer has a greater incentive to search for a better deal. Given vulnerability denotes the interplay of certain individual consumer and market characteristics, it is necessary to consider how disadvantage may contribute to or exacerbate consumer detriment in particular market settings. Furthermore, a regime based on consumer empowerment may require certain trade-offs to be assessed. First, the interests of consumers generally should be balanced against the interests of vulnerable consumers. It may be that in identifying the costs of intervening, that more targeted, or less-interventionist solutions can be identified. Secondly, it should be recognised that, as with consumers more generally, short-term detriment may act as an incentive for consumers to develop market skills, which carries with it potentially important spill-over effects outside of the market in question.
Box 6: the differing levels of protection given to vulnerable consumers

- In Australia, the onus is very much upon business to guard against problems of the vulnerable and the Australian Competition and Consumer Commission (ACCC) lists who these might be vulnerable, suggesting ways in which a business can mitigate against accusations of not acting correctly. According to the ACCC ‘a business should continue to contract or do business with consumers who may experience a disadvantage or vulnerability, as a refusal to deal will not be in any party’s interests, and may be in danger of breaching anti-discrimination legislation.’

- In Spain, the Consumer Defence Act (LGDCU) recognises that groups of consumers can be more vulnerable to misleading behaviour, abuse and fraud, and thus it contemplates a special legal treatment for them.

- In the US, besides giving general advice to consumers, the Federal Trade Commission also administers specific education programs which centre on specific practices or information needs of particularly vulnerable consumer groups.

- In Denmark, special protection for certain classes of consumers can be found in Part 3 of the Marketing Practices Act which for example contains provisions regarding marketing directed at children and young people. Accordingly, a firm must frame marketing directed at children and young people with specific reference to their natural credulity and lack of experience and critical sense.

- The EC Directive on Unfair Commercial Practices provides that a commercial practice shall be unfair if “it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed”.

- In the UK the OFT is committed to use its enforcement power to protect vulnerable consumers in particular.

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211 Article 2.f and Chapter VII. Consumer laws of the Autonomous Communities also provide similar protection.
213 OFT, Statement of consumer protection enforcement principles, OFT964 (London: OFT, 2007), [5].
References

M Armstrong ‘Interactions between competition and consumer policy’ MPRA Paper 7258 (University Library of Munich Germany 2008) available: http://ideas.repec.org/e/par85.html

I Ayres and J Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (OUP Oxford 1992)


R Baldwin and Martin Cave Understanding Regulation: Theory, Strategy and Practice (OUP Oxford 1999)

R Baldwin and C McCrudden Regulation and Public Law (Weidenfeld and Nicolson 1987)


J Braithwaite, Regulation, Crime, Freedom (Dartmouth Aldershot 2000)

BRE/NCC, Consumer Information and Regulation (by Vanilla Research) (BERR London 2007)

BRE/NCC, Warning: too much information can harm (BERR London 2007).

P Cane Atiyah’s Accidents, Compensation and the Law (7th ed Cambridge University Press Cambridge 2006)


COI, Consumer education: Establishing an evidence base (OFT London 2006)


Consumers International Balancing the Scales (Consumers International 1999)


M Doyle, K Ritters, S Broker, Seeking resolution: the availability and usage of consumer-to-business alternative dispute resolution in the United Kingdom, URN 03/1616 (DTI London 2004)

DTI, A New Future for Communications (DTI London 2000).


DTI and HM Treasury, Consumer Representation in Regulated Industries (DTI London 2004)


M George, C Graham and L Lennard *Complaint handling: Principles and Best Practice* (energywatch London 2007)


G Howells ‘Consumers and Participation’ in ND Lewis and D Campbell (eds), *Promoting Participation, Law or Politics?* (Cavendish London 2000), 291-318


Institut für Europäisches Wirtschafts und Verbraucherrecht e.V *The Feasibility of a General Legislative Framework on Fair Trading* commissioned by
Directorate-General Health and Consumer Protection of the European Commission (DG SANCO)


P Lunt The psychology of consumer detriment: A conceptual review (OFT 792 London 2006).


V Wallis Advice and the best way of delivering it (FSA London 2005)


Annexe B Comparative analysis of the regimes

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5. **Summary table of assessment and findings**
1. Legislative framework for consumer rights

In this section we discuss the legislative framework for consumer rights. First, we evaluate legislative objectives, the definition of consumer, and the substantive rights enjoyed by consumers, with our analysis informed by the following benchmarking principle:

- Principle 1: Consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels.

We then go on to evaluate the duties placed on firms in the UK and the comparative jurisdictions. In this regard, we specifically discuss the implication for the UK of the duty to trade fairly under the EC *Unfair Commercial Practices Directive*\(^1\) which has been transposed into national law by *Consumer Protection from Unfair Trading Regulations* that came into effect on 26 May 2008. Our analysis on this is informed by the following benchmarking principle:

- Principle 2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.

1.1 Legislative Objectives

Introduction

The legislative objectives of consumer protection rules are expressed differently in different jurisdictions. In the jurisdictions under study, at a general level, this difference appears to depend mainly on whether consumer law and competition law are regulated in different pieces of legislation and

whether consumer law is primarily treated as a separate body of law or as part of, for example, contract law. At a specific level, the legislative objectives naturally differ depending on whether the legislation is aimed at addressing consumer protection in general or whether it regulates a particular aspect of it. Falling into the category of jurisdictions in which consumer law is treated as a separate body of law are the United Kingdom, Denmark and Spain. In these jurisdictions, depending on whether the rules are found in a general piece of legislation on consumer protection, as in the case of Spain or in several pieces of legislation in a piecemeal manner, the expressed objectives differ.

UK
The Government of the United Kingdom expresses itself to be committed to improving Britain’s consumer regime which is sought to deliver social justice, economic and environmental progress, and which is as fair to business as it is to consumers.² The target has been set as that of raising the consumer regime of the UK to the level of the best in the world.³ Indeed, the Government wishes to reach the level of the best by 2008 and wants a consumer regime that is fit for purpose for the 21st century; that is, a regime that will empower and protect consumers; support open, competitive and innovative markets which is fair to all and has the minimum regulation necessary to achieve these goals.⁴ The regime should moreover support patterns of consumption that respect the pressures on the local and global environment and protect vulnerable consumers.⁵ This consumer regime is to be based on the principle of proportionate, risk-assessed and evidence based intervention; instead of regulating and inspecting on a routine all-inclusive basis, more effort will be targeted on rogue traders and a lighter touch for mainstream responsible businesses.⁶ Central government intervention in markets is thus to be kept to the absolute minimum that is necessary to achieve the objectives set out.⁷ The Government aims to see empowered

³ DTI Fair Deal for All (n 2) 3, 6.
⁴ DTI Fair Deal for All (n 2) 6.
⁵ DTI Fair Deal for All (n 2) 7.
⁶ DTI Fair Deal for All (n 2) 7.
⁷ DTI Fair Deal for All (n 2) 9.
consumers who are able to make informed choices between different goods and services and who have access to the information needed to do so. It thus wants a legal framework that is clear and simple so that it can be understood by consumers and business; is flexible and responsive to the changing demands of the 21st century markets; supports innovation; provides suitable protection for consumers and does not put unnecessary restrictions on the market or place unnecessary burdens on business.

In Denmark, although consumer law is regulated separately from competition law, Denmark does not have one overall or codified consumer protection law. Instead, there are several Acts which each contain some consumer protection provisions. Each Act has its own legislative objective. For example, the Danish Sale of Goods Act10 aims at protecting consumers in issues relating to price, delivery, time of performance, late performance for buyer and seller, risk for damaged or lost goods, buyer’s inability to pay, lack of conformity of the goods, rejection of the goods and terms of sale.11 The Marketing Practices Act12 aims to ensure that traders, subject to the Act, exercise good marketing practice with reference to consumers, other traders and public interests. The Consumer Complaints Act13 aims to encourage companies to set up more private complaints boards, make case processing by the Consumer Complaints Board swifter and more efficient, and strengthen efforts to prevent complaints from arising in the first place.

Comparative jurisdictions
In Denmark, the Government launched the largest general consumer policy reform in twenty-five years in 2003. The government’s expressed objectives

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8 DTI Fair Deal for All (n 2) 13.
9 DTI Fair Deal for All (n 2) 16.
11 A consumer sale means a contract of sale between a buyer (consumer) and a merchant acting in the course of business when the buyer is primarily acting for purposes that are not related to his trade, business or profession.

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with the reform were to: introduce a new principle for consumer policy based on consultation and joint responsibility between companies and consumers, create a new organisation devoted to consumer affairs, and launch around fifty initiatives to realise the new policy. The Danish Government aimed at achieving: more efficient organisation of consumer authorities; greater consumer protection; improved consumer advice services; promoting consumers’ freedom of choice; involving companies as partners and simplifying consumer regulations. Of the Government’s fifty initiatives to realise the new consumer policy, twenty-nine were realised by November 2004. The other twenty-one initiatives were, at the time, pending but most of them have now been achieved. According to the report Denmark’s New Consumer Policy (2003) the object of consumer legislation is to ensure consumers of a high level of consumer protection and equally to protect companies against unfair trading practices by competitors.

In Spain, the mandate for consumer protection is found in the Constitution: Article 51 of the Constitution requires the public administration to protect the consumers and promote their education, information and representation. The key legislation for consumer protection in Spain is the Consumer Defence Act 26/1984 of 19 July (Ley General para la Defensa de los Consumidores y Usuarios [LGDCU]) which was enacted in response to this constitutional mandate and has become the cornerstone of the legal regime that protects consumers in Spain. The LGDCU has seen amendments over the years, the most recent being made by the Improvement of the Protection of Consumers Act 44/2006 of 29 December (LMPCU). The LGDCU lays down the following objectives: to create effective procedures for the defence of consumers; to provide a legislative framework that fosters the development of associations of

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16 Denmark’s New Consumer Policy (n 14) 20.
17 A León Arce and LM García Derecho de los Consumidores y Usuarios (2nd ed Tirant Lo Blanch Valencia 2007) 110-111.
18 Arce and García (n 17) 130-131.
19 Arce and García (n 17) 131.
20 For example, Article 31 LGDCU recognises arbitral proceedings for the resolution of disputes on consumer law.
consumers\textsuperscript{21} and to define the principles, rights and obligations that protect consumers. Literature suggests that these objectives have been accomplished only partially, the first objective being realised less effectively.\textsuperscript{22} Since the competence over issues of consumption is shared between central and regional governments, most of the Autonomous Communities (ACs) have also enacted their own consumer laws.\textsuperscript{23}

It must be noted that even in jurisdictions where consumer law is primarily treated as a separate body of law, there is nevertheless some reliance on, for example, contract law rules. However, the absence of a separate body of consumer law and its treatment as part of contract law becomes most obvious in the case of Germany.

As such, in Germany, the legal landscape of consumer protection is fragmented: neither does a single consumer protection law exist, regulating all or most aspects of consumer protection, nor an exact definition of what belongs to consumer protection law.\textsuperscript{24} Instead, duties and rights concerning consumer protection are allocated in numerous pieces of legislation in both civil and public law areas. These laws pursue a variety of objectives and often do not intent to protect consumers’ interests in the first place. In its \textit{Action Plan on Consumer Protection 2003}\textsuperscript{25} and in the \textit{Consumer Policy Report 2004}\textsuperscript{26} the Federal Government delineated its consumer policy. Three basic principles are supposed to determine consumer policy in Germany. First, health and safety should be protected in accordance with the precautionary principle. Secondly, consumer policy is geared to the preventative protection of consumers’ economic interests. Finally, the Government commits itself to strengthen the principle of consumers’ individual responsibility and autonomy. Thus, the aims of consumer protection policy are: further development of precautionary protection of consumer health, especially for food, cosmetics,

\textsuperscript{21} For example, Articles 8.3 and 20-22 LGDCU.
\textsuperscript{22} Arce and García (n 17) 131.
\textsuperscript{23} Arce and García (n 17) 111-117.
\textsuperscript{24} G Borchert \textit{Verbraucherschutzrecht} (2\textsuperscript{nd} ed C.H.Beck Munich 2003) 1.
\textsuperscript{25} Bundesregierung ‘Bericht der Bundesregierung – Aktionsplan Verbraucherschutz’ Bundestagsdrucksache 15/959 (07 May 2003).
\textsuperscript{26} Bundesregierung ‘Verbraucherpolitischer Bericht 2004 der Bundesregierung’ (2004).
and products handled by consumers; protection of economic interests of consumers and strengthening of consumer rights, especially information rights, rights of revocation and damages rights in consumer contracts which also include the protection against misguidance and deception; strengthening of self-determination and individual responsibility by making sufficient, coherent and balanced information available, and ameliorating the knowledge and competencies of consumers; and encouraging sustainable consumption.

Falling into the category of jurisdictions where consumer law and competition law are regulated in the same piece of legislation are Australia, Canada and the United States. In these jurisdictions the legislative objectives are expressed in terms of the protection of both competition and consumers. This unified treatment may have more than semantic or systematic implications which can be observed in the case of, for example, the United States.

The United States possesses a mature, sophisticated but at the same time complicated consumer protection regime – particularly at the federal level which incorporates many different enforcement mechanisms activated by different actors. The Federal Trade Commission Act (FTC Act) constitutes the main federal legislation of consumer protection in the US. Section 5 of the FTC Act – as amended by the Wheeler-Lea Amendments of 1938\(^\text{27}\) - declares ‘unfair methods of competition’ as well as ‘unfair and deceptive acts or practices’ unlawful. The second part of the FTC Act’s mandate constitutes the main legislative basis of the US federal consumer protection regime. Since the 1970s courts generally show deference to the FTC’s interpretations as to whether a practice falls within the Section 5 of the FTC Act. In the light of this picture, it is possible to say that the objectives of the US federal consumer protection regime are defined and fulfilled by the FTC through practical enforcement efforts. In general however, the FTC Act aims to ‘[make] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest

\(^{27}\)Wheeler-Lea Act, 52 Stat. 116 (1938).
competitor.\textsuperscript{28} The FTC on the other hand, defines its objective as ‘to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions without unduly burdening legitimate business activity.’\textsuperscript{29}

After the 1994 amendment of the FTC Act\textsuperscript{30} which incorporated Section 5(n) clarifying the concept of ‘unfairness’, the FTC shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice \textit{causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition}.\textsuperscript{31} Thus, countervailing benefits to consumers or \textit{competition} can trump ‘unfairness’ to consumers. In other words, in some jurisdictions, the regulation of consumer law and competition law under the same piece of legislation may also signify a different treatment of the issues and the relationship between protection of consumers and protection of competition which might lead to a different policy compared to those jurisdictions where the two areas of law are regulated separately.

A similar example to the US is Australia where the primary piece of consumer protection legislation is the \textit{Trade Practices Act} (TPA) 1974 which is administered by the Australian Competition and Consumer Commission (ACCC). The legislative objective of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and the provision of consumer protection. The TPA covers anti-competitive and unfair market practices, mergers and acquisitions, product safety and liability. It contains both civil remedies and criminal liability provisions.

\textsuperscript{28} 83 Cong. Rec. 3255 (1938) (Remarks of Senator Wheeler).
\textsuperscript{31} 15 U.S.C.A. § 45 (n).
In the same vein, in Canada, consumer policy has two main legislative sources: the Federal Competition Act and the Provincial Trade Practices Acts. The Federal Competition Act covers such consumer issues as misleading advertising, deceptive telemarketing, and multi-level marketing and pyramid schemes, as well as such competition issues as price discrimination and predatory pricing. Consumer policy at the central government level (Industry Canada) is aimed at providing a fair and efficient marketplace that supports and advances the interests of Canadians as consumers and protects them in the event of market failure. The Competition Bureau which is part of Industry Canada, defines itself as ‘protecting and promoting competitive markets and enabling informed consumer choice’. To achieve these aims the organisation investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction.\(^{32}\) In its business plan, the Office of Consumer Affairs (federal) sets out five strategic goals which it is working to: assist consumers in obtaining information on how to protect their interests in the marketplace; influence the formulation of government policies to reflect consumer interests; promote cooperation in the development of consumer policies across Canada; assist consumer organisations to represent consumer interests effectively to government and the private sector; and to work with the consumer movement and the private sector to develop new approaches to consumer protection.\(^{33}\)

**Summary and conclusion**

In terms of legislative objectives, the main difference between jurisdictions is based on whether consumer law and competition law are regulated under the same legislation and whether consumer law is treated as a separate body of law or as part of, for example, contract law. The relation between competition law and consumer law can in effect imply a choice between regulation to protect consumers and trusting the operation of the markets, such as the case in the United States. In the UK, although consumer law is regulated separately from competition law, there nevertheless is a high level of trust in the free market, especially under the current consumer law reform aiming at minimum government intervention targeted at rogue traders. In this respect, it is also

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\(^{33}\) [www.opc.gouv.qc.ca](http://www.opc.gouv.qc.ca).
important to note that in the UK both competition law and consumer law are enforced by the same authority, namely the Office of Fair Trading, save for local enforcement of consumer law by Trading Standards Services.

1.2 Nature of Rights Enjoyed By Consumers

Introduction
Consumer rights lie at the heart of consumer empowerment. However, to be effective, consumer rights have to transparent, so that consumers are aware of their rights \textit{ex ante} or failing that, consumer rights should be disseminated effectively through consumer advice channels that consumers can have recourse to \textit{ex post}. This section first sets out the definition of ‘consumer’ in the jurisdictions under study, then sketches out the rights enjoyed by consumers, followed by a look at the issue of ‘vulnerable’ consumers and finally provides an assessment.

1.2.1 Definition of ‘consumer’
The definition of ‘consumer’ changes from jurisdiction to jurisdiction and is broader in scope in some jurisdictions as compared to others. For example, in Australia, according to Section 4B for the purposes of the TPA, unless the contrary intention appears: a person shall be taken to have acquired particular goods or services as a consumer if, and only if (i) the price of the goods or services did not exceed the prescribed amount (currently $40000); or (ii) where that price exceeded the prescribed amount the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle. Moreover, for goods, the person should not have acquired the goods, or hold herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land. As such, this definition of ‘consumer’ does not appear to be limited to ‘end-users’ or ‘final consumers’,
Unlike most European counterparts; outside the areas specified in Section 4B, a trader who purchases goods for use in a business, can be a ‘consumer’.

In Denmark, few of the consumer protection laws contain a ‘consumer’ definition, but an exception is the E-Commerce Act\(^\text{34}\) which defines ‘consumer’ as any natural person who is acting for purposes which are outside her trade, business or profession.\(^\text{35}\) It must be noted that this is also the common definition of ‘consumer’ in EC consumer law.\(^\text{36}\) Further, in the Danish Consumer Complaint Board (CCB)’s Terms of Complaint ‘consumer’ is defined as a person who has bought a product or service principally intended for use as a private individual, i.e. the product or service forms part of her everyday domestic arrangements.\(^\text{37}\) If the product or service is principally intended for the exercise of commercial activity or the like, then the person is not a ‘consumer’.\(^\text{38}\) Similarly, a definition of consumer covering all areas and aspects of law does not exist in Germany. However, Section 13 of the Civil Code defines the term ‘consumer’ as ‘every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.’\(^\text{39}\) In Spain, ‘consumer’ is defined as ‘natural or legal persons who acquire, use or enjoy, in the capacity of final users, movable or immovable goods, products, services, activities or functions, whatever the nature of those that produce, distribute or deliver them, be it public or private, individual or collective.’\(^\text{40}\) This definition somewhat differs from the EC counterpart in that it includes not only natural persons, but also legal persons.

The definition of ‘consumer’ under UK legislation is also not necessarily the same as that under EC legislation. For example, under Part 8 of the Enterprise Act 2002, the definition of consumer was deliberately worded to include individuals setting up a business, in order to ensure that operations such as scam home-working schemes and vanity publishers would be caught


\(^{35}\) E-Commerce Act (n 34) Article 2(5).

\(^{36}\) See for example Unfair Commercial Practices Directive (n 21) Article 2(a).

\(^{37}\) http://www.forbrug.dk/english/complaints-board/00/.

\(^{38}\) http://www.forbrug.dk/english/complaints-board/00/.

\(^{39}\) http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#Section%201.

\(^{40}\) Articles 1.2 LGDCU.
by the Part 8 enforcement mechanism.\textsuperscript{41} In contrast, for EC infringements, the definition of a ‘consumer’ is taken from the \textit{Injunctions Directive} and the European Directives listed in the annexe to that Directive. The specific definition will therefore depend upon the legislation that is being enforced. Yet, in general, the ‘consumer’ will be any natural person who is acting for purposes which are outside her trade, business, craft or profession.\textsuperscript{42}

There is no definition of ‘consumer’ in the \textit{Canadian Competition Act} or the US FTC Act.

1.2.2 Rights Enjoyed by Consumers

Introduction
In all jurisdictions, consumers have a variety of rights arising from a variety of legal instruments. In most jurisdictions consumers have a right of private action to include damages, injunctions, refunds and revocation of contract, as well as the right to complain to an administrative body. In some jurisdictions, for example Germany, the private action rights arise from contract law. Some jurisdictions, like Denmark, require the consumer to first try to resolve the problem with the business before she can use her right to complain. Most jurisdictions provide specific protection for ‘vulnerable’ consumers which is dealt with separately in Section 1.2.3.

UK
Consumer rights arise from a range of legislation in the UK. For example, \textit{Sale of Goods Act 1979} sets out the law governing contracts for the sale of goods and governs a wide range of matters such as formation of contract, implied terms, the parties’ rights including remedies for breach of implied terms and other breaches of contract, transfer of ownership in the goods and performance of the contract. As such, where goods are supplied to a consumer in breach of an implied term, she is entitled to reject them and claim

\vspace{0.5cm}


\textsuperscript{42} \textit{Unfair Commercial Practices Directive} (n 21) Article 2.
a refund of the price if she acts before she is deemed to have accepted them. Where a consumer has lost her right to reject goods, she may claim damages in respect of the non-conformity of the goods with the implied terms. The Act provides additional remedies to consumers where goods do not conform to the contract of sale at the time of delivery. In that case, the consumer can require the seller to repair or replace the goods. Where that would be impossible or disproportionate in comparison to the other remedies the seller must give a full or appropriate partial refund. Similar rights arise from Supply of Goods (Implied Terms) Act 1973 and Supply of Goods and Services Act 1982 as well.

Unfair Terms in Consumer Contract Regulations 1999 [amended by Unfair Terms in Consumer Contract (Amendment) Regulations 2001] implement an EC Directive and provide that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term. An unfair term in a contract concluded with a consumer by a seller or supplier is not binding on the consumer. Under the Regulations, the OFT has an obligation to consider any complaint made to it about the fairness of any contract term drawn up for general use. OFT may seek assurances and, if necessary, injunctions against those using terms which it considers as unfair. Certain other named bodies are also empowered to seek injunctions against unfair terms.

Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 [amended by Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) (Amendment) Regulations 1998] protect the consumer in respect of contracts made at the doorstep or otherwise concluded away from business premises. Where the Regulations apply, they provide a cooling-off period of seven days
enabling a consumer within that period to cancel the contract by giving a notice of cancellation. The Regulations provide that if the consumer does not receive a written notice informing her of this right of cancellation and of this period for reflection, the contract will not be enforceable against her. The Amendment Regulations make it an offence for a trader who enters into a contract to which the principal Regulations apply without giving the consumer written notice of her right to cancel that contract, together with a cancellation form for that purpose, in accordance with those Regulations.

Comparative jurisdictions
In Australia, the TPA confers private rights and imposes private obligations. Under the TPA, the consumer has the right to a refund if goods are defective, not fit for purpose, do not match the sample shown to the consumer or are not of merchantable quality. There is often no precise description of these criteria and thus case law is important. Competitors, customers or consumers can sue for damages if they suffer harm as a result of a breach. At the information centre maintained by the ACCC, 65% of complaints relate to consumer protection. The ACCC and State agencies aim to encourage customers and traders to solve problems themselves without seeking formal enforcement action by the authorities. Industry Codes of Practice help businesses and customers and provide accessible summaries of the key consumer legislation, with the obligations falling on businesses and consumer rights.43

In Canada, the provincial governments are responsible for regulating individual transactions, contract and sales of goods and services, and most industry specific issues.44 Such provincial legislation may establish the basis for a private right of action against a trader. Almost all provinces require door-to-door sellers to be licensed and there is generally a ten-day cooling-off period, during which a consumer can cancel a contract she makes with a door-to-door salesperson for any reason.

44 DTI Report (n 43).
In Denmark, consumers have the right to complain via the administrative system with several opportunities. They can complain to the Consumer Complaint Board (CCB); one of the seventeen private independent complaint boards and any other specialised complaint boards. Before complaining to the CCB, the consumer must have tried to resolve the problem directly with the business. This is to give the business an opportunity to remedy the problem. Besides action via the administrative system, consumers can take private action before the civil courts. For instance, according to the *Danish Sale of Goods Act*\(^\text{45}\) the seller shall be liable to pay damages to consumers if, in a sale of specific goods, the goods are not delivered to the consumer by the agreed time; under the *Danish Contracts Act*\(^\text{46}\) if the consumer agreement is misleading and unfair towards the consumer, the agreement can be set aside partially or fully; the *Act on Actions for Injunctions*\(^\text{47}\) makes it possible for the courts and administrative authorities to issue an injunction against actions violating consumer interests; the *Act on Certain Consumer Contracts*\(^\text{48}\) prohibits cold calling and other non-initiated attempts to enter into an agreement with a consumer, for example door-to-door sales and insofar as a consumer enters into such an agreement, the consumer has a right to withdraw from the agreement in certain circumstances.\(^\text{49}\) Concurrent action before a civil court and an administrative complaint board is excluded. If the consumer takes private action before the court, Chapter 31 of the *Administration of Justice Act*\(^\text{50}\) offers legal aid if certain economic criteria, set out in the Act, are fulfilled.\(^\text{51}\)

In Germany, the duties imposed on firms do not necessarily grant corresponding rights for damages, injunction or remedial action for consumers in case of an infringement. The majority of rights including damages,
withdrawal, injunction and revocation stems from the area of civil law. Breaches of public consumer protection law are not normally pursued by consumers, but by public authorities. Consumers may defend their rights and claim redress under the law of obligations forming part of the Civil Code. However, these rights do not exclusively address consumers. The German Civil Code provides a set of rules protecting consumers: provisions about (the withdrawal from) doorstep contracts, distance selling contracts, contracts in e-commerce, contracts on commodities, time-sharing contracts, consumer credits and financing agreements between consumers and entrepreneurs. Consumers have a right of revocation in loan contracts. Provisions regarding the delivery by instalments allow consumers to withdraw and return the good. The same right exists for distance selling contracts; a consumer who has entered into a doorstep agreement is endowed with the right to revoke the contract. The rules about general business terms which were implemented in the Civil Code regulate formalities, the admissibility of contract terms and clauses, withdrawal and information rights. The violation of business terms rules renders the clause in question void.

The German Act Against Unfair Competition (UWG) also arranges for actions for injunction, damages claims and actions to skim the excess profit (which has to be passed on to the federal budget). Although the Act aims at consumer protection, consumers do not have the right to pursue violations of the Act’s provisions. The vast majority of enforcement actions are taken by competitors or business organisations. Since 1966 the Act Against Unfair Competition has provided for a right of action by designated consumer bodies, but not individuals. Consumer bodies can seek court injunctions to stop unfair competitive behaviour, but unlike competitors cannot claim for damages or compensation. This has not been changed with the recent reform of 2004. However, after the amendment, consumer bodies are now allowed to skim the excess profits if provisions of the Act have been violated intentionally and caused damage in a multiplicity of cases. The Ministry of Justice has rejected proposals by consumer bodies that individual consumers should be allowed to bring actions under the Act Against Unfair Competition. To implement the EC
**Unfair Commercial Practices Directive** a first ‘consultant draft’\(^{52}\) has been published.\(^{53}\) According to this draft the blanket clause in Section 3 is suggested to be concretised in terms of consumers. The protection of consumers from misleading omissions must be clarified in the Act. The implementation of the Directive will induce a final policy change towards consumer protection. However, the right for individuals to seek damages is still not intended to be introduced. The *Injunctions Act (UKlaG)*\(^{54}\) supplements the enforcement of the *Act Against Unfair Competition* and other laws, such as the *Civil Code*. It serves the protection of consumers and enables authorised bodies, including consumer bodies with at least seventy-five members and which have been operating for at least a year, to act on behalf of consumers.

In Spain, according to Article 2.1 LGDCU consumers are entitled to the basic rights of: protection against risks that may affect their health and security,\(^{55}\) protection of their social and economic legitimate interests, in particular as a result of abusive clauses in contracts,\(^{56}\) redress or reparation against the harm suffered;\(^{57}\) correct information on the different goods and services; education; and the dissemination of information that facilitate knowledge on the adequate use, consumption or enjoyment of goods and services;\(^{58}\) advice, participation in the process of elaboration of those rules that affect the consumers directly, and representation of their interests - all these through legally constituted associations, groups or confederations of consumers;\(^{59}\) legal, administrative and technical protection in case of disadvantage, subordination and lack of defence.\(^{60}\) These basic rights are complemented by the legal framework that governs particular sectors like travel agencies, banking cards, sanitation and medical products, industrial products, credit

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\(^{52}\) That is not an official draft to initiate formal legislation.


\(^{54}\) *Unterlassungsklagengesetz*.

\(^{55}\) Articles 3-6bis LGDCU as modified by Article 1.1 LMPCU.

\(^{56}\) Articles 7-12 LGDCU as modified by Articles 1.2-1.6 LMPCU.

\(^{57}\) Articles 23-24 LGDCU as modified by Article 1.9 LMPCU.

\(^{58}\) Articles 13-19, 20Bis, 41 LGDCU as modified by Article 1.7 and 1.8 LMPCU.

\(^{59}\) Articles 20-22er LGDCU as modified by Article 1.8 LMPCU.

\(^{60}\) Articles 23-24 LGDCU.
sales, etc\textsuperscript{61} and by the transposition of European legislation into the Spanish regime of consumer law.\textsuperscript{62}

In the United States, consumers enjoy a right to complain to the FTC and any other federal agency and state agency with the power of enforcement depending on which federal statute is violated. They may also bring actions for injunctions and monetary relief before the federal and state courts. The substantive problem facing consumers in actions brought under federal law is the fact that the FTC Act can only be enforced by the Federal Trade Commission, and in order to recover damages in cases of unfair and deceptive practices, consumers have to rely on the conventional 
\textit{caveat emptor} doctrine of the common law which requires a high standard proof regarding the causality between the practice and the injury, and the intent and/or fault of the defendant in causing the injury.\textsuperscript{63} Therefore, in most consumer actions plaintiffs prefer to rely on the state laws instead which provide a special right of action against unfair and deceptive practices.\textsuperscript{64} Some state statutes also authorise award of multiple damages in consumer actions.\textsuperscript{65}

1.2.3 Vulnerable consumers
Broadly speaking, the consumer protection rules in the jurisdictions studied are designed for the ‘average consumer’ and where it is deemed necessary, the law provides additional protection for those who might be deemed ‘vulnerable’. Some type of direct and additional protection for ‘vulnerable’ consumers is provided by law in Denmark, Spain and the UK. The factors that result in the consumer being identified as ‘vulnerable’ are to a large extent common in all jurisdictions: age; income; physical/metal disability; level of

\textsuperscript{61} Arce and García (n 17) 145.
\textsuperscript{62} Arce and García (n 17)143-146.
\textsuperscript{64} A private right action to sue for the violations of the state consumer protection act exists in every state except Iowa and North Dakota. See Pridgen (n 63) § 6:2.
\textsuperscript{65} California, Connecticut, District of Columbia, Georgia, Idaho, Kentucky, Missouri, Oregon and Rhode Island statutes authorise the award of punitive damages. In Vermont it is possible to recover exemplary damages not exceeding three times the value of consideration given by the consumer. See Pridgen (n 63) § 16:6.
literacy and some cultural characteristics, such as language, ethnicity and religion which result in the consumer’s belonging to a minority in the jurisdiction. Similarly, although the EC Unfair Commercial Practices Directive in general takes the ‘average consumer’ as the benchmark, according to Article 5(3) commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.

UK
In the UK, for example, Consumers, Estate Agents and Redress Act 2007 Section 12 provides for special investigation of complaints made by ‘vulnerable’ designated consumers to the National Consumer Council. For that purpose, a person is ‘vulnerable’ if the Council is satisfied that it is not reasonable to expect that person to pursue the complaint on that person's own behalf. Vulnerable consumers and the additional help to be provided to them is also included in the relevant criteria for the OFT approval of codes of practice.66 ‘Vulnerable consumers’ are defined as those whose circumstances put them at risk of making an incorrect or inappropriate decision or who are at risk of receiving inferior goods or services.67 They include those: with a disability that may put them at risk of making an incorrect or inappropriate decision; with poor literacy skills; with a lack of knowledge about a complex product or service; who are purchasing something at a time of particular stress or distress; where English is not the first language and English is the only language in which material is available.68

67 OFT Consumer Codes Approval Scheme (n 66) 25.
68 OFT Consumer Codes Approval Scheme (n 66) 25.
Comparative jurisdictions

In Denmark, special protection for certain classes of consumers can be found in Part 3 of the *Marketing Practices Act*. For example, the Act contains provisions regarding marketing directed at children and young people. In Spain, the LGDCU recognises that groups of consumers can be more ‘vulnerable’ to misleading behaviour, abuse and fraud, and thus it contemplates a special legal treatment for them. For example, it promotes information campaigns directed to the geographical areas of disadvantaged social groups. However, the LGDCU fails to present a set of legal rules to this respect that facilitate implementation, like by defining ‘vulnerable’ groups with clarity and specifying actions directed to protect them. In contrast, most of the consumer laws of the Autonomous Communities do define those groups of consumers that the law considers vulnerable and the type of protection from which they can benefit. For instance, according to Article 21 of the *Statute of Consumer* (Ley 3/1993 of 5 March) of the region of Cataluña, the regional government has the duty to grant special protection to (i) children and adolescents, (ii) pregnant women, (iii) persons aged above sixty-five years old and (iv) the sick and physically impaired persons. Article 22 of the Statute lists particular actions directed to protect these groups, like the security of toy products or the regulation of advertisements that may result in harm to children.

In the other jurisdictions under study, even if the legislation does not directly provide additional protection for the vulnerable, the system appears to nevertheless show some recognition of the issue.

For example, in Australia, regarding vulnerable consumers, the onus is very much upon business to guard against problems. The test on which the deceptive or misleading character of conduct is decided under the TPA is that of ‘an ordinary purchaser’, including purchasers who fail to take reasonable

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69 *Marketing Practices Act* (n 12).
70 Article 2.f and Chapter VII LGDCU.
71 Article 23.b LGDCU.
73 Llamas Pombo (n 72) 674-675.
care of their own interests, but not to the level of ‘unusual stupidity.’ The ACCC website lists who the ‘vulnerable consumers’ might be and suggests ways in which a business can mitigate against accusations of not acting correctly. Suggestions include staff training, subscribing to a code of conduct and acquiring their booklet entitled ‘Don’t Take Advantage of Disadvantage’.74 ‘Disadvantaged’ or ‘vulnerable’ consumers are defined on the ACCC website as those who: have a low income; are from a non-English speaking background; have a disability (intellectual, psychiatric, physical, sensory, neurological or learning related); have a serious or chronic illness; have poor reading, writing and numerical skills; are homeless; are very young; are old; come from a remote area; have an indigenous background. The ACCC points out that ‘a business should continue to contract or do business with consumers who may experience a disadvantage or vulnerability, as a refusal to deal will not be in any party’s interests, and may be in danger of breaching anti-discrimination legislation’.75 From the responses to our questionnaire, it is also understood that there are programmes designed by the agencies to cater for ‘vulnerable’ consumers which involve forming partnerships with various cultural and ethnic groups.76

In Canada, ‘vulnerable consumers’ appear to be defined by Public Interest Advocacy Centre (PIAC) as those on low income77 and also ‘seniors’ for whom there exists a special website with detailed information. However, it appears that there is no legal definition of ‘vulnerable’ in Canada and PIAC self-defines its representation of who it thinks are vulnerable.78 It is usually seniors, but sometimes also youth, those on low income and otherwise marginalised. Similarly, it can be mentally or physically handicapped or any identifiable (often racial, religious or ethnic) group depending entirely upon the circumstances.

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76 See Response to Q16.
77 www.piac.ca.
78 E-mail correspondence with John Lawford Counsel at PIAC Canada.
In the United States, federal law does not foresee any formal special protection mechanisms for certain classes of consumers. However, the FTC enjoys a wide discretion in terms of designing its enforcement agenda and planning mechanisms for consumer advice. In both accounts, as a policy it gives priority to the consumers who are most vulnerable to deception, such as elderly or the Hispanics.

1.2.4 Assessment

Questionnaire data
The responses to our questionnaire show that, even if the average consumer does not know about the legislation in place, she may know ‘where to go’ when she has a problem. This seems to be the opinion in the UK and Australia.\(^79\) Nonetheless, the complexity of the regime and the consumers’ difficulty with understanding their rights have been acknowledged by respondents from the UK, Australia, Canada, Germany and to an extent Denmark.\(^80\) Confusion on the part of consumers in terms of which agency to complain to or as regards the difference between public agencies and consumer associations was acknowledged by the respondents from Denmark and Spain.\(^81\) Nonetheless, an overwhelming majority of respondents to our questionnaire agree that consumers are provided with adequate information relating to the consumer protection regime as can be seen Table B.1.

Table B.1: Consumers are provided with adequate information relating to the consumer protection regime (Q21)

| Strongly Agree | 1 |
| Agree          | 16 |
| Disagree       | 3 |
| Strongly Disagree | 1 |
| Do not know    | 0 |
| Total:         | 21 |

\(^79\) See response to Q5, Q8.
\(^80\) See response to Q3, Q5, Q8.
\(^81\) Response to Q5, Q6.
Insofar as the complexity of the regime reduces the consumers’ awareness of their rights and their chances of learning about their rights, all the regimes may be suffering from a lack of transparency to a degree. Overall, it appears that in most jurisdictions, the rights of consumers are not clear to most consumers, but there exists an overwhelming perception on the part of agencies that most consumers know how to find out about their rights.\(^8^2\) Nonetheless, this perception may be a challengeable one since as one of the respondents from Denmark points out, the agencies only become aware of the consumers who have been able to find out about their rights.\(^8^3\) Thus, the proportion of consumers who genuinely know ‘where to go’ in case of a breach of their rights remains unclear.

On the other hand, the issue may not only be one of consumers’ not knowing what rights they have. It appears that there may also be the issue of consumers’ believing to have rights that they do not actually have. The responses to our questionnaire from Canada, the UK and to an extent Spain point at this confusion.\(^8^4\)

There similarly seems to be a dominant belief that arrangements for the protection of consumers work well for the ‘average consumer’, whereas this belief does not seem to hold true for how well the arrangements work for those consumers who find it difficult to get the best outcome when making a market transaction in a specific market as can be seen in Tables B.2 and B.3.\(^8^5\)

**Table B.2: Arrangements for the protection of consumer interests work well for the average consumer (Q31)**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>3</td>
</tr>
<tr>
<td>Agree</td>
<td>13</td>
</tr>
</tbody>
</table>

\(^8^2\) Response to Q8.
\(^8^3\) Response to Q8.
\(^8^4\) Responses to Q3, Q4, Q8
\(^8^5\) Response to Q31 and Q32.
Table B.3: Arrangements for the protection of consumers work well for those who find it difficult to get the best outcome when making a transaction in a specific market (Q32)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>0</td>
</tr>
<tr>
<td>Agree</td>
<td>8</td>
</tr>
<tr>
<td>Disagree</td>
<td>6</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>2</td>
</tr>
<tr>
<td>Do not know</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>21</strong></td>
</tr>
</tbody>
</table>

Hence, the perception appears to be that ‘vulnerable’ consumers are not adequately protected by the regime, even if this is vulnerability in a specific market, rather than general vulnerability.

Summary and conclusion
Although the extent and reach of the rights enjoyed by consumers differ across jurisdictions, in that some jurisdictions like the UK have an extensive body of law conferring rights on consumers, whereas some jurisdictions like Canada have much less legislation, this alone cannot signify whether consumers are empowered or not. This is because how empowered consumers are depends not only just on the rights enjoyed by them, but also on the consumers’ awareness of those rights, their ability to find out about their rights and the clarity of those rights. All these factors can be thought to make up the ‘transparency’ of the regime from the viewpoint of consumers. Moreover, these factors can have a complementary effect in that the lack in one area, for instance, the consumers’ awareness of their rights, can possibly be mitigated by the strength in another area, for instance, the ease with which
consumers can find out about their rights even when they are not aware of them *ex ante*.

Across all jurisdictions, ‘consumers’ are provided with a range of rights attached to their status as ‘consumers’. In most jurisdictions, these rights include a right of private action for damages, injunctions, refunds, revocation of contract and the right to complain to an administrative body. In terms of the extent and content of rights, UK appears to be on a par with the best, with the caveat that the amount of legislation conferring these rights may be higher than desirable and may potentially render the rights inaccessible to consumers.

1.3 Nature of Duties Imposed on Firms for the Purpose of Protecting Consumers

Introduction

In many cases, it is not possible to clearly demarcate duties imposed on firms for the purpose of protecting consumers from rights enjoyed by consumers, especially when breach of duties gives rights of enforcement to consumers. This sub-section will first broadly set out the duties imposed on firms and then provide an assessment including an examination of the general ‘duty to trade fairly’. Our principle informing the benchmarking of this issue is as follows:

- Principle 2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.

1.3.1 Duties imposed on firms

The duties imposed on firms are of either a general nature or a specific nature. One common general duty is usually expressed as a variant of a ‘duty to trade fairly’ or a ‘duty not to trade unfairly’. This duty exists in Denmark in the *Marketing Practices Act* and in the United States as regulated in the FTC
Act. The duty does not exist in Canada and the EC Member States that did not previously have a general duty to trade fairly and/or are running late in implementing EC Unfair Commercial Practices Directive, namely Spain. Germany has a prohibition of unfair business practices in the Act Against Unfair Competition, although consumers do not have the right to pursue violations of the Act’s provisions. However, once the Directive is transposed into national law, all EC Member States will have to have a general duty not to trade unfairly if they are to comply with the Directive. As for Australia, even though the DTI Study from 2003 appears to interpret the TPA as imposing a general duty not to trade unfairly, the respondents to our questionnaire from Australia do not seem to agree with this view in that they do not treat the Australian prohibition of misleading and deceptive practices as imposing a general duty to trade fairly.86 This response is very interesting since although a duty not to mislead or deceive can be differentiated from a general duty to trade fairly, the duty not to engage in ‘unconscionable’ conduct regulated in Section 51AB of the TPA seems very similar, if not identical to the duty not to engage in ‘unfair’ practices as envisaged by the EC Unfair Commercial Practices Directive.

Other than the general duty not to trade unfairly, the most common duty imposed on firms is the duty not to mislead or deceive the consumers, thus the provision of accurate and sufficient information to consumers. The jurisdictions also differ in terms of whether breach of duty by firms gives rise to a criminal offence or not. In Australia, for example, the breach of the prohibition on misleading or deceptive practices does not give rise to criminal sanctions, whereas in the UK the breach of most consumer protection related duties gives rise to an offence.

UK

In the UK, until the very recent transposition of the EC Unfair Commercial Practices Directive into national law, there has not been a general duty to trade fairly, but various pieces of legislation have imposed duties on firms for

the purpose of protecting consumers. The legislation includes: *Consumer Protection Act 1987* which stipulates that a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available; *Price Marking Order 2004* which requires the selling price of products to be clearly displayed; *Accommodation Agencies Act 1953* which makes it an offence to demand or accept payment from prospective tenants or landlords under certain conditions; *Administration of Justice Act 1970* (section 40) which renders it an offence to coerce another person to pay money claimed from the other as a debt due under a contract, by harassment and various types of false representation; *Business Names Act 1985* which requires businesses which trade under a name other than the proprietor’s true name to prominently display the names and addresses of the proprietor at business premises, etc; *Control of Misleading Advertisements Regulations 1988* (as amended by the *Control of Misleading Advertisements (Amendment) Regulations 2000* and the *Control of Misleading Advertisements (Amendment) Regulations 2003*) which place a duty on the Office of Fair Trading to consider any complaint that an advertisement is misleading or which does not comply with the conditions under which comparisons are permitted in advertisements; *Trade Descriptions Act 1968* which makes it an offence for a trader to apply, by any means, false or misleading descriptions, or to knowingly or recklessly make such statements about goods and services; *Consumer Protection (Distance Selling) Regulations 2000* [amended by the *Consumer Protection (Distance Selling) (Amendment) Regulations 2005*) which impose information disclosure duties on suppliers and provides the consumer with a cooling-off period of seven days for distant contracts. The EC *Unfair Commercial Practices Directive* which will be implemented by Regulations (to come into force in April 2008) introduces a general duty on traders not to treat consumers unfairly.

**Comparative jurisdictions**

In Australia, the general duty imposed on firms for the purposes of protection of consumers can be found in Sections 52 and 51AB of the TPA. Section 52 of the TPA stipulates that ‘[a] corporation shall not, in trade, or commerce,
engage in conduct that is misleading or deceptive or is likely to mislead or deceive’ and as such imposes strict liability on undertakings in that it is not necessary that there should have been an intention to mislead or deceive. Nor does any person have had to suffer loss or damage as a result of the conduct or even in fact have been misled or deceived; engagement in misleading or deceptive conduct suffices for responsibility. The test on which the deceptive or misleading character of conduct is decided is that of ‘an ordinary purchaser’, including purchasers who fail to take reasonable care of their own interests, but not to the level of ‘unusual stupidity.’ There are no criminal sanctions for violation of Section 52, but only civil remedies, namely injunction and statutory damages.  

Section 51AB of the TPA, on the other hand, prohibits ‘unconscionable’ conduct in business-to-consumer dealings and stipulates that ‘a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable’. In this respect, the Court may have regard to: the relative strengths of the bargaining positions of the corporation and the consumer; whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation; whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; whether any undue influence or pressure was exerted on, or any unfair tactics were used against the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

In Denmark, a general duty to trade fairly applicable to all industries is found in the *Marketing Practices Act*. Moreover, the seller shall be liable to pay damages to consumers if, in a sale of specific goods, the goods are not delivered to the consumer by the agreed time.\(^8\) Except for generic goods, the seller is exempted from paying damages only if it is established that the delay is not his fault. This is not the case, however, if the seller has reserved the right to be exempted from paying damages or the performance of the contract must be deemed impossible by reason of circumstances that are not the fault of the seller. Similarly, Part 3 of the *Marketing Practices Act*\(^9\) contains provisions regarding consumer protection. For example, in relation to sales promotions, the firm offering the promotion must be presented in such a way that the terms of offer are clear and easily accessible to the consumer. According to the *Danish Contracts Act*,\(^10\) if the consumer agreement is a written agreement, the trader must ensure that the agreement is clear and the agreement must also set out the terms so these are understandable to the consumer. If the consumer agreement is misleading and unfair towards the consumer, the agreement can be set aside partially or fully. In case of misunderstanding as to what has been agreed, the agreement will be interpreted in favour of the consumer’s understanding. The *Act on Actions for Injunctions*\(^11\) makes it possible for the courts and administrative authorities to issue an injunction against actions violating consumer interests.

In Germany, the duties imposed on firms by consumer protection laws can arise from either public or private law. The *Act Against Unfair Competition* prohibits false and misleading advertisements and other unfair business practices. Thus, the Act imposes a general duty to trade fairly, although consumers do not have the right to pursue violations of the Act’s provisions. It bans acts contrary to honest business practices, including acts which are

\(^8\) *Danish Sale of Goods Act* (n 10).
\(^9\) *Marketing Practices Act* (n 12).
against ‘public morals’, and arranges for injunction and damages claims. The
original concept was aimed at protecting traders against ‘unfair competition’.
With the amendment of 2004 consumer protection has been added to the
objectives in Section 1. The reform also incorporated the extensive case law
in the Act. Some violations of the *Act Against Unfair Competition* are regarded
as a criminal offence. Duties for undertakings on how to act within the market
arise from these provisions.

Similar to the protection of consumers from product safety risks, a series of
acts protect consumers from risks arising from services, such as the
*Securities Trading Act* (WpHG), 92 the *Banking Act* (KWG), 93 the *Insurance
Supervision Act* (VAG), 94 *Federal Lawyer Regulation* (BRAO) 95 and the
*Distance Learning Protection Act* (Fern-USG) 96 which allow public authorities
to monitor specified services. These acts impose various duties on
undertakings. Private law also arranges for consumer protection duties and
parties to contracts are committed to duties of care. For instance, the service
contract between a medical practitioner and a patient binds the doctor to
inform the patient about the risks of treatment. To improve transparency
concerning prices and services the legislator has also introduced information
duties for a multiplicity of goods and services. The infringement of certain
information duties, especially those emanating from the *Civil Code* (BGB), 97
gives consumers the right to revocation. As for the transparency of contract
terms and information rights, in general, unclear terms in consumer contracts
are invalid according to Sections 307(1)2 and 310(3)No 2 of the *Civil Code*
which are complemented by special rules for certain types of contracts. There
are also other provisions in the *Civil Code* which target the inequality of
bargaining power between parties. However, some of the rules balancing
bargaining power do not exclusively apply to consumers and are not genuine
consumer protection law. For instance, EC Directive 1999/44/EC was

92 *Wertpapierhandelsgesetz.*
93 *Kreditwesengesetz.*
94 *Versicherungsaufsichtsgesetz.*
95 *Bundesrechtsanwaltsordnung.*
96 *Fernunterrichtsschutzgesetz.*
97 *Bürgerliches Gesetzbuch.* An official English translation is available on the Internet:
incorporated into the *Civil Code* to strengthen the rights not only of consumer purchasers, as it was intended in the Directive, but of all other purchasers as well.\(^{98}\) A contract might be void under Section 138 of the *Civil Code* if the contract or a contract term interferes with moral and customs or violates a law. Standard contract terms which are regularly used by one of the contracting parties and which are not individually agreed are subject to judicial control.\(^{99}\) This applies to consumer contracts in general\(^{100}\) and partly to business-to-business contracts.

In Spain, obligations on the part of sellers of goods or providers of services work as counterparts of the rights of the consumers. They are imposed at different stages of the contractual path, including pre-contractual, contractual and post-contractual obligations.\(^{101}\) At the pre-contractual stage, regulated by Articles 8 and 9 of LGDCU the goal is to protect the consent of the consumer, so that she purchases goods/services in full conformity with her action. Spanish law regulates this by giving consumers free access to adequate information.\(^{102}\) Sellers, providers and distributors bear the obligation to inform consumers of the characteristics of the goods/services they provide, so that consumers consent to the transaction without error.\(^{103}\) At the contractual stage, Article 10 LGDCU regulates the legal validity of general clauses in standard contracts which have not been negotiated with the consumer, but imposed unilaterally by the seller and can inflict harm to consumers.\(^{104}\) Abusive clauses, ie those against good faith bringing about severe detriment to the contractual position of the consumers in such contracts are null and void.\(^{105}\) On the front of information, sellers and providers bear the obligation to inform the consumers of all the instructions of use, risks and performance of

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\(^{99}\) Sections 305 ff of the *Civil Code*.

\(^{100}\) Except for water, electricity, gas, and district heating contracts.

\(^{101}\) Arce and García (n 17) 191-192.

\(^{102}\) Articles 2.1, 13-17 LGDCU as modified by LMPCU; Arce and García (n 17) 191, 195-99.

\(^{103}\) Arce and García (n 17) 196-99.

\(^{104}\) Arce and García (n 17) 191-92; Modifications include Article 10bis incorporated by the Act 7/1999 of 13 April 1998 *sobre condiciones generales de la contratación*, Articles 10ter and 10quater introduced by Act 29/2002 of 28 October which transposed into Spanish law diverse community directives on the protection of the interests of consumers, and the LMPCU.

\(^{105}\) Articles 10bis and 10bis 2 LGDCU as modified by LMPCU; Arce and García (n 17) 336-339.
the product sold, so that they can utilise them properly and safely, and benefit from their expected performance.\textsuperscript{106} At the post-contractual stage, Spanish law imposes obligations on the part of firms of, for example, post-sale reclamations and guarantee of quality of the products sold which may include the reimbursement of the price paid by the consumer.\textsuperscript{107} Firms must also fulfil obligations that are imposed by sector-specific laws and regulations.

In the United States, Section 5 of FTC Act imposes a general duty to trade fairly by declaring ‘unfair methods of competition’ as well as ‘unfair and deceptive acts or practices’ unlawful. Any firm violating the FTC Act and other federal consumer protection statutes may face administrative penalties, restitution and other monetary remedies to make good any harm done to the consumer and even criminal charges depending on the nature of the violation. Federal agencies and particularly the FTC enjoys a wide discretion in terms of its decision as to whether or not pursue formal action against any violation and what kind of remedies to impose. Additionally, Trade Regulation Rules regarding specific industries sometimes define very specific courses of conduct which the businesses must follow.

The only jurisdiction under study that does not have and to our knowledge is not planning to introduce a general duty to trade fairly is Canada. In Canada, regulation exists under the \textit{Federal Competition Act} and \textit{Provincial Trade Practices Acts}. The \textit{Federal Competition Act} covers such consumer issues as misleading advertising, deceptive telemarketing, and multi-level marketing and pyramid schemes, as well as such competition issues as price discrimination and predatory pricing. Moreover, broadcast advertising is regulated by the Canadian Radio-Television and Telecommunications Commission under regulations pursuant to the \textit{Broadcasting Act}. There is also regulation of specific product advertising such as alcoholic beverages, foods, drugs, cosmetics and medical devices. The \textit{Tobacco Act} similarly imposes stringent restrictions on advertising of tobacco products.

\textsuperscript{106} Article 13 LGDCU as modified by LMPCU; Arce and García (n 17) 197-199.
\textsuperscript{107} Article 11 LGDCU as modified by LMPCU; Article 12 LOCM (\textit{Ley de ordenación de comercio minorista}) and Act 23/2003 of 10 July on \textit{Garantías en la Venta de Bienes de Consumo}; Arce and García (n 17) 192.
There is no general duty to trade fairly in Canada, but several provinces have broad prohibitions on misleading and unconscionable acts and practices. Eight Provinces have enacted legislation to control unfair business practices. They are usually called Business Practices Act or Trade Practices Act and are essentially the same in most Provinces, albeit called differently. Quebec has the Loi sur la protection du consommateur (Law on consumer protection) that applies generally to any consumer contract, whereas Ontario has recently (July 30th 2006) brought into force comprehensive consumer legislation entitled The Consumer Protection Act 2002. The new legislation provides consumers and businesses in Ontario with new rights, responsibilities and remedies for a fair, safe and informed marketplace. The Act imposes a non-excludable obligation that supplier warrants services to be ‘of a reasonably acceptable quality.’ It is based on three guiding principles: fairness for consumers, responsiveness to business and consumers, and flexibility to adapt to future needs. ‘Fairness for consumers’ means that the law sets out disclosure requirements that ensure both parties understand a transaction. ‘Responsiveness to both business and consumers’ means that the law is practical so that businesses can follow it, consumers can use it and government can enforce it. ‘Flexibility to adapt to future needs’ means that the law allows the government to respond to marketplace developments as problems emerge.

1.3.2 Assessment – the general duty to trade fairly
Regarding the discussion of the nature of duties imposed on firms for the purposes of consumer protection, the most important distinction appears to be that of having a general, broad duty covering all aspects of commercial practices, as opposed to having specific duties concerning specific types of commercial practices. The latter has been the predominant approach of the UK (and to an extent Canada) amongst the jurisdictions under study. However, with the transposition of the EC Unfair Commercial Practices

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108 Woodroffe and Giannoulopoulos (n 87) 114.
109 Woodroffe and Giannoulopoulos (n 87) 118.
110 www.mgs.gov.on.ca.
Benchmarking the UK Framework Supporting Consumer Empowerment

Directive, such a general duty has been included in the UK legal system as well. Thus, the Unfair Commercial Practices Directive deserves further elaboration.

The EC Unfair Commercial Practices Directive introduces a general prohibition of all ‘unfair commercial practices’.\(^\text{111}\) According to Article 5(2) a commercial practice is unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. Other than this general prohibition, the Directive specifically prohibits ‘misleading unfair commercial practices’ (Article 6) and ‘aggressive unfair commercial practices’ (Article 9). In its Annex I, it also contains a list of practices which are deemed unfair \textit{per se}.

The general prohibition can thus be seen as a ‘safety net’ applying to all of those practices which are neither covered by Annex I nor the prohibitions of misleading and aggressive practices.\(^\text{112}\) The special prohibitions of Article 6 and 9, along with the list of practices prohibited by Annex I arguably delineate fairness in business practice and as such limit the residual function of the general clause.\(^\text{113}\) According to one view, cases of misleading and aggressive practices which are not regulated cannot be subjected to a review of fairness through the backdoor by reference to the general clause; the general clause only applies in extreme and evident circumstances to bridge gaps.\(^\text{114}\) Thus, the Directive arguably takes a liberal approach, in that everything that is not explicitly prohibited is allowed.\(^\text{115}\) Still, given the very broad scope of the

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\(^{111}\) Article 5.


\(^{113}\) Micklitz (n 25) 119-120.

\(^{114}\) Micklitz (n 25) 120.

\(^{115}\) Abbamonte (n 25) 14-15.
general clause, it should not be easily circumvented even by the most imaginative rogue traders.\textsuperscript{116}

The concepts of ‘professional diligence’ and ‘material distortion of the economic behaviour of the consumer’ constitute the foundations of the general duty to trade fairly. The Directive defines ‘professional diligence’ as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’.\textsuperscript{117} Professional diligence is broadly equivalent to the common law concept of ‘duty of care’ and is a measure of the diligence that a good businessman can reasonably be expected to exercise, commensurate with the duty to be performed and the individual circumstances of each case.\textsuperscript{118} The Directive defines the material distortion of economic behaviour of consumers as ‘using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise’.\textsuperscript{119} The ‘material distortion’ test thus aims to verify whether the practice has the potential to distort the consumer’s economic behaviour.\textsuperscript{120}

It has been commented that although the Directive presents itself as a consumer protection measure aiming at establishing a high level of protection for consumers across the EC, this is not entirely true since the aim of the Directive is basically that of liberalisation and enhancement of open markets.\textsuperscript{121} The fundamental idea behind the Directive is to create a common level playing field for advertising and marketing throughout the EC; hence, the risk of lowered consumer protection standards (compared to the situation

\textsuperscript{116} Abbamonte (n 25) 15.
\textsuperscript{117} Article 2(h).
\textsuperscript{118} Abbamonte (n 25) 22.
\textsuperscript{119} Article 2(e).
\textsuperscript{120} Abbamonte (n 25) 23.
before the Directive) which led to Denmark and Sweden being the only countries that voted against its adoption.\textsuperscript{122}

In any case, even before the adoption of the *Unfair Commercial Practices Directive*, most continental systems have used a general clause to control unfair commercial practices.\textsuperscript{123}

Questionnaire data
Our questionnaire responses regarding the general duty to trade fairly are mixed. On the one hand, it was stated that the advantages of having a general duty to trade fairly were that such a duty was timeless, very good at regulating industry, flexible and future proof to new legislation.\textsuperscript{124} On the other hand, it has been commented that such a general duty to trade fairly was too loose a term to be able to apply sanctions and it was difficult to see how the law could characterise this concept.\textsuperscript{125} Moreover, it was seen likely to lead to litigation to explore the limitations due to its vagueness.\textsuperscript{126} Yet, the exact opposite has also been suggested that a general duty would take away uncertainty; the process could therefore be more easily understood and better enforced.\textsuperscript{127} It is striking that whereas all respondents from the UK and Canada – where currently/until very recently there is/has been no general duty to trade fairly - responded positively to the question of whether there are any advantages to such a duty, the remaining respondents - in whose jurisdictions there already existed a general duty - predominantly responded negatively to the question.

**Table B.4: Are there any advantages to a general rule to ‘trade fairly’? (Q19)**

<p>| | |</p>
<table>
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<td>8</td>
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</table>

\textsuperscript{122} Bernitz (n 25) 37.
\textsuperscript{124} See Response to Q19.
\textsuperscript{125} Response to Q19.
\textsuperscript{126} Response to Q19.
\textsuperscript{127} Response to Q19.
### Table B.5: The imposition on firms of a general duty to trade fairly makes consumers better off (Q36)

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</tr>
<tr>
<td>Agree</td>
<td>10</td>
</tr>
<tr>
<td>Disagree</td>
<td>5</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>21</strong></td>
</tr>
</tbody>
</table>

Summary and conclusion

The main categorisation of duties imposed on firms is that of a general duty to trade fairly as opposed to more specific duties. Almost in all jurisdictions under study, there is a general duty to trade fairly or a variant of it and with the imposition of the EC *Unfair Commercial Practices Directive*, the UK will be on a par with these jurisdictions. However, the effects of this general duty on consumer empowerment will mainly depend on how well the balance can be struck between certainty and flexibility. This in turn will depend on how closely aligned the consumers’ perception of ‘(un)fairness’ is with that of the law. The more closely aligned these are, the more potential the duty has for increasing consumer empowerment since consumers are more likely to be aware of the existence of a broad and single duty than a multitude of specific duties.
2. The consumer interface: consumer advice, information, education and representation

2.1 Provision of consumer advice and information, the level(s) at which that advice is offered, and the accessibility of that advice (eg whether there is internet provision and/or helplines)

2.1.1 Consumer information and advice

Introduction
The provision of information and advice to consumers is an important plank of consumer empowerment. While it may often be inevitable that consumers will not *ex ante* have a full awareness of their rights nor how to obtain redress, the provision of accessible and visible advice mechanisms can significantly support the empowerment of consumers. The following benchmarking principles inform our assessment:

- Principle 3: Consumer advice channels should be accessible, strongly branded and based on the one-stop-shop principle.

- Principle 4: The provision of information is an important plank of consumer empowerment. Appropriate information should be presented to consumers in a clear and accessible manner.

UK
The leading consumer advice and information channel is Consumer Direct. BERR (and its predecessor the DTI) has adopted a policy of simple branding and the one-stop shop principle in respect of consumer advice and information.\(^{128}\) This is particularly important where there are multiple advice providers. Consumer Direct (which is operated by the OFT in partnership with TSSs) fulfils this role and is the central gateway for consumer advice and

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\(^{128}\) See Department of Trade and Industry *Consumer Helplines Study Final Report* (DTI London 2002).
information. It coordinates with other agencies, such as TSSs. Consumer Direct has concluded protocols with all TSSs under which referred advisees are contacted by TSSs within 5 working days. Furthermore, there need to be in place mechanisms for the ‘flagging up’ of cases which may be of wider significance.

Consumer Direct has both a telephone helpline (charged at the local rate) and a web presence. The other major outlet for consumer advice is the local network of Citizen’s Advice Bureaus. Unlike Consumer Direct, this network makes provision for face-to-face advice.

In 2006-7, Consumer Direct carried out a two part customer satisfaction survey.\(^{129}\) The second survey published in March 2007 (carried out by IFF research on behalf of Consumer Direct) found that:

- 86 per cent said they were satisfied with the service, up 2 per cent from the first survey.
- 81 per cent said that their expectations were met or exceeded, down slightly by 3 per cent from the first survey.
- 48 per cent said that they had fully resolved their issue after calling Consumer Direct, up 6 per cent from the first survey.
- 91 per cent said they would recommend Consumer Direct to others, up 2 per cent from the first survey.

In order to keep quality levels high, every new advisor has to undergo an intensive six-week training programme before beginning to handle consumer calls. Recruits are then given further support through mentoring and additional on-the-job training. In many centres local TSS provide floor walkers and experts to help develop and broaden the advisors’ knowledge and skills.

\(^{129}\) Consumer Direct customer satisfaction survey in Consumer Direct Annual Review 2006-7 available http://www.consumerdirect.gov.uk/shared_cd/medialibrary/157296/398018/CDannualreview.pdf. Interviews for the first survey took place between November and December 2006, the second survey was conducted between February and March 2007. In total, around 2,200 users took part in each survey, with around 200 people chosen at random from each region.
In terms of value to customers of Consumer Direct service, of the 878 callers surveyed who had successfully resolved their complaint after calling Consumer Direct, 52 per cent had managed to save over £100 through refunds, repairs and replacements and nine per cent had saved over £1000.\textsuperscript{130}

Comparative jurisdictions

In Australia, the ACCC Infocentre is a call centre for consumer and business complaints regarding possible contraventions of the TPA; it is accessible through a national hotline, the Internet and e-mail.\textsuperscript{131} In addition, the ACCC and State consumer offices provide straightforward general guidance for consumers and business. The provision of information is a key element in the ACCC enforcement strategy, and there are a number of publications available to consumers, including a complete booklet on consumer rights.\textsuperscript{132} It gives clear advice as to how to complain, taking the consumer through a step by step guide, with practical advice, for example, on the need to take notes and keep copies of letters in dealing with a dispute with a trader. State Fair Trading Office websites provide extensive advice to consumers on their rights in straightforward terms. They also provide advice on exactly how to make complaints and take cases through the courts. Queensland even provides a model letter for various situations. The Treasury Department produces a ‘Consumer Handbook,’ which is a complete guide to consumer dispute resolution and complaints handling organisations. There are a number of other providers, for example, the Australian Consumers Association ‘Choice’ gives product information and has an informative website. All States and Territories have Consumer Affairs Bureaux. Their aims are to promote consumer awareness by education and dissemination of information on consumer matters and handling consumer complaints. They all seem to have informative and efficient websites, plus established bureaux in the major cities.

\textsuperscript{130} Consumer Direct Annual Review (n 39) 10.
\textsuperscript{131} In 2006-7, it received nearly 69000 inquiries and complaints (ACCC Annual Report 2006-7, 7).
\textsuperscript{132} In 2006-7, it sent out a total of 263930 publications through the ACCC Infocentre (ACCC Annual Report 2006-7, 44).
In Canada, the Canadian Consumer Information Gateway (CCIG) is a strategic partnership between more than 400 Federal departments and agencies, provincial and territorial ministries and NGO partners. It provides simple information on consumer rights, with step by step guides upon how to complain. The Office of Consumer Affair’s website, Consumer Connection, provides interactive information tools designed to enable consumers to obtain information quickly. OCA also offers the electronic Canadian Consumer Handbook which includes, for example, questions to ask and steps to take when making purchases or signing contracts. There are tips on how to complain effectively, including a sample complaint letter, and advice on how to deal with common consumer problems. The main national television network CBC offers consumer advice tips and news on their website and a number of consumer programs, ‘Marketplace’ aimed at younger audience and ‘Street Cents.’ Straightgoods.com is an online independent source of news and tips relating to consumer affairs to which one can subscribe.

The Danish Consumer Agency provides a consumer telephone hotline where consumers can get free personal advice in relation to consumer issues (and receives around 40000 calls pa). Consumers also have access to advice and guidance on consumer issues on the Consumer Agency’s FAQ consumer portal. Furthermore, there are 117 public nationwide libraries with permanent consumer information desks, so consumers can obtain face-to-face advice during daytime hours (receiving 40000-50000 requests for advice pa).

In 2004, The Consumer Agency launched two important initiatives. First, it set up the Consumer Portal, a single point of access for consumer information. This portal is being extended to give consumers access to tailor-made information to match their individual requirements. Second, it established an integrated Service Portal for complaints. The Portal functions as a central point of access for consumers and companies in matters concerning complaints. It provides consumers and companies with an overview of the various recourses for filing complaints, advice concerning rights and obligations and on how disputes may be settled by the parties themselves. It
also provides an electronic facility for formulating and filing, and digitises case processing.\textsuperscript{133}

In Germany, consumer information is offered through various channels. Information about facts and rights concerning consumers are provided on large scale by Federal institutions or nationwide operating consumer bodies. The Consumer Compass, a Website-based information portal run by the Ministry of Nutrition, Agriculture and Consumer Protection, makes general advice to consumers available, and links all types of information and documents related to consumer protection. The Federation of German Consumer Organisations (VZBV) does not give individual advice to consumers but offers information booklets, brochures and leaflets on the Internet and in its office. It also sells a wide range of books covering all relevant areas of consumer protection. Advice is offered by a diverse number of consumer organisations.\textsuperscript{134} The most important are the 16 Consumer Advice Centres, one for each Länder, with some 200 field offices providing advice to consumers. Consumers can approach those centres via telephone, email, letter or in person. For most of the services charges apply. Some free information is available on the Websites of the Consumer Advice Centres. A broad variety of books and brochures is distributed over the Internet and the regional offices.

Consumer information and advice in Spain is made available via the Offices of Information for Consumers (OsIC)\textsuperscript{135} and other consumer organisations. Consumers can seek information and/or advice or submit a complaint at the municipal level by several means, including personal visit to the offices, phone, and internet. Consumer organisations use several means to inform, educate and advise the consumers, including publication of studies, guides and leaflets, websites, media campaigns in newspapers, radio and TV, courses and workshops, among others. In respect of the media, the law also

\textsuperscript{133} In addition, the Danish Environmental Protection Agency, administers a telephone hotline (\textit{Frontlinien}), which provides consumer centred information services on environmental issues concerning consumers, for example, on chemicals in consumer products and food-safety concerns.

\textsuperscript{134} A full list is provided in the country study.

\textsuperscript{135} These may be public or private and are formally recognised under LGDCU.
prescribes that the media controlled by the government will allocate broadcasting time for the purpose of information and education of consumers.

In the US, consumer advice and information constitutes one of the central pillars of FTC’s enforcement agenda, it being seen as the most efficient preventing unfair and deceptive practices. It devotes significant resources to warning consumers of the dangers of identity theft and financial fraud on the internet, for example, by maintaining an interactive website specifically designed to educate consumers about the consumer protection issues raised by the internet and novel communication techniques. The FTC claims to have developed an approach to information dissemination which emphasises plain-language, in recognition of the fact the form in which the information is presented is important to consumer information campaigns. In the design of such information, it consults with and engages in partnerships with stakeholders. The FTC provides advice directly to consumers through the Consumer Response Center (CRC). The CRC accepts inquiries and complaints from consumers via the telephone, the Internet, and the mail.\textsuperscript{136} Apart from the Commission, there is a number of private national consumer organisations which provide free and easily accessible information to consumers.

Questionnaire data
Respondents were asked whether consumer advice was easily understood by most consumers in their respective countries. While most respondents answered yes to this question, some respondents referred to unnecessary complexity and arbitrary distinctions as between different markets/product types, and to underlying problems of literacy.\textsuperscript{137} One of the UK respondents underlined the importance of an awareness of advice channels, another the importance that advice is tailored to the market in question (in particular, the complexity of the advice may be a function of the complexity of the transaction). Respondents were also asked whether the legal rights enjoyed

\textsuperscript{136} The CRC receives approximately 30,000 to 40,000 contacts per week from consumers, law enforcement agencies, and other consumer advocate groups, of which 10,000 – 12,000 are complaints.

\textsuperscript{137} Responses to Q3.
by consumers were clear to them. Around three quarters of respondents answered no to this question (including in the UK).\textsuperscript{138} When asked to identify particularly problematic markets, warranties and refunds appear to be particularly problematic across most jurisdictions. When asked, however, whether consumers were able to find out about their rights easily, the vast majority answered yes, and in Spain two respondents commented upon an increasing willingness on the part of consumers to seek advice. Most of the UK respondents underlined the importance of an awareness of Consumer Direct. When asked whether consumer advice was \textit{quickly and easily} available to most consumers in their jurisdictions, the vast majority of respondents answered yes to this question (19 as opposed to two answering no).\textsuperscript{139} All of the UK respondents answered yes. One UK respondent did observe the importance of an awareness of Consumer Direct. Another respondent pointed out that advice should not always be quick ‘as good advice takes time’. When asked if consumer advice was available via an appropriate delivery vehicle, the vast majority of respondents answered yes to this question (19 as opposed to two answering no).\textsuperscript{140} All of the UK respondents answered yes. In comments a number of respondents observed the lack of face-to-face advice in Canada and Australia, while a UK respondent observed that the provision of face-to-face advice was varied. When asked whether consumers are provided with adequate information relating to the consumer protection regime, the vast majority of respondents agreed with this statement.\textsuperscript{141} In terms of the quality of advice, when asked whether staff are \textit{clear} about the procedures to use to address the complaints brought to them by consumers, the vast majority of respondents either agreed or strongly agreed with this statement.\textsuperscript{142}

Overall, the questionnaire data underlines the importance of consumer advice. When asked whether the \textit{average} consumer knew what the arrangements for the protection of consumer interests were, of the five UK respondents, three

\textsuperscript{138} Responses to Q8.
\textsuperscript{139} Responses to Q1.
\textsuperscript{140} Responses to Q2.
\textsuperscript{141} Responses to Q21.
\textsuperscript{142} Responses to Q25.
answered no to this question. One respondent commented on the problem of the legislative framework being highly complex (contrasting it with the framework for competition law, which was far simpler). Another respondent suggested that consumers, while not necessarily aware of their rights, were likely to be aware of CABx and possibly Consumer Direct. In the other jurisdictions, nine respondents answered yes, and seven no. In Canada, all respondents answered no, pointing to the complexity and fragmented nature of the system, and the low profile given to consumer issues in the media. By contrast, all respondents in Australia were of the view that consumers knew to whom they should address their queries or complaints, even though they might not have a more detailed understanding of how the system worked. One respondent in Germany asserted that consumers were likely to misunderstand the nature of their rights because of over-simplification by the media. In Spain, respondents pointed towards confusion among consumers as to the different functions of private and public sector organisations, and the difference between advisory services and complaints resolution services.

When asked whether the lead agency or agencies had a sufficiently high public profile for consumers to know of their existence, of the UK respondents, three answered yes and two no. In other countries, eleven answered yes, and five no. In Australia, all respondents answered yes, especially in respect of the ACCC, although as was noted, most complaints are dealt with at a local level. Other respondents pointed to the fact that there was a general awareness of the existence of consumer agencies, few consumers were aware of how the work of central agencies related to them, nor the differences in terms of the respect roles of different bodies.

Summary and conclusions
It is clear that most jurisdictions are increasingly focusing resources on the provision of consumer information and advice channels. While telephone and the internet appear to be the dominant channels of delivery, some jurisdictions also provide for face-to-face advice which may benefit certain disadvantaged

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143 Response to Q6.
144 Responses to Q6.
groups in particular. The UK’s Consumer Direct initiative, taken together with the national coverage of CABx, appears to be on a par with the best.

2.1.2 Consumer education

Introduction
During the course of our investigation, and in consequence of respondents’ comments, we noted the increasing weight that policy makers were putting on consumer education. The term is used in a number of different ways. In its broadest sense, it encompasses the provision of information and advice channels to consumers (as discussed above). It is, however, increasingly seen as requiring more formal interventions through, for example, incorporation into the curricula for schools, and consumer agencies are increasingly playing a supportive role in the development of such initiatives.

The assessment here is informed by the following benchmarking principle:

- Principle 5: Consumer education aimed at raising consumer market skills may make an important contribution to the empowerment of consumers.

UK
The OFT is the strategic leader of an alliance to promote consumer education and awareness. The OFT also undertakes an educative function for business and consumers, coordinating the national consumer education strategy and lead the consumer education Alliance of public, private and voluntary-sector organisations. Recent innovations include a pilot series of modules aimed at ‘delivering consumer education alongside basic skills learning, within a further education (FE) environment’. Examples of more general consumer awareness campaigns include: the ‘OFT-Save Xmas campaign’, a consumer education campaign helping consumers to decide how best to save for

145 See http://www.of.t.gov.uk/of.t_at_work/partnership_working/consumer-alliance/current-work/.
Christmas, ensuring they can afford to pay for Christmas; and a consumer information campaign on how best to avoid internet scams.\textsuperscript{146}

In terms of more formal provision, the National Consumer Education Partnership has a generic ‘Framework for Developing Consumer Skills and Attitudes’, supported by one for the National Curriculum, and one for adult education lifelong learning.\textsuperscript{147} The UK Trading Standards Agency is active in provision of materials for teaching in schools and provides detailed lesson plans.\textsuperscript{148}

Comparative jurisdictions\textsuperscript{149}  
In Germany, the Federal Government funds institutions and establishments operating nationwide in consumer education. In addition, the Federal Government supports nationwide awareness schemes on priority issues within the scope of project financing, although the consumer organisations remain independent from the state as regards the contents of their work. In Spain, the law provides that one of the roles of the consumer organisations is to educate consumers. In this context, the ACs resort to several means to inform, educate and advise the consumers, including publication of studies, guides and leaflets, websites, interventions in newspapers, radio and TV, courses and workshops, among others. Furthermore, the law provides that public service broadcasters allocate broadcasting time for the purpose of information and education of consumers.\textsuperscript{150} The INC has recently developed the \textit{Plan of Information, Capacity Building and Education 2007-2010}, carried out in collaboration with consumer organisations and the Autonomous Communities. This includes initiatives aimed at educational establishments, and the provision of diverse pedagogic materials.

\textsuperscript{146} See \url{http://www.oft.gov.uk/oft_at_work/consumer_initiatives/scams/}.
\textsuperscript{147} See \url{http://www.ncep.org.uk/pdfs/framework.pdf}. According to key stages 1 and 2 of the National Curriculum, pupils should learn how to spend and save money, and about pocket money and charities through citizenship classes. At citizenship key stage 4, this progresses into a specific unit on consumer rights and responsibilities. In respect of the National Curriculum, see DfES Standards site for further information: \url{http://www.standards.dcsf.gov.uk/schemes2/ks4citizenship/cit09/09q1}.
\textsuperscript{148} See \url{http://www.tradingstandards.gov.uk/schools/181271.cfm}.
\textsuperscript{149} The picture here is somewhat incomplete, this being a feature of consumer empowerment that emerged during the course of our investigation.
\textsuperscript{150} Article 17 LGDCU.
In the US, the FTC administers specific education programmes on specific practices or information needs of particularly vulnerable consumer groups. For example, in 2004, the FTC launched a Spanish-language fraud awareness campaign to reach the large population of Spanish-speaking consumers including radio public service announcements, a Spanish-language website, and ‘outreach’ to more than a thousand community-based organisations in cities with large or growing Hispanic populations. The FTC has also targeted reports, education, and enforcement to address fraud aimed at the elderly population. It has also launched many initiatives that are targeted to children of all ages. One program is designed to provide financial literacy education to school-aged students.\(^{151}\)

Questionnaire data
Respondents were asked whether children were routinely taught in school about consumer policy (eg about consumer rights and how to seek redress). The majority of respondents answered no to this question, with the exception of Australia.\(^{152}\) In that country, New South Wales was given as an example of where education fed into the school curriculum, being taught from primary school level onwards through English, maths and financial literacy. The same appears to be the case in Denmark and Spain. In Canada, it appears that there has been a recent increase at consumer education in schools, but these initiatives were at the local level and varied greatly. In the UK it appears that some efforts are made to teach children about consumer rights, and recent changes to the national curriculum were referred to.

Summary and conclusions
It appears that the more formal provision of consumer education is seen as having an increasingly important role in consumer policy. Recent initiatives in the UK, in particular the leadership role played by the OFT in coordinating

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\(^{151}\) The U.S. has several consumer education clearinghouses. For example, consumers can order many federal government publications from the Federal Citizen Information Center website, and www.MyMoney.gov is a clearinghouse for financial literacy information.

\(^{152}\) Responses to Q7.
educational initiatives, and the incorporation of consumer issues into the National Curriculum, places the UK at the forefront of such initiatives.

2.2 Provision of formal advocacy mechanisms for consumer representation

Introduction
Consumer advocacy is viewed as an important plank of an effective consumer empowerment regime. The representation of consumer interests and priorities in the formulation of consumer policy and enforcement priorities may be particularly important to the extent that it highlights emerging problems in markets and the needs of vulnerable and disadvantaged consumers.

The assessment here is informed by the following benchmarking principle:

- Principle 6: The provision of strong consumer advocacy groups can ensure the representation of consumer interests in policy formulation and the setting of agency priorities.

Before moving on to the assessment, it is useful to consider some of the Eurobarometer data on the importance consumers themselves attach to consumer organisations. When asked whether they had trust in independent national consumer organisations to protect their consumer rights, 66% of European consumers (EU25) answered yes.

UK
There are a number of statutory and non-statutory bodies in the UK with responsibility for the representation of consumer groups. The leading institution is the National Consumer Council (NCC) which was created in 1975 as a non-departmental public body, and funded mostly by BERR. The NCC will shortly be placed on a statutory footing, and will merge with Postwatch and energywatch to form a new, enhanced consumer representation and

The new NCC results from the Government’s decision to streamline and strengthen the UK’s consumer representation regime, which has been criticised as being fragmented, lacking coherence, and public presence. The new NCC has considerably enhanced powers and duties. Whereas previously, its main roles were to carry out research and advocate change where needed, it now has general powers to investigate and gather information from firms and regulatory bodies. Its core functions will be to act as consumer advocate, to research into consumer matters, and to provide information to consumers. It is also under a formal duty to enter into cooperation agreements with various designated bodies, such as the OFT and consumer panels in the financial and telecommunications sectors.

A number of other non-statutory bodies exist for the representation of consumers, including Which?, Citizens Advice (supporting a charitable network of Citizens’ Advice Bureaus). In addition, the BBC have a number of programmes which seek campaign and raise awareness on behalf of consumers.

Comparative jurisdictions
A number of consumer organisations exist in Australia. In terms of input into policy, the ACCC has instituted a Consumer Consultative Committee to facilitate discussions with consumer representatives on consumer issues. Appropriate individuals are invited to apply and attend the thrice-yearly meetings. At the Federal level in Canada there are a number of committees which represent the interest of consumers (among others). The Standards Council of Canada includes consumer representatives, as does the Consumer and Public Interest Committee, the latter highlighting emergent consumer issues. Canada appears to lack strong consumer representation on a national scale. At the provincial level, Quebec has a tradition of funding consumer advocacy body. The new NCC results from the Government’s decision to streamline and strengthen the UK’s consumer representation regime, which has been criticised as being fragmented, lacking coherence, and public presence. The new NCC has considerably enhanced powers and duties. Whereas previously, its main roles were to carry out research and advocate change where needed, it now has general powers to investigate and gather information from firms and regulatory bodies. Its core functions will be to act as consumer advocate, to research into consumer matters, and to provide information to consumers. It is also under a formal duty to enter into cooperation agreements with various designated bodies, such as the OFT and consumer panels in the financial and telecommunications sectors.

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groups. The Consumers’ Association of Canada (CAC), a charitable organization, has a mandate to advocate consumer interests with government and industry. Option consommateur is a small consumer organisation, part of a loose network of about 40 consumer groups in Quebec. It gives practical advice to consumers and takes action in the courts on behalf of groups of consumers. In Ottawa, the Public Interest Advocacy Centre (PIAC) seeks to advance the interests of individuals and groups who are generally unrepresented or under-represented. In respect of consumer issues, it is mainly concerned with issues involving the delivery of public and utility services. PIAC has pursued a number of legal cases in pursuit of its objectives.

In Denmark, the Forum for Consumers, established in 2003, provides a forum where current consumer issues are discussed. It provides advice on the public development of consumer information, fosters to create dialogue between public agencies, consumers and businesses on consumer policy and provides advice to the responsible minister and other consumer agencies. The Consumer Council (‘the CC’) (a private organisation established in 1947) represents the interests of consumers and commercial interests. The CC is the principal voice for consumers' interests, lobbying the Government, Parliament, public authorities and the business community. It is represented on more than 200 committees, boards and councils dealing with matters important to consumers. The CC has an extensive dialogue with the business community. This contact has among other things led to the establishment of several private complaint boards covering sectors such as insurance, banking and investments, travel and construction. The CC takes the initiative to bring up issues, for example, through taking issues to court.

The German Federal government uses consultative bodies to take account of consumer interests. For example, the Ministry of Nutrition, Agriculture and Consumer Protection uses the Scientific Advisory Board for Consumer, Food, and Nutrition Policies which present consumer opinions and makes suggestions. Additionally, the Food and Consumer Goods Act requires consumer organisations to be consulted before any regulation is issued under
that Act. The Consumer Council of the German Institute for Standardization (DIN) provides for input from consumer interests on standards matters. The main private advocacy organisation is the Federation of German Consumer Organisations (VZBV). The VZBV and other consumer protection organisations are mainly concerned with lobbying, information, and advice. Representatives of consumer protection organisations act for consumer interests in diverse committees and institutions. Interest and lobbying groups can participate in hearings during the legislative procedure and issue statements to relevant aspects of the bills.

Article 51 of the Constitution of Spain requires the public administration to protect consumers and promote their education, information and representation. The right of consumers to representation has two dimensions: the right to associate or organise themselves into consumer organisations, and the right that their associations are heard by the government agencies. This is a formal objective in the LGDCU, and consumer organisations are given representative functions where they are legally constituted and duly registered with the INC. They can represent consumers in a formal way by carrying out legal actions in defence of the consumers. The main consumer council, Consejo de Consumidores y Usuarios (CCU), integrates most of the representative consumer councils in Spain, and is entitled to be consulted on general rules that affect directly the interests of consumers and in some specific instances, the participation of the CCU is compulsory. LGDCU also imposes the consultation of consumer councils in the system of arbitration of consumer complaints. In the US, there is a plethora of consumer organisations dealing with differing aspects of consumer issues and ranging from the general to the specific, although we have no direct information on how they input into policy making at the Federal level.

Questionnaire data
Asked whether consumer advocacy organisations were effective at securing benefits for consumers in their respective countries, most respondents either agreed or strongly agreed with this statement: four out of five in the UK, and
nine out of 14 in the other jurisdictions.\textsuperscript{157} One respondent in the UK did comment that coverage of advocacy mechanisms in the UK was variable.

When asked whether consumers had a statutory right to representation, most answered no, though there was some ambiguity in the question.\textsuperscript{158} In fact, most respondents pointed to the existence of both statutory and non-statutory mechanisms for consultation with and representation of consumer interests in policy making. Of those respondents commenting, most appeared to be of the view that participation of consumers did or would improve policy. Two respondents in Canada did point to the lack of an effective lobby at the Federal level, though this was contradicted by another respondent in that country.

When asked whether there were other less formal ways in which consumers can influence policy-making, of the 21 respondents, only two answered no to this question (in Denmark and in Spain), the remainder answering yes.\textsuperscript{159} In Australia, all respondents were of the view that there were effective consultation processes. Across all jurisdictions, reference was made to the importance of consumer groups (both public and private) and the use of members of parliaments in highlighting consumer issues and concerns. Two respondents from the UK referred to regulatory impact assessments requiring consultation with consumer groups and the role of supercomplainant bodies in highlighting consumer issues, while another referred to the importance of the media to the same end. Overall, across all jurisdictions there appear to be effective informal mechanisms for the consultation of consumers and the majority of respondents appeared to view this as having a beneficial effect upon policy formulation. Only in Canada did respondents point to serious deficiencies in this regard.

\textsuperscript{157} Responses to Q28. 
\textsuperscript{158} Responses to Q9. 
\textsuperscript{159} Responses to Q10.
Summary and conclusion
Across all jurisdictions (including the UK) there appear to be mechanisms in place for the representation of consumer interests in policy making and priority setting, and our questionnaire data appears to underline the importance of this in improving policy. Recent reforms in the UK can reasonably be expected to strengthen and improve consumer representation in the formulation of consumer policy. We conclude that the UK’s arrangement for consumer representation are on a par with the best.
3. Consumer Redress Mechanisms

3.1 Ombudsman schemes and other alternative dispute resolution mechanisms

Introduction

ADR mechanisms are characterised by greater flexibility, shorter duration, and lower costs as compared to ordinary court procedures. The aim of using ADR mechanisms is to solve the dispute through, for example, a mediator, a complaints procedure through an administrative agency or an ombudsman scheme. Most ADR mechanisms are self-evidently more accessible to consumers than actions through the ordinary courts. These mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.

All of the jurisdictions covered by this study provide ADR mechanisms for consumers. ADR mechanisms differ from country to country, but the aim of the ADR mechanisms is the same: to provide an easily accessible, cost-efficient, prompt dispute resolution procedure for consumers in their disputes with businesses. There is a large number of ADR schemes available in the reviewed jurisdictions, and they vary greatly. Indeed, as one UK respondent observed, as economies are converging, ADR mechanisms are diverging.  

We use the following benchmarking principle to inform our assessment:

- Principle 7: ADR mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and

160 Response to Q56.
effectiveness. Regard should be had to the particular needs of disadvantaged consumers.

UK

There is plethora of ombudsman/ADR schemes in the UK, dealing with an estimated 150,000 cases in 2006/7.\textsuperscript{161} As a recent report by the NCC reveals, the coverage of ADR schemes is patchy, and indeed some markets which appear particularly problematic do not have an ADR scheme at all.\textsuperscript{162} Leading examples of ombudsman/ADR schemes are as follows:\textsuperscript{163}

- Advertising Standards Agency (ASA) which generally regulates misleading, harmful or offensive advertising (through codes of practice). While it has no direct enforcement powers, broadcasters and media owners generally will not carry advertisements which are non-compliant with ASA codes. Where there is persistent non-compliance, the matter can be referred to the OFT.\textsuperscript{164}

- Ombudsman for Estate Agents (OEA) is an independent service for dealing with disputes between member estate agencies and consumers who are actual or potential buyers or sellers of residential property in the UK. Any estate agency in the UK may apply to join the scheme provided that they meet certain criteria laid down by the OEA.

\textsuperscript{162} Brooker (n 161) 6. For a recent study of ADR provision in the UK see M Doyle K Ritters and S Brooker \textit{Seeking Resolution: the availability of consumer-to-business alternative dispute resolution in the UK}, URN 03/1616 (DTI London 2004) available at \url{http://www.berr.gov.uk/files/file11557.pdf}.
\textsuperscript{163} For a comprehensive list see \url{http://www.tsi.org.uk/links/index.htm?frmClient=DFB8A829-5F93-485A-A1AF5D36DF645D1&frmItemID=127488&frmShared=1#Ombudsmen_and_Regulators}.
\textsuperscript{164} Statutory regulations require the OFT to investigate complaints advertisements which mislead or which do not comply with the conditions under which comparisons are permitted in advertisements, and the OFT may seek, if necessary, an injunction from the courts against publication of an advertisement. Before investigating, the OFT can require that other means of dealing with a complaint, such as the ASA system mentioned above, have been exhausted. As a result, action by the OFT usually results only from a referral from the ASA.
board. The code of practice has been approved by the OFT, and around 60% of estate agents in the UK are member of the scheme.  

- Removals Industry Ombudsman Service is an independent ombudsman scheme, offering a final resort (other than the courts) for consumers who allege that the removal firms has acted in breach of contract, in an unprofessional, inefficient or unfitting way, or in breach of the industry code of practice. Members of the scheme agree to be bound by the ombudsman’s determination. There is no cost to the complainant.

The Consumer Estate Agent Redress Act (CEARA) provides for the establishment (with the approval of the relevant sectoral regulator) of new consumer redress schemes in the gas, electricity and postal services markets, with the hope that this will improve consumers’ access to out-of-court resolutions in the case of complaints with their service providers.

**Comparative jurisdictions**

In Australia, the Banking and Financial Services Ombudsman (BFSO) provides for a free and independent dispute resolution service. It can consider a dispute which relates to any act or omission by a financial services provider, in relation to financial services in Australia, or any act or omission by a financial services provider relating to confidentiality, and, in the case of an individual disputant, privacy.

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165 Under the Estate Agents Act 1979 the OFT may determine that an estate agent is unfit to practice. The Consumers, Estate Agents and Redress Act 2007 gives the Secretary of State the power to require estate agents to belong to an independent approved ombudsman scheme which will determine disputes between estate agents and buyers or sellers of residential property in the UK, together with further powers for the OFT to regulate estate agents.

166 Consumers must first exhaust any grievance procedure which is available via a removals firm’s trade association.

167 Similar powers already exist in respect of the sectoral consumer bodies which are being merged with the NCC under the Act.

168 For the powers of the BFSO, see: http://www.abio.org.au/abionet/ABIOWebsite.nsf/0/B385C2D0F3E87335CA256C0E0045047A/$file/BFSO+Terms+Of+Reference+1-1-07.pdf
Canada has a number of sector specific ADR mechanisms for example, the Canadian Association of Motor Vehicle Manufacturers Arbitration Plan. Similarly, an Air Travel Complaints Commissioner was established in frame of the amendments to the Canada Transportation Act in 2000. Powers of the Commissioner include resolving consumer complaints in relation to quality of airline service and terms and conditions of carriage. The Better Business Bureau also provides complaint and mediation services. For example, for online disputes, the BBB participates in dispute resolution only after the customer has failed to satisfactorily resolve a dispute with an online merchant. Once the consumer files the complaint, the BBB contacts the merchant on the consumer’s behalf and attempt to resolve the dispute through one of three means: conciliation, mediation, or arbitration.

The Consumer Complaint Board in Denmark deals with business to consumer disputes is a public ADR scheme which acts as a stop-gap where there is no (approved) private ADR provision. Denmark also has a Consumer Ombudsman, who monitors primarily business compliance with the *Marketing Practices Act*, and only intervenes in cases of harm to the collective interest of consumers, and does not have power to settle individual disputes.

In Germany there has been a relatively recent development of the ombudsman principle appearing in the private sectors for example, the Private Health Insurance Funds and the Deutsche Bundesbank has an ADR scheme for the credit transfer system. Litigation and arbitration were the preferred German methods of administrative law redress until the breakthrough in ADR developments which occurred in 1999 when a Federal law introduced mandatory court-annexed mediation.\(^{169}\) Ombudsman schemes are partly used to enforce consumer laws, but according to one respondent they do not play an important role.\(^{170}\) Some sector specific authorities can deal with consumer complaints. For example, the Federal Financial Supervision Authority (BaFin) can be addressed with complaints about banking or insurance institutions.

\(^{170}\) Responses to Q56.
The BaFin does not make a binding decision to resolve the dispute but can use its supervisory power and intervene if necessary.

In Spain, Article 31 of the LGDCU mandates the Central government to create a system of arbitration of consumer disputes. More recently, the Arbitration Act supplemented these provisions, and now applies as subsidiary to the LGDCU legal regime. The INC is responsible to the management of the National Arbitration Council (Junta Arbitral Nacional). The functions of the INC are, among others, (1) the organization and promotion of the System of Arbitration of Consumptions (JsAC), (2) management of the Junta Arbitral Nacional. The system of arbitration of consumer disputes was further complemented nationwide by means of the Juntas Arbitrales de Consumo (JsAC). Multiple JsAC have been set up across public administrations that concluded an agreement with the INC. As of 2000 there was 62 JsAC across Spain. The OsIC also provides support to the system of arbitration.

In the US, the majority of the relevant legislation is passed at state level, and in consequence there is a vast array of both public and private ADR schemes.

**Questionnaire data**

Respondents were asked to indicate how likely consumers were to pursue specifically indentified ADR mechanisms. All UK respondents stated that it ‘may vary’, one point being made was that consumers need to know about the relevant redress schemes which tend to vary by sector. By contrast, the majority of the German respondents thought it was quite likely for consumers to pursue ADR mechanisms, and in Denmark respondents thought it was very likely for consumers to pursue ADR mechanisms. Similarly, the majority of respondents from Australia answered that it is very likely whereas all respondents from Canada said that it is not very likely. Across all jurisdictions, 

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171 Real Decreto 636/1993 of 3 May.
173 LGDCU, Articles 14.2 and 31.
174 Responses to Q54.
almost 40% of the respondents found that it was quite likely or very likely for consumers to pursue ADR mechanisms whereas less than 15% of the respondents found that it is not very likely.

**Table B.6: How likely is the consumer to pursue any of the alternative mechanisms you have identified in Q.53 (Q54).**

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highly unlikely</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Not very likely</td>
<td>0 (0%)</td>
<td>3 (18.75%)</td>
<td>3 (14.28%)</td>
</tr>
<tr>
<td>Quite likely</td>
<td>0 (0%)</td>
<td>3 (18.75%)</td>
<td>3 (14.28%)</td>
</tr>
<tr>
<td>Very likely</td>
<td>0 (0%)</td>
<td>5 (31.25%)</td>
<td>5 (23.80%)</td>
</tr>
<tr>
<td>Do not know</td>
<td>0 (0%)</td>
<td>5 (31.25%)</td>
<td>5 (23.80%)</td>
</tr>
<tr>
<td>May vary</td>
<td>5 (100%)</td>
<td>0 (0%)</td>
<td>5 (23.80%)</td>
</tr>
<tr>
<td>Total respondents</td>
<td>5</td>
<td>16</td>
<td>21</td>
</tr>
</tbody>
</table>

Following from this, respondents were asked to identify the advantages and disadvantages of turning to specifically identified ADR mechanisms. Redress schemes were seen as having advantages for firms, who also have an interest in avoiding costly litigation. UK respondents commented upon the variable accessibility of redress schemes, and the Financial Services Ombudsman was given as an example of a good model in this respect. Another respondent commented on the fragmented nature of ADR schemes, and the possibility of a ‘race to the bottom’ in terms of effectiveness for consumers where provision was voluntary. Another respondent pointed to the problem of visibility of the schemes.

\[^{175}\text{Responses to Q55.}\]
In the UK, the majority of the respondents agreed that the advantages were the lower costs, speed, and the informality of procedures. These were also the advantages mentioned by the respondents in all the other jurisdictions although one Danish respondent noted that ADR mechanisms are not necessarily speedy. According to an Australian respondent, ADR schemes have the advantage of creating performance standards. Two respondents (from the UK and Australia) noted that consumers were more likely to use ADR schemes where the outcome is binding on the company but not the consumer. In this regard, it was noted that in both Denmark and Spain firms are not bound by the outcomes of a number of ADR schemes, although in Denmark a number of industry organisations make it a condition of membership for firms to abide by ADR decisions.

A UK respondent noted that the disadvantages of ADR are that it only provides approximate justice, an especial concern where the outcome is binding. One German respondent noted the potential problem of a lack of legal certainty. One Australian respondent was of the view that bias exists in some ADR schemes, and highlighted the possible dangers of capture if it is an industry-based mechanism. One Canadian respondent was of the view that ADR mechanisms are mainly for the benefit the supplier and effectively disenfranchise the consumer.¹⁷⁶

Summary and conclusions

There are a variety of ADR mechanisms across the countries under study. The coverage of ADR schemes in the UK is patchy, and some markets do not have an ADR scheme at all (and this is true of some markets which display low levels of consumer satisfaction). There are obvious benefits to ADR, but we note a level of concern among respondents as to the quality of certain schemes and the danger that consumers may be ‘short changed’. In the UK and Denmark, there are mechanisms in place for approving schemes, but in respect of the former, relatively few schemes have been approved. In

¹⁷⁶ Responses to Q53.
Denmark, the Consumer Complaints Board acts as a default mechanism where there is no private (approved) scheme in place. This has the benefits of increasing the visibility of ADR to consumers generally, and this is reflected in the respondents from Denmark who view ADR in that country as being very accessible. It also has the benefit of encouraging industries to put in place their own mechanisms, and provides a model for ADR which may avoid some of the potential problems over independence and quality of decision-making. We note from the European Consumer Scoreboard that the UK’s performance is relatively good as compared with the EU 25 average (see Figure B1 below).

Figure B1: Percentage of consumers who agree that it is easy to resolve disputes with sellers/providers through an arbitration, mediation or conciliation body

We conclude that the UK’s provision of ADR schemes is an area where further progress could be made if the UK is to be on a par with the best.

3.2 Civil redress

3.2.1 Small claims procedures

Introduction

This section considers consumers’ possibilities for civil redress in form of small claims across the countries under study. Our assessment is informed by the following benchmarking principle:

- Principle 8: Provision should be made for flexible and expedited small claims procedures (although ADR mechanisms may fulfil this role).

UK

In the UK, consumers can take action in the civil courts when the law gives individual rights of redress or when there is a breach of contract. Consumers can seek civil redress in a County Court or the High Court. If the amount in dispute (the value of the claim) is £5000 or below, it can be dealt with through the County Court’s small claims procedure. Ultimately, it is up to the judge to decide whether the claim will be dealt in the ‘small claims track’. The average duration of the procedure is around six months which is average when compared to the other countries, and consumers have to pay £30-120 for filing a claim.\(^\text{178}\) Certain claims can be made via an internet portal maintained by Her Majesty’s Court Service.

Comparative countries

In Australia, consumers are able to use a small claims procedure where the value of the claim is AUD25000 to 50000 (approximately £11500 – £23000) depending on the state. In the Australian provinces of New South Wales, Victoria, Queensland and Western Australia this procedure is applied in separate small claims courts. The majority of cases finish within 35 days from filing the case. It costs consumers approximately £20 to file a complaint.

Canada also provides small claims procedures. Some provinces of Canada have such procedures available in separate courts. It costs consumers CAD50 or more for filing a case which may act as a barrier for some consumers. Depending on the province, claims of up to CAD7000 (approximately £3500) can be resolved through the small claims procedure. The duration of the procedure is approximately six months.

Unlike the other countries covered by this study, Denmark only recently (January 2008) made it possible for consumers to bring a claim through a small claims procedure. Claims of up to Dkr50000 (approximately £5000) can be brought through this mechanism. The small claims procedure is a new mechanism in Denmark so there is no statistic on the average duration of complaints. Consumer will have to pay a fee of Dkr500 (approximately £50) for filing a complaint through this procedure.

Small claims procedures are available in Germany. Whether the procedure is appropriate, however, is dependent upon the discretion of the courts which makes it less accessible (and perhaps more risky) for consumers. Moreover, the value of the claim must not exceed EUR 600 (approximately £400) which is a relatively low upper threshold compared to other countries. This is particularly so considering that consumers will have to pay a fee of EUR 75 to

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179 The following draws on information from J Stuyck E Terryn V Colaert T Van Dyck N Peretz N Hoekx and P Tereszkiewicz An Analysis and evaluation of alternative means of consumer redress other than redress through ordinary legal proceedings, Final Report (Katholieke Universiteit Leuven 2007).
(approximately £50-75) to file a complaint. Like in Canada, the majority of complaints are on average dealt within 6 months.

In Spain, the small claims procedure has a general scope of application. Consumers can use the small claims procedure if the value of the claim does not exceed EUR 3000 (approximately £2000). Unlike some of the other countries, there is no fee for Spanish consumers to file a complaint under this procedure. The duration of a claim is 5 months using the small claims procedure.

In most of the states in the US, the small claims procedure is applied in separate small claims courts. Depending on which state, the value of the claims ranges from $2000 to $15000 (approximately £1000 - £7500). The average duration for a claim is between 10-90 days. A complaint under this procedure will normally attract a fee.

Questionnaire data

Respondents were asked whether enforcement mechanisms are easily accessible to consumers. The responses are summarised in Table B.7 below.

Of the five UK respondents, two strongly disagreed and one disagreed that enforcement mechanisms are easily accessible to consumers whereas one strongly agreed and another agreed. Of the other respondents, eleven agreed, and four disagreed. One Australian respondent said that easy access to enforcement of a low cost transaction is still quite difficult.

180 Responses to Q22.
Table B.7: Enforcement mechanisms are *easily accessible* to consumers (Q22)

<table>
<thead>
<tr>
<th>Strongly Disagree</th>
<th>UK (1/5)</th>
<th>The five other jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
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<tr>
<td>2 (40%)</td>
<td>0 (0%)</td>
<td>2 (9.52%)</td>
<td></td>
</tr>
<tr>
<td>Disagree</td>
<td>1 (20%)</td>
<td>4 (25%)</td>
<td>5 (23.80%)</td>
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<tr>
<td>Agree</td>
<td>1 (20%)</td>
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<td>0 (0%)</td>
<td>1 (6.25%)</td>
<td>1 (4.76%)</td>
</tr>
<tr>
<td><strong>Total respondents</strong></td>
<td><strong>5</strong></td>
<td><strong>16</strong></td>
<td><strong>21</strong></td>
</tr>
</tbody>
</table>

They were also asked whether consumers can easily obtain redress in the event of genuine complaints. The responses are summarised in Table B.8 below.

The UK and Australia noted that it depends on the market. None of the respondents in UK or any of the other jurisdictions strongly agreed. With the exception of Denmark where all respondents agreed that consumers can easily obtain redress, the majority of respondents disagreed. One respondent in Australia reiterated that it is difficult to access tribunals for low cost transactions.

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181 Responses to Q27.
Table B.8: Consumers can *easily obtain redress* in the event of genuine complaints. (Q27)

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly disagree</td>
<td>1 (20%)</td>
<td>2 (12.5%)</td>
<td>3 (14.30%)</td>
</tr>
<tr>
<td>Disagree</td>
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<td>7 (43.75%)</td>
<td>9 (42.85%)</td>
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<tr>
<td>Agree</td>
<td>2 (40%)</td>
<td>5 (31.25%)</td>
<td>7 (33.33%)</td>
</tr>
<tr>
<td>Strongly agree</td>
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<td>0 (0%)</td>
</tr>
<tr>
<td>Do not know</td>
<td>0 (0%)</td>
<td>2 (12.5%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Total respondents</td>
<td>5</td>
<td>16</td>
<td>21</td>
</tr>
</tbody>
</table>

Summary and conclusions

‘Small claims’ is a general term which covers different kinds of procedures, with diverse rules of procedure and scope of application. It is used in this study to examine whether the individual countries covered by this study have a specific simplified procedure which is an efficient, flexible and accessible dispute resolution for small claims below a certain threshold value. All the countries covered by this study have a small claims procedure, although in Germany it is for the courts to decide whether such a procedure is appropriate. Some small claims procedures are general in their scope of application meaning that all small claims can be brought under the procedure. Others are specific in their scope of application meaning that only consumers’ complaints can be brought under a small claims procedure. All the countries have certain threshold values.

The aim of the small claims procedure is to provide a flexible, cheaper, faster and less formal procedure than ordinary civil court procedures. In consequence, consumers have better access to justice to resolve small
disputes and obtain redress at a cost and burden which is not disproportionate to the value of their claim. In the light of this, we note that in the UK it can take around six months to use this procedure. Some jurisdictions such as Germany, some provinces of Australia and the UK allow the judge to decide to apply the ordinary court procedure to complex small claims; while such mechanisms may be desirable from the point of view of legal certainty, it does increase litigation risks for consumers. In all the countries except Spain, consumers have to pay a fee to access the procedure. In low cost transactions this may act as a barrier and discourage consumers from claiming all together. While all the jurisdictions include some simplification of the ordinary court procedures when dealing with small claims, the threshold for the value of the claim is very different. It ranges from approximately £400 to £23000, with the UK at the lower end with a threshold of £5000. We note, however, that despite apparent shortcomings both the UK and Germany appear to do well when compared with the EU 25 average (see Figure B2).

Figure B2: Percentage of consumers who agree that it is easy to resolve disputes with sellers/providers through courts

We conclude that, on balance, the UK’s small claims procedure is average.

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182 Consumer Markets Scoreboard (n 19) 64.
3.2.2 Collective enforcement

Introduction

Collective actions for individual damages offer great opportunities for judicial economy by gathering claimants with similar claims against the same defendant(s). The possibility of handling large groups of claims potentially enhances consumer protection. It is perceived as increasing access to justice, and may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counter-balance weak public enforcement. According to Eurobarometer data, 74 per cent of European citizens polled have expressed that they would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same issue. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation. Our assessment here is informed by the following benchmarking principle:

- Principle 9: Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counter-balance weak public enforcement. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.

UK

The UK currently does not recognise the existence of class actions, but the Civil Procedure Rules do allow for group litigation and for representative

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183 Eurobarometer (n 153) 100.
184 Accordingly, a ‘Group Litigation Order’ (GLO) means an order providing for the case management of claims which give rise to common or related issues of fact or law (GLO issues). Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues, that judgment or order is binding on the parties.
claims where more than one person has the same interest in a claim.\textsuperscript{185} Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under this rule is binding on all persons represented in the claim. It may only be enforced by or against a person who is not a party to the claim with the permission of the court. In private law cases there are no procedures for representative organisations, such as a consumer group, to bring proceedings on behalf of people whose collective interests they support or on behalf of an unnamed individual.\textsuperscript{186}

Comparative jurisdictions

In Australia, grouped proceedings are possible. It is also common practice for some provincial magistrates to try to conciliate rather than consider a case in court, as this saves money for the court system and the parties involved. There is a small fee payable, but many cases are resolved in this way. Moreover, in case of product liability, the Commission is empowered to take action on behalf of persons who have suffered loss with their written consent.

In Canada class actions are available in some of the provinces and territories for example British Columbia, Ontario and Quebec. Litigation by this route can be pursued by consumer groups.

Class actions were introduced in Denmark in January 2008. In order for a claim to be brought, the court must be satisfied that collective redress is the best procedural way to examine the claim. The claims in the class need not be completely identical, but they must arise from the same factual circumstances and have the same legal basis. Class actions are conducted by a class

\textsuperscript{185} Representative actions in the UK have suffered from the limitation since Markt & Co Ltd v Knight Steamship Co Ltd where the English Court of Appeal interpreted the requirement of ‘same interest’ for parties in representative actions to mean that individuals with different contracts and individual damage claims could not be aggregated within a common representative claim (I Ramsay Consumer Law and Policy: Text and Materials on Regulating Consumer Markets (Hart Publishing Oxford 2007) 259).

\textsuperscript{186} Such claims are possible by certain designated bodies before the Competition Appeal Tribunal for harm or loss suffered as a result of an infringement of UK or EC competition law (Competition Act 1998, s 47B).
representative (appointed by the court) on behalf of the class. The representative may be a member of the class, an association, private institution or other organisation when the action falls within the framework of the organisation’s object (eg a consumer organisation), or certain public authorities.\(^\text{187}\) In class actions under the opt-out arrangement, meaning that the class members automatically join the class unless they opt-out, the only eligible class representative is a public authority approved for this purpose by law, in the field of consumer law, the Consumer Ombudsman only. The access to such redress resolutions means that the Consumer Ombudsman is now able to help consumers get redress.\(^\text{188}\)

German civil procedural law does not provide for US-type class actions. However, it diverges from the principle of individual rights enforcement and allows consumer associations to pursue collective claims (Verbandsklagen) in the general interest of consumers in selected areas of law. The German Civil Law also provides for the possibility of facilitating claims and bundling resources so that potential plaintiffs can join an existing action if there is a common factual and legal basis. Consumers are allowed to cede their claims to consumer associations who may bring actions on their behalf.

In Spain, a group of consumers can bring an action in protection of their collective interests before a civil court provided that three conditions are met: the harm inflicted on consumers affects their interests as consumers, the consumers affected can be identified, and the group of consumers constitute the majority of the consumers affected. Consumer associations (recognised in law) can also bring an action in protection of the interests of their associates.

In the US, class actions are available for consumers. The US class action is an action brought by a person, on behalf of a class of persons, who are not

\(^{187}\) E Werlauff ‘Class actions in Denmark – from 2008’ available at http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf. \(^{188}\) In class action under the opt-in arrangement, meaning that class members have to join the action to be a part of the class action, the court can decide that joining the class action is conditional upon the member’s providing security for legal costs specified by the court. The exemption is where a the member has legal aid insurance or other insurance which covers the costs of the case, or the class action fulfils the terms for free legal aid.
individually represented by the acting party but are deemed to be represented by it, unless they opt-out. Given this there are high standards of standing in class actions. According to the Federal Rules of Civil Procedure, which prescribe the preconditions of class actions, questions of law or fact common to all members of the class should predominate over individual questions, class action must be ‘manageable’ and superior to other methods of litigation, and since the judgment has res judicata effect for all class members unless they opt-out, all potential members should be identified and given notice about the litigation. Even if these procedural hurdles are cleared and the class is successfully certified, substantive analysis and distribution of damages in a class action can be problematic. In the context of class actions, proof of damages on an aggregate basis is not sufficient, and verification of the individual damages is required.\(^\text{189}\)

Agencies in the US can seek redress on behalf of consumers. At the federal level, the Commission can secure restitution from the courts, and at the state level Advocates General can initiate parens patriae actions. State Advocates General coordinate their activities under the roof of the NAAG, and collectively target national firms which are beyond the reach of individual consumers, securing substantial amounts of damages on behalf of consumers. Compensation is distributed through innovative mechanisms (eg the cy pres principle).

Summary and conclusions

There is a great diversity between the countries when it comes to collective redress. Collective action exists in different forms. For example, Denmark has introduced group actions which have some but not all of the characteristics of US type class actions, the UK has a system of representative actions and group litigation orders, whereas Germany puts an emphasis on consumer

\(^{189}\) Although some cases, such as Nasdaq Market Makers Antitrust Litigation, 169 F.R.D. 493 (S.D.N.Y.1996), courts allowed the computation of damages on an aggregate basis, those cases seem to be the exception rather than the rule. See S Calkins ‘An Enforcement Official’s Reflections on Antitrust Class Actions’ (1997) 39 Arizona Law Review 413, 418.
associations taking actions on behalf of consumer. Even within these categories considerable heterogeneity exists. Essential features of collective actions are regulated in diverging ways for example the persons who can initiate the claim and the opt-in or opt-out nature of the collective action.

It is difficult to evaluate the UK’s position vis-à-vis the other countries, not least because of the apparent lack of empirical data on the effectiveness of collection actions generally. Moreover, the relative importance of class actions depends upon other features of the enforcement regime, and should not therefore be taken in isolation. In a country like Germany, for example, where there is a lack of public enforcement, collective redress mechanisms are more important than in countries, like the UK, where there are core public agencies responsible for enforcement. We note from the European Consumer Scoreboard the apparent willingness on the part of consumers to engage in collective actions (see Figure B3).

Figure B3: Percentage of consumers who agree that they would be more willing to defend their rights in court if they could join other consumers complaining about the same issue

Overall, the UK does make provision for group litigation and representative actions, but its procedures are more restrictive than is the case in other countries (in particular the US and, to a lesser extent, Denmark). Whether the

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190 Consumer Markets Scoreboard (n 19) 65.
law should be changed to facilitate more group litigation is an issue which is beyond the scope of this study.
4. Public Enforcement

In this section we assess the UK’s public enforcement regime with those of the comparator jurisdictions against several principles which we believe will best promote consumer empowerment. We focus here on several issues, including deterrence and the targeting of resources.

4.1 Securing compliance: penalties

There are a number of types of enforcement powers, and we use the following nomenclature:191

- criminal penalties (agency prosecution, judicial enforcement);
- civil orders and penalties (agency standing, judicial enforcement);
- administrative orders and penalties (agency enforcement, judicial oversight).

Our assessment here is informed by the following benchmarking principles:

- Principle 10: Administrative enforcement has an important role by correcting for the under-use of redress mechanisms. Penalties should be used to change the behaviour of the offender, and should be transparent, proportionate and fair. Enforcement agencies should have a hierarchy of sanctions, with the ability to escalate sanctions in the face of non-compliance by firms

UK

Consumer enforcement in the UK on the administrative level is enforced by the Office of Fair Trading (OFT), Local Authority Trading Standards Services (TSSs) and, in certain respects, other designated bodies, for example, National Consumer Council (NCC). There exists a number of different powers.

In respect of civil orders, under the *Enterprise Act 2002*, Stop Now Orders can be obtained from the court to stop infringements which harm the *collective interests* of consumers. According to the OFT guidance there ‘is no obligation to establish a specific number of individual consumer complaints or incidence of infringements’, in order for the court to issue such an order.\(^{192}\)

The *Regulatory Sanctions and Enforcement Bill* (RSEB), which will come into force shortly, will significantly augment the enforcement powers of the OFT and the TSSs in respect of infringements of consumer law by giving them powers to impose administrative penalties.\(^{193}\) On coming into law, the OFT and TSSs (among others) will have the power to issue fixed and variable penalties to firms who break the law. While Stop Now Orders relate to practices which may harm consumers collectively, there is no such requirement under RSEB. More importantly, there is no involvement of the court, save for the right of an appeal against a penalty.

In terms of criminal powers, Local Authority TSSs (and the Department of Trade and Investment in Northern Ireland) can investigate and prosecute criminal offences. Trading Standards services can bring criminal prosecutions to either Magistrates Courts or to the Crown Court. Fines and imprisonment are possible penalties for breaches of consumer protection law in the Crown Court and Magistrates Courts can impose a maximum fine. Moreover, failure to comply with an enforcement order is a contempt of court, punishable by a fine or a term of imprisonment not exceeding two years.

Certain consumer organisations and bodies in the UK have the ‘super-complainant’ status before the OFT. In essence this means that the OFT

\(^{192}\) OFT Guidance on Part 8 of the Enterprise Act (n 66). However, the court has said that harm to collective interests could be inferred from the accumulation of individual interests and, in the context of a default of an enforcement order, a single breach would be insufficient to amount to a breach of the order (*Office of Fair Trading v MB Designs* [2005] CS 85, Court of Session [14-15, 17]).

\(^{193}\) There are around 40 consumer protection statutes the infringement of which invokes the penalty power.
must (within 90 days) issue a reasoned decision in respect of the complaint stating what enforcement action (if any) it proposes to take. This is an important mechanism in terms of ensuring that the OFT’s enforcement resources can be targeted in a responsive way.

Comparative jurisdictions

The Australian Competition and Consumer Commission (ACCC) has discretion as to whether to act on a complaint, and it does so in about 400 instances a year. It is most likely to act in the following circumstances: where there has been a blatant disregard for the law; there is significant public detriment; where intervening would have a worthwhile deterrent or educative effect; and/or where there are significant new market issues; and/or significant effect on disadvantaged consumers. In other cases, the system relies on, and encourages, individuals to resolve disputes themselves. While the State fair trading agencies may mediate to help settle disputes, they cannot compel parties to accept their findings.

Upon deciding to take action, the ACCC can compel provision of information, require evidence to be given on oath, and enter premises to see or copy documents. Only the courts, however, have power to make orders concerning remedies in relation to contraventions or offences pursuant to the Trade Practices Act 1974 (TPA). In pursuing a case, the ACCC may apply to the Federal Court to seek orders to grant damages, make declarations, secure enforceable undertakings and impose injunctions. In these cases independent lawyers have to be employed to represent the ACCC in court. Court based enforcement clearly attracts significant agency costs, this being the ACCC’s second largest item of expenditure (after employee costs). While the costs of litigation are generally not considered to be a decisive factor, the ACCC is required to comply with the Attorney General’s Legal Services Directions, which require that before instituting proceedings, the ACCC must obtain external legal advice, and be satisfied that there is a reasonable basis for taking action. They also allow the ACCC to be receptive to settlement offers.
from the defendant where it is considered appropriate and in the public interest to dispose of the matter in this way.

A probation order is one of the civil remedies available to the ACCC (but is not available in all Australian states and territories). A probation order may require an infringing firm to establish a compliance programme, an education and training programme, or direct a firm to revise the internal operations of its business. Compliance programmes provide a preventative mechanism enabling companies to identify, remedy and reduce the risk of subsequent trade practices breaches. The ACCC has a dedicated team that monitors compliance with court orders and compliance programmes, and breach of an order can give rise to proceedings for contempt of court, leading to imprisonment or a very hefty fine.

Criminal sanctions are available under the TPA, although imprisonment is currently not available to the courts.\textsuperscript{194} Emphasis is put, nevertheless, on reputational damage, and there is the possibility of significant financial penalties (a maximum AUD200000 for corporations and AUD40000 for individuals). Criminal sanctions are reserved for the most serious contraventions of the law and, because of the additional time and complexity involved, they are not generally considered an effective mechanism for achieving timely consumer redress.

In Canada, consumers can complain to the Office of Consumer Affairs (OCA) in Quebec which does not have enforcement powers. Consumers have the possibility of making written complaints to Provincial Consumer Services Bureaux or Consumer Protection Departments, which can mediate between consumers and businesses. Criminal prosecutions are the responsibility of the Attorney General. The Competition Bureau may refer evidence of an offence to the Attorney General who will consider bringing the matter before the

\textsuperscript{194} Prosecutions can only be instituted with the written consent of the Minister and the limitation period is 3 years.
courts. Criminal sanctions exist under the *Competition Act*; for example, misleading advertising is a criminal offence when it is committed recklessly. At the provincial level, the *Ontario Consumer Protection Act 2002* provides for possibility of compensation or restitution where a person is convicted of an offence under the Act.\(^{195}\)

Denmark has an administrative based system where most consumer complaint cases start. A consumer can lodge a complaint to the Consumer Agency, a Consumer Complaint Board or private complaints and appeal panels. Consumers cannot complain to the Ombudsman, as it does not have power to settle individual disputes between consumers and traders, nor does the Danish Consumer Council. However, the latter can offer consumers financial support and guidance in leading consumer cases. The Consumer Agency may bring decisions taken or settlements made by a complaint board (which are non-binding) before the courts at the request of the consumer and on her behalf. While a complaint case is pending before a complaint board, the parties to the case cannot bring the case before the courts. However, given that the decision is not binding, after a decision has been made, either party may pursue a civil claim. The Consumer Ombudsman has the power to issue administrative orders against unlawful practices harming the collective interests of consumers, and it may seek further remedies before the court. Criminal liability, punishable by fines, can result from some infringements of the *Marketing Practices Act*.

Consumer protection in Germany is focused on individual enforcement, and there is no central or supervisory authority monitoring the core of consumer laws. Consumer organisations help consumers to enforce their rights and are said to act as the ‘attorneys of consumers’. Criminal sanctions for the infringement of consumer laws are rare in Germany. In general, the *Criminal Code* penalises fraud or the attempt to commit fraud with imprisonment up to

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\(^{195}\) Prosecutions in Ontario in 2005 under consumer protection legislation administered by the Ministry of Government Services, resulted in a total of 45 months in gaol terms and 675 months of probation.
five years. That includes attempts to seduce consumers to enter into an unfair agreement. The Act Against Unfair Competition provides for prison sentence up to two years for some cases of illegal advertisement.

In Spain consumers may complain to the Offices of Information for Consumers (OsIC). Upon receiving a consumer complaint, OsIC may pass the complaint to the INC, which investigates and imposes sanctions in case of infringement. In cases of infringement of the rights of the consumer the administration can use its powers to sanction; and the consumer is entitled to redress to the extent that harm is established. Criminal actions can be taken against those who harm the legitimate economic interests of a consumer, most notably by means of misleading conduct or fraud. Punishment includes imprisonment and/or fines. Conduct that harms the collective interest of consumers can also be reprimanded criminally. Criminal conduct of this latter type captures the harm to the general economic interest of consumers including, for example, fraudulent advertisements and the unlawful alteration of instruments used to measure cost or price, among others.

In the US, the Bureau of Consumer Protection is the main body within the Federal Trade Commission (FTC) responsible for the enforcement of federal consumer protection statutes. In the case of violation, the FTC litigates cases before the federal courts. The Federal Trade Commission Act constitutes the main federal legislation of consumer protection in the US, but in addition the FTC has adopted Trade Regulation Rules (which are a set of specific principles regarding certain unfair and deceptive practices in certain industries). These rules are binding upon the business and, in cases of knowing violations, the Commission is entitled to seek civil penalties, as well as preliminary and permanent injunctions before the courts. Some violations of the federal consumer protection legislation may also violate the federal criminal law (for example, some deceptive practices may also constitute criminal fraud), and enforcement here falls to the Department of Justice.
Questionnaire data

Respondents were asked to indicate whether they agreed or disagreed that consumer protection regimes provide enforcement mechanisms that encourage compliance in their countries. Of the five UK respondents, four agreed and one disagreed. Canada and Germany were the only two jurisdictions with all respondents disagreeing. None of the respondents in Australia, Denmark or Spain disagreed. The vast majority of the respondents even agreed – some strongly – that consumer protection regime provides enforcement mechanisms encouraging compliance. One UK respondent noted that criminal sanctions are particularly important to deter scams.

Table B.9: The consumer protection regime provides enforcement mechanisms that encourage compliance (Q37)

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
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<td>Strongly Disagree</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Disagree</td>
<td>1 (20%)</td>
<td>2 (12.50%)</td>
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<td>Agree</td>
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<td>Do not know</td>
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<td>1 (4.76%)</td>
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<td>Total respondents</td>
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</tbody>
</table>

They were also asked whether penalties imposed on firms for non-compliance were designed to deter. The majority of UK respondents agreed, one strongly disagreed and one disagreed. None of the Canadian respondents agreed – one even disagreed strongly. One respondent from Canada said

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196 Responses to Q37.  
197 Responses to Q38.
more emphasis needed to be placed on criminal sanctions. The majority of respondents from Australia, Denmark, Germany and Spain agreed that penalties for non-compliance are designed to deter. Overall, the majority of the respondents agreed that penalties are imposed to deter, although almost 25% disagreed.

Table B.10: Penalties imposed on firms for non-compliance are designed to deter (Q38)

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Disagree</td>
<td>1 (20%)</td>
<td>1 (6.25%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Disagree</td>
<td>1 (20%)</td>
<td>4 (25%)</td>
<td>5 (23.80%)</td>
</tr>
<tr>
<td>Agree</td>
<td>3 (60%)</td>
<td>8 (50%)</td>
<td>11 (52.38%)</td>
</tr>
<tr>
<td>Strongly agree</td>
<td>0 (0%)</td>
<td>1 (6.25%)</td>
<td>1 (4.76%)</td>
</tr>
<tr>
<td>Do not know</td>
<td>0 (0%)</td>
<td>2 (12.5%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Total respondents</td>
<td>5</td>
<td>16</td>
<td>21</td>
</tr>
</tbody>
</table>

Summary and conclusions

All of the jurisdictions in this study (with the exception of Germany), have an administrative enforcement system for consumer laws. The norm is that enforcement is before the courts, however, and this is currently the case in the UK. Court based enforcement may have a number of advantages, including securing transparency and fairness for firms. The down side, however, is that it attracts significant litigation costs for the agencies, and to this extent the deterrent effect of the law is undermined. Agencies are also limited in their capacity to employ a layered approach to enforcement, tailoring interventions to the severity of infringement. Mention here should be made of forthcoming changes in the UK under the RSEB. Once in force, the OFT and TSSs will
have the powers to impose both fixed and variable penalties against businesses who fail to comply with consumer protection laws. In this latter regard, agencies will have the ability to escalate the level of a sanction according to, for example, recidivist law-breaking. We conclude that once these powers are in place, the UK will be on a par with the best in respect of its enforcement powers. Nevertheless, there are important innovations elsewhere which the UK could examine with a view to further augmenting the regulatory ‘tool-kit’. The use of orders which put an emphasis on changing the behaviour of firms (as is the case in Australia in respect of probation orders), appears to be another useful means of encouraging compliance. We note also the split of competencies as between the OFT and the TSSs, with the latter having powers to take criminal cases. In principle, this does not mean that enforcement powers cannot be used in a responsive way (to maximise compliance), but it does depend crucially upon the importance of mechanisms for coordination of enforcement (which was discussed above).
4.2 Do the agencies monitor systematically consumer enquiries/complaints?

Introduction

In this section we consider whether there is evidence of systematic monitoring of markets, and the extent to which agencies target their resources in response to evidence of consumer detriment. We start with the expectation that agencies should have mechanisms in place to monitor market conditions, with a view to identifying if and how to intervene. The transparency of these mechanisms is likely to increase the accountability of the agencies. The following benchmarking principle informs our analysis here:

- Principle 11: Enforcement resources should be targeted appropriately. Transparency both in terms of enforcement policy and in terms of monitoring outcomes can increase both compliance and the efficient use of enforcement resources.

UK

The OFT uses a number of indicators to identify potentially problematic traders or markets, including levels of complaints: Consumer Direct and consumer organisations regularly collect complaint information and data. The OFT regularly conducts market studies which, according to the nature of the problem identified, may result in a number of different types of interventions. In addition to complaints data, the OFT uses a wide range of sources to identify candidates for market studies.\(^\text{198}\)

Certain consumer groups are recognised as ‘super-complainants’, which requires the OFT, upon receipt of a complaint from such a body, to respond with reasons stating whether or not it has identified a problem, and how this problem can be remedied. To the extent that consumer bodies play an important role in representing the interests of consumers, this may be an

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\(^{198}\) Including evidence from complainants, suggestions from consumer groups and TSSs, quantitative data, internal OFT reports and information gathered in the course of the exercise of other functions (such as its competition powers).
important mechanism for increasing the responsiveness of the enforcement regime.

The OFT has published an enforcement strategy which sets out the criteria under which it will use its various enforcement tools, and this is supplemented normally by more detailed guidance.

For the purposes of external accountability and internal management, the OFT (in particular, its policy committee and board), seeks to systematically evaluate its performance against the Public Service Agreement (PSA) it has agreed with HM Treasury. To this end, an evaluation team conducts evaluations of projects, develops frameworks to help project teams estimate impact at both the prioritisation and evaluation stages, and commissions research into wider issues related to the OFT’s work. In respect of monitoring the outputs of Trading Standard Departments, comparative performance information based on regular monitoring by the Department for Business, Enterprise and Regulatory Reform (BERR) is collected and published on an annual basis.

A number of initiatives have been used by the Government to ensure greater use of risk assessments by regulators (including the OFT). Most recently, BERR has issued a statutory code of practice for regulators which gives further effect to the Hampton principles, including the requirement of risk assessment.

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199 The OFT has agreed to deliver measurable benefits to UK consumers of five times our annual budget over the financial years 2008-11, and 3.5 times the budget for Consumer Direct.
200 The first major initiative was the ‘Enforcement Concordat’, between the Cabinet Office and the Local Government Association in 1998 (for background see: http://bre.berr.gov.uk/regulation/reform/enforcement_concordat/enforcementBackground.asp (accessed 20 December 2007)). The concordat was criticised by the BRE on the basis of inconsistent and patchy implementation, and failing to ‘place sufficient weight on risk–based enforcement, a key necessity to ensure that enforcement activities are proportionate and targeted.’ (ibid).
Comparative jurisdictions

In Australia, the ACCC utilises complaints data received from the ACCC Infocentre (a call centre for consumer and business complaints). The information received enables the ACCC to judge if there are trends or escalations of particular problems in different markets. Other monitoring mechanisms available to the ACCC include industry and community liaison groups and consultative committees. The ACCC can also undertake a market study or an evaluation of a specific area and may target education and compliance campaigns at specific industry sectors where it appears there may be a systemic market failure or general compliance issues.

In Denmark, the Consumer Agency publishes information and statistics, including decisions made by the Consumer Complaint Board, and the identity of traders who fail to comply with its decisions. In terms of monitoring markets, the Consumer Agency publishes a rating of 57 consumer markets in Denmark on an annual basis, with a view to examine consumer conditions in these markets using a Consumer Conditions Index (CCI). The CCI provides authorities and business organisations with an overview of market conditions, consumers’ experience and consumer conditions in the investigated markets.\(^{202}\)

The Federation of German Consumer Associations monitors its enforcement activities and administers an intranet-based database called AIDA.\(^ {203}\) It helps to coordinate the activities of the regional Consumer Advices Centres and provides information about all types of enforcement activities. At the agency level in Germany, the Federal Network Agency and the Financial Supervision Authority (BaFin) has dealt with a number of different complaints which has led to market interventions. The INC in Spain publishes yearly data on the numbers of advice inquiries and complaints by consumers to those nationwide consumer bodies that are part of the CCU. The INC also publishes

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\(^{202}\) These were measured on a scale from 0-10 in form of: consumer confidence: expectations, marketing and consumer protection; transparency: comparability, information on price and competition; and complaint conditions: means of complaint, trend/development and compliance.

\(^{203}\) Anbieter-Informations-Datenbank – Supplier-Information-Database.
systematic data on the performance of the system of arbitration of consumer disputes.

At the Federal level in the US, the FTC’s priorities in consumer protection are informed by complaints data, which is monitored and published on a regular basis. On the basis of this information and other evidence, the FTC has focused in particular on fraud and identity theft. The FTC itself administers a consumer response centre, and maintains a number of databases. For example, its fraud and identity theft complaint database houses nearly three million complaint records and the Identity Theft Assistance Centre, administered by the Commission and the financial services industry, provides a database of complaints which is accessible to 1,400 law enforcement agencies. As part of its annual financial reporting requirements to Congress, the FTC submits reports on the resources allocated to, and the effectiveness of, its consumer protection activities against a number of key indicators.

Questionnaire data

Across all jurisdictions, most respondents agreed that the effectiveness of the consumer protection regime in their respective countries was regularly monitored, including in the UK. In respect of how quickly agencies responded upon becoming aware of significant consumer detriment, there was some variation across countries. All respondents agreed this was the case in Australia, Spain, and Denmark. In respect of the latter, however, one respondent stated that response time depends very much on the public profile given to the issue in question. In Canada, all respondents disagreed, with one respondent being critical of the time it took for agencies to respond. In the UK and Germany responses varied.

Respondents were also asked whether the consumer regime in their respective countries faced challenging targets intended to drive its

204 Responses to Q29.
205 Responses to Q26.
Most respondents agreed with the statement, except in Canada where all disagreed. In respect of whether the targets were challenging, all UK respondents agreed, whereas all Canadian respondents disagreed. Performance targets varied in type. In Denmark, the Consumer Agency takes three large initiatives annually, and attempts to measure whether this has had an effect on the Danish CCI index. In Germany, benchmarking occurs on a biannual basis by the Federation of German Consumer Organisations, applying a ‘Consumer Protection Index’ by which it measures and compares levels of consumer protection in the Federal States. In the UK, reference was made to two ‘challenging’ targets in particular: the PSA target, according to which the UK is committed to have one of the best consumer protection regimes in the world by 2008, and the OFT’s own target of providing consumers with benefits totalling five times its expenditure. This latter target was described as a ‘good driver’ preventing the OFT from becoming an ‘epidemic organisation’.

Summary and Conclusion

There is evidence across all jurisdictions of the monitoring of complaints data, and some further evidence of its use in identifying particular areas of concern. In some jurisdictions, consumer organisations play a particularly important role in bringing to the attention of either the agencies or the courts particular consumer problems. A number of regimes have challenging targets against which their performance or market interventions can be measured. A number of regimes have clearly set their enforcement priorities in response to a high volume of complaints in respect of particular sectors.

One factor which provides indirect evidence for the responsiveness of the public enforcement regime is the degree of trust which consumers place in it. In this regard we note from the European Consumer Scoreboard the apparently high level of trust which UK consumers appear to have in the regime as compared with the EU 25 average (see Figure B4).

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206 Q14.
Overall, the UK performs well against this measure. Mechanisms are in place to identify and target resources to deal with specific market problems, and challenging targets are in place to measure agency performance.

4.3 Is there evidence of investigations and policy interventions in the light of evidence of consumer detriment?

Introduction
Moving on from the discussion under principle 11, we now consider the extent to which the UK and comparator jurisdictions have the necessary tools in order to deal with systemic market problems. The types of tools we have identified differ from jurisdiction to jurisdiction, and we have sought evidence, in particular, of markets where interventions have been made.

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207 Consumer Markets Scoreboard (n 19) 66. The remainder % is “don’t know”.
- Principle 12: The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets.

UK
Under the Enterprise Act, the OFT (and certain sectoral regulators) have the power to refer a market to the Competition Commission for it to consider, among other things, whether there is consumer detriment, and if so whether and how it can be remedied. Remedies cannot generally be imposed directly by the OFT, but are consequent upon an investigation by the Commission. Examples of such cases include a recent inquiry into store cards which demonstrated that consumers in the UK generally paid more in interest on their store cards as compared to credit cards, that there was a lack of transparency in respect of relevant charges and fees, and a general price insensitivity among consumer to interest rates. The Competition Commission imposed a remedy which required, among other things, lenders to warn cardholders that cheaper credit may be available elsewhere (where APRs were 25% or above) and to give more and clearer information on statements. Likewise, in respect of Home Credit, the Commission identified impediments to switching, the lack of clear information for consumers, and a lack of price transparency. A number of informational remedies were imposed upon suppliers, including a requirement on lenders to publish prices on a website (to increase price transparency for consumers), and a requirement on lenders to pay a fair rebate to those consumers (around a third) who settled early.

A number of market studies have been conducted into the estate agency market, identifying structural problems in the market which caused consumer detriment. The OFT responded by launching informational campaigns for consumers, and by advocating regulatory change. The latter led to the strengthening of redress schemes, and an enhancement of the powers of the OFT and the TSSs to take action against suspected unlawful activity by estate agents.\textsuperscript{208} The OFT is investigating a number of suspected consumer

\textsuperscript{208} Under the Consumers, Estate Agents and Redress Act 2007.
detriment problems in the bank accounts market, and is currently taking legal action to establish whether it has the power to intervene against the banks in respect of alleged unlawful unauthorised overdraft charges.\textsuperscript{209}

In terms of court-based interventions, the OFT and the TSSs have the power under Part 8 of the Enterprise Act to intervene against specified traders where a practice has the potential to harm the collective interests of consumers.

Comparative jurisdictions
In Australia, the ACCC does not have direct enforcement powers itself, enforcement being generally a matter for the courts. The ACCC does, however, see the use of publicity in the media as one its most effective remedies for infractions of consumer protection laws. In Denmark, the Consumer Agency surveys systematically a number of markets according to the CCI (see above). A recent survey concluded that consumer conditions in Denmark are continuously improving, but there is scope for more improvement by, for example, more use of price comparison portals and improvements to existing ones, increasing transparency in respect of financial products and services, and the increased use of complaints data by both agencies and firms to improve consumer satisfaction.

In Germany, the Federation of German Consumer Organisation undertakes legal actions on behalf of consumers (some 100 cases per year against unfair contract terms and 300 cases per year against unfair misleading advertisements). In addition it issues warning letters to firms in respect of suspected abusive contract terms and regarding infringements of unfair competition law. At the agency level, external experts are normally used to examine current problems of consumer protection. The Federal Government has been concerned with consumer rights in the telecommunications sector, especially the misuse of premium services and unwanted advertising on the

\textsuperscript{209} The legality of these fees is being challenged under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) which requires that the charges met the test of fairness. The litigation is ongoing. The High Court ruled in favour of the OFT on 24/4/08 see: http://www.oft.gov.uk/news/press/2008/55-08.
telephone.\textsuperscript{210} That was backed by a study commissioned by the Federal Ministry of Food, Agriculture and Consumer Protection into the abuse of premium services. In Spain, the law permits consumer organisations and the INC, among others, to bring legal actions in protection of the collective interests of consumers. The Spanish Ombudsman may also of his own initiative intervene in cases where he suspects consumer harm.

At the Federal level in the US, fraud has been a specific priority area for the FTC in recent times. For instance, the Commission’s 2004 consumer fraud survey found that Hispanic consumers were at particular risk, resulting in an education program targeting Hispanic consumers, and to date 34 enforcement actions involving Spanish-language frauds. The FTC vigorously enforces the Can-SPAM Act (filing 85 law enforcement actions in 2005 resulting in $17 million in consumer redress and $1.1 million in civil penalties).

Misrepresentation of the health benefits of products has been identified as a priority area, and the FTC brought 31 cases in this field in 2005, and 27 cases in 2006, including the deception case against Q-Ray Bracelet where $87 million was secured in consumer redress. The FTC has in recent years focused its competition enforcement efforts on areas of the economy which have a significant impact on consumers, for example, the health care, energy and real estate sectors.

Questionnaire data

When respondents were asked whether problematic markets are regularly monitored by enforcement agencies in their countries, responses varied, except in Denmark, where all agreed this takes place.\textsuperscript{211} However, in response to the statement that a significant proportion of consumers will always be prone to detriment in some markets despite the best efforts of the consumer protection regime’, all but two of the respondents either agreed or strongly agreed.\textsuperscript{212}

\textsuperscript{210} The recent changes of in the Telecommunications Act go back to the misuse of premium and mobile phone services through misleading advertisements and other detrimental practices.

\textsuperscript{211} Response to Q30.

\textsuperscript{212} Response to Q39.
Summary and conclusion
The need for specific market intervention in the light of systematic consumer detriment is important for several reasons. It may provide a mechanism for dealing with specific issues surrounding disadvantaged consumers (where the consumer regime generally is based on the needs of the average consumer). It can deal with market level problems, where there is no specific breach of consumer law, but where consumer detriment can be remedied by targeted remedies. While there is evidence that several jurisdictions monitor markets, and use resources and the enforcement tools that they have in a responsive way, the UK is unique in having the ability to impose remedies at the market level (even where there has been no infringement of the generic consumer laws). While the OFT only envisages using its referral power in respect of three markets per annum, it is nevertheless an important complement to its other enforcement powers, has a level of transparency and due process safeguards, and ensures that remedies can be targeted effectively.

4.4. Institutional arrangements

Introduction
As is clear from the following, the constitutional arrangements of the country in question has important potential implications in terms of consistency, cooperation and coordination. Where there is a shared legislative competence as between the Federal and State levels (as is the case in the US) or divided competence (as is the case in Canada), there are potentially dangers in terms of fragmentation.

Whether or not it is desirable for a divergence to exist depends upon a number of factors, including the size of the economy, the disparity of market conditions and consumer behaviour. Furthermore, the division of institutions as between a central and local level may well be desirable if there are important informational advantages of local level enforcement. Fragmentation, both of laws and institutions, may therefore be the product of the relevant country’s constitutional arrangement, or a positive policy choice.
Nevertheless, fragmentation can be addressed through the provision of strong mechanisms for the coordination of policy (including initiatives for harmonisation where appropriate) and of enforcement. In accordance with the following principle, we would expect an effective consumer empowerment regime to display evidence of strong mechanisms for cooperation and coordination of policy (at the political and agency level) and in respect of enforcement (at the agency level). The assessment here is informed by the following benchmark principle:

- Principle 13: In a multiple-agency setting, mechanisms should be in place to ensure that there is co-ordination and consistency of approach.

4.4.1 Allocation of responsibility/functions as between Ministerial departments and non-departmental agencies

UK

The Department for Business, Enterprise and Regulatory Reform (BERR) has overall responsibility for consumer law and policy in the UK. BERR has primary responsibility for the legislative framework, is the sponsoring department of the Office of Fair Trading and the Competition Commission, and funds a number of consumer organisations. The Better Regulation Executive (BRE), which is part of BERR, has overall responsibility for the Government’s ‘better regulation’ commitments, and is currently involved in reviewing the UK’s consumer protection regime.

The Office of Fair Trading (OFT) is the central agency with responsibility for consumer law and policy, having the broad objective to make markets work

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213 Of course, in respect of the latter much depends upon whether the system is based on public enforcement.
214 This new department replaced the Department of Trade and Industry in July 2007.
215 Legislation on consumer matters is a reserved matter for the UK Parliament in respect of England, Scotland and Wales. Consumer protection (other than safety in relation to goods) is a transferred matter in relation to Northern Ireland, but in most cases Northern Ireland offers equivalent protections to those given by legislation applying to Great Britain.
well for consumers.\textsuperscript{216} There a number of other regulators which protect the interests of consumers, for example, Ofgem for energy and Ofcom for telecommunications. The Financial Services Authority (FSA) has overall responsibility for financial services, although there is some overlap and considerable complementarily of the powers enjoyed by it and the OFT. In order to reduce administrative burdens and deliver risk-based regulation, the OFT and FSA have published a Joint Action Plan which is regularly updated to reflect changing priorities.

Comparative jurisdictions
In Australia, responsibility for consumer policy is split between the Federal level and the State/Territory Governments. At the Federal level, the Treasury is responsible for consumer policy. The lead Federal agency is the Australian Competition and Consumer Commission (ACCC) which has responsibility for the enforcement of the key piece of Federal legislation, the Trade Practices Act (which only concerns complaints relating to business operating across state borders).

Under the Canadian constitution, responsibilities for consumer law and policy are shared between the Federal and Provincial levels. The Federal Government has broad responsibility for national marketplace standards, and for ensuring a fair and efficient marketplace for traders and consumers. It also has exclusive jurisdiction to regulate the banking and telecommunications sectors, while most other consumer matters are regulated at the Provincial level, including contractual and consumer credit matters. At the Federal level, the Minister of Industry has a statutory responsibility to promote and protect consumer interests throughout Canada. The Office of Consumer Affairs (part of Industry Canada) has broad policy responsibilities, including the

\textsuperscript{216} In England, Wales and Scotland the enforcement of consumer law is undertaken by the Office of Fair Trading, local authorities and some specified designated bodies. In Northern Ireland most consumer policy (except in relation to consumer safety) is implemented and enforced through the Department of Enterprise, Trade and Investment (DETI) which is responsible for economic development. Enforcement of consumer legislation is by the Trading Standards Service.
development of industry codes and practices and facilitating the harmonisation of consumer protection legislation.217

In the main, all consumer matters in Denmark are dealt with either by the central government or centralised public agencies. The Consumer Agency, among other functions, provides assistance to business in the drawing up of private complaint and redress mechanisms. The Consumer Ombudsman deals with primarily the enforcement of the Marketing Practices Act. The Consumer Complaints Board (of which the Consumer Agency is the secretariat) is responsible for dealing with complaints from consumers where there exists no approved private scheme. The Consumer Council (a private institution) is responsible for the representation of consumer interests. The Consumer Taskforce, established in 2003, is responsible for coordination of consumer policy across all the different government agencies, and consists of representatives from different government departments dealing with consumer policy. The aim of the Taskforce is to make sure that the consumer policy is coherently applied across all departments responsible for consumer policy.

In Germany, responsibility for consumer law and policy at Federal level is dispersed among a number of Ministries. The lead Ministry is the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV), which supervises the lead agency dealing with consumer protection, the Federal Office of Consumer Protection and Food Safety (Bundesamt für Verbraucherschutz und Lebensmittelsicherheit), and also provides institutional funds to the Federation of German Consumer Organisations (VZBV). Other Ministries play an important role too, notably the Federal Ministry of Justice which is responsible for the Act Against Unfair Competition. Given the diversity of ministries and agencies responsible for consumer law and policy, VZBV (a non-governmental, not-for profit organisation) plays an important consumer representation role across the Federal government.

217 Other Ministries have responsibility for consumer protection issues, eg the Minister of Agriculture and Agri-Food Canada (through Canadian Food Inspection Agency) is responsible for food safety and labelling.
The Ministry of Health and Consumption (MSC) is the lead ministry in Spanish central government responsible for consumer law and policy. It supervises the National Institute of Consumption (INC), the core public agency in Spain that promotes the rights of consumers. Of its various functions, the INC provides technical support to other agencies, conducts market screening, provides information and education to consumers, as well as having supervising and management of arbitration mechanisms.

In the US, the Federal Trade Commission is the main body charged with responsibility for consumer protection laws. Within the meaning of section 5 of the Federal Trade Commission Act, it may enact certain laws dealing with unfair or deceptive practices. It also has investigatory and enforcement powers. There are a number of other Federal institutions with responsibility for consumer protection. At the sectoral level, banks are regulated primarily by the Federal Reserve Board, common carriers by the Interstate Commerce Commission, and communications by the Federal Communications Commission. The division of responsibilities, and in particular, cases of overlap are dealt with by informal liaison agreements, recognising differing levels of specialisation and historical practice. There has been increased efforts to coordinate efforts at a federal level, for example, on dealing with problems of identify theft. The Department of Justice has a special branch responsible for criminal enforcement of consumer protection laws, the Office of Consumer Litigation, which liaises with other federal agencies in drawing up its enforcement agenda.

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218 For example, under the liaison agreement between the Commission and the Federal Food and Drug Administration, the Commission takes primary responsibility for advertising practices with the exception of advertisements for prescription drugs, whereas the Administration deals mainly with labelling of food and drug products.

219 The President’s Task Force on Identity Theft, chaired by the Attorney General and the FTC Chairman coordinated the efforts of 17 Federal agencies.

220 For example,
4.4.2 Allocation of responsibility/functions as between central/local level

UK
Much of consumer protection legislation is enforced by Local Authority Trading Standards Services (TSSs). In recent times, there has been a number of initiatives to promote cooperation as between TSSs and between them and the OFT. In respect of the inter-TSS cooperation, LACORS (the Local Authorities Coordinators of Regulatory Services) provides advice and guidance to help support local authority regulatory and related services, including trading standards. The Regulatory Sanctions and Enforcement Bill also contains important provisions which should promote coordination between local authorities in respect of businesses which are subject to more than one local authority in respect of trading standards (the ‘primary authority’ principle). The OFT has responsibility for coordinating enforcement activity across a wide range of legislation enforced by both the OFT and TSS, which has led to collaborative working and a better understanding of respective priorities and ways of working, with a joint programme of action in place. The Local Better Regulation Office (LBRO) has been set up in order to secure effective performance of local authority regulatory services in accordance with the Hampton principles. LBRO’s objective is to ensure that local authorities carry out their functions effectively, including their trading standards powers. LBRO will have significant powers in order to promote these principles, including the power to issue statutory guidance and the power to specify enforcement priorities to local authorities. One recent example of increased coordination and cooperation is the Retail Enforcement Pilot, essentially providing for a network between regulatory agencies, facilitating information exchange.

Comparative jurisdictions
There are a number of coordinating bodies in Australia. At the high policy level, the Ministerial Council on Consumer Affairs (MCCA) comprises consumer ministers from the Federal and State and Territory levels, as well as from New Zealand government. It meets annually to develop a consistent approach to consumer issues, and is supported by the Standing Committee of
Officials of Consumer Affairs (SCOCA) comprising the CEOs of the various consumer protection agencies.\textsuperscript{221} The MCCA has a rolling list of issues, known as the Strategic National Consumer Affairs Agenda, to focus their efforts. Consumer Affairs Bureaux are established in all States and Territories, and there is apparently a close relationship between the Federal regulator (ACCC) and the local authorities. Whether a given case will be dealt with at State or Federal level depends on the circumstances of the case, and ACCC may refer complaints or matters to the State/Regional level, in particular where the issue is not of national significance.

In Canada, a number of agencies have responsibility for consumer issues. At the Federal level, the Competition Bureau deals with the enforcement of the Competition Act (which includes provisions aimed at consumer protection), and other consumer legislation,\textsuperscript{222} and Measurement Canada polices weights and measures. There appear to be some mechanisms for coordination in Canada, for example, the Consumer Measures Committee, comprising representatives from the Federal and Provincial levels, dealing with issues such as harmonisation of consumer laws. There has also been ministerial level cooperation on issues such as enforcement cooperation.

The Federal German Government generally enacts legislation governing consumer protection within the scope of its constitutional competencies, while the 16 federal states, the Länder, are generally responsible for the enforcement of laws including Federal legislation.\textsuperscript{223} A central supervisory authority for consumer protection does not exist as such. In Germany, private organisations (in particular consumer bodies) play a particularly important role in enforcement; government enforcement tends to focus on product safety and health issues. There have been recent initiatives to coordinate consumer protection issues with a new committee being formed comprising Ministerial representatives at both Federal and Länder level.

\textsuperscript{221} The Commonwealth is represented by both Treasury and the ACCC. Four advisory committees report to the SCOCA on different consumer matters.

\textsuperscript{222} The Competition Act deals with misleading advertising, telemarketing, bait and switch, pyramid schemes, promotional contests.

\textsuperscript{223} Despite the general rule that laws are executed by the Länder, in some areas federal agencies have taken over enforcement activities (eg in relation to financial services).
In Spain, central government does not enjoy exclusive competence in respect of both legislative and enforcement of consumer laws. A number of Autonomous Communities (ACs), but not all, have enacted their own laws. In terms of coordination, the Sectorial Conference on Consumption (CSC) coordinates institutional aspects of consumer policy between the Central government and the Autonomous Communities. An independent public body created in 1987, comprises the Minister of Health and Consumption and the Regional Ministers responsible for consumption affairs in the Autonomous Communities. The decisions of the CSC are implemented by the INC in cooperation with the Directorate General of the Consumer Affairs of the Autonomous Communities (DGCCA), the latter coordinating strategy between central government and the ACs. The Consumer Council (CCU), located in the INC, provides for the representation of the ACs before the central government, and promotes cooperation and coordination between the central and regional level.

In the US, States also have their own consumer protection legislation, and are typically enforced by States Attorneys General (State AGs). State AGs coordinate their activities in respect of interstate issues under the auspices of the National Association of State Attorney General (NAAG). Since the 1990s, there have been increased efforts between State AGs and the FTC to develop a greater understanding of work division and partnership.

Questionnaire data
Asked whether the different agencies involved in the protection of consumer interests interact with one another, the vast majority of respondents answered yes to this question. In Australia, mention was made of the importance of a Ministerial Council and the Standing Committee on Consumer Affairs, together with more informal day-to-day liaison between agencies. There appeared to be less visible mechanisms in Canada. In Denmark and

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224 Directorate General of the Consumer Affairs of the Autonomous Communities.
225 Response to Q11.
Germany, liaison between different agencies appeared to occur through less formal (but not necessarily less effective) means. In the former, mention was made of the Consumer Taskforce charged with a coordinating function. In Spain, formal mechanisms for coordination between the central and regional governments exist, and ad hoc working groups are regularly created to deal with specific legislative and enforcement policies. In the UK, respondents were generally of the view that coordination and cooperation occurs regularly and at multiple levels. Mention was made of regular contact between the OFT and TSSs, and the sectoral regulators (via the Senior Level Regulatory Forum). One respondent did, however, comment more could be done in this regard. Asked to comment on the burden on firms, the vast majority of respondents either thought that the burden on business was either low or ‘just right’. One Australian respondent did comment upon the variation in laws as between territories imposing extra costs on firms, but acknowledged that the territories justified different laws according to differing needs and local conditions.

Summary and conclusions
The constitutional arrangements of the jurisdictions under study vary greatly, and in this respect the UK has a comparative advantage given that consumer laws are harmonised across the UK, and the OFT has a remit for the UK (excluding Northern Ireland). There is, however, both an overlap and a split of powers and functions as between the OFT and local authority TSSs. As was discussed in section 3 of this Report, there have been criticisms of a lack of coordination of activities of the TSSs, both as between themselves and between them and the OFT. Recent initiatives, including legislative measures, are likely to facilitate greater coordination and cooperation, thereby reducing burdens for firms and encouraging the more efficient use of scarce public resources. We conclude that in the UK, robust mechanisms are in place to ensure that there is co-ordination and consistency of approach.

Response to Q41.

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226 Response to Q41.
4.5 Soft-law and self-regulation

Introduction
Soft-law rules cover a wide array of instruments whose unifying characteristic is that they are not binding, at least until a party formally agrees to be bound. Soft-law is often used interchangeably with the phrase ‘self-regulation’. Soft-law mechanisms in the area of consumer protection usually consist of guidelines provided by the agencies and ‘codes of practice’ adopted by the businesses themselves. As such, soft-law mechanisms can enhance consumer empowerment by either providing additional rights for consumers or by clarifying the existing duties of firms/rights of consumers and thus making the system more transparent.

This section first sets out the soft-law mechanisms in place for the protection and empowerment of consumers, then provides a separate assessment.

The principle informing the benchmarking of this issue is:
- Principle 14: Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.

UK
In the UK, businesses can sign up to a code of practice that has been approved by the OFT under the Consumer Codes Approval Scheme (CCAS) set up in accordance with the power given to the OFT by the Enterprise Act 2002 Section 8. A code of practice is a set of rules that businesses agree to follow and is usually operated by a trade association or similar body, known as the ‘code sponsor’. The OFT core criteria for approving codes of practice include: a commitment to provide customers with adequate information about goods and services; the use of clear and fair contracts; user friendly and

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227 Howells (n 185) 195.
228 Howells (n 184) 195.
speedy procedures for dealing with customer complaints and low cost, independent redress if a complaint is not dealt with satisfactorily.\footnote{OFT ‘Promoting Consumer Confidence’ OFT 947 09/2007 \url{http://www.oft.gov.uk/shared_oft/business_leaflets/codes_of_practice/of947.pdf}} Code sponsors are expected to develop codes that offer consumers benefits beyond the protection provided by law.\footnote{OFT Consumer Codes Approval Scheme (n 66) 4.} It is a requirement for the CCAS that all eligible members of the code sponsor’s organisation sign up to the code in order to ensure a consistency of message to consumers.\footnote{OFT Consumer Codes Approval Scheme (n 66) 5.} Code sponsors should also establish a procedure for handling non-compliance by members with the code which should include independent disciplinary procedures and reasonable timescales for action.\footnote{OFT Consumer Codes Approval Scheme (n 66) 38.}

Moreover, many local authorities run assured trader schemes. Businesses that join such schemes receive the support and promotion from their local authority Trading Standards Services, in return for a commitment that they will meet their legal obligations and treat their customers fairly. While most of these schemes have been developed separately and therefore vary in nature, the OFT leads the Local Authority Assured Trader Scheme Network (LAATSN) and member schemes have the common aims of: giving consumers a reliable way of finding trustworthy businesses, offering help and advice in the event of a problem, and enable local businesses to demonstrate that they have signed up to national standards.\footnote{See \url{http://www.oft.gov.uk/of at_work/consumer_initiatives/trader/}.}

Comparative jurisdictions

In Australia, the Government encourages development of industry self-regulation, ie ‘codes of practice’. These mandatory and voluntary standards are seen as light-handed market sensitive ways of securing compliance with TPA and alternative dispute resolution schemes are incorporated in these codes. ACCC and State agencies are involved with development and review of operation of industry codes. The ACCC seeks to encourage a compliance culture and stresses the advantages of signing up to voluntary codes of
practice as business benefits, reputation and mitigation of penalties.\textsuperscript{235} The arguments are that codes promote best practice, enable regulation to be tailored to the specific circumstances of the industry, provide low compliance costs and a quick low cost dispute resolution procedure. They are expected to also give trading advantages, through the consumer confidence engendered by membership and provide access to efficient and cost effective alternative dispute resolution schemes. The TPA allows for codes of conduct to be prescribed in which case compliance becomes mandatory, making breach unlawful and enforceable through the courts. The Minister may pursue this route in response to complaints from members of the industry, consumers or reports from government authorities. Currently mandatory codes of practice are the \textit{Franchising Code}, the \textit{Oil Code} and the \textit{Horticulture Code}.\textsuperscript{236} Licensing of trades also has a long tradition in Australia and the States continue to regulate problematic sectors by licensing and/or specific legislation. Licensing is seen as a step beyond co-regulation and more intrusive and potentially costly. It must also be noted that because of the limited success of codes of practice, some States have begun to introduce sector specific legislation. This allows licences to be cancelled for bankruptcy and introduces tougher criteria for licence renewal.

In Canada, the Office of Consumer Affairs (OCA) has published a Guide on the Development and Implementation of Voluntary Codes; an Evaluative Framework for Assessing Voluntary Codes and various research papers on the subject.\textsuperscript{237} There are also various mediation practices, such that Provincial Consumer Services Bureaux or Consumer Protection Departments mediate written complaints between consumers and businesses. Topics covered include collection agencies, credit repair, consumer reporting, loan broker fraud, car repairs, home renovations, door-to-door sales, health clubs, modelling and talent contracts, condominiums, time shares, refunds and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{235} \url{www.accc.gov.au}.
\item \textsuperscript{236} \url{www.accc.gov.au}.
\item \textsuperscript{237} \url{www.ic.gc.ca/epic/site}.
\end{itemize}
\end{footnotesize}
Moreover, there is a significant role for codes and self-regulation in advertising.

In Denmark, the Danish Consumer Ombudsman publishes guidelines regarding, for example, marketing activities, sales promotions, marketing towards children, and payment cards. The Consumer Council and the Consumer Taskforce also adopt guidelines on consumer issues.

In Germany, voluntary self-commitments by enterprises do not have an important part in protecting consumer rights. In practice, voluntary self-commitments are criticised for not being effective, for instance, by the Federal Institute for Risk Assessment. An example for a voluntary commitment is the agreement of mobile phone service providers to enhance information of young consumers before entering into premium service agreements. The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety provides a list with self-commitments regarding Environment and Nature which, at least, partly aim at consumer protection.

In Spain, the Autonomous Communities have used normative models (modelos normativos) to assist rulemaking by the competent regulatory bodies. The normative models are texts adopted by the Commission of Cooperation of Consumption (CCC) and ratified by the Sectorial Conference on Consumption (Conferencia Sectorial de Consumo) (CSC) in participation with business sectors and consumer associations. The public administrations

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238 Woodroffe and Giannoulopoulos (n 87) 120.
240 http://www.bfr.bund.de/cd/934.
can rely upon those agreed-upon normative models for rulemaking.\textsuperscript{243} These model rules are not binding, however, unless given legal force by the competent authority and can therefore be considered soft-law.\textsuperscript{244}

Questionnaire data
The degree of compliance with soft-law, according to the responses to our questionnaire varies. In Australia, Canada and Germany there are no binding consequences of not following guidelines outlining best practice since following them is a voluntary matter.\textsuperscript{245} On the contrary, the consequence of not following guidelines in Denmark is a violation of the \textit{Marketing Practices Act}. However, there seem to be other mechanisms in place, such as naming and shaming the concerned undertakings and recommendation that their products not be bought in some jurisdictions, such as Germany and to an extent the UK.\textsuperscript{246} Breach of codes of conduct that the firm adheres to also has legal consequences in Spain and the UK. It must also be noted that the EC \textit{Unfair Commercial Practices Directive} classifies non-compliance with a code of conduct that the trader has undertaken to be bound as a ‘misleading’ practice.\textsuperscript{247} The main reasons for guidelines not being followed appear to be a lack of incentives and awareness of them on the part of the undertakings.\textsuperscript{248}

Insofar as soft-law mechanisms provide clarity and guidance to firms and consumers regarding the interpretation of the law, they may be effective tools of consumer empowerment. However, it must also be borne in mind that adopting and monitoring compliance with these will entail costs. For these mechanisms to be \textit{efficient}, such costs should be outweighed by the benefits which can only arise when these are complied with by the undertakings and/or they provide clarity and awareness of the law when this cannot be achieved in any more efficient way. If the soft-law mechanisms do not provide any of these benefits, then they may actually be counterproductive by adding more

\textsuperscript{243} Arce and García (n 17) 119-123.
\textsuperscript{244} See \url{http://www.consumo-inc.es/Informes/modNormativos.htm}.
\textsuperscript{245} Response to Q 12.
\textsuperscript{246} Response to Q12.
\textsuperscript{248} Response to Q12.
rules to an already complicated body of law and by increasing the cost of the regime.

Summary and conclusion
Soft-law mechanisms can enhance consumer empowerment so long as they increase the transparency and clarity of the duties of firms and rights of consumers. However, these benefits will only be realised if there is sufficient compliance with these mechanisms. Moreover, since the adoption of these mechanisms entail costs, for them to be efficient, these costs should be outweighed by the benefits. The UK appears to be on a par with the best in terms of the provision and management of these mechanisms, although how much additional consumer empowerment these provide in practice is an issue that needs empirical testing and is beyond the scope of this Report.

4.6 Resource levels

Introduction
The issue of resource levels is not a specific benchmarking principle, but naturally feeds into the analysis in other parts of this section (eg provision of consumer advice or the effectiveness of public enforcement mechanisms). We have not been able to identify relevant data in respect of all of the countries under study, and comparisons are difficult because some resources are not visible (eg in respect of non-public consumer organisations), or are very difficult to measure, in particular, the experience, knowledge and understanding, and skills of key actors. We did, however, as part of the questionnaire ask respondents a number of resource related questions.

UK
In 2006-2007, the OFT had an operating cost for consumer protection and enforcement (including Consumer Direct) of £28.3m. In addition OFT has a budget of £12.3m for competition enforcement, £4.5m for market studies and
£1.4m for self-regulation. BERR also funds a number of consumer organisations who provide advice in respect of enforcement matters (most notably National Consumer Council and Citizens Advice).

Comparative jurisdictions

In 2005-2006, the Australian Competition and Consumer Commission (ACCC) had a total budget of AUD91.3 million, with AUD89.8 million being appropriation funding and the remaining AUD1.5 million being external funds. The ACCC characterises itself as a knowledge-based organisation, spending approximately 56% of total expenditure on employee costs. Traditionally legal expenditure has been the second largest expenditure category, however significant work has been undertaken to reduce the cost of external legal services.

The different agencies in Denmark dealing with consumer issues have the following resources: The Danish Consumer Agency has around 115 employees across six different branches: Executive Office, Centre for Communication, Marketing, Consumer Policy, Consumer Rights and Administration. The Consumer Ombudsman has 18 lawyers, along with a head of legal division, a communications officer, two secretaries and a student assistant. The Danish Consumer Agency puts staff and other resources at its disposal. The Consumer Council has about 50 staff members with different backgrounds, eg lawyers, economists and food experts. Its main sources of income are the independent consumer magazine Tænk ('Think') and an annual subsidy under the Finance Act. The Consumer Complaint Board consists of three judges, and 20 consumer representative bodies. The latter includes the Consumer Council and a variety of representatives from different industries. The CCB members are not day to day employees, but are on call for their expertise in individual cases. The Forum for Consumers is an agency with 12 employees representing consumers and businesses with an

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independent chairman. The Consumer Taskforce consists of seven members from different ministerial departments, three members from different government agencies and an administration consisting of two employees. An individual break down of the annual budgets for the above agencies is not available.

According to its Annual Report 2006-2007, the Federation of German Consumer Organisations spends about EUR275000 – 2% of its budget on claims under the Act Against Unfair Competition and the Civil Code (unfair standard business terms). The Federation states that its scarce resources prevent it from pursuing all cases of consumer law violations, for example, claims to skim excess profits, even where an infringement of law has been established. The Consumer Advice Centres in the Länder have varying budgets from EUR 800000 up to almost EUR 4 million. The Federal Network Agency has an overall budget of EUR 147.5 million to regulate electricity, gas, telecommunications and railways. To enforce competition law the Federal Cartel Office is endowed with approximately EUR 17 million. The Federal Financial Supervision Authority (BaFin) budgets EUR 7.8 million for enforcement activities from its overall budget of EUR 122.9 million.

The main federal institution responsible for consumer protection in the US is the Federal Trade Commission (FTC). In terms of financial resources, the Commission had a budget of USD211 million for fiscal year 2006. In 2007/8, FTC’s workforce comprised 1100 civil service employees (including 527 attorneys and 73 economists).

251 http://www.bundeskartellamt.de/wEnglisch/GenerallInformation/GenerallInformation.php.
Questionnaire data

Respondents across the countries were asked whether they thought their respective consumer protection regime was adequately resourced. The responses are shown in table B.11 below.

Of the five UK respondents, two agreed, two disagreed, and another strongly disagreed. Two of the Australian respondents agreed – one even strongly – and one disagreed. All the respondents from Germany and Denmark agreed. In Spain, two respondents agreed and two disagreed – one even strongly.

Table B.11: The consumer protection regime is adequately resourced (Q20)

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Disagree</td>
<td>1 (20%)</td>
<td>2 (12.5%)</td>
<td>3 (14.28%)</td>
</tr>
<tr>
<td>Disagree</td>
<td>2 (40%)</td>
<td>5 (31.25%)</td>
<td>7 (33.33%)</td>
</tr>
<tr>
<td>Agree</td>
<td>2 (40%)</td>
<td>6 (37.5%)</td>
<td>8 (38.09%)</td>
</tr>
<tr>
<td>Strongly agree</td>
<td>0 (0%)</td>
<td>1 (6.25%)</td>
<td>1 (4.76%)</td>
</tr>
<tr>
<td>Do not know</td>
<td>0 (0%)</td>
<td>2 (12.5%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Total respondents</td>
<td>5</td>
<td>16</td>
<td>21</td>
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</tbody>
</table>

Respondents were also asked whether staff within enforcement and support agencies is competent (experience, personality, resources, knowledge and understanding, skills, confidence and attitudes of consumers and businesses) at dealing with the complaints brought to them by consumers.

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255 Responses to Q20.
256 Responses to Q24.
The UK respondents either agreed or strongly agreed and only one disagreed. Of the three Australian respondents two agreed and one strongly agreed. In Canada one respondent agreed whereas two did not know. All the Danish respondents strongly agreed and all the Spanish respondents agreed. Overall, almost 50% of all respondents agreed (almost 40% strongly agreed) that enforcement and support agencies are competent.

Table B.12: Staff within enforcement and support agencies are competent at dealing with the complaints brought to them by consumers (Q24)

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly disagree</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Disagree</td>
<td>1 (20%)</td>
<td>0 (0%)</td>
<td>1 (4.76%)</td>
</tr>
<tr>
<td>Agree</td>
<td>2 (40%)</td>
<td>8 (50%)</td>
<td>10 (47.61%)</td>
</tr>
<tr>
<td>Strongly agree</td>
<td>2 (40%)</td>
<td>6 (37.5%)</td>
<td>8 (38.09%)</td>
</tr>
<tr>
<td>Do not know</td>
<td>0 (0%)</td>
<td>2 (12.5%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Total respondents</td>
<td>5</td>
<td>16</td>
<td>21</td>
</tr>
</tbody>
</table>

Finally respondents were asked whether their respective consumer enforcement agencies were prepared to take up cross-border cases for consumers.257

In the UK, the majority said it varied or they did not know whereas two respondents agreed. All the German and Danish respondents agreed – one

257 Responses to Q40.
Danish respondent strongly agreeing. In contrast, the majority of the Spanish respondent disagreed – one strongly – and one agreed. Similarly, two respondents from Australia agreed whereas one strongly disagreed. The respondents from Canada were divided equally between agreeing and disagreeing. However, overall almost 60% of all respondent agreed that consumer enforcement agencies were prepared to take up cross-border cases for consumers.

Table B.13: Consumer enforcement agencies are prepared to take up cross-border cases for consumers (Q40)

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>The other five jurisdictions</th>
<th>Percentage of total respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Disagree</td>
<td>0 (0%)</td>
<td>2 (12.5%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Disagree</td>
<td>0 (0%)</td>
<td>3 (18.75%)</td>
<td>3 (14.28%)</td>
</tr>
<tr>
<td>Agree</td>
<td>2 (40%)</td>
<td>10 (62.5%)</td>
<td>12 (57.14%)</td>
</tr>
<tr>
<td>Strongly agree</td>
<td>0 (0%)</td>
<td>1 (6.25%)</td>
<td>1 (4.76%)</td>
</tr>
<tr>
<td>Do not know</td>
<td>1 (20%)</td>
<td>0 (0%)</td>
<td>1 (4.76%)</td>
</tr>
<tr>
<td>May vary</td>
<td>2 (40%)</td>
<td>0 (0%)</td>
<td>2 (9.52%)</td>
</tr>
<tr>
<td>Total respondents</td>
<td>5</td>
<td>16</td>
<td>21</td>
</tr>
</tbody>
</table>

Summary and conclusions

In conclusion the different variables taken into account in measuring resource levels differ from jurisdiction to jurisdiction due to historic, legal, political, socio-economic, educational or cultural factors. Not all the countries have available information on these variables. Thus, the resource levels are not measured in same parameters across the different countries, which make it difficult to make a comparison.
### 5. Summary table of assessment and findings

<table>
<thead>
<tr>
<th>Benchmarking principle</th>
<th>Rationale</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1: Consumer rights should be transparent, or should be disseminated effectively through accessible consumer advice channels.</td>
<td>The ability of consumers to enforce their rights does depend logically upon their awareness of those rights, although awareness need not be ex ante. It may well be that a broad duty can send a powerful signal to consumers that certain rights are protected by law, while the precise nature of the right in question can be disseminated to consumers through information and advice systems if and when problems arise.</td>
<td>Although the extent and reach of the rights enjoyed by consumers differ across jurisdictions, in that some jurisdictions like the UK have an extensive body of law conferring rights on consumers, whereas some jurisdictions like Canada have much less legislation, this alone cannot signify whether consumers are empowered or not. This is because how empowered consumers are depends not only just on the rights enjoyed by them, but also on the consumers' awareness of those rights, their ability to find out about their rights and the clarity of those rights. All these factors can be thought to make up the ‘transparency’ of the regime from the viewpoint of consumers. Moreover, these factors can have a complementary effect in that the lack in one area, for instance, the consumers’ awareness of their rights, can possibly be mitigated by the strength in another area, for instance, the ease with which consumers can find out about their rights even when they are not aware of them <em>ex ante</em>. In terms of the extent and content of rights, the UK appears to be on a par with the best, with the caveat that the amount of legislation conferring these rights may be higher than desirable and may potentially render the rights inaccessible to consumers.</td>
</tr>
<tr>
<td>Benchmarking principle</td>
<td>Rationale</td>
<td>Assessment</td>
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<tr>
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<tr>
<td>2: The imposition of a duty to trade fairly (or equivalent) may deliver important benefits to consumers, especially in terms of the responsiveness of the law. However, if there is a misalignment of what consumers regard as (un)fair with the meaning given to it in law, consumers may misunderstand the nature of the rights they enjoy.</td>
<td>There are potential advantages and disadvantages of a duty to trade fairly. The key advantage is the potential it provides for the law to be dynamic and future proof. Whether a duty to trade fairly results in increased transparency depends upon whether there is an alignment of the consumers’ understanding of what is fair with that of the court/agency enforcing the provision.</td>
<td>Almost in all jurisdictions under study, there is a general duty to trade fairly or a variant of it and with the imposition of the EC Unfair Commercial Practices Directive, the UK is now on a par with these jurisdictions. The effects of this general duty on consumer empowerment will mainly depend on how well the balance can be struck between certainty and flexibility. This in turn will depend on how closely aligned the consumers’ perception of ‘(un)fairness’ is with that of the law. The more closely aligned these are, the more potential the duty has for increasing consumer empowerment since consumers are more likely to be aware of the existence of a broad and single duty than a multitude of specific duties.</td>
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</table>
### 2. The consumer interface: consumer advice, information, education and representation

<table>
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<th>Benchmarking principle</th>
<th>Rationale</th>
<th>Assessment</th>
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<tbody>
<tr>
<td>3: Consumer advice channels should be accessible, strongly branded and based on the one-stop-shop principle.</td>
<td>The provision of information and advice to consumers is a key plank of an effective consumer empowerment regime.</td>
<td>It is clear that most jurisdictions are increasingly focusing resources on the provision of consumer information and advice channels. While telephone and the internet appear to be the dominant channels of delivery, some jurisdictions also provide for face-to-face advice which may benefit certain disadvantaged groups in particular.</td>
</tr>
<tr>
<td>4: The provision of information is an important plank of consumer empowerment. Appropriate information should be presented to consumers in a clear and accessible manner.</td>
<td>The main barriers to consumers obtaining advice could be remedied by providing consumers with strongly-branded, clearly identified and trustworthy sources of advice, as well as ensuring that information was presented in a language which is readily accessible.</td>
<td>The UK’s system for consumer information and advice clearly performs well in a number of key respects. Consumer Direct provides a single gateway for consumer advice with referral mechanisms where a complaint requires further agency action. This is underlined by research which shows high levels of consumer satisfaction with the service, leading to considerable consumer benefits in a significant proportion of cases. The national network of CABx also provides for face-to-face advice – which may be particularly important for disadvantaged consumers.</td>
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We conclude that the UK’s Consumer Direct initiative, taken together with the national coverage of CABx, appears to be on a par with the best in respect of consumer advice and information delivery.
<table>
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<th>Benchmarking principle</th>
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<th>Assessment</th>
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<tr>
<td><strong>5: Consumer education aimed at raising consumer market skills may make an important contribution to the empowerment of consumers.</strong></td>
<td>An empowered consumer is equipped with the knowledge and skills to make informed choices, and assert her rights when things go wrong.</td>
<td>It appears that the more formal provision of consumer education is seen as having an increasingly important role in consumer policy (a point confirmed by our respondents). There is a lack, however, of evidence on how this impacts on consumer empowerment.</td>
</tr>
<tr>
<td><strong>6: The provision of strong consumer advocacy groups can ensure the representation of consumer interests in policy formulation and the setting of agency priorities.</strong></td>
<td>Consumer advocacy—alongside information and advice—plays an important role in empowering consumers, and it enables governments and regulators to respond to the disparate and diverse nature of consumers at the policy level and in setting enforcement priorities. Consumer complaints to advocacy/representative groups may provide agencies with important intelligence on markets. Consumer advocacy groups can highlight the special problems of disadvantaged consumers.</td>
<td>Across all jurisdictions (including the UK) there appear to be mechanisms in place for the representation of consumer interests in policy making and priority setting, and our questionnaire data appears to underline the importance of this in improving policy. Recent reforms in the UK, in particular streamlining and enhanced powers for the NCC, can reasonably be expected to strengthen and improve consumer representation in the formulation of consumer policy. We conclude that the UK’s arrangement for consumer representation are on a par with the best.</td>
</tr>
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</table>
### 3. Redress mechanisms for consumers

<table>
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<th>Benchmarking principle</th>
<th>Rationale</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>7: ADR mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction. They should meet minimum standards in terms of independence, accessibility and effectiveness.</strong></td>
<td>The provision of simple, low-cost ADR mechanisms can promote confidence among consumers. ADR can create important feedback effects for self-regulatory mechanisms (e.g., industry codes of practice). Broad agreement on the principles which should underpin ADR provision, in particular, visibility, accessibility, and independence. Disadvantaged consumers are least likely to complain – making redress mechanisms more accessible will assist disadvantaged consumers in particular.</td>
<td>There are a variety of ADR mechanisms across the countries under study. The coverage of ADR schemes in the UK is patchy, and some markets do not have an ADR scheme at all (and this is true of some markets which display low levels of consumer satisfaction). There are obvious benefits to ADR, but we note a level of concern among respondents as to the quality of certain schemes and the danger that consumers may be ‘short changed’. In the UK and Denmark, there are mechanisms in place for approving schemes, but in respect of the former, relatively few schemes have been approved. In Denmark, the Consumer Complaints Board acts as a default mechanism where there is no private (approved) scheme in place. This has the benefits of increasing the visibility of ADR to consumers generally, and this is reflected in the respondents from Denmark who view ADR in that country as being very accessible. It also has the benefit of encouraging industries to put in place their own mechanisms, and provides a model for ADR which may avoid some of the potential problems over independence and quality of decision-making. We conclude that the UK’s provision of ADR schemes is an area where further progress could be made if the UK is to be on a par with the best.</td>
</tr>
<tr>
<td>Benchmarking principle</td>
<td>Rationale</td>
<td>Assessment</td>
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<tr>
<td>------------------------</td>
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</tr>
<tr>
<td>8: Provision should be made for flexible and expedited small claims procedures (although ADR mechanisms may fulfil this role).</td>
<td>Given the relatively small monetary value associated with consumer claims, there is a need for flexible and expedited small claims procedures for consumers. All the countries covered by this study have a small claims procedure, although in Germany it is for the courts to decide whether such a procedure is appropriate. All the countries have certain threshold values, which vary markedly. One of the main deficiencies with the UK is the time that it takes to conclude a claim (average 53 weeks). In all the countries except Spain, consumers have to pay a fee to access the procedure. In low cost transactions this may act as a barrier and discourage consumers from claiming all together. While all the jurisdictions include some simplification of the ordinary court procedures when dealing with small claims, the threshold for the value of the claim is very different. It ranges from approximately £400 to £23000, with the UK at the lower end with a threshold of £5000. We conclude that, on balance, the UK’s small claims procedure is average.</td>
<td>Given the relatively small monetary value associated with consumer claims, there is a need for flexible and expedited small claims procedures for consumers.</td>
</tr>
</tbody>
</table>
9: Collective enforcement may play an important role in securing redress for consumers and in deterring firms from breaking the law. The provision of collective actions may also counterbalance weak public enforcement. Such mechanisms do, however, need to be designed appropriately, having regard to the potential for wasteful and strategic litigation.

There are two main justifications for facilitating group litigation:
(1) providing compensation for those harmed by infringements of the consumer protection laws (but who would not have an incentive to litigate individually);
(2) to deter infringement (which is particularly important if there are insufficient resources available for public enforcement).

In respect of compensation, class actions increase the leverage of consumers to obtain settlements from defendants, while also providing an efficient means of redress for consumers.

Group litigation mechanisms have the disadvantage, however, of taking the litigation out of the hands of the plaintiffs, and it is generally accepted that mechanisms need to be in place to ensure that plaintiffs’ interests are protected.

It is difficult to evaluate the UK’s position vis-à-vis the other countries, not least because of the apparent lack of empirical data on the effectiveness of collection actions generally. Moreover, the relative importance of class actions depends upon other features of the enforcement regime, in particular the strength of the public enforcement regime. In a country like Germany, for example, where there is a lack of public enforcement, collective redress mechanisms are more important than in countries, like the UK, where there are core public agencies responsible for enforcement.

Overall, the UK does make provision for group litigation and representative actions, but its procedures are more restrictive than is the case in other countries (in particular the US and, to a lesser extent, Denmark). Whether the law should be changed to facilitate more group litigation is an issue which is beyond the scope of this study.
<table>
<thead>
<tr>
<th>Benchmarking principle</th>
<th>Rationale</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Public enforcement</td>
<td>Redress mechanisms are unlikely to be sufficient to secure firm compliance with the law – consumer transactions tend to be small relative to the costs of redress, consumers may suffer harms which is incapable of being compensated by a monetary award, and the harmful behaviour of the firm may produce externalities for society. Compliance will be optimised if enforcement is transparent. In line with the principles of better regulation, firm compliance is likely to be optimised if penalties are seen as proportionate and fair. There should be an hierarchy of enforcement powers, which regulators can escalate in the face of non-compliance by firms.</td>
<td>The UK’s current regulatory framework compares favourably with the other jurisdictions in the study. Forthcoming changes under the RSEB will give the OFT and TSSs the powers to impose both fixed and variable penalties against businesses who fail to comply with consumer protection laws. In this latter regard, agencies will have the ability to escalate the level of a sanction according to, for example, recidivist law-breaking. Furthermore, such penalties are not subject to the sanction of the court. We conclude that once these powers are in place, the UK will be on a par with the best in respect of its enforcement powers. Nevertheless, there are important innovations elsewhere which the UK could examine with a view to further augmenting the regulatory ‘tool-kit’. The use of orders which put an emphasis on changing the behaviour of firms (as is the case in Australia in respect of probation orders), appears to be another useful means of encouraging compliance. We note also the split of competencies as between the OFT and the TSSs, with the latter having powers to take criminal cases. In principle, this does not mean that enforcement powers cannot be used in a responsive way (to maximise compliance), but it does depend crucially upon the importance of mechanisms for coordination of enforcement (discussed below).</td>
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<tr>
<td>Benchmarking principle</td>
<td>Rationale</td>
<td>Assessment</td>
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<td><strong>11: Enforcement resources should be targeted appropriately. Transparency both in terms of enforcement policy and in terms of monitoring outcomes can increase both compliance and the efficient use of enforcement resources.</strong></td>
<td>Transparency in enforcement – in particular monitoring of outcomes – increases the accountability of public agencies, and ensures that enforcement resources are being targeted to where harm to consumers is greatest. Enforcement agencies should have targets and mechanisms in place for the measuring of outcomes of interventions.</td>
<td>There is evidence across all jurisdictions of the monitoring of complaints data, and some further evidence of its use in identifying particular areas of concern. In some jurisdictions, consumer organisations play a particularly important role in bringing to the attention of either the agencies or the courts particular consumer problems. A number of regimes have challenging targets against which their performance or market interventions can be measured. A number of regimes have clearly set their enforcement priorities in response to a high volume of complaints in respect of particular sectors. Overall, the UK performs well against this measure. Mechanisms are in place to identify and target resources to deal with specific market problems, and challenging targets are in place to measure agency performance.</td>
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**Principle 12: The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets.**

An effective consumer empowerment regime requires that there are mechanisms in place to deal with systemic market issues:
- the cause of consumer detriment may be at a market level rather than a firm level;
- the use of tightly defined and focused ex ante remedies (consequent upon a market inquiry) may avoid the problem of business uncertainty associated with more general ex post duties;
- most jurisdictions are designed around the needs of average consumers, specific market

The need for specific market intervention in the light of systematic consumer detriment is important for several reasons. It may provide a mechanism for dealing with specific issues surrounding disadvantaged consumers (where the consumer regime generally is based on the needs of the average consumer). It can deal with market level problems, where there is no specific breach of consumer law, but where consumer detriment can be remedied by targeted remedies. While there is evidence that several jurisdictions monitor markets, and use resources and the enforcement tools that they have in a responsive way, the UK is unique in having the ability to impose remedies at the market level (even where there has been no infringement of the generic consumer laws). While the OFT only envisages using its referral power in respect of three markets per annum, it is nevertheless an important complement to its other enforcement powers, has a level of transparency and due process safeguards, and ensures that remedies can be targeted effectively.

In this regard, we conclude that the UK is on a par with the best.
issues which impact on disadvantaged consumers may not be covered by generic consumer law.

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<th>Benchmarking principle</th>
<th>Rationale</th>
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<td>13: In a multiple-agency setting, mechanisms should be in place to ensure that there is co-ordination and consistency of approach.</td>
<td>As a general proposition, regulatory tasks should be allocated to those best placed to make decisions, and local enforcers may enjoy significant informational advantages over central agencies. Some diversity of enforcement may be desirable, but these benefits should be balanced carefully against the needs to conserve scarce enforcement resources (for example, by avoiding duplication), target such resources appropriately, and avoid the imposition of unnecessary costs on business (through, for example, being subject to more than one agency in respect of the same activity).</td>
<td>The constitutional arrangements of the jurisdictions under study vary greatly, and in this respect the UK has a comparative advantage given that consumer laws are harmonised across the UK, and the OFT has a remit for the UK (excluding Northern Ireland). There is, however, both an overlap and a split of powers and functions as between the OFT and local authority TSSs. In the past, there have been criticisms of a lack of coordination of activities of the TSSs, both as between themselves and between them and the OFT. Recent initiatives, including legislative measures, are likely to facilitate greater coordination and cooperation, thereby reducing burdens for firms and encouraging the more efficient use of scarce public resources. We conclude that in the UK, while there are (or will shortly be) robust mechanisms in place to ensure that there is co-ordination and consistency of approach, how effective such mechanisms are will probably require further testing at a later time.</td>
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<td>14: Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.</td>
<td>There are a number of potential benefits to self-regulation, including the reduction of agency costs, a more responsive regime (assuming that self-regulatory bodies have greater informational advantages than do public agencies), and the possibility of providing more accessible redress mechanisms for consumers. Self-regulation requires the credible threat of state intervention should the self-regulatory mechanisms fail or Insofar as soft-law mechanisms provide clarity and guidance to firms and consumers regarding the interpretation of the law, they may be effective tools of consumer empowerment. However, it must also be borne in mind that adopting and monitoring compliance with codes of conduct will entail costs. For these mechanisms to be efficient, such costs should be outweighed by the benefits for consumers. If the soft-law mechanisms do not provide these benefits, or if these benefits can be achieved in a more efficient way, then they may actually be counterproductive by adding more rules to an already complicated body of law.</td>
<td>The UK appears to be on a par with the best in terms of the provision and management of these mechanisms, although how much additional consumer</td>
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The empowerment these provide in practice is an issue that needs empirical testing and is beyond the scope of this Report.
Annexe C Evaluating the Level of Consumer Empowerment and Explaining Consumer Detriment from the Perspective of Economic Theory

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1.0 Introduction

The aim of this literature review is to identify the reasons why consumers, both in the aggregate and as individuals, may be susceptible to detriment and, thence, to develop theoretically-informed indicators of the level of consumer empowerment.

In recent years, there has been increasing interest in the role that consumers play in markets, and in two distinct respects. The first is in understanding the importance of consumers as a group in ‘making markets work well’. Thus, a well-functioning market is understood to depend in large part on consumers as a group being able to choose those products which best meet their needs as the means of disciplining suppliers into efficient provision (Waterson, 2003; Sylvan, 2004). The role of consumers as active players in implementing effective competition policy has been increasingly recognised and researched. But there is also interest in the benefits which are directly available to consumers, particularly in the context of individuals, or groups of individuals, who may be considered vulnerable because of poverty, age, disability, low income or other factors. This is the domain of consumer empowerment and, in discussing it, it is important to recognise both aggregate and individual interpretations of the term.

The context to the discussion is provided by the following market characteristics, all of which are associated with the potential for consumer detriment:1

(i) markets that exhibit a lack of transparency, for example, airline tickets with undeclared surcharges attached;

(ii) markets where pressure selling is an issue, for example, home credit;

1 Some markets are associated with more than one kind of detriment; for example, the market for home credit is one in which significant numbers of low-income consumers operate and where pressure sales techniques can be observed, along with switching and transparency problems. For the purpose of this analysis, these different sources of potential detriment are treated separately.
(iii) markets where consumers choose a provider under conditions of asymmetric information, for example, estate agents;

(iv) markets that exhibit search and switching costs and that are typically characterised by complex transactions, for example, mobile phone services;

(v) markets that exhibit significant levels of consumer inertia, for example, personal bank accounts; and

(vi) markets that raise particular concerns for low-income/vulnerable consumers, for example, personal bank accounts and home credit.

The structure of the review is as follows. Section 2 reviews the neoclassical economic literature for evidence of how consumer empowerment might be recognised and evaluated. Sections 3 and 4 introduce alternative literatures that extend our understanding of the sources of consumer detriment and the indicators of consumer dis/empowerment. Section 5 considers the relationship between consumer empowerment and competition remedies. Section 6 then brings together our findings to address the issue of the practical ways in which consumer dis/empowerment can be recognised and evaluated; and Section 7 concludes.

2.0 The standard economic approach to consumer well-being

Given that the dominant paradigm (that is, neoclassical economic theory) gives primacy of place to welfare and, in particular, in the policy arena to the promotion of consumer welfare, it is somewhat surprising to find little in this literature on how one might evaluate the level of consumer empowerment, either in absolute terms or before and after some form of intervention. Where the term does appear, it is not treated with rigour and relies on intuitive understanding.
2.1 The benchmark for consumer welfare: perfect competition

As conditions come to more closely satisfy the requirements of a perfectly competitive market (say, through an improvement in the level of information available to consumers), *ceteris paribus* we would expect prices to fall and consumer surplus to increase (for example, as consumers respond to the exposure of relative prices). But a model of perfect competition is of limited value in the current context: as the markets identified in Section 1.0 above suggest, real-world markets are typically complex and idiosyncratic, the *ceteris paribus* condition is rarely met, and deviations from perfect competition are the norm rather than the exception, even after intervention.

However, from the model of perfect competition, in which many non-dominant and perfectly informed consumers face similarly non-dominant and perfectly informed providers, the paradigm has developed to consider both models of monopoly provision and monopsony purchasers, as well as oligopoly, particularly on the supply side. The analysis includes consideration of the impact of such market forms on consumers, but it largely treats consumers, both individually and in the aggregate, as fully informed rational actors intent on utility maximisation.

2.2 The well informed consumer

Thus, in turning from theories of the market to theories of consumer behaviour, standard economics tells us that the perfectly informed consumer is an ‘effective’ consumer in a competitive market: being fully apprised of the range of products on offer, their prices and attributes, and the location of outlets, it is assumed that the consumer will make the utility-maximising choice (in that the chosen product will provide the best possible fit with the consumer’s tastes and preferences given their budget constraint). Given these attributes of the outcome of a transaction, one *might* then say that an empowered consumer is a well informed consumer:

*Indicator 1:* An empowered consumer is a well informed consumer.
Note, however, that practical use of this indicator of empowerment turns on the (tacit) assumption that people are endowed with, and are fully cognisant of, a consistent set of preferences and values relating to every conceivable good and service. Indeed, standard theory’s rational economic agent is constituted by (no more and no less than) a ‘well-behaved’ set of preferences since, traditionally, the focus of standard consumer theory is on how preferences map in to choices. Yet it is not at all clear that the assumption of a well-behaved set of preferences is empirically justified, even in the case of familiar consumption goods (see, for example, Frederick and Fischhoff, 1997).

2.3 Choice and empowerment

The principle of consumer sovereignty – or that consumers know best what is in their own interests (as against government or some other agency) – is one of the cornerstones of standard economic theory applied to a market-based economy. At first sight, the principle would seem to imply that choice is key to a good outcome. This being the case, it might be argued that an empowered consumer is one who is able to exercise choice, implying that a choice set necessarily exists. However, choice has several dimensions that impact on the quality of outcomes. A review of these leads to the conclusion that the existence of a choice set is not sufficient to guarantee a good outcome for the consumer.

First, it may be the case that a choice set exists but that none of the options would generate a good quality outcome for the consumer. For example, there may be a reasonably wide choice of suppliers in a particular market, but if all

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2 It should be emphasised that, as Starmer (2000, p.349) observes, “the conventional approach [to decision making], interpreted descriptively, seeks to predict which choices are made and, typically, there is no presupposition that the model corresponds with any of the mental activities involved in making choices.” The next section of the paper opens up the ‘black box’ of such mental activity.

3 Frederick and Fischhoff conducted an experiment using familiar supermarket goods such as canned tuna, applesauce and toilet paper that were packaged in a range of different quantities. They find that even respondents who understand how much a quantity is may not know how much that amount is worth and respond with a number that seems like the ‘right’ amount to spend on that type of good.

4 In a discussion of the limits to neoclassical theory, Brandstätter et al (2003, p.304) observe that the assumptions that human individuals do optimize and choose intentionally on the basis of given preferences lie at the root of neoclassical orthodoxy and yet these assumptions are widely off the mark and should not be accepted.
suppliers are colluding such that price is above that of a well-functioning market, we may say that the 'good' – that is, competitive – outcome is not contained within the choice set.

Second, in markets in which product differentiation is important, it may be the case that a choice set exists but that the contents of the set are so similar in terms of their characteristics that there is insufficient diversity given the range of consumer tastes and preferences (Hotelling, 1929).

And third, we may say that a necessary dimension of choice in a modern market society is the freedom to choose not to engage in a transaction, which is to exclude transactions undertaken under coercion (Hayek, 1976/1944), for example, pressure selling.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:
(i) the choice set includes the 'good' quality outcome;
(ii) the options are 'reasonably' far apart in product characteristic space (that is, in a market where differentiation is important, they are sufficiently different from one another); and
(iii) there is the choice not to engage in a transaction.

**Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

To add to the complexity of the relationship between choice and empowerment, economic theory identifies two situations in which a good outcome requires the imposition of limits on what can be supplied to consumers and, hence, which implicitly limit consumer choice.

First, from the perspective of paternalism, it can be argued that some consumers, given free reign, will make choices that are 'inappropriate', either with respect to their own welfare (for example, choosing to consume demerit goods such as cigarettes or fatty foods), or with respect to the welfare of society...
in the aggregate (for example, choosing to consume guns to the extent that a negative externality is imposed on society\(^5\)). Hence, there are grounds for over-ruling consumer sovereignty by imposing restrictions on the supply of demerit goods.

Second, in cases of natural monopoly (for example, a rail network), the cost of providing a choice of products is likely to exceed the benefits. Under these conditions, efficiency in the allocation of resources requires a limit to be placed on the number of suppliers.

**Indicator 4:** Under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers.

For completeness, we note that consumers may democratically choose to restrict the choices available to them, for example, by electing a government with a mandate to remove refrigerators containing chlorofluorocarbons (CFCs) from the market. Thus, somewhat paradoxically, being able to choose to restrict one's choices through the ballot box constitutes a modality of empowerment.

### 2.4 Optimal search theory

From Section 2.2 above, it is apparent that markets are understood to function optimally for fully informed consumers on the assumption that the supply side is functioning well. But for a wide range of markets, the standard paradigm recognises that consumers will have a good deal less than the full information assumed by the theory. Thus, it is axiomatic within *optimal search theory* that because information bears a positive cost, rational economic agents will only engage in search up to the point at which the marginal cost of doing so equals the anticipated marginal benefit of the information so acquired. Consumers are thereby exposed to an information gap and the potential for poor quality outcomes. The likelihood of a poor quality outcome can be expected to be

\(^5\) My awareness that some people are consuming guns imposes a negative externality on me if I believe that the practice leads to violence on the streets and, as a consequence, I am afraid to walk home at night.
larger the greater are the informational demands on consumers of transactions; for example, a market that is subject to frequently changing prices and/or complex tariff structures is particularly demanding with respect to the amount of search required to identify the ‘right’ product.

Moreover, as Stigler (1961) observes, although more time devoted to search can reveal which supplier charges the lowest prices, it means less time for doing something else. Waterson (2004) points out that this includes search related to another good, suggesting that search will be greatest in areas where the greatest potential savings are expected to be made (for example, there will be more search when buying a new car than when buying a new computer printer) implying that some purchases will be made with little or no search (for example, a cup of coffee at a station).

Novel products, and products that are purchased only rarely or infrequently, are informationally demanding. But for three categories of goods, the information gap is recognised as particularly problematic. In the case of experience goods (goods whose attributes cannot be discerned until they have been consumed\(^6\)), no amount of search can plug the information gap. In the case of credence goods (goods with attributes that may not be readily apparent even after purchase\(^7\)), there is the potential for the consumer’s choice of the quantity to purchase (at any given price) to be inappropriate to their needs; moreover, the price at which the product is sold in the market may differ from the perfect information price (Hunter \textit{et al}, 2001). And in the case of distress purchase,\(^8\) the need for immediacy may rule out search altogether (Waterson, 2003).

\textit{Indicator 5:} Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

\(^6\) Examples of experience goods include novel food products and television programmes.

\(^7\) Examples of credence goods include professional services (such as private medicine or veterinary services) and repair and maintenance services (such as car repairs), where the buyer is dependent upon the seller for advice as to exactly what, and how much, should be consumed.

\(^8\) Examples of distress purchases include plumbing and car windscreen repairs.
2.5 Economic inclusion
Standard economic theory does recognise cases where social goals (for example, justice or equity) cannot be satisfied by the market, even one that is perfectly competitive. *Merit goods* are a case in point. These are goods and services that government believes should be consumed in adequate quantities but that may be under-consumed due to inability-to-pay or ignorance of the benefits of consumption, for example, education and health care. It can be argued that some of these goods have externalities in consumption; for example, I benefit if my neighbour is immunised against infectious diseases and has adequate sanitation; and society benefits from being populated by better educated citizens beyond the benefits which accrue directly to the individuals concerned. Under these conditions, intervention in the market (say, through subsidy, social tariffs or free provision) is often regarded as justified. But while intervention can clearly be empowering for low-income consumers and/or those who are ignorant of the benefits of consumption, the costs and benefits are often as difficult to identify and measure as the concept of ‘merit good’ is to define.

There would seem to be no consensus in the literature with respect to the *range* of goods and services that might fall under the heading of merit goods in contemporary times or of *new kinds of detriment* to which society (or particular consumers) may be exposed as social and economic conditions change. Personal bank accounts are a case in point. Whilst a bank account is not a merit good, it can be argued that access to banking should be considered essential given that many goods and services can only be paid for by means of direct debit or debit cards, and because bank accounts are a prerequisite for most forms of legal employment and for access to the property rental market.⁹ Accordingly, low-income consumers and consumers with poor credit ratings suffer a detriment beyond its immediate effect when they are denied access to

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⁹ In support of these arguments, the European Commission include banking and the internet in the category of 'services of general interest'. These are services considered to be in the general interest by the public authorities and accordingly subjected to specific public-service obligations. Thus, services of general interest should be of good quality and accessible to all at affordable prices. (European Commission website glossary: http://europa.eu/scadplus/glossary/general_interest_services_en.htm)
For similar reasons, it can be argued that access to computer technology should also be considered essential given the increasingly vital role of computers in the dissemination of and access to information relating to goods and services across a broad spectrum of markets. In both of these cases, one market acts as the 'portal' to one or more other markets and, hence, when access to the former is restricted, it can be argued that the consumer suffers a negative externality from one product market to another. More generally, the above analysis reveals that consumer empowerment may not be uniquely defined in any one market, without reference to levels of access and cognitive competence in others.

Indicator 6: A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

Indicator 7: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

Indicator 8: The level of consumer empowerment in a market may be defined by reference to one or more other markets.

2.6 Measurement issues
It would seem, then, that standard economic theory can contribute to an understanding of some of the sources of consumer detriment and some of the

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10 Where consumers have low credit ratings, there are two further dimensions to disempowerment: consumers may not know of the existence of these ratings (lack of transparency), and they may find it difficult to remove incorrectly assigned credit ratings (inadequate/poorly understood correction mechanisms).

11 People who do not pay by direct debit generally pay more for utilities: in 2004, paying household bills by direct debit could save the average consumer each year around £22 in electricity charges, £38 in gas charges, and £12 in telephone charges (National Consumer Council, 2004). Direct debit is clearly not available to those without a bank account; and low-income consumers who are concerned about high overdraft charges are reluctant to use direct debit for their bills for fear of becoming inadvertently overdrawn, through their own oversight or because payments in or out are mistimed.

12 The strength of this argument is reinforced by the appearance in recent years of a large number of product comparison websites (some of which facilitate product switching) and on-line consumer-authored product reviews that can contribute to matching consumers with the products and prices that are best suited to them.
conditions under which consumers are dis/empowered. But can it contribute to an evaluation of the actual level of consumer empowerment?

Theory points to price as the most obvious indicator. However, price data has to be interpreted, and herein lies a problem. Thus, stable prices over time may indicate that a given market has reached a competitive equilibrium, implying that the market is working well for consumers. But stable prices might alternatively be indicative of inertia on the part of consumers (perhaps due to the complexity/opacity of transactions) implying the potential for detriment. A similar argument applies to measures of the number of people switching supplier. On the one hand, a low level of switching activity may indicate a dynamic market in which price is converging on the competitive equilibrium; on the other hand, it may indicate that consumers are unaware of the possibility of choosing between alternative suppliers and/or that they face high search costs and/or high switching costs (Chang and Waddams Price, 2008). This is not to say that price data, and data on switching activity, are entirely useless but that the data must be interpreted in conjunction with other parameters, such as the structure and conduct of the supply side, the level of consumer satisfaction with the market, and the prevailing consumer culture.

Some studies have involved field surveys of consumer behaviour in specific markets, such as Russo et al, 1986, who examine the impact of nutritional information on sales of breakfast cereals. Here, the argument is that the value of a particular piece of information lies in its ability to change consumer behaviour for the better as measured in the market place (Earl & Kemp, 1999\textsuperscript{13}). In this instance, a change in the pattern of demand comes to act as a (somewhat convoluted) proxy measure of consumer well-being. While this approach to an assessment of consumer empowerment is consonant with the limited guidance provided by standard economic theory, it is neither feasible nor appropriate when several different markets with the potential for different kinds of consumer detriment are at issue.

\textsuperscript{13} To exemplify the power of the argument, Earl & Kemp (ibid) point to how the appearance of a negative rating on a car’s safety in a product-testing consumer report can lead to a precipitous decline in sales.
But perhaps the greatest difficulty we have in approaching an evaluation of the level of consumer empowerment through the lens of standard economic theory is that the paradigm provides little substantive content to the term. To demonstrate the point, consider the treatment of consumer surplus, a closely aligned concept which provides a measure of consumer well-being. Consumer surplus is unambiguously defined as a monetary measure of the benefit to a consumer, net of the amount they are required to pay, from being able to buy a good at a particular price. The size of the benefit is determined by the area under the individual's demand curve between two prices: the maximum price the consumer is willing to pay, and the price the consumer actually pays. Thus, explicit parameters enable us (at least, in theory) to 'pin down' and evaluate the size of consumer surplus with precision. But ‘consumer empowerment’ is an abstract term that has yet to be theorised; while we may understand the term intuitively, it has hitherto lacked both formal definition and the specification of parameters that would allow us to measure it.

3.0 The cognitive architecture of consumer behaviour

Recent years have seen the development of a body of literature at the interface between economics and psychology, and firmly rooted in the observed behaviour of economic agents. Behavioural economics has extended the economist's lexicon to include terms such as 'cognitive bias', 'cognitive dissonance', and 'normative fallacies', a development that acknowledges the growing overlap of economics and psychology when it comes to understanding decision-making behaviour.

3.1 Bounded rationality

The consumer to emerge from behavioural economics differs significantly from the rational economic agent of standard economics.\(^\text{14}\) Drawing on experimental evidence, models of behaviour in the behavioural tradition build on the same basic beliefs about the nature of human behaviour as standard economics in so

\(^{14}\) For reviews of this literature, see, for example, Koehler and Harvey, 2004; Cosmides and Tooby, 1996; and Rabin, 1998.
far as the individual is assumed to be trying to identify their best course of action given their particular preferences over outcomes. But a major wedge between the approach of standard economics and that of behavioural economics is that the latter takes account of the 'cognitive architecture' of decision-making (or the mental activities involved in making choices) while the former does not. The motivation is that while the model of decision-making supplied by standard economics may have some normative persuasive force, it is inappropriate when it comes to analysing/explaining the behaviour of people who are only boundedly rational, that is, who are limited by time, knowledge, and/or computational ability. Such economic agents, as a consequence of these characteristics, are apt to pursue constrained maximisation, and to employ 'fast and frugal' decision rules (Gigerenzer, Czerlinski and Martignon, 2002). Thus, a disjunction emerges between rationality as it is conceived in standard economics and rationality as it is conceived in cognitive psychology, expressed by Herbert Simon as follows:

"The rational person in neo-classical economies always reaches the decision that is objectively, or substantively, best in terms of the utility function. The rational person of cognitive psychology goes about making his or her decisions in a way that is procedurally reasonable in the light of the available knowledge and means of computation."

(Simon, 1986, pp.S210-11; emphasis added.)

Behavioural economics offers several propositions of relevance to the question of why it is that consumers may be susceptible to detriment. Extrapolating from these propositions, we may say that the answer lies partly in the characteristics of consumers, and partly in the characteristics of the transactions confronting consumers. In short, consumers with limited information and computational abilities, and facing complex transactions, are

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15 Some behavioural economists go further in suggesting that people tend to engage in satisficing rather than utility maximisation; this is to say that people do not pursue the best result but the result that satisfies their 'aspiration level'. It can be argued that satisficing is essentially cost-minimising behaviour, the dual of the assumption of maximisation under neoclassical theory. However, Hodgson (1988) argues that this is to deny the full force and impact of behaviouralist analysis.

16 Many of the insights of behavioural economics have been generated through the study of decision making in the context of non-marketed goods and services but these insights have been found to apply more widely.
susceptible to poor quality outcomes relative to fully informed and rational utility maximisers.

3.2 Decision heuristics
Kahneman and Tversky (1979) were amongst the first theorists to formalise the proposition that ordinary people do not have unlimited computational abilities as implied by standard economic theory. This is to say that people do not approach decision-making with the rigorous mathematical logic of standard economics but with a collection of common ‘decision heuristics’, or procedural ‘rules-of-thumb’. The use of these decision heuristics may lead people into errors of judgement; but it is argued that they may also lead to quite ‘reasonable’ or ‘sensible’ paths of action for individuals who are trying to do the best that they can for themselves in the face of limited time and computational ability, cognitive illusions, and problems that are computationally intractable.

3.3 The role and interpretation of information
A related strand of the behavioural literature points to subtleties in the way in which people interpret and utilise information – and, indeed, to the kind of information that people perceive to be relevant to their decision-making.

First, experiments have revealed that people’s values and judgements over the objects of choice can be unduly influenced by a piece of information that is conveniently to hand, and that comes to act as an arbitrary comparison value, referent, or ‘anchor’ in the calculative process. These anchors are heuristic devices that have been found to derive from such random cues as a person’s telephone number (Epley, 2004; Tversky and Kahneman, 1974). The illusion is created of an ordered pattern of behaviour, underpinned by a tidy set of ‘true’ values, a phenomenon known as ‘coherent arbitrariness’ (Ariely, Loewenstein and Prelec, 2003).

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17 There is evidence to suggest that people do not necessarily abandon favoured procedures even when confronted with their mistakes (Rabin, 1998).
18 For example, in an experiment designed to unearth the rules-of-thumb governing consumer search behaviour, Hey (1982) finds that five rules appeared in a high proportion of observed behaviour and, although these rules were not optimal, they could be considered ‘reasonably sensible’.
Second, it has been observed that people may disproportionately weight salient, memorable or vivid evidence (for example, personal anecdote), even when information that is objectively of better quality is available to them (Tversky and Kahneman, 1973).

Third, it would appear that language is far from neutral and, hence, that information brings with it the potential for ‘framing effects’. This is to say that different ways of representing the same set of options can yield different choices; for example, Tversky and Kahneman (1986) find that people react differently to firms charging different prices for different services depending on whether the lower price is described as a 'discount' or the higher price is described as a 'surcharge'.

Finally, the idea that consumers should be empowered in their transactions by information has, of course, become a cornerstone of consumer policy. However, there is evidence to suggest that 'more' is not necessarily 'better', and that information overload can demotivate decision makers (Iyengar and Lepper, 2000). For example, Hauser and Wernerfelt (1990) find that as both the number of options, and the information about options, are increased, people tend to consider fewer choices and to process a smaller fraction of the overall information available relating to their choices.

Findings like these suggest that the use of information is not as straightforward as standard economic models imply. Indeed, drawing on behavioural economics, we might ask if information disseminated for the purpose of empowering consumers and enhancing the quality of outcomes will necessarily be harnessed to such an effect.

3.4 Measurement issues
There is robust empirical evidence to enhance the persuasiveness of claims made by behavioural economics. But while this school of thought can contribute to an explanation/analysis of consumer behaviour, its propositions are problematic with respect to the development of a rigorous approach to consumer empowerment in four key respects.
First, the emphasis of behavioural theory is on facets of behaviour that are not easily amenable to mathematical modelling or measurement, such as people’s *perceptions* of the situations confronting them. Second, the behaviouralists themselves would acknowledge that a full understanding of the subtleties of the mental processes associated with decision-making has yet to be grasped, such as the *contingencies* that determine the choice of a particular decision rule. Third, while it is possible — although not entirely unproblematic — to assess some aspects of consumer behaviour in the tightly controlled conditions of the experimental laboratory, it is difficult to see how this methodology can be turned to the task of deriving a measure of consumer empowerment.¹⁹ And, fourth, it is in any case an open question as to whether behavioural economics can deliver a sufficiently *general* — that is, context-invariant — theory of decision-making that could feed into a more substantive notion of consumer empowerment. Indeed, some theorists would argue that models of behaviour framed by bounded rationality are necessarily of short range and domain-dependent (Brandstätter, *et al.*, 2003).

In conclusion, we may say that an approach to consumer empowerment drawing on behavioural economics must inevitably involve a trade-off between the precision required for measurement on the one hand and greater realism on the other hand. However, what this approach does achieve is a deeper understanding of the complex of factors that attach to consumer behaviour and to the quality of consumer outcomes. Thus, there are now three possibilities with respect to the outcomes of consumer decision-making that can be summarised as follows:

*Indicator 9: For a given market:*

¹⁹ The experimental laboratory provides a setting in which to examine behaviour that is otherwise difficult/impossible to observe. However, the status of findings that are generated experimentally is open to question. Consider, for example, an experiment designed to evaluate the impact on consumer behaviour of new information. The artificiality of the experimental laboratory can itself be a source of bias if it encourages people to focus on parameters of a transaction in ways that they would not do in the normal conduct of their lives when their behaviour is necessarily embedded in the context of a much wider range of concerns.
(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
(ii) when acting under the constraints of bounded rationality, consumers may attain 'reasonable' outcomes (one behavioural conclusion);
(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion).

4.0 An institutional perspective on consumer dis/empowerment

The institutional approach within economics is motivated by the observation that economic actors are socially/culturally embedded and, hence, that factors beyond those described in standard models can influence behaviour. There is a degree of overlap between the institutionalists and the behaviouralists in that both perceive human action to be (at least, partially) rule-based and both find support for many of their claims in psychology. But a distinguishing feature of the institutional approach is the claim that:

"institutions play an essential role in providing a cognitive framework for interpreting sense-data and in providing intellectual habits or routines for transforming information into useful knowledge" (Hodgson, 1998, p.171).

Notice that the concept of an 'institution' that is at work here is quite broad; it embraces settled habits and socially accepted 'rules of the game', such as the norms and conventions that govern behaviour, as well as the protocols and practices that have developed for the organisation of society, such as money, language and law.

The socially-embedded individual of institutional economics is in sharp contrast to the 'bundle of preferences' described by standard economics. The individual in standard economics is essentially forward-looking; anticipated outcomes provide the focus for decision-making, while history and context are deemed to be irrelevant. But from the point of view of the institutionalists, this individual is overly abstract and unrealistically atomistic in a world of historical relationships.
and organisational structures, and in which information, and the ability to process it, are imperfect. These elements of the real world have powerful implications for the way in which economic behaviour must be analysed and understood. Thus, we turn now to a brief discussion of two strands of the theory that are particularly relevant to the notion of consumer empowerment.

4.1 Asymmetric information and principal-agent theory

The *transaction costs* model of exchange has developed under the wing of institutional economics to address behaviour in the face of the informational asymmetries that characterise a wide array of real-world transactions. At the heart of the model are two elements. First, there is the observation that positive costs are incurred in undertaking transactions; these include the costs of discovering the valued attributes of various goods and/or of the agents supplying those goods, but also the real or perceived costs of switching to another product. And second, there is the underlying behavioural assumption that incentives must be in place for ‘agents’ to behave in the interests of ‘principals’. This literature is extensive and we treat only a relevant implication here.²⁰

For many transactions, the cost of acquiring all relevant information is so high as to be prohibitive and so consumers (or principals) may defer to agents with specialist expertise for assistance or to undertake transactions on their behalf. Markets that can be characterised in this way include second-hand car sales and various professional/technical services such as estate agents, car and appliance repairs, private medical/veterinary services and legal services. These markets raise the issue of the potential for detriment as a result of *opportunistic behaviour* (Williamson, 1985), that is, that where there is a divergence of interests, the agent cannot be relied upon to act in the principal’s best interests. Two hazards associated with opportunistic behaviour are that actions can be hidden (*moral hazard*) and information can be hidden (*adverse selection*). For example, a heating engineer may charge the consumer for services that have not been undertaken or for an unnecessary repair (hidden action); or a second-

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²⁰ For reviews of the literature, see, for example, Allen, 2000.
hand car dealer may hide information from a potential consumer about the quality of a car (hidden information) (Akerlof, 1970).

**Indicator 10:** Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

4.2 Habit
The institutional approach draws attention to the way in which many areas of consumption are characterised by habit and/or are the product of social norms and relations rather than rationality. The institutionalists do not deny the influence of the future, but they point to the lingering effects of the past on behaviour in the present. In this spirit, North (1990) points out that the existence of an embedded set of institutions is of positive value in an environment of uncertainty: when people adhere to regular repetitive routines, they are saved from a degree of effort and anxiety.

An approach that embodies this idea is to treat habitual behaviour as the product of a trade-off between the desire for the best possible outcome and the desire to minimise cognitive effort. This being the case, it may be expected that as the complexity/opacity of transactions increases, the gap between the realised outcome and the best possible outcome increases in size. So, for example, in a market characterised by high search and switch costs, and complex tariff structures, the result may be a high level of ‘inertia’ as large numbers of consumers adhere to arrangements that historically may have been adequate to their needs rather than engaging at frequent intervals in a fully deliberative evaluation of whether such arrangements do, indeed, offer the best deal. Moreover, once consumers are ‘locked-in’ to an existing set or

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21 Studies have indeed found that a major part of consumer spending is subject to inertia, which is to say that it is heavily influenced by the preceding pattern of consumption (see, for example, Houthakker and Taylor, 1970).
22 One might understand such behaviour as a form of satisficing. However, this approach to habit is not inconsistent with the marginal approach of standard economic theory: if cognitive effort is costly, then it can be argued that repetition of an established pattern of behaviour on every occasion that a transaction is undertaken, or could be undertaken, is a product of the same kind of rational calculation that applies to search, implying that even rational consumers will not engage in limitless cognitive effort.
arrangements by their own inertia, firms' prices become independent of market share; that is, higher prices can be charged to 'old' customers relative to 'new' customers (Office of Fair Trading, 2003). This might lead to more intense competition to acquire new customers, from which consumers would benefit. But in some circumstances, which need to be identified on a case-by-case basis, consumers may be susceptible to poor quality outcomes.

Indicator 11: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

The situation described above raises the question of the distributional implications of a firm being able to differentiate prices between different consumers and/or products. Where such differentials reflect cost differences, total welfare and efficiency are likely to increase, although there will be some distributional consequences. Where firms are able to price discriminate, that is, to charge different prices to consumers who impose similar costs (or enforce similar prices for those imposing different costs), there may also be gains in efficiency, but regulators are reluctant to sanction such discrimination. However, the impact on consumer empowerment is ambiguous, since greater access to the market is achieved for those consumers for whom price falls, while there is the reverse effect on those for whom price rises. Many markets exhibit price discrimination, and in some cases this factor may be relevant, in conjunction with other factors and with consumer characteristics, in determining whether some consumers are disempowered.

Indicator 12: The impact of price discrimination on consumer empowerment in a given market is ambiguous.

4.3 An institutional evaluation of consumer empowerment

‘Consumer empowerment’ is not a part of the lexicon of institutional economics. However, extrapolating from the central propositions of the paradigm, one might say that the lower are transactions costs, the greater is consumer empowerment.
Indicator 13: Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

Realistically, we may expect transactions costs in many markets to be greater than zero, and to be particularly high in those markets described in the Introduction (Section 1.0 above). Under these conditions, institutional economics recognises the role of formal (or 'hard') institutional mechanisms, such as the law and its enforcement agencies, in defining people’s rights and in enforcing ‘good’ behaviour on the part of transacting agents. But because the market is viewed primarily as a social institution, the paradigm would also recognise the part to be played by ‘softer’ institutional mechanisms such as broadly accepted standards of conduct and the conventions to emerge from repeated interactions (North, ibid). The latter can be understood to supplement and reinforce the formal rules of market exchange, together with a matrix of supporting institutional forms that might include voluntary organisations (for example, Citizens Advice Bureaux), local authorities (for example, trading standards agencies) and the media (for example, consumer magazines, and press and television coverage of consumer issues). On this view, a measure of the level of consumer empowerment in a given market would need to take into account the existence and effectiveness of these hard and soft institutional forms.

Indicator 14: For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

5.0 Consumer empowerment and competition remedies
The role of consumer empowerment is increasingly important for competition authorities and the remedies which they propose. The focus on consumers has increased, both in terms of the appropriate ‘welfare standard’ against which competition policy should be judged, and on the role which they play in ensuring that markets work well (see, for example, Armstrong, 2008; and Garrod et al,
Against this backdrop, we note that the divergence of consumers' behaviour from that of perfectly informed rational agents, as described in this literature review, may either cause difficulties in delivering good market outcomes or, more likely, affect the appropriate remedies to be applied, even when the competition concern is on the supply side.

Interventions may arise at a number of points: before the point of sale (improving consumer information about products and their prices); at the point of sale (ensuring that consumers are not rushed into making decisions that they may later regret); and after the point of sale (helping them to change suppliers to exert a discipline on the market). As in all interventions, there is the danger of 'unintended consequences'. For example, on the demand side, the imposition of a cooling-off period, so that consumers have some weeks in which to reconsider, could exacerbate the problem of decisions made in haste and repented at leisure if consumers take comfort from their existence but overestimate the likelihood that they will activate them. On the supply side, some interventions which enable consumers to access more information can also increase the ability of firms to coordinate their actions to the detriment of consumers.

The focus in terms of competition policy tends to be on the activation rather than the empowerment of consumers. In the context of the debate here, we would see empowerment as being a necessary (but not sufficient) condition for activation, while consumers may well be active without being empowered (for example, if the choice set from which they choose their actions is severely limited).

6.0 Evaluating the level of consumer empowerment

In this section, we bring our findings together to formulate practical ways in which to evaluate the level of consumer empowerment.

First, to reiterate our theoretically-driven indicators, a consumer, or group of consumers, might be seen as [dis]empowered as follows:
**Indicator 1:** An empowered consumer is a well informed consumer.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:
(i) the choice set includes the 'good' quality outcome;
(ii) the options are 'reasonably' far apart in product characteristic space (that is, in a market where differentiation is important, they are sufficiently different from one another); and
(iii) there is the choice not to engage in a transaction.

**Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

**Indicator 4:** Under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers.

**Indicator 5:** Markets that are informationally demanding leave (even rational) consumers exposed to poor quality outcomes.

**Indicator 6:** A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

**Indicator 7:** A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

**Indicator 8:** The level of consumer empowerment in a market may be defined by reference to one or more other markets.

**Indicator 9:**
For a given market:
(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
(ii) when acting under the constraints of bounded rationality, consumers may attain 'reasonable' outcomes (one behavioural conclusion);
(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion).

**Indicator 10:** Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

**Indicator 11:** As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

**Indicator 12:** The impact of price discrimination on consumer empowerment in a given market is ambiguous.

**Indicator 13:** Consumer [dis]empowerment is greater the [higher] owner are transaction costs.

**Indicator 14:** For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

Extrapolating from these indicators, it can be seen that consumer empowerment has connotations both of the process of decision-making and of its outcome: it captures both the sense of some degree of 'control' within the consumption relationship, and of an outcome that is beneficial (the 'good' outcome). Both of these ideas can be interpreted either for an individual consumer, or for the consumer body (as relevant in a particular market) as a whole.
While the characteristics described by the indicators are not all directly observable, each indicator points to one or more 'symptomatic states' which are observable and which potentially give rise to concern. For example, we cannot directly observe whether consumers are well informed with respect to a given market (Indicator 1); but we can observe the extent to which prices are transparent and/or the ease with which consumers can compare products.

It should be noted that where one or more of the above indicators identifies a market as one in which consumers are disempowered, it cannot be assumed that consumers will, as a result, necessarily experience detriment. Indeed, it is possible for disempowered consumers to achieve good outcomes where there is effective regulation; and, conversely, empowered consumers may achieve poor outcomes in the face of coordinated effects on the supply side. Thus, application of the indicators points to those markets in which, as a result of a degree of consumer disempowerment, there is the potential for detriment.

Subject to the above proviso, the potential for detriment is graphically represented in the three-dimensional triangle of Figure 7.1. The three axes of the triangle represent the characteristics of transactions, consumers and the supply side, respectively, while the interior of the triangle represents 'outcome space'. A given market outcome is anchored in outcome space by three points, one on each axis. These points describe a plane. The higher [lower] the plane in outcome space, the greater [smaller] is the potential for consumer detriment.23

23 The area of a plane cannot be treated as a measure of consumer empowerment because the triangle is not drawn to scale; this is to say that it cannot be assumed that equal-sized movements along different axes will deliver equal-sized changes in the level of consumer empowerment.
To fix ideas, consider a rational and well informed consumer undertaking a simple/transparent transaction in a perfectly competitive market. The outcome is located in the plane described by the base of the triangle, ABC, indicating consumer empowerment and a good quality outcome. Since price equals marginal cost in this location, we may expect consumer surplus to be maximised. Few markets will generate outcomes in the plane ABC, but it provides a benchmark for consumer empowerment.

Conversely, as consumer disempowerment increases (say, as transactions become less transparent, information gaps open up, computational abilities are...
restricted and/or elements of monopoly power come into play), there is movement up the triangle indicating that the potential for poor quality outcomes is increasing. Consumers might experience poor quality outcomes in terms of:

- the choice of products available to them;
- the quality of the goods which they buy;
- the prices which they pay;
- and other measures of outcome as appropriate to a given market.

But to the extent that there exists a robust set of institutional arrangements serving consumer interests, the potential for poor quality outcomes may be ameliorated.

7.0 Conclusion

'Consumer empowerment’ is a slippery concept. Most of us would claim to have an intuitive grasp of the term and yet, hitherto, it has lacked both formal definition and the specification of theoretically-informed parameters. While it is unlikely that the measurement of consumer empowerment will ever amount to a precise science due to the idiosyncrasies of markets, economic theory can supply some theoretically-driven indicators with empirical 'grip' on consumer empowerment. Given adequate data, these indicators can be applied to markets in order to identify those in which consumers are most likely to be empowered and those in which they are most likely to be disempowered.
References


National Consumer Council, 2004, Why do the poor pay more ... or get less?, NCC Consultation Pack.


Waterson M, 2004, 'Research to analyse the links between consumer empowerment and competition/productivity and to scope further work which could be undertaken to quantify these effects', ….DTI ...

Annexe D Market Studies

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6.0 Summary table

7.0 A commentary on the market studies
1.0 Introduction
This section comprises four sector-specific case studies; these are the markets for: retail banking: personal current accounts (Section 2 below); car repairs/servicing (Section 3); energy (Section 4); and mobile phone services (Section 5).

1.1 Motivation
The case studies are motivated as follows. First, sector-specific case studies enable us to investigate the economic issues germane to the question of consumer empowerment in a specific empirical setting (these issues are identified in Section 4/Annexe C). For this reason, we have selected markets from amongst those that respondents to our questionnaire have identified as problematic for consumers. These include three markets with sector-specific economic regulators (banking, energy and mobile phones) and one without (car repairs/servicing); and one where the structure of supply and consumer choice and protection has been radically transformed in the last decade (energy) with considerable differences in progress between countries. Second, sector-specific case studies supplement and extend our analysis of the effectiveness of the general consumer protection regime in a given country (as undertaken in Section 3's 'Comparative Analysis', above) as well as focusing attention on the level of consumer empowerment prevailing in a particular market.

1.2 Methodology
The scope of the analysis includes seven countries (Australia, Canada, Denmark, Germany, Spain, the UK and the US) and draws on responses to our questionnaire as well as survey data and the policy literature. Cross-country comparisons of consumer transactions in each of the four markets are informed by the theoretically-driven indicators for identifying the extent of consumer empowerment which emerged from Section 4's review of the economic literature.

In undertaking these market studies, we have found that, in some cases, there is a dearth of data (in particular, for the car repairs/servicing sector); in other cases, we have found that data is only available in aggregated form (in
particular, for the European Union Member States). Thus, there are some limits on the extent to which cross-country comparisons can be made against all relevant indicators and for all countries individually. We note in this respect that a central finding of the European Commission's 'Consumer Markets Scoreboard'\(^1\) is that "complete, harmonised and comparable data on consumer outcomes are largely absent" and that an important forward task must be to develop such data. This finding underlines a point made in our discussion of benchmarking under Principle 11: the ability to identify and deal with consumer detriment calls in the first instance for evidence against key consumer indicators acquired through systematic monitoring of outcomes.

2.0 Retail banking: personal current accounts

It would appear that the financial services sector is (or has been) regarded as problematic in most of the seven countries under study; indeed, it is the sector cited most frequently in response to Questions 42 and 43 of our questionnaire (see Table D.1).

**Table D.1: Respondent references to the Financial Services sector in Questions 42 and 43\(^2\)**

<table>
<thead>
<tr>
<th>Country</th>
<th>Resp.</th>
<th>Q.42 Markets in which the average consumer is particularly prone to detriment:</th>
<th>Q.43 Markets which have been the subject of intervention:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>1</td>
<td>Financial services; insurance</td>
<td>Fringe lending; high interest small loans</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Financial services</td>
<td>Financial advice</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Financial services &amp; credit</td>
<td></td>
</tr>
<tr>
<td>Canada</td>
<td>1</td>
<td>Short-term loans</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Financial services; pay-day loans</td>
<td>Low-cost bank accounts</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Financial loss</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>1</td>
<td></td>
<td>Bank loans</td>
</tr>
</tbody>
</table>


\(^2\) The US is excluded from this table because they did not respond to the questionnaire in the requested format. However, we note that "protecting consumers in the financial services marketplace is a critical part of the FTC's [Federal Trade Commission's] consumer protection mission" and that the FTC has focused recent efforts in this area on subprime mortgage lending, payment cards, debt collection practices, and credit and debt counselling services (Federal Trade Commission: 'Prepared Statement before the Subcommittee on Interstate Commerce, Trade, and Tourism Committee on Commerce, Science and Transportation', United States Senate, Washington DC, September 12, 2007).
For the purposes of this study, we focus attention on one particular market within the financial services sector: the market for personal current accounts. This market has been selected because it supplies a product that is widely available and widely purchased across all seven countries; for example, 90% of UK households have a current account. Indeed, 86% of respondents from the EU-25 Member States consider that having a current account is an important part of their daily life. But this is also a market which is associated with consumer inertia, and which raises particular concerns for low-income/vulnerable consumers because of the potential for them to be excluded from the market.

A variety of services are offered under the heading of ‘personal current accounts’. Following a study by Oxera, we treat a current account as one that allows:

- payments into the account;
- payments out of the account by internet, telephone or through the branch;
- payments out of the account using a debit card;
- ATM cash withdrawals using a debit card (both domestic and international cash withdrawals);

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- automated payments out of the account, such as standing orders or direct debits; and
- cheque payments.

'Premium' accounts offering extra benefits/services are excluded from the analysis; but 'basic' bank accounts that offer fewer services and that are supplied to particular groups of consumers are referred to in the section on 'Vulnerable consumers' (Section 2.2.4 below).

Where reference is made to respondents' comments in the sections which follow, we specify if a comment refers to banking in particular or if it refers to the broader financial services sector.

2.1 Supply side characteristics

There are some variations in the supply-side characteristics of the banking sector across countries. Suppliers are national in scope in some countries (for example, Canada and the UK) while there is a strong provincial/local focus in others (for example, Germany, which has a wide range of different kinds of banks as well as the largest number of banks in Europe, and Spain). With respect to Europe, the retail banking sector is largely fragmented along national lines,\(^5\) despite the Second Banking Coordination Directive in 1992 (as part of the single European market project) and the establishment of the European Monetary Union in 1999.\(^6\) However, Denmark's three largest suppliers are regional in focus in drawing their customer bases from the Nordic countries as a whole. The US banking sector is particularly complex and highly fragmented, with several types of ownership structure: at the end of 2004, there were 9,014 federally insured credit unions (representing 83.6m consumers), 7,630 commercial banks, and 1,345 organisations in the not-for-profit mutual sector. In contrast, most retail banking services in Australia are provided by privately owned banks while the mutual sector is relatively small. Retail banking in Canada is mainly provided by a number of large privately-owned banks, and


around 1,100 credit unions/caisses populaires. The six largest Canadian suppliers together have a market share of 66% in deposits and 65% in loans.  

The introduction in recent years of online and telephone banking has seen some new suppliers enter the market and has expanded choice for consumers. However, it would appear that across most of the European countries, the traditional ‘high street’ branch network remains the primary channel for retail banking, giving large established suppliers a significant advantage over their new and smaller rivals. Thus, in the UK, for example, the ‘Big Four’ banks (NatWest, Barclays, Lloyds TSB and HSBC) continue to dominate the market and hold around 65.8% of all current accounts. In Denmark, the banking sector has become increasingly concentrated in recent years, with the largest bank holding more than half of the total system’s assets. A combination of increasing concentration and profitability has raised concerns, particularly amongst consumers, about insufficient competition in this market.

Table D.2 shows that for the period 1997–2003 concentration has risen for Denmark, Germany and the UK and fallen for Spain.

**Table D.2: European Banks: Concentration ratios (CR) by total assets**

<table>
<thead>
<tr>
<th></th>
<th>1997</th>
<th></th>
<th>2003</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CR3 (%)</td>
<td>CR5 (%)</td>
<td>CR3 (%)</td>
<td>CR5 (%)</td>
</tr>
<tr>
<td>Denmark</td>
<td>77.42</td>
<td>84.76</td>
<td>83.19</td>
<td>89.07</td>
</tr>
<tr>
<td>Germany</td>
<td>39.99</td>
<td>54.67</td>
<td>49.00</td>
<td>61.31</td>
</tr>
<tr>
<td>Spain</td>
<td>50.44</td>
<td>61.38</td>
<td>48.82</td>
<td>57.59</td>
</tr>
<tr>
<td>UK</td>
<td>41.50</td>
<td>57.70</td>
<td>43.93</td>
<td>61.53</td>
</tr>
</tbody>
</table>

Source: Casu & Girardone, 2006

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2.2 The demand side
2.2.1 Price

It is particularly difficult to compare the price of bank accounts across countries because 'price' can be comprised of several different fees and charges (account management fees, closing fees, excess borrowing charges, fees for ATM withdrawals and fees for credit transfers), and because some banks charge for a package whereas others charge for the different current account transactions separately. To add to the complexity, some current accounts are bundled together with other products, such as travel insurance and/or car breakdown cover. Moreover, consumer usage varies according to different stages in the life cycle/consumer profiles (for example, young professionals make a higher number of international ATM withdrawals and debit card transactions than students and pensioners); usage also varies from country to country (for example, US young professionals use fewer banking services than their UK counterparts; in Germany, a larger proportion of payments are made by cash than in the UK\textsuperscript{12}). However, Oxera's study of the price of banking finds that the fees on UK current accounts, and the total consumer costs of using current accounts (that is, including the costs of unauthorised overdrafts), are consistently among the lowest of the 11 countries which they investigate (Australia, Canada, France, Finland, Germany, Ireland, Italy, the Netherlands, Sweden, the UK and the US); it is only in the Netherlands that the fees charged for current accounts for most types of consumer are consistently lower than in the UK.\textsuperscript{13}

\begin{table}[h]
\centering
\caption{The market for personal current accounts: consumer profile price comparisons (€)}
\begin{tabular}{lrr}
\hline
 & Total cost of running a bank account & Fees only \\
\hline
\textit{Student} &  &  \\
UK & 11 & 14 \\
Australia & 90 &  \\
Canada & 81 &  \\
Germany & 44 &  \\
US & 39 &  \\
\hline
\end{tabular}
\end{table}

\textsuperscript{13} Oxera, 2006, \textit{ibid}. 

### Low-income family

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>Australia</th>
<th>Canada</th>
<th>Germany</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>21</td>
<td>118</td>
<td>93</td>
<td>76</td>
<td>23</td>
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</tbody>
</table>

### Young professional

<table>
<thead>
<tr>
<th></th>
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<th>Canada</th>
<th>Germany</th>
<th>US</th>
</tr>
</thead>
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<tr>
<td></td>
<td>32</td>
<td>210</td>
<td>116</td>
<td>96</td>
<td>36</td>
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</tbody>
</table>

### Median income family

<table>
<thead>
<tr>
<th></th>
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<th>Australia</th>
<th>Canada</th>
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<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>29</td>
<td>134</td>
<td>90</td>
<td>77</td>
<td>27</td>
</tr>
</tbody>
</table>

### Pensioner

<table>
<thead>
<tr>
<th></th>
<th>UK</th>
<th>Australia</th>
<th>Canada</th>
<th>Germany</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>18</td>
<td>70</td>
<td>54</td>
<td>59</td>
<td>4</td>
</tr>
</tbody>
</table>


Notes:
(i) Only those countries that fall within the scope of the current study are included.
(ii) For each country, data is based on a sample of leading suppliers of bank accounts that together form a representative picture of the market.
(iii) Consumer profiles represent 'typical' consumers and include universal and less common transactions.
(iv) Since US banks do not offer an overdraft equivalent, only current account fees are compared, rather than overall charges including overdrafts.
(v) Data in this table are not controlled for different patterns of usage across countries.

Oxera also find that of the countries which they study the UK has among the broadest range of services, with easy and cheap overdraft access from a current account, and access to cash overseas using debit cards. They find that although US and UK consumers may incur similar levels of costs, UK consumers arguably receive greater benefits.

---

2.2.2 Transparency

Oxera examine the transparency of retail banking prices as provided to consumers by the banks, and the transparency of charging (that is, how easy it is to understand when fees apply and when they do not). Then the level of transparency is categorised as follows:

A = high transparency (complete and easily understood information);
B = moderate transparency (occasional gaps and unexplained/unclear charges); and
C = low transparency (incomplete information and unexplained/unclear charges).

Table D.4 reports Oxera’s findings for those countries that are the subject of the current study, showing that UK banks are amongst the most transparent in their presentation of information about charges for their services.

<table>
<thead>
<tr>
<th>Bank price transparency</th>
<th>Transparency of charging</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>A</td>
</tr>
<tr>
<td>Canada</td>
<td>A</td>
</tr>
<tr>
<td>Australia</td>
<td>B</td>
</tr>
<tr>
<td>Germany</td>
<td>C</td>
</tr>
<tr>
<td>US</td>
<td>C</td>
</tr>
</tbody>
</table>

Source: Oxera, 2006

Note: Charges on unauthorised overdrafts are not included.

The degree of transparency of German bank charges is more limited than in the UK: information on charges is often not available on banks’ websites, and there is no single source of information on charges. The level of transparency in Australia is mixed: while most fees are disclosed, the complexity of products and charging structures is not matched by clear explanations of when certain charges apply. Moreover, there are several significant gaps in the availability of information on charges and interest rates. In the case of Canada, despite the complexity of the product offerings from some banks, there is a high level of transparency of fees and charges, enabling consumers to work out in advance...

---

what type of account may be optimal for them. In the US, limited price data is available from the websites of banks and credit unions, although this is often made available by telephone when requested.16

The European Commission’s report on retail banking finds that transparent pricing is broadly lacking across Europe.17 The report observes that the effective price charged by banks for providing current accounts may be reflected in the interest rates and fees applied to the account, and also in the level of charges for payment services; thus, it may be hard for consumers to assess the effective ‘price’ of a particular current account, and harder still to compare products across several suppliers with differentiated products. Indeed, a survey of the EU-25 Member States reports that around 34% of consumers find it difficult to compare offers related to a bank account; 53% of Danish respondents found this exercise difficult, and 25% of Danish respondents said they found this comparison very difficult to conduct.18

With respect to Denmark, the International Monetary Fund19 point to the difficulty faced by consumers in assessing and comparing bank products: even if a consumer can identify their needs, finding the bank with the best price-quality combination is not likely to be easy. The International Monetary Fund cite a study that finds that most Danish banks charge 35–70 different types of fees, with one bank having as many as 340 different types of fees.

One facet of the costs of running a current account which may elude consumers is ‘float’; this occurs when money reaches the beneficiary’s account some time after it leaves the paying customer’s account. The Office of Fair Trading estimates that the cost for consumers in terms of float interest is £30 million per year.20 In the UK, the revised Banking Code effective from 2003 provides for the

16 Oxera, 2006, ibid.
18 European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.
first time that financial institutions will inform customers of the length of the clearing cycle, which should improve the level of transparency in this regard.

Behavioural and industrial economists have argued that, because of cognitive limitations, consumers are liable to make sub-optimal choices in complex decision problems. Firms can exploit these limitations by introducing spurious complexity into tariff structures thereby weakening price competition and inducing a welfare loss. Thus, consumers do not merely have to navigate the 'natural' complexity of competitive markets; they also have to cope with the unnecessary complexity which has deliberately been created to confuse/disempower them.  

2.2.3 Switching

As the European Commission observes, switching current accounts can be a complex operation for consumers, with a costly administrative burden arising from: filling in the necessary forms for opening a new account; closing the old one; transferring balances; transferring direct debits; and setting up payment instructions. In addition, there is the risk that direct debits or other transactions might be lost in the process. Given this administrative burden, together with the widespread complexity of tariffs and lack of transparency in pricing (see Section 2.2.2 above), it is not surprising that account switching in the European Member States is reported to be extremely limited: data suggest that in the majority of Member States, annual switching rates for current accounts are low and stable at 5 to 10 per cent per year. Indeed, consumers are less likely to consider switching current account provider than they are to consider switching mobile phone, internet and fixed-line telephony providers. The proportion of customers surveyed who say they easily switched their bank account is relatively low, with the highest proportion – just 12% – in Greece. High switching


359 Benchmarking the UK Framework Supporting Consumer Empowerment
costs are perceived to be a key factor in discouraging consumers from leaving their current provider.23

With respect to the UK, the Cruikshank Report finds that consumers do not shop around much before choosing a current account supplier: at the time of this report, over 60% of new current account holders in the previous five years considered no other suppliers than the one they ultimately selected; and less than 5% compared the products of more than four potential suppliers. Then, once a current account has been chosen, the consumer will typically hold it for a long period of time, the median in the sample surveyed being 11.1 years.24

Chang and Waddams Price point out that potentially important factors in the level of switching activity are consumers' prior expectations (as against the realisation) of the time it takes to search and switch suppliers together with the expected gains. With respect to the UK, they find that the expected costs of switching current accounts (and to some extent, the expected gains) do influence switching activity, as a utility-maximising model would predict; but they also find that their role is small and that other factors, particularly the experience of switching in other markets, and the confidence with which consumers predict their likely gains and costs, are also influential. Table D.5 shows that the proportion of consumers from amongst the sample surveyed who actually search is small and that the proportion of those who actually switch supplier is even smaller.25 Chang and Waddams Price also find that the majority of respondents surveyed did not know how much they could gain by shopping around. A UK respondent to our own questionnaire commented that "there is some evidence of increased switching [in the UK], but it's the same people who always switch" (Question 43, emphasis added).

23 European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.
24 Cruikshank D, 2000, 'Review of Banking Services in the UK'. Available at: www.hm-treasury.gov.uk/documents/financial_services/banking/bankreview
Table D.5: The market for personal current accounts: Switching activity amongst UK consumers

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of respondents responsible for making decisions about current accounts</td>
<td>1,759</td>
</tr>
<tr>
<td>Number of respondents aware that choice was available</td>
<td>1,683 (96%)</td>
</tr>
<tr>
<td>Number of respondents who searched</td>
<td>125 (7%)</td>
</tr>
<tr>
<td>Number of respondents who switched</td>
<td>74 (4%)</td>
</tr>
</tbody>
</table>

Source: Chang & Waddams Price, 2008

Note: The survey was undertaken amongst a nationally representative sample of 2,027 adults.

With respect to Denmark, there is some evidence that shopping around is limited: one respondent to our survey observed that "If the good is butter, then the consumer shops around to save a penny, but they do not shop around to get better bank terms" (Question 33); and another respondent observed that: "Consumers do not switch when it is a complex product such as financial services, but they do when it is less complex, such as daily goods" (Question 34). The comments of Danish respondents chime with the findings of the International Monetary Fund report on banking in Denmark; they find that most depositors do not seem to like moving their bank accounts to other banks. The International Monetary Fund observe that this may be due to customer loyalty and locational convenience, but it may also indicate that the costs of doing so outweigh the benefits: switching banks is seen by Danish consumers as complicated, time-consuming, and with possible disruptions to payment activities.

There are several factors in addition to those we have already mentioned which may play some part in the low level of switching, although the significance of these other factors in each country is not clear.

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26 Chang & Waddams Price, *ibid.*
27 A potential explanation for less shopping around with respect to current accounts is that financial products require more analytic ability than everyday items, like food or clothing, and that shopping for financial products may be less pleasurable (Agarwal S, Driscoll JC, Gabaix X & Laibson S, 2008, 'The Age of Reason: Financial Decisions over the Lifecycle', Working Paper.)
First, a survey of 2000 Australian consumers finds that approximately 50% of respondents mentioned being worried about security as a reason for not switching to online banking channels.\textsuperscript{29}

Second, there is evidence that many of the leading banks in the European Member States practice ‘product tying’; that is, consumers are forced to buy one or more extra products in order to secure their desired product (for example, access to a loan/mortgage may require consumers to sign up for a current account with the same supplier).\textsuperscript{30} This practice can exacerbate the difficulty for consumers of comparing suppliers and identifying whether or not a switch would be advantageous. Moreover, the practice results in consumers being locked in to a particular supplier and becoming vulnerable to being charged higher prices than those offered to new consumers.\textsuperscript{31}

Third, the International Monetary Fund report that the largest Danish banks are making extensive use of the related practice of ‘product bundling’ by wrapping up current accounts, pension insurance and mortgage or other loans into one package. While bundled products may also be available separately and there is no compulsion to buy them (which distinguishes bundling from tying), the effect is to make it difficult for consumers to compare prices which inevitably reduces consumer mobility.\textsuperscript{32, 33}

A related issue arises when products are either bundled or tied together. This is the possibility of cross-subsidisation across different products which, again,
obscures the 'real' costs to the consumer of the particular product that they are interested in. As Gabaix and Laibson point out, optimising suppliers can exploit myopic consumers through marketing schemes that advertise the virtues of their accounts but which shroud high-priced add-ons, for example, bounced cheque fees, ATM usage fees, etc.\textsuperscript{34, 35}

And finally, there is the issue of the part played by loyalty-enhancing strategies (such as 'free' extra benefits) in reducing the level of switching as against providing real advantages to consumers.\textsuperscript{36}

One further factor that may be affecting switching behaviour, given the complexity of tariff structures, is the cognitive skill base of consumers and their financial sophistication. As we observe in our review of the economic literature, where consumers are limited in computational ability, the capacity to identify the optimal product is restricted, particularly where the parameters of decision making are complex (see Section 4/Annexe C). Agarwal \textit{et al} undertake an analysis of financial decision-making over the lifecycle. They find that relatively young borrowers have low levels of experience and a high degree of analytic function, while older borrowers have high levels of experience but relatively lower levels of analytic function. In addition, they suggest that older cohorts may use less sophisticated search technologies, for example, they may be less inclined to use the internet to compare financial products. These features of decision making may be expected to reduce consumer mobility in the market.\textsuperscript{37}

A report by the UK’s Financial Services Authority offers a different perspective on financial capability over the lifecycle: they find that the 18–40 age-group (on whom some of the greatest financial demands are now placed) are typically


\textsuperscript{35} Outside financial services, the classic example is provided by the hotel industry. Bedrooms may be priced very low to attract consumers in the first instance, with profitability subsidised by the high revenues to be earned from other services such as mini-bar drinks.


much less financially capable that their elders, even allowing for their generally lower levels of income and experience in dealing with financial institutions.\textsuperscript{38}

Set against this backdrop, an indicator of particular relevance is 'churn', which describes the share of customers who change providers in a given year. As Table D.6 demonstrates, churn is particularly low in the UK and below the average for the EU-15 Member States.

**Table D.6: The market for personal current accounts: The rate of churn for European consumers: weighted averages for the year 2005**

<table>
<thead>
<tr>
<th></th>
<th>Churn</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Denmark</strong></td>
<td>10.02%</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>8.46%</td>
</tr>
<tr>
<td><strong>Spain</strong></td>
<td>12.12%</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td>5.07%</td>
</tr>
<tr>
<td><strong>EU-15 average</strong></td>
<td>7.55%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007\textsuperscript{39}

Note: Churn after control: (new current accounts + closed current accounts)/(2*number of current accounts beginning of year) – absolute value of growth rate/2.

In interpreting data on the level of switching, it is important to bear in mind that not all customers are dissatisfied with their supplier. As the European Commission's report observes, retail banks typically compete on a range of product characteristics (price, quality of service, location and reputation), and for customers who are satisfied with their bank, the question of switching (and its related costs) do not arise. However, the report also suggests that the number of dissatisfied customers is typically greater than the number actually switching supplier, and that four sources of switching costs are likely to reduce the ability to switch: (i) the administrative burden on consumers, (ii) informational asymmetry and low price transparency, (iii) product bundling and tying, and (iv) closing charges.\textsuperscript{40}

\textsuperscript{38} Financial Services Authority, 2006, Financial Capability in the UK: Establishing a Baseline'.

\textsuperscript{39} European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.

\textsuperscript{40} European Commission, 2007, \textit{ibid.}
The relationship between consumer satisfaction and the level of switching activity is complex. The European Commission point to divergent views.\textsuperscript{41} According to banking industry experts, a low level of switching is not a problem in itself but rather a reflection of high consumer satisfaction rates and of the fact that consumers often have multiple banking relationships. According to consumer experts, consumer satisfaction has to be considered with caution as it depends on the level of expectations. They argue that what is important is to give consumers the possibility to exercise mobility without obstacles, in which case even satisfied consumers might be willing to switch if there are better offers on the market.

2.2.4 Vulnerable consumers

The European Commission's 'Consumer Markets Scoreboard' states:

"There is 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." (European Commission, 2008, p.7)\textsuperscript{42}

The market for current accounts raises issues in this regard. A study by the European Commission finds that apart from several countries where there is a legal right to a basic bank account, banks are not obliged to open bank accounts.\textsuperscript{43} Industry experts point out that the freedom to contract is a fundamental principle of market economy, guaranteed in several member States' constitutions. In contrast, consumer experts argue that it is impossible nowadays to participate in social and economic life without a bank account, and that this is why the provision of a basic bank account could be installed by means of a universal service obligation.

Where consumers are denied access to the market, they suffer both a direct detriment because many goods and services can only be paid for by means of direct debit or debit card, and an indirect detriment because a bank account is a prerequisite for most forms of legal employment and for access to the property

rental market. In the case of low credit ratings, consumers may not know of the existence of these ratings because the mechanism by which they are assigned is itself lacking in transparency. Moreover, consumers may find it difficult to remove incorrectly assigned low credit ratings if the correction mechanisms are inadequate and/or poorly understood. Claessens reports that the costs of being 'unbanked' for the lowest income segment in the US are estimated at 2.5% of median income.\textsuperscript{44} The unit costs of alternative informal mechanisms in the US can be very high; for example, to wire $100 from New York to Mexico costs $9 for the banked and $19 for the unbanked. In other words, unbanked consumers can pay high penalties as a result of being excluded from the market.

A survey of consumers from the EU-25 Member States finds that, compared with the EU average of 88%, 97% of Finnish and Danish respondents, and 96% of Spanish respondents, said that they had easy access to the banking system through a current account.\textsuperscript{45} German and UK respondents are not far behind, with 94% and 93% of respondents, respectively, saying that they had easy access. Those EU-25 consumers who said they had difficulty accessing the banking system through a current account were asked which particular difficulties they had encountered.

\begin{table}[h]
\centering
\begin{tabular}{l|c}
\hline
\textbf{Difficulty} & \textbf{\% of respondents} \\
\hline
The nearest branch is too far away from home/work & 34\% \\
The opening hours are not convenient & 16\% \\
Do not understand the services offered by the banks & 13\% \\
The waiting time at the bank is too long & 11\% \\
Other & 8\% \\
Do not have adequate means of transport to get there & 8\% \\
Don't know & 6\% \\
The local bank branch has closed down & 6\% \\
\hline
\end{tabular}
\caption{The market for personal current accounts: Specific difficulties in accessing the banking system amongst EU-25 Member States}
\end{table}

\textsuperscript{45} European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.
Have difficulty with the application procedure 6%
Tried to open a bank account but were refused 2%

It would appear that consumers living in rural locations are particularly disadvantaged with respect to access to the market: of those respondents who pointed to the distance from the branch as the problem (see Table D.7), 53% live in rural areas compared to 18% who live in large towns. Moreover, 10% of those living in a rural location say that they do not have a means of transport to get to their bank compared to just 4% of those living in towns. At least two UK banks offer mobile banking services for consumers in remote rural areas, one of which has been running since 1946. However, it is not clear how widely available these services are, either in the UK or in the other countries of the study.

The survey also asked respondents who are users of current accounts whether they think the service is affordable or not. Table D.8 shows that the majority (82%) feel that charges for current account services are affordable, while 8% feel that they are not. But nearly one in three European consumers who does not have access to a current account says that this is for reasons of affordability.

<table>
<thead>
<tr>
<th>Country</th>
<th>Affordable</th>
<th>Not affordable</th>
<th>Excessive</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>92%</td>
<td>Figure not provided</td>
<td>Figure not provided</td>
</tr>
<tr>
<td>Denmark</td>
<td>87%</td>
<td>7%</td>
<td>5%</td>
</tr>
<tr>
<td>Germany</td>
<td>86%</td>
<td>Figure not provided</td>
<td>10%</td>
</tr>
<tr>
<td>Spain</td>
<td>82%</td>
<td>12%</td>
<td>5%</td>
</tr>
<tr>
<td>EU-25</td>
<td>82%</td>
<td>8%</td>
<td>8%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007

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47 European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.
Claessens finds that evidence on the factors affecting households’ access to financial services is very limited. But he observes that, although there may be barriers to access on the supply side, it can be the case that there is a lack of demand. In support of this view, Claessens cites a US Treasury Department programme initiated in 1999 by which all federal benefits, such as social security payments, were paid by electronic transfer accounts. One impediment to the success of the programme was the large number of recipients without bank accounts. The Treasury provided an incentive to the banks to extend the supply of bank accounts amongst benefit recipients: a fee was paid for each electronic transfer account established which satisfied a minimum set of characteristics, including the requirement that the account should not cost the consumer more than $3 a month. The take-up was less than expected, suggesting that lack of use in this particular case reflects lack of demand rather than lack of access.

In some countries, some groups of consumers are offered special deals which recognise their circumstances; for example, in the UK, young professionals (with graduate accounts) and students have access to free overdraft facilities. It is not clear if the practice is widespread amongst other countries under study although a respondent to our survey from Canada comments: "There has been the introduction of low-cost bank accounts for people with little money as bank accounts are expensive in Canada. It was negotiated with the main banks that they would provide this service as significant re-regulation was taking place. It was required but was mainly an act of good faith" (Question 43).

Other groups of consumers identified by respondents to our survey as potentially vulnerable in relation to the market for current accounts include immigrants and the elderly in Denmark, and consumers with limited literacy and numeracy in the UK.

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2.2.5 Consumer satisfaction/complaints

In this section, we consider how dis/satisfied consumers are with the services provided to them by suppliers of current accounts. The European Commission's 'Consumer Markets Scoreboard' reports that the most important criterion influencing consumers' overall satisfaction is *pricing*, and that pricing over-rides quality and image in the case of the retail banking sector.\(^{49}\) But as we have seen, for all the countries under study, consumers can face (sometimes, serious) difficulties in determining the price of a current account, the level of charges, and whether or not charges apply to them.

The UK seems to perform 'reasonably' well with respect to terms and conditions. Eurobarometer asked a sample of EU-25 consumers if they thought that the terms and conditions of their contract with their current account supplier were fair or unfair. The UK is ranked third among the EU-25 (after Denmark and Finland) and, as Table D.9 shows, the proportion of UK respondents with positive perceptions of fairness is higher than the average for the EU-25.

<table>
<thead>
<tr>
<th>Country</th>
<th>Fair</th>
<th>Unfair</th>
<th>Don't know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>87%</td>
<td>9%</td>
<td>5%</td>
</tr>
<tr>
<td>UK</td>
<td>85%</td>
<td>11%</td>
<td>Figure not provided</td>
</tr>
<tr>
<td>Germany</td>
<td>78%</td>
<td>15%</td>
<td>6%</td>
</tr>
<tr>
<td>Spain</td>
<td>52%</td>
<td>32%</td>
<td>16%</td>
</tr>
<tr>
<td>EU-25</td>
<td>67%</td>
<td>25%</td>
<td>8%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007\(^{50}\)

Eurobarometer also examined the level of complaints. The relationship between consumer dis/satisfaction and the level of complaints is open to interpretation. It can be argued that the low level of complaints evident in Table D.10 is inconsistent with the (relatively) high level of dissatisfaction with banking terms and conditions in Table D.9. But the low level of complaints may instead

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\(^{50}\) European Commission, 2007, *Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest*.
represent a lack of awareness and/or usage amongst consumers of redress/complaints mechanisms.

Table D.10: The market for personal current accounts: Complaint levels amongst European consumers ('In the last two years, have you personally made a complaint about any aspect of a current bank account?')

<table>
<thead>
<tr>
<th>Country</th>
<th>Yes, to the service provider</th>
<th>Yes, to a complaint handling body (consumer organisation, European Consumer Centre, ombudsman, regulator)</th>
<th>Yes, to another party (e.g., industry body)</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>5%</td>
<td>0%</td>
<td>0%</td>
<td>94%</td>
</tr>
<tr>
<td>Germany</td>
<td>6%</td>
<td>0%</td>
<td>0%</td>
<td>92%</td>
</tr>
<tr>
<td>Spain</td>
<td>3%</td>
<td>0%</td>
<td>0%</td>
<td>96%</td>
</tr>
<tr>
<td>UK</td>
<td>9%</td>
<td>0%</td>
<td>0%</td>
<td>91%</td>
</tr>
<tr>
<td>EU-25</td>
<td>6%</td>
<td>0%</td>
<td>0%</td>
<td>93%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007

Eurobarometer find higher-than-average levels of complaint among managers (11%) and the self-employed (10%) compared with just 4% amongst house persons, the unemployed and the retired. One interpretation of this finding is that some groups of consumers are less confident about complaining, are unaware of the conduits for complaints and/or lack the skills required to pursue complaints.

With respect to the UK, the number of complaints received by the Financial Ombudsman Service is increasing (see Table D.11); their report for the financial year 2006–2007 finds a 47% increase in banking-related cases, largely fuelled by "the flood of enquiries and complaints about current account charges for customers who go overdrawn without prior authorisation" (p.29). However, this finding is difficult to interpret without further information (are consumers receiving a poorer product over time, or are consumers becoming better informed/more confident with respect to the Financial Ombudsman Service?).

51 European Commission, 2007, ibid.
Table D.11: The market for personal current accounts: Complaints received by the UK's Financial Ombudsman Service: 2001–2007

<table>
<thead>
<tr>
<th>Year end March</th>
<th>No. of complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>8061</td>
</tr>
<tr>
<td>2006</td>
<td>3543</td>
</tr>
<tr>
<td>2005</td>
<td>2521</td>
</tr>
<tr>
<td>2004</td>
<td>2106</td>
</tr>
<tr>
<td>2003</td>
<td>1602</td>
</tr>
<tr>
<td>2002</td>
<td>1208</td>
</tr>
<tr>
<td>2001</td>
<td>927</td>
</tr>
</tbody>
</table>


The Financial Ombudsman Service also report that they have received an increased number of complaints over the financial year 2006–2007 with regard to the so-called 'upgrading' of ordinary current accounts to fee-bearing accounts with added benefits. Complaints are from consumers who said either that their accounts had been upgraded without their knowledge, or that the fee structure had not been made clear to them.

Question 42 of our own survey asked respondents to identify any markets in which they felt consumers were particularly prone to detriment. A respondent from the UK pointed to the broad terrain of financial services as one where consumers can pay too much because they do not know how to compare products (a point reiterated by another UK respondent). The respondent observed that "This is particularly difficult for vulnerable consumers and the less well-educated who cannot afford to pay for their own financial advisors", and that "Markets that are prone to detriment are more likely to be those where consumers make large and infrequent purchases, which is a particular characteristic of the financial services market" (Question 42). The extent to which these observations apply to current accounts in particular is unclear.

\[53\] Financial Ombudsman Service, ibid.
In Spain and the UK, more than a quarter of banks’ current account fee income derives from excess borrowing charges, raising the question of the extent to which suppliers use these fees simply to cover the costs resulting from customers exceeding their borrowing limits or as an additional source of income. UK banks derive approximately £3 billion a year from interest and fines on unauthorised borrowing; the usual charge on unauthorised borrowing with a traditional account is 30%, sometimes more. Two inter-related issues are whether consumers are aware in advance of these charges and whether the level of charges is fair. These issues are in the process of being addressed in the wake of a large number of consumer complaints and a lengthy campaign by consumer organisations. Following a study into the complexity of the charging structures and practices associated with personal current accounts, the OFT has been taking seven banks and one building society to the High Court. A judgement reached on April 24th 2008 gives the Office of Fair Trading permission to challenge the charges levied by banks on unauthorised overdrafts. Thus, it has been agreed that these charges are covered under rules governing the Unfair Terms in Consumer Contracts Regulation 1999. If the case favours the OFT, up to £3.5 billions could be returned to consumers for 2007 alone.

Consumers in the US are also facing problems with respect to charges perceived to be unfair. Consumer complaints have become so pervasive that in 2007 the Consumer Overdraft Protection Fair Practices Act was reintroduced to prevent banks from charging overdraft protection fees unless customers explicitly opt in to the service.

2.2.6 Institutional support for consumers
As we observe in our review of the economic literature (Section 4/Annexe C), the institutional mechanisms which potentially support consumer interests can

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54 European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.
be categorised as 'hard' or 'soft'. The former include the law and its enforcement agencies which play a key role in defining consumer rights and in enforcing 'good' behaviour on the part of transacting agents, while the latter include the range of private and public sector organisations which supplement and reinforce the formal rules of market exchange. In this section, we focus on the existence and efficacy of these mechanisms as they apply to personal current accounts.

'Hard' institutional mechanisms

With regard to Europe, Eurobarometer reports a general dissatisfaction with respect to the protection of consumer interest in relation to current accounts, (see Table D.12).\textsuperscript{59} Denmark appears first in the ranking of EU-25 Member States, while the UK appears 8th, and Spain appears last.

Table D.12: The market for personal current accounts: Perceptions of the level of protection amongst EU-25 users

("In general, how well do you think consumers' interests are protected in respect of a current bank account?")

<table>
<thead>
<tr>
<th>Country</th>
<th>Very well</th>
<th>Fairly well</th>
<th>Fairly badly</th>
<th>Very badly</th>
<th>Don't know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>35%</td>
<td>45%</td>
<td>8%</td>
<td></td>
<td>8%</td>
</tr>
<tr>
<td>UK</td>
<td>22%</td>
<td>61%</td>
<td>9%</td>
<td></td>
<td>7%</td>
</tr>
<tr>
<td>Germany</td>
<td>15%</td>
<td>56%</td>
<td>16%</td>
<td>6%</td>
<td>7%</td>
</tr>
<tr>
<td>Spain</td>
<td>3%</td>
<td>40%</td>
<td>25%</td>
<td>7%</td>
<td>25%</td>
</tr>
<tr>
<td>EU-25</td>
<td>13%</td>
<td>51%</td>
<td>16%</td>
<td>6%</td>
<td>14%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007.\textsuperscript{60}

Consumer protection rules for retail banking, and the extent to which these are monitored and enforced, vary considerably across European Member States. In the US, the regulatory regime faced by banks varies from state to state, and with the type of ownership structure, leading to particularly complex

\textsuperscript{59} However, in interpreting the same data, the European Commission's 'Consumer Markets Scoreboard' draws attention more positively to the 64% of European consumers who feel that their interests are 'very well' or 'fairly well' protected with respect to current accounts (European Commission, 2008, 'The Consumer Markets Scoreboard: Monitoring Consumer Outcomes in the Single Market').

\textsuperscript{60} European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.

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arrangements.\textsuperscript{61} Thus, national commercial banks are regulated by the Federal Reserve; commercial banks can also choose a state charter, under which they are regulated on a state-by-state basis; then, credit unions operate under a range of different regulatory regimes, including those operated by the National Credit Union Association and the Federal Trade Commission. In the case of Canada, one of the respondents to our survey commented that certain sectoral guidelines are monitored, including those applying to financial services/banking (Question 12). An Australian respondent commented that "Legislation for insurance and finance is too copious" (Question 35).

UK respondents pointed to several interventions in the market for current accounts. One respondent pointed to the introduction of a code of practice to reduce charges; this intervention was judged to be partially effective. Also mentioned was a Competition Commission inquiry following an enforcement action by the OFT, the motivation being to provide better interest rates, although some banks had already begun to do so voluntarily; this intervention was judged to be partially effective. However, not all of the issues affecting consumers have been addressed: a UK respondent pointed to the problem of consumer lock-in that arises as a result of pre-existing relationships and observes that there has been no intervention in this regard.

\textit{‘Soft’ institutional mechanisms}  
In the discussion of benchmarking to be found in Section 2/Annexe A of this report, we point to how the provision of strong consumer advocacy groups can contribute to the empowerment of consumers by ensuring the representation of their interests in policy formulation and the setting of agency priorities (Principle 6). In addition, as the European Commission's 'Consumer Markets Scoreboard' observes, these groups play an important role as representatives of consumers and as an independent source of information, advice and help (for example, in

the case of complaints) to consumers. The issue of the charges levied on unauthorised overdrafts in the UK is a case in point (see Section 2.2.5 above): the consumer organisation Which? and the Financial Ombudsman Service have been playing leading roles in the long-running campaign to reduce these charges by providing information and advice to consumers in an accessible form.

As we point out in Section 2/Annexe A of this report, consumer education aimed at raising consumer market skills can make an important contribution to the empowerment of consumers (Principle 5). We note in this regard that The Financial Services Authority has devised a programme to develop financial capability amongst UK consumers, which includes the provision of education and advice in schools, higher education organisations, organisations that help young and often excluded adults, and the workplace.

Apart from the details made available by UK banks, there is a variety of alternative sources of information. A UK respondent to our survey cited advertising campaigns as an important source of information. Then, consumer magazines, such as Which?, and the quality press, periodically compare bank charges for current accounts. The consumer organisation Directgov provides a website explaining the nature of the different types of bank account, the services they offer, and the charges associated with running a bank account, together with a brief account of consumer rights and a link to the Financial Services Authority.

Online sources are helpful for those with the motivation and ability to access the information and then to process it; as we point out in Section 4/Annexe C, we have reason to suppose that there are limits on the number of consumers to whom this will apply. Moreover, as we note in our ‘Statistical Pen Sketch of the Countries under Study’ (Annexe F), only 27.7 people per 100 in the UK are

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64 One of our UK respondents observes that “Financial services is the biggest area of work for Which?” (Question 42).
internet subscribers. Thus, while the number of consumers with access to the internet is likely to exceed this number and to be increasing, there are limits on the accessibility of online information.

Surveys of bank charges on current accounts are undertaken and published by the German consumer organisation, Stiftung Warentest, and private publications such as Forium. These surveys provide thorough coverage of basic bank charges, but little or no information is included on detailed charges such as international transaction fees.\(^6^5\) In the US, a number of commercially run websites also provide details of interest rates and basic transaction charges for retail financial services. In the case of Denmark, in 2006, the Danish Bankers Association in coordination with the Danish Consumer Association, established a website allowing consumers to compare the prices of the 25 least expensive banks of a range of products.\(^6^6\) It is expected that this initiative will improve the transparency of pricing and quality of the different products and services on offer.

**Obtaining redress**

How satisfied are consumers with the handling of complaints in the market for personal current accounts?

Eurobarometer examine the handling of complaints pertaining to current accounts amongst a sample of consumers from the EU-25 Member States. They find that 50% of respondents consider their complaint has been dealt with well, while 47% take the contrary view.\(^6^7\)

The little evidence that we have from our own survey suggests that the courts are not regarded as the optimal route to redress in two countries at least. UK respondents observe that, with respect to problems pertaining to financial services, there are many different dispute resolution mechanisms apart from the

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\(^6^7\) European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.
courts. One respondent observes that "the Financial Services Ombudsman has lots of experience because of the tens of thousands of complaints it has dealt with." The respondent points out that access [to the ombudsman] is easier than it is to the courts and that "a consumer would need to be very committed to take an issue through the court process" (Question 56). The Financial Ombudsman Service itself reports in their Annual Review for the financial year 2006–2007 that they have resolved 111,673 cases of which 94% were settled informally, without the need for formal ombudsman decisions (the data relate to all complaints addressed to them and not just banking-related cases). They also report a 20% increase in the number of people visiting their website compared to the previous year: 225,000 complaint forms were downloaded, and the other most regularly-used online resource was the 'how to complain' page.

A respondent from Australia cited banking as an example of a market where it is easy to obtain redress because of the existence of an ombudsman (Question 27).

2.3 Consumer empowerment in the market for personal bank accounts
In this section, we draw together our findings with respect to the market for personal bank accounts and assess them against our indicators for identifying the extent of consumer empowerment. Where the availability of data permits, we rank the countries under study against these indicators.

Indicator 1: An empowered consumer is a well informed consumer.

Indicator 5: Markets that are informationally demanding leave consumers exposed to poor quality outcomes.

Indicator 7: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

Indicator 11: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

The market for personal current accounts is not one in which we are likely to find fully informed consumers. This is a market which is informationally and cognitively demanding; it is characterised by complex tariff structures and a lack of price transparency, making it difficult for consumers to compare products and identify the one that is optimal for them. These characteristics are to be found in all seven countries under study. Thus, when our findings are set against Indicators 1, 5, 7 and 11, we may say for all countries that the market environment does not provide for a high level of consumer empowerment.

However, against this backdrop, UK consumers benefit from a higher level of transparency than is to be found in five of the six other countries. Findings suggest the following ranking with respect to transparency:

UK > Canada > Australia > Germany > US > Denmark.

There is insufficient information pertaining to the market in Spain to make an assessment vis-à-vis the UK.

The UK performs less well with respect to switching. Four countries can be ranked on the basis of findings, as follows:

Spain > Denmark > Germany > UK.

However, as we observe in Section 8’s review of the economic literature, care has to be exercised in interpreting data on the level of switching activity.

Indicator 2: Where a choice set exists, the consumer is empowered if:

(i) the choice set includes the 'good' quality outcome;
(ii) in a market where differentiation is important, the options are 'reasonably' far apart in product characteristic space; and
(iii) there is the choice not to engage in a transaction.
(i) and (ii): The evidence suggests that a wide choice of products is available to consumers in all seven countries under study. However, the lack of transparency in the market might mean that, where a ‘good’ outcome exists, it is difficult for consumers to identify it. Several countries, including the UK, provide accessible consumer advice channels (Principle 3) which may be expected to help consumers identify the optimal product. But we have insufficient data to rank countries in this respect.

In terms of price, the UK appears to perform well with consumer costs consistently amongst the lowest for most types of consumer. Another approach to evaluating the level of consumer empowerment against Indicator 2(i) is in terms of consumer satisfaction with outcomes. With respect to the number of complaints made about bank accounts, the UK appears at the bottom of the ranking with the most number of complaints:

(least complaints) Spain > Denmark > Germany > UK (most complaints).

In the absence of further information, this finding must be interpreted with circumspection: the number of complaints may be a function of the consumer culture in a country and indicate a high level of consumer confidence and/or it may be a function of the (poor) quality of the product.

The UK performs ‘reasonably’ well with respect to consumer perceptions of the fairness of banking terms and conditions (85% of UK consumers surveyed perceive banking terms and conditions to be fair):

Denmark > UK > Germany > Spain.

(iii): Product tying restricts the ability of a consumer to close an account and switch to a better deal where it is available. To the extent that consumers are locked in to a supplier, the choice not to engage in a transaction is impeded. We do not have sufficient disaggregated data to comment on individual countries; but product tying would appear to be widespread amongst the leading European banks and, where it is to be found, the level of consumer empowerment will be low in this regard.
Indicator 3: The consumer is disempowered in the face of suppliers who are able to exploit monopoly power.

In countries where the traditional 'high street' branch network provides the primary channel for retail banking, large established suppliers have been able to sustain a significant advantage over their new and smaller rivals; this situation applies to several of the European countries. Under these conditions, there is the potential for suppliers to exploit monopoly power. There is no evidence to suggest that monopoly power is being exploited, but concentration is particularly high and increasing in Denmark, which, in combination with an increasing level of profitability, is raising concerns for consumers.

Indicator 4: Under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers.

There is no reason to apply Indicator 4 to the market for personal current accounts.

Indicator 6: A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

Indicator 8: The level of consumer empowerment may be defined by reference to one or more other markets.

We have argued that a personal current account is essential for participation in society and, hence, that consumers are disempowered if they are unable to access this market (and other related markets). The level of access to the market would appear to be particularly high in Denmark (97% of consumers surveyed say they have easy access) but Spain, Germany and the UK are not far behind:

Denmark > Spain > Germany > UK.
In terms of consumer perceptions of affordability, the UK performs 'reasonably' well (92% of consumers surveyed perceive a current account to be affordable):

UK > Denmark > Germany > Spain.

Amongst European consumers, those living in rural locations are disadvantaged. Affordability is an issue for some European consumers, but less so for UK consumers. Immigrants and the elderly are identified as potentially vulnerable in relation to this market in Denmark, as are consumers with limited literacy and numeracy in the UK. However, insufficient information is available against which to evaluate the level of consumer disempowerment for each country individually with respect to these particular groups of consumers.

**Indicator 9:** For a given market:
(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
(ii) when acting under the constraints of bounded rationality, consumers may attain 'reasonable' outcomes (one behavioural conclusion);
(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion).

Insufficient information is available to evaluate the level of consumer empowerment against this indicator. However, as we have observed, the market for personal bank accounts is one that is cognitively demanding. We also note that cognitive capacity will vary over the lifecycle which may translate into variations in the level of consumer empowerment for different consumer profiles.

**Indicator 10:** Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.
Asymmetric information is an issue in the market for personal current accounts. However, there is insufficient information available in order to evaluate the level of consumer empowerment for each country against Indicator 10.

**Indicator 12:** The impact of price discrimination on consumer empowerment in a given market is ambiguous.

One of the issues we have identified as germane to the market for personal current accounts is the potential for existing customers to be denied access to the advantageous terms offered to new customers. However, there is insufficient information available in order to evaluate the level of consumer empowerment for each country against this indicator.

**Indicator 13:** Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

Search costs are an issue in the market for personal current accounts, given the complexity of tariff structures and a lack of transparency. Insufficient information is available in order to evaluate the level of consumer empowerment for each country against Indicator 13. However, given increasing reliance on the internet as a source of information, one pertinent indicator might be the proportion of internet subscribers in the population.\(^69\) Against this indicator, the UK is in the middle of the ranking (with 27.7 subscribers per 100 people) (see Annexe F: ‘Statistical Pen Sketch of the Countries Under Study):

Denmark > Australia > UK > Canada > Germany > US > Spain.

**Indicator 14:** For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

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\(^69\) As we observe in Section 2.2.6 above, this figure is likely to under-estimate the number of consumers with internet access. Nevertheless, it provides a rough guide to the proportion of consumers who are willing and able to consult online information.
UK consumers appear to be ‘reasonably’ well supported by institutional mechanisms. In terms of consumer perceptions of the level of protection of their interests with respect to current accounts, the UK appears first in the ranking (with 80% of consumers surveyed perceiving their interests to be ‘very well’ or ‘fairly well’ protected):

UK > Denmark > Germany > Spain.

There is evidence to suggest that the UK’s Financial Ombudsman Service is a source of consumer empowerment. However, further information is required in order to evaluate the level of consumer empowerment afforded by the wider range of redress mechanisms for each country.

In summary, our investigation of the level of consumer empowerment in the market for personal current accounts points to a mixed picture for UK consumers. This is a market characterised by a number of different issues germane to the question of consumer empowerment – and in all of the countries under study. But against this backdrop, the UK appears to perform better than most.

3.0 Car repairs and servicing
Modern cars are so complex that few car owners are able or willing to service or repair their own car and many are not able to judge the repair needed with any degree of accuracy. “Car repair and servicing” is, therefore, a classic example of a credence good, defined as a good where even after purchase and consumption, the consumer is not able to assess the quality of the product accurately.70

The market raises three issues. First, the consumer may not be able to judge whether the repair or service which was undertaken was of an adequate standard. Second, the consumer may not know whether a repair was

70 Thus the finding by the Danish Consumer Agency that consumers find the market for car repair and servicing lacks transparency may at least to some extent be an inescapable feature of the market.
necessary. And third, the consumer may not know whether the repair was actually carried out in the first place. This may make it difficult for the majority of car owners to formulate a coherent complaint about perceived inadequate repair or servicing. Service and repairs are somewhat different in this regard. The consumer is likely to be particularly uninformed in taking a car for service where they are dependent on the garage for identification and resolution of any problems, while in the case of repair, there is likely to be some initial symptom which initiated the repair, and whose incidence the consumer can observe. Moreover, major (and high value) repairs are often paid for by insurance companies, who are generally much more empowered than individual motorists. In general, disempowerment would seem to be more problematic for service than for repairs.

The characteristics of asymmetric information raise a problem both for the consumers and the garages. Because complaining in many cases may not be a realistic option, it is important for the consumer to pick a reliable garage to carry out the work. Consumers therefore look at various observable measures to assess quality, such as how the garage looks. Trust is expected to be particularly important for consumers and widespread switching may in this market be a sign that all is not well. Consumers can also be expected to be willing to pay more for garages they believe they can trust. Garages who can convince consumers that they are worthy of this trust can as a result make more money and one would expect them to try to provide a credible signal of trustworthiness. One obvious way for a garage to signal is to bundle the repair and service provision with a new car dealership, thereby attaching the reputation of the garage to the reputation of the brand of cars sold at the dealership. Thus, the finding in a report on “mystery shoppers” in Germany\textsuperscript{71} that garages tied to dealerships offer a higher quality service \cite{ADAC_report}.

\textsuperscript{71} Report by ADAC, the biggest German lobby organisation for drivers/car owners, investigating garages in Germany. For details, see http://www.adac.de/Tests/Autokauf_Werkstatt/Werkstatt/default.asp?ComponentID=165022&SourcePageID=176883#.

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the faults deliberately introduced into the cars] and charge more for the repair and services is as would be expected.\textsuperscript{72}

While car repairs and servicing is only cited once in response to Question 42 (Denmark) and not at all in response to Question 43 of our questionnaire, there appears to be a general mistrust of the industry. For example, the 2006 statistics from the Canadian and US Better Business Bureaus\textsuperscript{73} on requests for reports\textsuperscript{74} on the industry place this industry in the top 10 of such requests for both countries out of more than 3,300 industries in their classification. The total number of requests for the US in 2006 for this narrowly defined industry was 635,344.\textsuperscript{75} This level of consumer activism may be high enough to be reassuring and if true across countries may go some way towards explaining the low level of public concern. The industry itself may be concerned that reputation and trust is important and respond rationally through self-regulation and through involvement in dispute resolution bodies. Indeed we find that for many of the countries, such dispute resolution bodies exist with widespread involvement and acceptance by industry members.

Unfortunately the obscurity of the transaction is matched by the paucity of data, and the absence of any direct comparative statistics. Although reliable consumer data is sparse and in most cases not comparable across countries, there appear to be concerns about car repair/servicing, and for this reason we were asked to include it in our study. For example, further information from the combined statistics of the Canadian and US Better Business Bureaus for 2006 show that Auto Repair & Service were ranked 11\textsuperscript{th} out of more than 3,348. This marks an improvement relative to 2005, where it was ranked 9\textsuperscript{th}. Similarly, for Denmark, Forbrugerstyrelsen (the consumer agency) in its annual report for 2007\textsuperscript{76} devote a full chapter to this market and note in the introduction to the

\textsuperscript{72} Reputation could alternatively be provided through a third-party assessment or guarantee, such as a kitemark scheme. The latter was recently introduced in the UK.

\textsuperscript{73} The Better Business Bureau system is comprised of 178 local BBB offices and branches serving communities throughout the U.S. and Canada. The BBB is a private, non-profit organization. Bureaus are not government or law enforcement agencies.

\textsuperscript{74} The report include a rating of the firm and information about any complaints via the BBB.

\textsuperscript{75} See http://us.bbb.org/WWWRoot/SitePage.aspx?site=113\&id=ab12ce37-3680-42cc-9817-df71ecfda32e

\textsuperscript{76} See Forbrugerredegørelse 2007 at: http://www.forbrug.dk/fs/omfs/00/fr07/
chapter that garages are for the fourth year running bottom of the “ForbrugerForholdsIndekset” (FFI).\textsuperscript{77} In response to this poor performance the trade association carried out their own research\textsuperscript{78} which on the one hand showed that only 30% of the consumers asked thought the garages were “trustworthy” or “very trustworthy” but on the other almost 70% thought that their own garage were “trustworthy” or “very trustworthy”. This difference in perception of the general and the specific reputation is intriguing. The analysis also shows that experiences of problems occur for 21% of households. These problems are concentrated on inadequate repair and poor service, though 10% of the 21% [i.e. 2.1% of the sample] found that they had been charged for work not carried out. More generally, using a scale from 1-10, where 1-4 indicate dissatisfaction, only 8% indicated that they were dissatisfied. In terms of complaints, the FFI score is very low [which is bad] partly caused by the lack of an independent complaints body, although such a body was created in November 2007. Despite the low FFI score, only 12% had encountered an actual need to complain. The complaint was accepted and corrections made free of charge in 7.4% of cases and in a further 2.3% of cases the consumer decided not to complain after all. In the remaining 2.6% of cases, the garage either refused to accept the complaint or demanded further payment to make corrections.

An important issue relates to the car warranty and who can carry out repair and services without invalidating it. There is a trade-off between an attempt by the car dealerships to tie in the repairs and servicing to their own garages and legitimate concerns of the car manufacturers arising from the obvious double moral-hazard problem, namely that consumers will take inadequate care of the car leading to greater need for repairs falling under the warranty. There has been action both on the EC level and in the UK. The EC Cars Block Exemption Regulation (BER), which came into force in October 2003, enables independent garages to compete on a more equal footing with franchised dealers including

\textsuperscript{77} FFI, Consumers’ conditions index, is an index measuring the position of a consumer in a market. The index combines measures on three aspects of consumer issues: trust, transparency and rights of complaint. Based on 1,063 respondents.

\textsuperscript{78} “Ry som fortjent”, available at: http://bil.di.dk/OmBilbranchen/Aarsdag+2007/Ry+som+fortjent.htm
the opportunity to become authorised to carry out servicing by manufacturers. By 2006, when the OFT commissioned a study into the market for car repair and servicing, only a small number of independent garages had become authorised under the BER. The OFT, as a result of a 2003 market study of new car warranties, called for an end to the warranty restriction. This restriction required owners to have their cars serviced at the garages of franchised dealers approved by the manufacturer in order for the warranty to remain valid. As a result of discussion with trade associations to develop codes of practice, manufacturers have dropped the specific restrictions which tied the warranty to servicing at a franchised garage in 2004. Despite the removal of such tying, owners of cars in warranty still show a preference for service at franchised dealers, even though the prices charged are generally higher, and then switch to the independent sector when the warranty expires.

3.1 Supply side characteristics

It is difficult to get relevant detailed information about market structure for any of the countries. What little information there is points to a structure where there are a large number of garages both absolutely and relative to the number of cars. Data for Denmark and the UK confirms this (see Table D.13).

<table>
<thead>
<tr>
<th>Table D.13: Market structure in Denmark and the UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
</tr>
<tr>
<td>Denmark</td>
</tr>
<tr>
<td>UK [1998]</td>
</tr>
</tbody>
</table>

Garages can typically be divided into those who are tightly related to car dealerships, those who belong to a chain that is independent of a car dealership or car manufacturer, and independent garages. These may belong to different or the same trade association which makes comparisons across countries very problematic. However, generally, there are a large number of independent garages, some of whom may belong to a trade association. There are also a

80 Information on this is available in the SMMT code of practice approved by the OFT in 2004.
81 See also table 4.2 in Evaluating the impact of the car warranties market study, OFT852.
number of garages tied to a brand name car manufacturer. Finally some of the independents may be authorised by one or more car manufacturers to carry out work without a warranty being invalidated.

In the UK, the size distribution of garages in terms of employees is very skewed with about 70% having four or fewer employees, about 10% having between five and nine, roughly 6% having 10-19 and the remaining, approximately 14%, having more than 20 employees.\(^{82}\) A more recent change to the structure in the UK is that there are now more small businesses (operating on two to three ramps), but fewer medium sized firms (operating on about six ramps).\(^{83}\) Where reputation matters and is costly to create, this is to be expected. Firms can create reputation through size, where a large, expensive facility requires substantial repeat business to be financially viable and hence offers a credible signal of a commitment to quality. And some reputation-building mechanisms may incur fixed costs. Alternatively firms can rely on word-of-mouth recommendations and repeat purchase, which may work better with very small garages.

Market power may arise if the consumer believes it important to have the car serviced by a garage linked to the manufacturer of the car. The importance of this link depends on the nature of competition in the market for new cars.

In the UK, despite there no longer being a tie between dealership and repairs during the warranty period, the 2006 study found that 86% used a franchised garage. The change in the tie was found to have lead to an increase in the market share of the authorised independent garages. As this undertaking was agreed in 2004 and the study is from 2006, this may have developed further. Hence it is too early to assess the impact of the agreement.

\(^{82}\) From chart 4.3 in “Evaluating the impact of the car warranties market study”, OFT852. Available at: http://www.oft.gov.uk/shared_oft/about_oft/of852.pdf

3.2 The demand side

In general, there is little consistent data across the countries which could be used to make comparisons. However, car ownership is extensive in all the countries considered. Apart from individual car owners who need car repairs and servicing, there are also in all countries fleet buyers, who purchase and maintain a larger fleet of cars. The latter may have some buyer power vis-à-vis an individual garage and may be better informed about the impacts of warranties from the choice of garage.

3.2.1 Price

Both from Germany and from the UK, there is some evidence that franchised garages are more expensive than independent but authorised garages which are again more expensive than independent, non-authorised garages. The 2006 evaluation of the OFT’s market study of car warranties found that, unlike in the German case, there appears to be no quality differences to explain this price differential. The report also concedes that there may be differences in other dimensions such as the cost of add-ons such as a pick-up service or a courtesy car, and reception facilities that improve the servicing ‘experience’ for the consumer but not necessarily the servicing quality for the car. The report does not engage with the fundamental problem caused by inescapable asymmetric information. If consumers use the reputation of the dealership as a proxy for the reliability of the garage, then one would expect to see a higher price at a franchised garage. Similarly, being authorised by a manufacturer links the reputation of the manufacturer to that of the garage and again this should lead to an informational price premium, if a weaker one than for the franchised garages. While the DTI mystery shopper report found little difference in the quality, this does not appear entirely borne out by the table reproduced below. However observations may be too few to assess if the differences are statistically significant.

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84 Work on this in general involves “mystery shoppers” providing garages with cars having problems known to the mystery shopper to assess how many of these they identify. This methodology also enables the investigator to assess bills, the work done and the work claimed to have been done.

85 Department of Trade and Industry (2002), “Car servicing and repairs, mystery shopping research”.
Table D.14: Number of faults rectified (by type) from 4 faults presented

<table>
<thead>
<tr>
<th>Number rectified</th>
<th>Independent No.</th>
<th>%</th>
<th>Dealer No.</th>
<th>%</th>
<th>Total No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>19</td>
<td>22%</td>
<td>16</td>
<td>13%</td>
<td>35</td>
<td>17%</td>
</tr>
<tr>
<td>1</td>
<td>23</td>
<td>26%</td>
<td>27</td>
<td>23%</td>
<td>50</td>
<td>24%</td>
</tr>
<tr>
<td>2</td>
<td>19</td>
<td>22%</td>
<td>26</td>
<td>22%</td>
<td>45</td>
<td>22%</td>
</tr>
<tr>
<td>3</td>
<td>17</td>
<td>19%</td>
<td>32</td>
<td>27%</td>
<td>49</td>
<td>24%</td>
</tr>
<tr>
<td>4</td>
<td>10</td>
<td>11%</td>
<td>18</td>
<td>15%</td>
<td>28</td>
<td>14%</td>
</tr>
<tr>
<td>Total</td>
<td>88</td>
<td>100%</td>
<td>119</td>
<td>100%</td>
<td>207</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Department of Trade and Industry (2002), “Car servicing and repairs, mystery shopping research”, Table 4.17

Something similar is observed for Germany. ADAC, the biggest lobby organisation for drivers/car owners, has carried out a comparative investigation of independent garages and garages tied to a car manufacturer. For all garages, they were presented with cars having the same faults. The performance is determined both by their ability to identify technical faults and their overall service.

Table D.15: performance of different types of garages: Germany

<table>
<thead>
<tr>
<th></th>
<th>Very poor</th>
<th>Poor</th>
<th>Adequate</th>
<th>Good</th>
<th>Very good</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tied to brand, authorised</td>
<td>3</td>
<td>1</td>
<td>5</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>Chain</td>
<td>7</td>
<td>7</td>
<td>4</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Independent (specialised)</td>
<td>11</td>
<td>8</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

It is noticeable from Table D.15 that for authorised garages, the performance is at least adequate and mostly good or better, while the performance of the independents is typically poor or worse. The report also notes that the authorised/tied garages are more expensive than the independents, so that there is a trade-off between price and quality. Performance appears linked to reputation so that those who are tied to a brand or part of a chain have an incentive to maintain their reputation, while this is less likely for independents, who as a result have to be cheaper in order to attract customers.

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86 For details, see: http://www.adac.de/Tests/Autokauf_Werkstatt/Werkstatt/default.asp?ComponentID=165022&SourcePageID=176883#
Research also shows that while there is a non-trivial difference in price in the UK, the potential saving, relative to the second-hand value of the car, is very small. Thus any degree of risk aversion could push the consumer to use a more expensive franchised garage.

3.2.2 Transparency
From the Danish index, we know that the industry scores very badly relative to other sectors on transparency. However, given the nature of the services provided by this industry, this is not necessarily a surprise nor something the industry or a regulator can remedy. There are clearly areas where transparency is desirable. For example, in the UK, transparency about when a warranty is violated is important and measurable. From the assessment of the OFT, it would appear that the level of transparency in this regard is somewhat limited.87

Other areas where there is evidence of transparency are the price of individual repairs, the likely bill and the extent to which the garage will carry out work without asking permission. The DTI “mystery shopper” report88 suggests that there is a substantial degree of transparency in some but not all areas.

3.2.3 Switching
There is no direct evidence on this, though evidence from both Denmark and the UK suggests that the vast majority of owners of new cars [still under warranty] use either a franchised garage tied to the dealership where they purchased the car or tied to the manufacturer of the car.

Evidence from Denmark also indicates that while many had concerns about garages in general, they were satisfied by their own. Whether this degree of loyalty is a rational response to the nature of the service or a sign of problems is impossible to judge.

88 Department of Trade and Industry (2002), “Car servicing and repairs, mystery shopping research”
A report for the OFT⁸⁹ suggests that there may be inadequate switching in the market because there is a substantial price difference between franchisee and independent, authorised garages and switching does not appear to have reduced this gap. However some of this gap can be explained by differences in the overall experience provided and, given the importance of trust when it comes to a credence good, consumers may be prepared to pay for peace of mind. The potential gains from switching garage do not appear large relative to other markets such as domestic energy supply.

If consumers are mainly concerned about price and there are price differences between garages, then extensive switching is a sign of consumers being well informed and acting on this information. If consumers are more concerned with (unobservable) quality, then extensive switching is a sign that consumers are dissatisfied with the level of quality provided in the market. Data for the UK from the 2006 assessment of the OFT market study⁹⁰ provide some evidence that the direct price of the repair or servicing is not the most important issue in choosing garage.

3.2.4 Vulnerable consumers
We do not have evidence on this issue with respect to the market for car repairs/servicing. Many of the particularly vulnerable consumers may not have a car, making this less of an issue.

3.2.5 Consumer satisfaction/complaints
There is some limited data on this and what there is should be treated with care. In particular, comparisons across countries/jurisdictions are problematic.

Data from the OFT, collected by the National Consumer Council (NCC), provide some information about complaints made to the Trading Standards officers. The number of complaints rose steadily from 1988 (13,376) to 1999 (33,011), at

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which point the OFT changed its classification system. In Table D.16 below we only give the data from 2000.

Table D.16: Car services – Complaints to trading standards (UK)\(^{91}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>28032</td>
</tr>
<tr>
<td>2001</td>
<td>25486</td>
</tr>
<tr>
<td>2002</td>
<td>24062</td>
</tr>
<tr>
<td>2003</td>
<td>23734</td>
</tr>
</tbody>
</table>

A summary of data from the US and Canada from the Better Business Bureau system is provided in Tables D.17 and D.18 below.

Table D.17: Canadian Complaint and Inquiry Statistics, Auto Repair & Service

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Total Reports Requested</th>
<th>Total Complaints</th>
<th>Complaint Rank</th>
<th>% Complaints Settled(^{92})</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>56,449</td>
<td>341</td>
<td>11</td>
<td>63.0%</td>
</tr>
<tr>
<td>2005</td>
<td>41,812</td>
<td>292</td>
<td>11</td>
<td>67.1%</td>
</tr>
<tr>
<td>2004</td>
<td>14,248</td>
<td>17</td>
<td>7</td>
<td>58.8%</td>
</tr>
</tbody>
</table>

Source: Better Business Bureau, Complaint and Inquiry Statistics, for 60103: Auto Repair & Service

Table D.18: US Complaint and Inquiry Statistics: Auto Repair & Service

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Total Reports Requested</th>
<th>Total Complaints</th>
<th>Complaint Rank</th>
<th>% Complaints Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>635,344</td>
<td>10,882</td>
<td>11</td>
<td>63.2%</td>
</tr>
<tr>
<td>2005</td>
<td>495,113</td>
<td>10,371</td>
<td>10</td>
<td>60.5%</td>
</tr>
<tr>
<td>2004</td>
<td>419,874</td>
<td>11,142</td>
<td>9</td>
<td>59.4%</td>
</tr>
</tbody>
</table>

Source: Better Business Bureau, Complaint and Inquiry Statistics, for 60103: Auto Repair & Service

\(^{91}\) From table 2 in “At a crossroads, getting the UK car servicing and repair sector back on track” by Steve Brookers, NCC.

\(^{92}\) The remaining cases are mostly not settled. Only in a few cases can the complaint not be pursued at all.
Two things are worth noting from the two tables. Firstly, consumers are relatively active in seeking information, as evidenced by the number of reports requested. Moreover as pointed out above, ‘car repair and service’ is highly ranked in both Canada and the US when it comes to information seeking. Secondly, in both markets, complaints also rank high, either just inside or outside the top-10. The number of complaints is, however, relatively modest. This is even more so when compared with the data from the UK, though such comparison may be misleading due to differences in definition.

Data from Denmark referred to above suggest that the amount of complaints is relatively modest while the degree of satisfaction appears to be relatively high.

3.2.6 Institutional support for consumers
The area is covered by standard consumer law and hence consumers do have the option of pursuing a garage through the courts if they have a specific complaint. The relevance of this clearly depends on the amount of money involved, the cost of the legal system and the ability of the consumer to demonstrate that they have a case. There may in some cases be additional regulation which affects consumers.

However, arbitration bodies, in many cases set up as a voluntary measure of self-regulation involving both industry and consumer lobby groups appear to be on the increase. Below we provide a sketch of some of the options for arbitration available to consumers.

In Denmark, the car owner lobby group, FDM (Forenede Danske Motorejere) together with industry associations have set up a new [Nov. 2007] complaints body called “Ankenævn for biler”. Prior to that consumers would have to go through the standard consumer redress channels.
In New South Wales, Australia, the Motor Vehicle Repair Industry Authority (MVRIA)\(^93\) provides a free alternative dispute resolution process in relation to the standard and/or fair cost of motor vehicle repairs. It aims to resolve disputes between motor vehicle repairers and customers. Customers must discuss and attempt to resolve disputes with repairers before contacting MVRIA. It does not handle warranty or insurance disputes. The role of the MVRIA is to facilitate a fair and efficient motor vehicle repair industry in which repairers are appropriately equipped and trained to achieve effective and safe repairs at a reasonable cost to consumers.

For the US and Canada, the Better Business Bureau provides a dispute resolution program, BBB AUTO LINE.\(^94\) They point out that the vast majority of the 37,682 disputes received in 2005 were settled prior to an arbitration hearing; only 16% of the incoming complaints required formal arbitration. The report also refers to a survey of car owners who had recently participated in BBB AUTO LINE to resolve their auto warranty dispute. The survey found that 88% would recommend the program to friends and family. There may also be other consumer protection organisations providing dispute resolution facilities at the state or province level.

In Germany, customers wanting to complain have two possibilities. They can bring the complaint to "Schiedsstelle für das Kfz-Handwerk", which offers arbitration if the garage is a member of Kfz. If the outcome of this is not satisfactory or the arbitration body is not relevant, then consumers are forced to use the courts.

For the UK, the British Standards Institution (BSI) awards the Kite-mark to suppliers and products that have been independently evaluated and conform to specification. As part of the scheme, garages who qualify for the kite-mark must be members of an independent arbitration scheme, whose services are offered at no charge to consumers who are unable to resolve a dispute with their

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\(^93\) MVRIA is a New South Wales Government Statutory Authority.
garage. In addition, according to the NCC report, each trade association has its own redress system. Trade associations with full OFT code approval should have an independent consumer redress mechanism in place.

An alternative to arbitration schemes and complaints bodies are self-regulatory measures to ensure that the problems do not arise in the first place. The NCC argues that self-regulation is often not well suited to sectors like car servicing and repair that are fragmented and include many small traders. Despite these concerns, the author of this report has been an active and enthusiastic supporter of the development of the new industry code, launched in March 2008 and which is already attracting considerable support from within the industry, even before its public launch in August 2008. It is too soon to assess the impact of the code, which aims for OFT approval, but this is an encouraging development.

3.2.7 Consumer empowerment in the market for car repairs/servicing
In a market where the consumer in most cases has no way of knowing whether or not they were offered a good deal, it is difficult to identify the extent of empowerment. Moreover the paucity of data makes it difficult to measure in anything other than qualitative terms; while the absence of any international comparative data renders impossible any direct ranking between countries. Consumers appear to be aware that there may be a problem and they appear to be willing to complain about perceived shortcomings in what they have been offered. In this regard, tables D.16, 17 and 18, though not necessarily directly comparable, indicate that UK consumers appear particularly willing to complain. This difference may either indicate a greater degree of activism (that is, more empowerment), or lower quality. Comparison with other markets, where UK consumers complain more but express similar levels of satisfaction as their counterparts in other countries, suggests that the complaints are likely to be part of the higher general level of awareness and empowerment in the UK.

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96 “At a crossroads, getting the UK car servicing and repair sector back on track” by Steve Brookers, NCC.
However despite the activity of consumers in complaining, the nature of this market suggests that there is likely to be continuing detriment in all countries. This section has outlined the many interventions in various countries by statutory and other bodies. But the consumers’ uncertainty about the quality of the service received, even after the event, is, not surprisingly, reflected in a lack of authoritative comparative figures on quality of service. Assessment in this market therefore has to rely on interventions and support for consumers, where the greater choice between garages in the UK market and the increased trust which should be engendered, the new industry code of practice (as well as perhaps from the new independent kite-mark scheme) provide potential empowerment for UK consumers on a par with that in other countries.

3.3 Conclusion

Given the nature of the service provided, reputation and trust is important in a consumer’s choice and assessment of the garage currently used. Because the consumer has no way of knowing whether all necessary repairs have been carried out and whether all repairs carried out were necessary, even after the event, trust and independent indications of quality are important. This may point towards the need for either more self-regulation or some degree of direct regulation.97

In terms of the market indicators, we can draw the following conclusions.

*Indicator 1:* An empowered consumer is a well informed consumer.

*Indicator 2:* Where a choice set exists, the consumer is empowered if:

(i) the choice set includes the 'good' quality outcome;

(ii) in a market where differentiation is important, the options are 'reasonably' far apart in product characteristic space; and

(iii) there is the choice not to engage in a transaction.

97 One remedy sometimes suggested for credence goods is a separation of diagnosis and repair. This may not be a feasible option where substantial costs can be saved by doing the repair at the same time as the diagnosis.
**Indicator 5:** Markets that are informationally demanding leave consumers exposed to poor quality outcomes.

**Indicator 7:** A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

**Indicator 10:** Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

The car repair market supplies a credence good with high levels of asymmetric information. Consumers are generally not fully informed about either what service they require or how well that service has been provided, even *ex post*. These problems are reflected in the level of concern and complaints about the sector. In the absence of such information, alternative measures to guide consumers to reliable providers are necessary. The combination of choice between garages for car repair services and the kite mark system of quality in the UK provides consumers with as much relevant information as in other countries.

**Indicator 3:** The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

Because of the information difficulties, trust and alternative indicators of quality are important.

**Indicator 4:** Under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers.

**Indicator 8:** The level of consumer empowerment may be defined by reference to one or more other markets.

In all countries the law requires that cars pass certain roadworthiness tests to protect other road users.
Indicator 12: The impact of price discrimination on consumer empowerment in a given market is ambiguous.

Prices from different types of garage vary, but these may reflect quality differences, so it is unclear how far they are discriminatory. In the UK, the OFT has identified and addressed issues of price discrimination between franchisee and independent garages.

Indicator 14: For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

This is particularly important for car repairs, where institutions such as kite-marks, codes of confidence and dispute resolution mechanisms are appropriate remedies for the information asymmetry. The high-quality end of the industry itself has a strong incentive to combat the negative consumer impression of the industry. In a number of countries there are recent initiatives to set up complaints resolution mechanisms with involvement from both industry and consumer organisations. This keenness of at least part of the industry to provide self-regulation should be welcomed, but scrutiny by regulators is important to ensure that such regulation does not (inadvertently) lead to barriers to entry.

There have been a number of recent initiatives in the UK, such as the OFT agreement with the industry regarding warranties, the kite-mark initiative and, more recently, the introduction of a voluntary industry code of practice. The UK provides services among the best amongst the countries surveyed in this regard.

4.0 Energy

In energy markets, consumers across Europe and much of the world face a transition from regulated monopoly to competition which offers them a choice of suppliers. The transition poses a delicate balance between effective regulation
and real competition, because while an incumbent’s prices are regulated at a level close to efficient costs, there is little headroom for new entrants to offer deals that are attractive to consumers and profitable for themselves, unless their costs are much lower than the incumbents. Changing to competitive energy markets is an important plank of the EU’s energy policy, though the policy is not without critics. In the current context we assess the effects on consumer empowerment, without attempting to draw conclusions about the overall effect of the policy itself.

We first provide evidence on the empowerment of consumers provided by respondents to the questionnaire. Although energy markets did not feature very strongly in this sector in Questions 42 and 43, they were frequently mentioned as examples of where specific consumer issues were present. As for markets where the average consumer was prone to detriment, in Germany, one respondent identified aggressive selling and lack of transparency as problematic, and particularly affecting the ill informed. In both Germany and Spain, respondents criticised the lack of choice, in Germany drawing attention to high prices which had a particular adverse effect on “the deprived”. In the UK it was an “anticompetitive market structure” described by one respondent which led to adverse effects on price and service which particularly affected the vulnerable and fuel poor. Pressure selling and inertia were mentioned in Australia and the UK; and inertia, transparency and high search and switching costs in Germany. Lock-in was seen as a problem by respondents in Australia and Germany.
Table D.19: Respondent references to the Energy sector in Questions 42, 43 and 44

<table>
<thead>
<tr>
<th>Country</th>
<th>Resp.</th>
<th>Q.42 Markets in which the average consumer is particularly prone to detriment:</th>
<th>Q.43 Markets which have been the subject of intervention:</th>
<th>Q.44 Issues named where energy markets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>lock-in</td>
</tr>
<tr>
<td>Canada</td>
<td>4</td>
<td>5</td>
<td>pressure selling, lock-in</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>7</td>
<td>8</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>10</td>
<td>Energy</td>
<td>transparency, high search, switching costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td>11</td>
<td>Energy</td>
<td>inertia, lock-in</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>13</td>
<td>Energy</td>
<td>energy</td>
<td></td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>Energy</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>Energy</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>16</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>17</td>
<td>18</td>
<td>19</td>
<td>pressure selling, inertia</td>
</tr>
<tr>
<td></td>
<td>20</td>
<td>Energy</td>
<td>energy</td>
<td></td>
</tr>
<tr>
<td></td>
<td>21</td>
<td>Energy</td>
<td>pressure selling, inertia, low income</td>
<td></td>
</tr>
</tbody>
</table>

Source: Centre for Competition Policy survey

98 The US is excluded from this table because they did not respond to the questionnaire in the requested format.
Table D.20 Interventions and effectiveness in the energy market

<table>
<thead>
<tr>
<th>Country</th>
<th>Market</th>
<th>issue</th>
<th>intervention</th>
<th>effectiveness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Electricity</td>
<td>pressure selling</td>
<td>door knocking illegal – some enforcement don’t know</td>
<td>partial</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>knocking illegal – some enforcement don’t know</td>
<td>partial</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>illegal – some enforcement don’t know</td>
<td>partial</td>
</tr>
<tr>
<td>Germany</td>
<td>gas, electricity</td>
<td>transparency</td>
<td>information</td>
<td>partial</td>
</tr>
<tr>
<td></td>
<td>gas, electricity</td>
<td>high search costs</td>
<td>information</td>
<td>partial</td>
</tr>
<tr>
<td></td>
<td>electricity</td>
<td>high switching costs</td>
<td>information</td>
<td>partial</td>
</tr>
<tr>
<td></td>
<td>Electricity</td>
<td>inertia</td>
<td>none</td>
<td>NA</td>
</tr>
<tr>
<td></td>
<td>Electricity</td>
<td>lock-in</td>
<td>none</td>
<td>NA</td>
</tr>
<tr>
<td>UK</td>
<td>Energy</td>
<td>pressure selling</td>
<td>license condition Enforcement; media</td>
<td>Ineffective; completely effective</td>
</tr>
<tr>
<td></td>
<td>Energy</td>
<td>pressure selling</td>
<td>Enforcement; media</td>
<td>Ineffective; completely effective</td>
</tr>
<tr>
<td></td>
<td>Energy</td>
<td>inertia</td>
<td>comparison websites</td>
<td>completely effective</td>
</tr>
<tr>
<td></td>
<td>Energy</td>
<td>inertia</td>
<td>public persuasion</td>
<td>completely effective</td>
</tr>
<tr>
<td></td>
<td>Energy</td>
<td>low income</td>
<td>self regulation</td>
<td>ineffective so far</td>
</tr>
</tbody>
</table>

Source: Centre for Competition Policy survey

Respondents were not optimistic about the effectiveness of interventions. In only two cases, both in the UK, were these judged to be completely effective – namely media pressure and the provision of comparison websites. The concentration of issues and interventions in three countries does not necessarily reflect their absence elsewhere. In Canada the lack of mention is likely to be related to Provincial differences and responsibility for energy; and in Spain and Denmark due to the low levels of activity in the markets.

Respondents clearly saw important issues to be raised, partly because of the comparatively recent nature of choice. Because competition and regulation in energy markets are determined at State/Province level in the US, Australia and Canada, consumer issues in those countries are reported in the areas where
competition is most advanced, namely: Texas; Victoria, New South Wales and South Australia; and Alberta, respectively. In the UK the analysis is applied to England, Scotland and Wales, and not to Northern Ireland, where markets have been opened much later. The markets referred to throughout are those in which households are the consumers.

4.1 Supply-side characteristics
EC countries were obliged to open all their energy markets from July 2007, and Denmark, Germany, Spain and Britain all opened their gas and electricity residential markets before this date. The first of the countries in our sample to allow such choice was Great Britain, where gas markets were opened between 1996 and 1998; and electricity markets in 1998–1999. After considerable cross entry, from 2003 the market was supplied by six large companies, namely the national gas incumbent and five consolidated regional electricity. By June 2007 the incumbents in the national gas market and the 14 regional electricity markets retained between 40% and 80% of the market, averaging just under 50%. These figures rather overstate the role of entry, since within each region the electricity incumbent and the gas incumbent supply a majority of the dual fuel accounts, to which ‘switchers’ most commonly change. Concern about the competitiveness of the market resulted in the launch of two inquiries in early 2008 – one by the relevant Parliamentary committee, and one by the regulator. In particular there is concern about the potential for coordinated effects between suppliers.

In Germany a number of companies have entered since 1999, but many later left. There are around six entrants, offering some innovative tariffs. In Spain, initial entry was reversed when the government imposed regulatory prices lower than costs, so only one independent retailer remains. In Denmark there is very little choice for the household consumer, partly because of the predominance of Combined Heat and Power, in which electricity is a joint product.

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99 With some delays negotiated for new member states.
Beyond the EC, there are competitive markets in parts of Canada, the US and Australia. In Alberta, three companies compete for household custom. Since the gas market is liberalised, retailers offer dual fuel where possible. In Texas, more than 25 retailers offer electricity supply in each of the Texan transmission service areas. And there has been effective entry in the Australian States of Victoria, New South Wales, and South Australia.

Commentators generally assess that there is sufficient competition to exert some constraining role on household energy price levels not only in the UK, but also in Texas, Alberta and parts of Australia, while little such control is exerted by competition in markets in Denmark, Germany, and Spain. The relative competitiveness of the European markets is much as it was in 2006, reflected in the following table.

**Table D.21 Energy market ranking for downstream markets**

<table>
<thead>
<tr>
<th>Country</th>
<th>Electricity Score</th>
<th>Gas Score</th>
<th>Gas Rank</th>
<th>Overall Competitiveness Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>8.8</td>
<td>1.6</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Germany</td>
<td>8.8</td>
<td>1.8</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Spain</td>
<td>3.1</td>
<td>4.2</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>UK</td>
<td>9.1</td>
<td>7.2</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

*Source: DTI, 2007*¹⁰³

4.1.1 Regulation of final prices

The traditional way of protecting consumers in energy markets has been by direct price control, either implicit (for publicly owned companies) or explicit (for public or private suppliers). Price caps were removed from all final energy prices in Britain in 2002. In Spain we have seen that their reintroduction stifled the development of the competitive market, but did provide direct protection for current consumers, and their presence in the Community remains a concern for the European Commission (EC, 2008). Final price controls remain on electricity prices in Denmark, Germany and Spain, and on final gas prices in Denmark and

¹⁰² This includes non-household customers.
Spain. In Texas the regulated ‘price to beat’, which acted as both a ceiling and a floor for incumbents, was removed in 2006. Alberta retains an element of price regulation as part of transitional arrangements. All three of the Australian States examined have a ‘default’ tariff for small consumers who do not switch, whose rate is determined with or by the regulator and whose level determines the headroom available for potential competitors. There are plans to phase these out as competition becomes effective.

The background for this deregulation was one of rising wholesale energy prices of energy. While Britain became a net exporter of energy (after running a large surplus on fuel trade since the early 1980s), this affected the tax payer rather than the consumer, since UK energy followed world prices, even when indigenously sourced. However world prices have been rising since 2003, and particularly in 2007–2008. Wholesale gas prices were estimated to increase from 0.63 p/kwh in 2003 to 1.44 p/kWh in 2006. Between the end of 2006 and mid 2008, crude oil prices, which are a strong influence on gas prices, have more than doubled. These changes affect gas price directly, and electricity prices according to the dependence on gas and oil as a feedstock in electricity generation. Where this is particularly high, as in the UK, prices would be expected to rise more than in countries where a high proportion of electricity is generated from coal, nuclear or hydro sources.

4.2 The demand side
4.2.1 Price

Table D.22 Domestic electricity prices in the EU and the G7 countries, pence per kWh

<table>
<thead>
<tr>
<th></th>
<th>Excluding taxes</th>
<th>Including taxes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1995</td>
<td>2006</td>
</tr>
<tr>
<td>Denmark</td>
<td>5.72</td>
<td>7.90</td>
</tr>
<tr>
<td>Germany</td>
<td>10.31</td>
<td>10.38</td>
</tr>
<tr>
<td>Spain</td>
<td>10.67</td>
<td>7.34</td>
</tr>
<tr>
<td>UK</td>
<td>7.46</td>
<td>9.64</td>
</tr>
<tr>
<td>Canada</td>
<td>3.30</td>
<td>-</td>
</tr>
<tr>
<td>USA</td>
<td>5.33</td>
<td>5.64</td>
</tr>
<tr>
<td>EU 15 &amp; G7</td>
<td>6.59</td>
<td>7.62</td>
</tr>
<tr>
<td>Median</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Energy prices in different countries vary according to a variety of factors, including availability of indigenous sources and tax rates. Although the UK scores highest on the competitiveness table, its electricity prices are not the lowest. The increase in prices over the past eleven years is above the median for the EU15 and G7, and second only to Denmark, both before and after taxes. Some of this is almost certainly due to the rising price of gas and oil, and the high proportion of these as fuel feed stocks in electricity generation. This may mask any evidence that the competitive market has delivered price benefits in the UK which are unavailable to other countries.

### Table D.23 Domestic gas prices in the EU 15 and the G7 countries pence per kWh

<table>
<thead>
<tr>
<th>Country</th>
<th>1995</th>
<th>2006</th>
<th>% increase</th>
<th>1995</th>
<th>2006</th>
<th>% increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>3.02</td>
<td>na</td>
<td></td>
<td>3.77</td>
<td>na</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>2.10</td>
<td>na</td>
<td></td>
<td>2.60</td>
<td>na</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>1.66</td>
<td>2.86</td>
<td>72.49</td>
<td>1.79</td>
<td>3.01</td>
<td>67.93</td>
</tr>
<tr>
<td>Canada</td>
<td>0.83</td>
<td>2.11</td>
<td>155.68</td>
<td>0.88</td>
<td>2.25</td>
<td>155.68</td>
</tr>
<tr>
<td>USA</td>
<td>-</td>
<td>2.36</td>
<td></td>
<td>1.33</td>
<td>2.48</td>
<td>86.47</td>
</tr>
<tr>
<td>EU 15 &amp; G7</td>
<td>1.66</td>
<td>2.82</td>
<td>69.73</td>
<td>1.79</td>
<td>3.53</td>
<td>97.21</td>
</tr>
</tbody>
</table>

For gas, the UK price is close to the EU and G7 median before tax, though considerably lower after tax (VAT is levied at 5% on domestic fuel in the UK), and is higher than the price in the US and Canada. The increase in price for all countries in the sample arises from increasing wholesale costs; for the UK the rise between 1995 and 2006, particularly after tax, is lower than in other countries in our sample, which does suggest that consumers benefited from opening the UK market to competition in this period.

Because of rising fuel costs, and the vertical integration of energy companies, it is much more difficult to identify profits and margins for each stage of the supply
chain, and in particular at the retail level. A study in the UK examining components of the increase in price between 2003 and 2006, found that profits had increased considerably as a proportion of the electricity price; in gas there was no evidence that profits had increased, but the unaccounted spend had risen.  

4.2.2 Transparency

Transparency is closely related to marketing, and it is one of the areas where respondents in the survey showed most concern about energy markets. The products themselves are homogeneous and, in the case of electricity, a particular unit delivered cannot even be traced to its source. One of the most effective ways for entrants to a region to gain custom in Britain, the US and Canada was door knocking, but this tends to provide information only about the canvassing company. Abuses of the process led to large fines in all these countries. In Victoria, too, the main source of information for consumers who switched was doorstep sales or telesales.

A private market in price comparison sites has developed in the UK, but there has been concern about the impartiality of such advice, leading to the introduction of a ‘confidence code’ by the consumer watchdog. In Victoria and South Australia, websites of comparative prices are run by the Essential Services Commission, though there is no equivalent in New South Wales, and few consumers knew about it in South Australia. In Texas a customer education programme in English and Spanish, including the “Texas Electric Choice” campaign has aimed to educate Texans about the changes and choices in the retail electric market. The websites www.powertochoose.org and its Spanish counterpart www.poderdeescoger.org are provided by the Public Utility Commission, and provide general information and price comparisons. In Alberta, the Government provides comparisons on the relative prices of suppliers, but in a less sophisticated way than a comparison website.

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has a number of apparently private websites, and Denmark an industry provided website which focuses on saving energy rather than comparing prices.

If comparison websites are to be effective, consumers need both to know about them and to trust them. Private providers may be more assiduous in advertising their services, but may be less trusted by the general public. The UK solution of ‘approved’ websites under energywatch’s confidence code has the potential to combine the merits of private promotion with confidence inspired by public approval, but only if consumers understand and respond to the official approval provided.

One indication of transparency is how well the outcome of consumers decisions align with their own stated intentions in making those decisions. Analysis of electricity switching decisions by consumers in the UK shows that even among those who were switching solely to save money, at least 20% ended up paying more than before. The authors of this study examined a number of explanations and concluded that the errors were due to difficulty in accessing and processing the necessary information. Unfortunately there is little evidence on whether such a level of errors is common in other markets, but it does add to other evidence that ‘too much’ choice may sometimes lead to poor outcomes.

4.2.3 Switching
The degree of switching varies considerably between countries. It is difficult to obtain figures calculated on a consistent basis, but the following figure provides a snapshot of activity in 2006–2007, based on the proportion of utility consumers who switched during the year. The UK, Victoria and South Australia were ranked as “Hot” (more than 15% of consumers switching per year); New South Wales and Texas as “Active” (5% to 15% switching); Alberta and Germany as “Slow” (1% to 5% switching); and Denmark and Spain as “Dormant” (less than 1% switching).

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4.2.4 Vulnerable consumers
As a necessity, household expenditure on energy increases with income but at a decreasing rate. Increases in energy price levels are therefore regressive in the sense that a higher proportion of low income household budgets are affected than of high income households. Liberalisation of the market may also change the structure of prices by eroding cross-subsidies that could be maintained by a monopolist. Where such previous cross-subsidies supported low income households, their removal clearly has an adverse effect on these consumers.
As energy prices have risen in the last few years, focus on the affordability of energy has increased, and the UK Government has set itself targets to abolish Fuel Poverty, some of them extremely challenging. In the March 2008 budget the Chancellor announced that companies in the UK would be required to do more to help the fuel poor, though whether this will be achieved through voluntary action or whether regulatory intervention will be required is still unclear.

Consumer views within the EC were collected in a special Eurobarometer study undertaken in 2006 (before some recent sharp price increases).  

Figure D.2:

![Affordability amongst electricity consumers, 2006](image-url)

---

109 European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.
Affordability amongst gas consumers, 2006

Source: European Commission, 2007

UK respondents were significantly more likely to believe that gas and electricity were affordable than consumers from other European countries in the sample, around 14 percentage points higher than the average in the EU-15. Correspondingly fewer UK consumers thought that they could not afford energy or that prices were excessive.

Suppliers in the UK have introduced some ‘social tariffs’ for households on income-related benefits, and further measures are currently under discussion by companies, government and the regulator. In Texas, a system benefit fund provides for the need of some low income customers and a low income energy efficiency programme. In South Australia, the Essential Services commission monitors the effect on low income groups as one of its measures of progress in the competitive energy market. In Victoria the Financial Hardship Policies Guideline requires flexible payment options.

European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.

---

**Figure D.3:**

Affordability amongst gas consumers, 2006

Source: European Commission, 2007

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4.2.5 Consumer satisfaction/Complaints

Satisfaction with electricity and gas suppliers in 2007 was measured by the Consumer Markets Scoreboard for European countries.

Table D.24 Consumers’ satisfaction with the markets for electricity and gas

<table>
<thead>
<tr>
<th></th>
<th>electricity</th>
<th>gas</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>satisfied</td>
<td>dissatisfied</td>
</tr>
<tr>
<td>Denmark</td>
<td>80</td>
<td>2</td>
</tr>
<tr>
<td>Germany</td>
<td>72</td>
<td>2</td>
</tr>
<tr>
<td>Spain</td>
<td>42</td>
<td>4</td>
</tr>
<tr>
<td>UK</td>
<td>58</td>
<td>6</td>
</tr>
<tr>
<td>EU15</td>
<td>57</td>
<td>5</td>
</tr>
<tr>
<td>EU25</td>
<td>59</td>
<td>6</td>
</tr>
</tbody>
</table>

Source: European Commission, 2008

Those who had made a formal complaint about any aspect of the industries, and, in these cases, the level of satisfaction with the handling of their complaint are shown below.

Table D.25 Percentage of consumers who have made a formal complaint and satisfaction with complaint handling – % saying ‘well’ as opposed to ‘badly’

<table>
<thead>
<tr>
<th></th>
<th>Electricity supply services</th>
<th>Gas supply services</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% consumers who have made formal complaint</td>
<td>% say dealt with well (rather than badly)</td>
</tr>
<tr>
<td>Denmark</td>
<td>3</td>
<td>65</td>
</tr>
<tr>
<td>Germany</td>
<td>8</td>
<td>32</td>
</tr>
<tr>
<td>Spain</td>
<td>3</td>
<td>45</td>
</tr>
<tr>
<td>UK</td>
<td>9</td>
<td>52</td>
</tr>
<tr>
<td>EU25</td>
<td>6</td>
<td>49</td>
</tr>
</tbody>
</table>

Source: European Commission, 2008

Consumer satisfaction with suppliers in the UK was similar to that in the EU-15 and EU-25, higher than in Spain, but lower than in Denmark and Germany.

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Consumer dissatisfaction was slightly higher in the UK than in the comparator countries and was reflected in higher levels of complaints; however amongst complainants, a slightly higher proportion was satisfied with the way their complaint was dealt with. In South Australia total complaints are below 1 per 100 customers (0.75 for electricity and 0.31 for gas).\textsuperscript{113}

UK consumers were more positive about the safety of their electricity and gas supplies than in any of the comparator countries, or in the EU 25 as a whole, showing a high level of confidence in the system.

**Table D.26 Percentage of consumers who believe that the service is safe or not safe (remainder ‘don’t know’)**

<table>
<thead>
<tr>
<th>Electricity supply services</th>
<th>Gas supply services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safe</td>
<td>not safe</td>
</tr>
<tr>
<td>Denmark</td>
<td>96</td>
</tr>
<tr>
<td>Germany</td>
<td>91</td>
</tr>
<tr>
<td>Spain</td>
<td>86</td>
</tr>
<tr>
<td>UK</td>
<td>96</td>
</tr>
<tr>
<td>EU25</td>
<td>89</td>
</tr>
</tbody>
</table>

Source: European Commission, 2008\textsuperscript{114}

4.2.6 Institutional support for consumers

All countries have an energy regulator who is established by statute and funded publicly (usually through levies on the companies) and which is responsible for regulating monopoly elements of energy. This is required by the European Commission and there are regulators at State/Province level in Australia, the US and Canada. In Denmark, Australia and the US these regulators include consumer representatives. The UK has a separate energy consumer representative body, energywatch, though this will be incorporated into the National Consumer Council (also statutorily established and publicly funded) from 2008. The UK and Australia also have energy ombudsmen to deal with complaints, organisations which are funded by the supply industry. In Denmark and Alberta the general consumer ombudsman (who deals with energy


complaints among others) is part of the statutory Danish National Consumer Agency. In the US, several voluntary energy consumers’ organisations have developed with a focus on influencing the political agenda directly, as much as assisting individual consumers.

4.2.7 Consumer empowerment in the markets for energy

The dramatic change in the role of consumers in energy markets is reflected in the factors discussed above. As competition has been introduced, the protection of price caps has been replaced by the ability to choose different suppliers. There are also accompanying responsibilities. If consumers do not (as a group) exercise such choice, the incumbent will retain market power from its dominance. Inertia was mentioned by respondents as a problem in situations as diverse as the ‘slow’ German market and the ‘hot’ British market. While consumer activity is crucial in overcoming incumbent power, it cannot address a softening of competition, if suppliers choose not to compete vigorously in the market. Such behaviour requires vigilance and possible intervention by authorities to exercise their general competition powers in this, as in other markets. This leads directly into assessment of Indicator 3 in energy markets:

Indicator 3: The consumer is disempowered in the face of a supplier or suppliers who are able to exploit monopoly power.

Where direct control of a monopolist’s prices and conditions has been removed because of new entry, as in the UK, there is a danger that unilateral or multilateral market power may remain. There is some concern that this may be the case in the UK. On this indicator, therefore, it is not obvious that a consumer free to choose from several suppliers in the UK is necessarily more empowered than one who buys in a regulated market. It depends on whether regulation or competition provides a better protection against market power, which in turn depends on how good the competition, as compared with regulation, is in constraining companies’ actions. The current enquiry by the UK energy regulator into these issues, albeit after some public and political pressure, provides comfort that the institutions are prepared to investigate and,
if necessary remedy, the possible existence and effects of lackadaisical competition in the energy market. Given this regulatory activity under general competition law, consumers in the UK should be as empowered as those in other, more explicitly protected, markets.

Indicator 1: An empowered consumer is a well informed consumer.  
Indicator 2: Where a choice set exists, the consumer is empowered if:  
(i) the choice set includes the 'good' quality outcome.  
Indicator 5: Markets that are informationally demanding leave consumers exposed to poor quality outcomes.  
Indicator 7: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.

Indicator 11: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

Indicator 13: Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

In terms of the choices which consumers can exercise in a competitive market, consumers can obtain full information, including a ‘good outcome’ for them, through comparison websites (since energy is homogeneous it is only price, and perhaps service, which are relevant for choice). Questions about the quality of information provided are addressed in the UK by a confidence code approval scheme; while the existence of competitive commercial sites may confuse consumers, competition among them should bring them to consumers’ attention. Thus while the reliability of information (and more importantly the consumers’ trust of it) may be less good than if provided by a public authority as in some other countries, consumers are more likely to be aware of their existence and function.
There is some evidence that consumers may not be achieving the best possible outcomes for themselves in the competitive UK market, but there are not comparable studies from other countries to suggest that the situation is worse in the UK than elsewhere. The provision of information in well publicised and well trusted forms is the best remedy for this problem.

**Indicator 6:** A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.

**Indicator 12:** The impact of price discrimination on consumer empowerment in a given market is ambiguous.

Although energy is not generally regarded as a merit good in the sense that it generates benefits for those who are not immediate consumers, it is the focus of considerable policy attention because it is seen as a basic necessity. There are concerns in all countries about the effect of sharp increases in price levels, or removal of cross-subsidies (price discrimination) which may adversely affect low income households and their ability to consume sufficient energy. More UK consumers believe that energy is affordable than their counterparts in other European countries. There is considerable publicity and campaigning about the problems of fuel poverty, and the UK government has threatened to mandate social tariffs if the industry is unable or unwilling to provide these adequately on a voluntary basis.

**Indicator 14:** For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

There are a variety of statutory and other institutions in energy markets in all the countries considered. Britain retains an energy sector regulator who has monitored the market, and intervened more formally, sometimes after pressure from less formal institutions. Of the interventions cited by respondents to the questionnaire, the only ones judged to have been completely effective are in the UK (comparison websites and media pressure). Support for energy consumers
from UK institutions, both statutory and voluntary, therefore seems to be at least as good as those of the comparator countries.

British energy consumers are expected to take a more active role in energy markets than those who are protected by continuing regulated prices. Concerns remain about the effect of high prices on vulnerable consumers; and this discussion has not addressed whether the outcome (for all consumers or for individuals) is necessarily better than in a regulated market. Compared with other Europeans, Britons have more choice between energy suppliers and tariffs; they have lower satisfaction levels, make more complaints, but are just as well satisfied with how their complaints are dealt with. More believe that their energy is affordable. Their decision making is supported by an appropriate range of information and institutions. On this basis, their empowerment in this market is among the highest, matched only by some parts of Australia.

5.0 Mobile Phone Services

Respondents to our questionnaire identify the telecommunications sector as one that raises issues for consumers in all seven comparator countries (see Table D.27).

Table D.27: Respondent references to the telecommunications sector in Questions 42 and 43

<table>
<thead>
<tr>
<th>Country</th>
<th>Resp.</th>
<th>Q.42</th>
<th>Q.43</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Markets in which the average consumer is particularly prone to detriment:</td>
<td>Markets which have been the subject of intervention:</td>
</tr>
<tr>
<td>Australia</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Telecoms</td>
<td></td>
</tr>
<tr>
<td>Canada</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Cell phones</td>
<td>Telecoms</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Cell phones</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>1</td>
<td>Mobile</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Mobile</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Telecoms</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>1</td>
<td>Telecoms</td>
<td>Mobile</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Mobile</td>
<td>Mobile</td>
</tr>
</tbody>
</table>
For the purpose of this study, we focus attention on the market for mobile phone services. This market has been selected because it supplies a product that has been taken up by large numbers of consumers in all seven countries. For example, by the end of 2006, penetration of the UK market had reached 115% (of individuals\textsuperscript{115}) and, moreover, the number of households with a mobile phone connection (93%) exceeded those with a fixed line connection (90%) for the first time.\textsuperscript{116} A survey of respondents from the EU-25 Member States finds that take-up is particularly strong in the Nordic countries and virtually all Danes (96%) use a mobile phone. But even in Spain, where the take-up is the lowest of our seven countries, 82% of respondents use a mobile phone.\textsuperscript{117}

Where reference is made to respondents’ comments in the sections which follow, we specify if a comment refers specifically to the market for mobile phones, or if it refers to the broader telecommunications sector.

5.1 Supply-side characteristics
Technology continues to evolve rapidly in the market for mobile phone services, providing users with access to an increasing number of applications quite apart from voice and text messaging services, for example, the ability to take photographs, watch videos, send email messages, play games and browse the internet. This is a feature of the market which provides EU-25 consumers with satisfaction.\textsuperscript{118} GSM (Global System for Mobile Communications), CDMA (Code Division Multiple Access) and 3G (Third Generation) are the three network

\textsuperscript{115} Some consumers have multiple mobile devices/subscriptions.
\textsuperscript{117} European Commission, 2007, 'Special Eurobarometer 260, Consumers' Opinions of Services of General Interest'.
\textsuperscript{118} European Commission, 2007, 'Consumer Satisfaction Survey', a report prepared by IPSOS INRA.
technologies that are currently in use to provide mobile voice and data services in all seven countries. 3G mobile networks differ from GSM and CDMA networks in that they provide higher bandwidth data services, allowing consumers access to a wider range of content and applications.

Licenses to supply 3G services were awarded relatively recently in all seven countries and have contributed to new entry in the market. Thus, a new 3G network operator (Hutchison) entered the Australian market in 2003 to provide mobile voice and data services in competition with three pre-existing operators (Telstra, Optus and Vodafone);\(^{119}\) Denmark, which has been the last of the European countries to award 3G licenses, awarded three licences in 2001 to existing GSM operators (TDC, Orange, and Telia) and a fourth licence to a new entrant (HI3G Denmark);\(^{120}\) then, a fourth operator (Xfera) entered the Spanish market in 2000 with the award of a 3G licence. Existing operators in all seven countries are now in the process of upgrading their 3G technologies to HSPA (High Speed Packet Access), which is sometimes referred to as '3.5G' and permits improved coverage and faster data speeds. This shift to HSPA is stimulating the take-up of 3G subscriptions still further.\(^{121}\) Thus, UK 3G mobile connections grew by 70% during 2006 to reach 7.8 million by the end of the year. The trend for consumers to move away from GSM and towards 3G technology brings with it the expectation that 3G operators will occupy a strong market position in the foreseeable future.

The market for mobile phone services has been gradually opening up to competition in all seven comparator countries since the early 1990s. Most recently, this trend is apparent in an increase in the number of mobile network operators (MNOs) (with the exception of Germany), and in the falling market


\(^{120}\) International Data Corporation, 2002, ‘European Telecommunications Services: Monitoring European Telecomms Operators’.

share of the leading operator between 2001 and 2006 for Australia, Denmark, Germany, Spain and the UK (see Table D.28).

### Table D.28: Mobile phone services: Market shares of MNOs & carriers

<table>
<thead>
<tr>
<th>Country</th>
<th>2001</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MNOs: Number</td>
<td>MNO CR1 (%)</td>
<td>MNOs: Number</td>
</tr>
<tr>
<td>Australia</td>
<td>3</td>
<td>46.8</td>
<td>4</td>
</tr>
<tr>
<td>Canada</td>
<td>4</td>
<td>31.9</td>
<td>6</td>
</tr>
<tr>
<td>Denmark</td>
<td>4</td>
<td>49</td>
<td>5</td>
</tr>
<tr>
<td>Germany</td>
<td>6</td>
<td>41</td>
<td>4</td>
</tr>
<tr>
<td>Spain</td>
<td>3</td>
<td>56</td>
<td>4</td>
</tr>
<tr>
<td>UK</td>
<td>4</td>
<td>28</td>
<td>5</td>
</tr>
<tr>
<td>US</td>
<td>7</td>
<td>23.4</td>
<td>6</td>
</tr>
</tbody>
</table>

Source: European Commission,\(^{122}\) CTIA,\(^{123}\) and Centre for Competition Policy calculations (in italics)

Note: Mobile Virtual Network Operators (MVNOs) are not included in this table; these are suppliers who do not have their own licensed radio frequency but who lease it from MNOs (e.g. Virgin Mobile UK).

There are currently at least four network suppliers available to consumers in all seven countries. But markets in the UK and the US are less concentrated compared to those in the other five countries: the leading operators in 2006, and the top two carriers in 2007, had lower market shares. The UK and the US are also the only two countries where no single operator has more than a 30% share of total national mobile subscribers. Lower concentration in the US may be explained in part by the large number of regional operators although, by 2006, the two largest mobile operators (AT&T Mobility and Verizon) had both increased their market shares.\(^{124}\) As Table 9.28 shows, markets in Australia and Spain are the least competitive, with the leading operator in each case holding almost half the market in 2006, and more than three-quarters of the market being held by the top two carriers in 2007. We note, however, that several suppliers operate in more than one geographic market (3, O2, T-mobile,

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\(^{123}\) Cellular Telecommunications & Internet Association (CTIA), 2008, Federal Communications Commission Filing.

Vodafone, and Orange) (see Table D.29). Under these conditions, there is the potential for non-competitive pricing.  

Mobile Virtual Network Operators (MVNOs) are mobile companies which do not have their own allocation of spectrum or radio infrastructure, but provide retail services to customers by using wholesale agreements with MNOs. It is estimated that, globally, over 250 MVNOs are currently active. Ofcom report that the development of MVNOs is a consequence of the strategy amongst existing operators to create new revenue streams by enabling wholesale partners to address sections of the population that are outside their target markets; for example, Lebara has launched in seven European markets including Spain and the UK with a proposition offering low-priced international calls aimed at immigrant populations. Ofcom suggest that initiatives like these have contributed to MVNOs' growing market share. For example, between the end of 2005 and the end of 2006, MVNOs' share of retail subscribers increased from 13% to 15% in the UK, remained unchanged at 25% in Germany, and increased from 8% to 9% in the US. Thus, it can be argued that the development of MVNOs provides an additional competitive dynamic in the market for mobile phone services, in particular, in the UK.

5.2 The demand side
The increasing demand for mobile voice and data services has been a major feature of telecommunications markets in the last five years, with mobile telephony becoming a substitute for fixed-line services in most countries. The number of mobile connections now exceeds the number of fixed-line connections in all of our comparator countries except Canada; and in Denmark, Germany, Spain and the UK, the number of active mobile connections exceeds the population. Ofcom report that fixed-line call volumes decreased in all countries for which data are available except Germany, a trend accompanied by


an increase of more than 60% in mobile call volumes between 2001 and 2006 in all countries.\textsuperscript{129} German consumers make less use of mobile phones than consumers in the UK, the US, Spain and Canada, with mobile costs being comparatively high (while fixed-line costs are comparatively low).

5.2.1 Price
Price is regarded by EU-25 consumers as the most important factor in their overall level of satisfaction with the mobile phone market, although a survey for the European Commission finds that the 'satisfaction score' against this factor is lower than it is against the two other factors which consumers find important: quality and image.\textsuperscript{130} Amongst the EU-25, 55% of mobile phone users express satisfaction with their operator's prices.\textsuperscript{131} Spain performs particularly poorly in this respect with just 26% of users expressing satisfaction. The elements of pricing which raise issues with EU-25 consumers are as follows:

- the price level of mobile phone services;
- the nature of the commercial offer: there are not enough attractive special tariffs for specific target groups or for specific usage; and
- the transparency of tariffs and invoices, which are not clear or easy to understand.

Tariffs are organised into three categories: (i) pre-paid (or 'pay-as-you-go'); (ii) post-paid monthly where the package includes a handset; and (iii) post-paid monthly where the package includes a SIM card but not a handset. Pre-paid services usually incur considerably higher call charges than post-paid services but are rental-free and, in most cases, the consumer is free to leave the network when desired. The monthly fees of packages that include a handset are higher for equivalent volumes of voice and data services compared to those without a handset. Post-paid services require the consumer to commit to a 12- or 18-month contract, with a fixed minimum monthly payment regardless of whether or not all the call minutes/texts included in the package are used.

\textsuperscript{129} Office of Communications, 2007, \textit{ibid}.
\textsuperscript{130} European Commission, 2007, 'Consumer Satisfaction Survey', a report prepared by IPSOS INRA.
\textsuperscript{131} European Commission, 2007, 'Consumers in Europe: Facts and Figures on Services of General Interest'.
Table D.29 shows that between 2002 and 2008, the price of a local call fell significantly in most cases where data is available.

**Table D.29: Mobile phone services: Price comparison across countries: 2002–2008**

<table>
<thead>
<tr>
<th>Country: Operator</th>
<th>Local calls (off-peak rate in € per min, inc. VAT, pre-paid)</th>
<th>Calls to the fixed network and to the same mobile network</th>
<th>Calls across mobile networks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark: 3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sonofon</td>
<td>0.83</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TDC Mobil</td>
<td>0.83</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany: E-plus</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>O2</td>
<td>0.25</td>
<td>0.25</td>
<td></td>
</tr>
<tr>
<td>T-mobile</td>
<td>0.48</td>
<td>0.29*2 +</td>
<td>0.29</td>
</tr>
<tr>
<td>Vodafone</td>
<td>0.48</td>
<td>0.29</td>
<td>0.29</td>
</tr>
<tr>
<td>Spain: Movistar</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Orange</td>
<td>0.23</td>
<td>0.32</td>
<td>0.40</td>
</tr>
<tr>
<td>Vodafone</td>
<td>0.48</td>
<td>0.35</td>
<td>0.35</td>
</tr>
<tr>
<td>Yoigo</td>
<td>0.12</td>
<td>0.30</td>
<td></td>
</tr>
<tr>
<td>UK: 3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>O2</td>
<td>0.40*3 +0.08</td>
<td>0.32*3 +0.06</td>
<td>0.64 +0.06</td>
</tr>
<tr>
<td>Orange</td>
<td>0.40*3 +0.08</td>
<td>0.19~0.25 +0.08</td>
<td>0.64 +0.19~0.25</td>
</tr>
<tr>
<td>T-mobile</td>
<td>0.16~0.48</td>
<td>0.25</td>
<td>0.16~0.48 +0.51</td>
</tr>
<tr>
<td>Vodafone</td>
<td>0.40*3 +0.08</td>
<td>0.38*3 +0.13</td>
<td>0.64 +0.13</td>
</tr>
<tr>
<td>Canada: Roger</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bell</td>
<td>0.19*2 +0.03</td>
<td>0.19*2 +0.03</td>
<td>0.03</td>
</tr>
<tr>
<td>Sasktel</td>
<td>0.16*2 +0.10</td>
<td>0.16*2 +0.10</td>
<td>0.10</td>
</tr>
<tr>
<td>US: AT&amp;T</td>
<td>0.64 for unlimited</td>
<td>0.64</td>
<td>0.06 or 0.16</td>
</tr>
<tr>
<td>Verizon</td>
<td>0.63 for unlimited</td>
<td>0.63</td>
<td>0.06</td>
</tr>
<tr>
<td>Sprint Nextel</td>
<td>0.29</td>
<td>0.29</td>
<td></td>
</tr>
</tbody>
</table>
Source: Competition Commission, 2003,\textsuperscript{132} Teligen,\textsuperscript{133} and operators’ websites

Notes:
(i) Under several tariffs, the first two, three or five minutes cost more per minute than subsequent minutes. For example, 0.16*5 + 0.10 indicates that the first five minutes are charged at 0.16€ per minute, with subsequent minutes charged at 0.10€.
(ii) O2 charges 0.03€ for weekend calls for the first three minutes.
(iii) AT&T and Verizon charge a daily access fee for their pay-as-you-go Unlimited Talk plan (on-net), which comes into operation only on those days that a voice call is made.
(vi) Sprint Nextel does not supply a pay-as-you-go tariff. Their pre-paid package costs 19.23€ for 200 minutes and thereafter 0.29€ per minute.

Roaming charges (that is, charges for calls across European countries) and per-minute local call charges are lower in the UK than in Denmark, Germany and Spain; this may reflect the more competitive environment to be found in the UK. UK consumers on pre-pay tariffs also face lower charges than those in the US and Canada.\textsuperscript{134}

5.2.2 Transparency
As Table D.29 demonstrates, this is a market characterised by multiple tariffs, complex tariff structures, and little standardisation in the specification of tariffs. To add to the complexity, mobile phone services may be supplied in a bundle with fixed-line telephony services, broadband and/or digital television services. As we have discussed in the context of personal current accounts (Section 2.2.3 above), when several products are bundled together, product comparison becomes particularly difficult. As Gabaix and Laibson point out, there is the potential for unsophisticated consumers to only compare the price of one of the goods in the bundle (the ‘base’ good) across suppliers, instead of comparing total prices; under these conditions, suppliers have an incentive to shroud the (less competitive) prices of other products in the bundle.\textsuperscript{135}

Against this backdrop, the European Commission’s Eurobarometer survey of European consumers reports that 50% of respondents found it easy to compare

\textsuperscript{132} Competition Commission, 2003, ‘Vodafone, O2, Orange and T-Mobile: Report on references under Section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O2, Orange and T-Mobile for terminal calls from fixed and mobile networks’ (Chapter 6).
\textsuperscript{133} Teligen, 2002, ‘Report on telecoms tariff data as of December 2002’.
offers from different mobile phone operators. However, 38% of European respondents found the process difficult; this includes 58% of Danish respondents. As Eurobarometer observe, it is notable that Denmark is a country where there has been a very high take-up of mobile phone services (96% of consumers, compared to an average for the EU-25 of 85%) and yet price comparisons seem difficult in this well-developed and relatively competitive market. Indeed, 30% of Danish respondents said that price comparison was 'very difficult' compared with 14% of EU-25 respondents. Table D.30 shows that the UK performs better in this respect than Spain, Germany and Denmark.

Table D.30: Mobile phone services: The difficulty of comparing offers

<table>
<thead>
<tr>
<th>Country</th>
<th>Respondents finding it 'difficult' to compare offers</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>21%</td>
</tr>
<tr>
<td>Spain</td>
<td>26%</td>
</tr>
<tr>
<td>Germany</td>
<td>53%</td>
</tr>
<tr>
<td>Denmark</td>
<td>58%</td>
</tr>
<tr>
<td>EU-25</td>
<td>38%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007

5.2.3 Switching

Poor transparency is associated with high search and switching costs. In the case of the market for mobile phone services, there is plenty of detailed information to be found on service providers' websites. But the multiplicity of different packages together with the complexity of tariff structures mean that price comparison is time consuming, which may impact on the willingness/capacity of consumers to persist in their search for the optimum deal.

Consistent with this view, one of the UK respondents to our questionnaire pointed to the lack of transparency associated with mobile phone tariffs, and a Canadian respondent pointed to asymmetric information as an issue for

136 European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.
consumers in switching. An Australian respondent observed that intervention had taken place to improve the quality and comparability of information but with limited effect.

The difficulties associated with switching are exacerbated for older consumers and those with lower levels of educational attainment: Eurobarometer report that 70% of respondents aged 15–24 found price comparison to be easy compared to just 32% of respondents aged 55 and over and, as the level of educational attainment falls, price comparison becomes more difficult. Indeed, although switching behaviour is relatively robust with respect to mobile phone services compared to other network services (fixed-line telephony, internet service provision and banking), only 29% of EU-25 mobile phone users had considered changing provider in the previous two years. Younger consumers (who tend to be the most active users of mobile phones) were most likely to consider alternative providers: 37% of 15–24 year-olds had considered switching compared to 19% of those aged 55 or over. Then, as the level of educational attainment rises, the likelihood of switching provider increases: 23% of users from the least educated group had considered switching compared with 32% of those educated to age 20 or beyond, and with 36% of those continuing in education.

One of the Spanish respondents to our questionnaire pointed to the difficulties faced by consumers in switching provider. While there has been intervention in the market to improve matters, in the respondent’s view, it has been completely ineffective.

However, Table D.31 shows that a significant proportion of consumers are not interested in switching.\(^{138}\)

Table D.31: Mobile phone services: Switching activity in the last two years

<table>
<thead>
<tr>
<th>Country</th>
<th>Did not switch</th>
<th>Switched</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not interested in switching</td>
<td>Thought switching might be too</td>
</tr>
</tbody>
</table>

\(^{138}\) European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’. 

426 | Benchmarking the UK Framework Supporting Consumer Empowerment |
<table>
<thead>
<tr>
<th></th>
<th>switching</th>
<th>difficult</th>
<th>to obstacles</th>
<th>ease</th>
<th>difficulty</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>64%</td>
<td>5%</td>
<td>3%</td>
<td>24%</td>
<td>2%</td>
</tr>
<tr>
<td>Spain</td>
<td>72%</td>
<td>4%</td>
<td>3%</td>
<td>14%</td>
<td>6%</td>
</tr>
<tr>
<td>Germany</td>
<td>53%</td>
<td>11%</td>
<td>5%</td>
<td>24%</td>
<td>4%</td>
</tr>
<tr>
<td>Denmark</td>
<td>49%</td>
<td>9%</td>
<td>3%</td>
<td>29%</td>
<td>8%</td>
</tr>
<tr>
<td>EU-25</td>
<td>62%</td>
<td>7%</td>
<td>4%</td>
<td>20%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2007.\(^{139}\)

Moreover, the level of commitment by consumers to their mobile phone service provider would appear to be quite high: 84% of consumers surveyed said they would still be using their existing provider in 12 months’ time.\(^{140}\) This finding has to be interpreted with caution since the level of commitment to a supplier may be influenced by consumers’ expectations of the market together with their awareness of other suppliers.

5.2.4 Vulnerable consumers
As the OECD observes, the most striking phenomenon in member countries is the daily use of mobile phones by children and young adults. For example, in Canada, 23% of students report having their own mobile phone, 44% of which have internet capability.\(^{141}\) Indeed, one Canadian respondent, and one Spanish respondent, to our questionnaire pointed to young consumers as constituting a group which is particularly prone to detriment with respect to their transactions in the market for mobile phone services. The OECD suggests that high penetration of mobile phones amongst minors may create serious risks of over-consumption and access to inappropriate content. However, insufficient information was provided by respondents to determine the extent of any detriment in the countries under study.

\(^{139}\) European Commission, 2007, *ibid.*

\(^{140}\) European Commission, 2007, ’Consumer Satisfaction Survey’, a report prepared by IPSOS INRA.

Access

The Eurobarometer survey reports that 93% of 15–39 year-olds said they had easy access to mobile telephone networks compared to 72% of those aged 55 and over.\textsuperscript{142} The survey also finds that house persons (83%) and the retired (69%) are at the lower end of the access scale compared with an EU-25 average of 85% and figures of 93% amongst white-collar workers and students, and 95% amongst managers. However, this is not to say that older consumers are necessarily disadvantaged relative to younger consumers since it may be the case that they are less interested in using mobile phones and/or less aware of the technology.

Within the UK, Ofcom has expressed concern that low-income consumers lacking the facility to pay bills by direct debit may be required to pay additional amounts for telecommunications services; at issue is whether these consumers may, as a result, be excluded from access to essential services. Ofcom is currently engaged in consultation on these and other issues pertinent to the broader telecommunications sector (for example, the transparency of contractual terms) and continues to monitor the implications for consumers of supplier behaviour.\textsuperscript{143}

Other factors which may limit access include poor indoor mobile network coverage, health concerns and lack of fixed-to-mobile number portability.\textsuperscript{144} However, it is not clear that these factors would identify specific groups of consumers as particularly disadvantaged in the market.

Affordability

Eurobarometer find that 76% of mobile phone users consider the service to be affordable. Affordability in the UK (87%), Denmark (86%) and Germany (83%) is above the average for the EU-25 (76%); while affordability in Spain (74%) is

\textsuperscript{142} European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.

\textsuperscript{143} Office of Communications, 2008, ‘Ofcom review of additional charges’.

below the EU-25 average, and is accompanied by an above-average number of respondents perceiving the service to be unaffordable.\textsuperscript{145}

**Complaints**

Eurobarometer find that only 7\% of mobile phone users aged 55 and over had complained about the services provided by their supplier in the previous two years compared with 15\% of those aged 15–24. In addition, while 7\% of those educated to age 15 voiced a complaint, this figure doubled to 14\% amongst those educated to age 20 or more. The self-employed (18\%) and managers (16\%) were more likely to complain than manual workers (10\%), house persons (9\%) and the retired (7\%).\textsuperscript{146} Thus, certain groups of consumers appear to be more/less confident and active in negotiating this market than others.

5.2.5 Consumer satisfaction/complaints

With respect to consumer satisfaction with the service provided, Germany performs particularly well (see Table D.32) and is ranked second amongst the EU-25. Denmark is ranked 16th, the UK 20th and Spain, with the lowest percentage of satisfied consumers, is 25\textsuperscript{th}.\textsuperscript{147}

With respect to the UK, measures of consumer satisfaction are somewhat ambivalent. On the one hand, Table D.32 shows that the proportion of UK consumers who are satisfied with their mobile phone service is greater than the average for the EU-25 and, moreover, that the proportion who are dissatisfied is less than the average. However, the proportion of UK consumers who said they were satisfied fell from 2004 to 2006, although the proportion who said they were dissatisfied also fell over the same period. Moreover, a customer satisfaction survey conducted by *Which?* Magazine amongst 4,600 of their members reports that networks fared so badly in their survey that not one

\textsuperscript{145} European Commission, 2006, ‘Special Eurobarometer 63.5: Consumers’ Opinions of Services of General Interest’.

\textsuperscript{146} European Commission, 2007, ‘Special Eurobarometer 260: Consumers’ Opinions of Services of Special Interest’.

\textsuperscript{147} European Commission, 2007, ‘Consumer Satisfaction Survey’, a report prepared by IPSOS INRA.
achieved 'best buy' status. In particular, the quality and speed of response to queries were problem areas for pay-monthly customers.\(^{148}\)

Table D.32: Mobile phone services: Overall Consumer Satisfaction

<table>
<thead>
<tr>
<th>Country</th>
<th>Satisfied (% of respondents)</th>
<th>Dissatisfied (% of respondents)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>80</td>
<td>83.5</td>
</tr>
<tr>
<td>Denmark</td>
<td>80</td>
<td>71.4</td>
</tr>
<tr>
<td>UK</td>
<td>77</td>
<td>67.5</td>
</tr>
<tr>
<td>Spain</td>
<td>66</td>
<td>41.7</td>
</tr>
<tr>
<td>EU-25</td>
<td>73</td>
<td>65.9</td>
</tr>
</tbody>
</table>

Source: European Commission, 2004 and 2007.\(^{149}\)
Note: Overall satisfaction is measured against several factors: price, quality, image, market and personal factors, and customer service.

Consumers in the UK tend to be more satisfied with their mobile phone service (67.5%) than they are with other network services, such as gas (58.3%), electricity (58.2%) and retail banking (67.2%).\(^{150}\) There is a relatively high level of complaints relating to UK mobile phone services (15%, which is above the 12% average for the EU-25) compared to other network services.\(^{151}\) With respect to Denmark, there is a lower level of appreciation of mobile phone services (71.4%) compared to electricity (78.9%), gas (77.9%), and retail banking (71.7%).\(^{152}\) German consumers show a much higher level of satisfaction with mobile phone services (83.5%) than the other three services. Spain manifests the lowest level of consumer satisfaction (41.1%) with mobile phone services amongst the EU-25 countries. Indeed, all three respondents to our questionnaire from Spain point to telecommunications as a market in which consumers are particularly prone to detriment, although only one respondent points to the market for mobile phone services in particular (where the issue is that it is difficult to switch provider).

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\(^{148}\) Which? Magazine, 2008: [www.which.co.uk/reports_and_campaigns/audio_visual/reports/phones](http://www.which.co.uk/reports_and_campaigns/audio_visual/reports/phones)


\(^{150}\) European Commission, 2007, 'Consumer Satisfaction Survey', a report prepared by IPSOS INRA.

\(^{151}\) European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.

\(^{152}\) European Commission, 2007, 'Consumer Satisfaction Survey', a report prepared by IPSOS INRA.
With respect to complaints, just 12% of EU-25 users surveyed had complained about the service provided by their mobile phone operator in the past two years, and 90% of this group had channelled their complaint directly to the service provider rather than to a complaint handling body. The level of complaints amongst UK users was slightly higher (15%) compared to the average for the EU-25. These findings call for circumspection since, as we have already observed, a low level of complaints may be indicative of consumer satisfaction, but it may signal a lack of awareness of complaint/redress mechanisms.

5.2.6 Institutional support for consumers

'Hard' institutional mechanisms

Table D.33 shows that the UK performs better than Denmark, Germany and Spain with respect to consumer perceptions of how well their interests are protected in the market for mobile phone services: 61% of consumers surveyed felt that their interests are 'very well' or 'fairly well' protected compared to an average for the EU-25 of 51%, and 18% of consumers felt that their interests are 'fairly badly' or 'very badly' protected compared to an average for the EU-25 of 31%.

Table D.33: European consumers’ perceptions of the level of protection: ‘In general, how well do you think consumers’ interests are protected in respect of mobile telephone services?’

<table>
<thead>
<tr>
<th>Country</th>
<th>Very well</th>
<th>Fairly well</th>
<th>Total</th>
<th>Fairly badly</th>
<th>Very badly</th>
<th>Total</th>
<th>Do not know</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>10%</td>
<td>51%</td>
<td>61%</td>
<td>14%</td>
<td>4%</td>
<td>18%</td>
<td>21%</td>
</tr>
<tr>
<td>Denmark</td>
<td>15%</td>
<td>42%</td>
<td>57%</td>
<td>23%</td>
<td>4%</td>
<td>27%</td>
<td>16%</td>
</tr>
<tr>
<td>Germany</td>
<td>6%</td>
<td>40%</td>
<td>46%</td>
<td>28%</td>
<td>9%</td>
<td>37%</td>
<td>18%</td>
</tr>
<tr>
<td>Spain</td>
<td>1%</td>
<td>30%</td>
<td>31%</td>
<td>30%</td>
<td>9%</td>
<td>39%</td>
<td>31%</td>
</tr>
<tr>
<td>EU-25</td>
<td>7%</td>
<td>44%</td>
<td>51%</td>
<td>23%</td>
<td>8%</td>
<td>31%</td>
<td>19%</td>
</tr>
</tbody>
</table>

Source: European Commission, 2006\(^{153}\)

\(^{153}\) European Commission, 2006, ‘Special Eurobarometer 63.5: Consumers’ Opinions of Services of General Interest’.
Intervention

The communications sector has attracted a national regulatory authority in six of the seven comparator countries, with tiers of regulatory authority below the national level in some cases (for example, Spain and Germany), and above the national level in the case of the European Commission, the World Trade Organisation (WTO), and the International Telecommunication Union (ITU).\textsuperscript{154} Denmark does not have a regulatory authority but it does have an independent Telecommunications Complaint Board; the Board cannot impose fines but it can respond to user complaints by asking for a change of behaviour on the part of providers and/or take them to court.

Where there have been interventions in the mobile phones sector, these have mostly been focused upstream (for example, on the allocations of radio spectrum). However, two recent interventions that are anticipated to have a beneficial effect on many mobile phone users are as follows.

(i) Roaming charges

To date, it has been a minority of European mobile users who have made use of roaming services despite high penetration of the market, possibly because of the high costs of cross-border mobile telephony. But in 2007, the European Union implemented price caps on international roaming services. It is now the case that all providers of roaming services must provide a roaming tariff under which customers can make and receive voice calls while roaming in the Eurozone for no more than 49 eurocents (38p) and 24 eurocents (19p) per minute, respectively, excluding VAT. Further price caps are anticipated in the near future (to apply to text messaging and data exchange). The European Commission report a high level of compliance in all Member States and that operators have not tried to compensate for the effects of the Roaming Regulation by increasing prices for non-regulated roaming calls.\textsuperscript{155}


\textsuperscript{155} European Commission, 2008, 'Roaming Regulation: Commission welcomes implementation benchmark report', IP/08/58.
(ii) Termination charges

A termination charge is levied by a telecoms operator for the service of terminating a call on its network. These charges constitute a significant proportion of operators’ revenues. Most regulators set maximum levels on the termination charges that mobile phone operators can impose. The UK first began regulating mobile termination charges in 1990, introduced further regulation in 1998, and then European Union regulation was introduced in 2002. Ofcom announced new termination charge controls in 2007. These limit the amount that operators can charge other companies for connecting calls on their mobile networks over a four-year period from 2007 to 2011 in the expectation that savings will be passed on to retail customers.

Interventions relating to other consumer issues (for example, search/switching costs, transparency, lock-in, etc) appear to be quite limited. One respondent to our questionnaire from Spain observed that intervention designed to remedy difficulties in switching has been completely ineffective. Two respondents from Australia observed that interventions designed to deal with consumer inertia and asymmetric information have been partially effective. And a respondent from the UK observed that intervention to deal with the poor level of transparency has been completely ineffective.

In the case of Canada, the Canadian authority (Canadian Radio-Television & Telecommunications Commission, CRTC) plays a role in ensuring the confidentiality of customer information and in ensuring that customers are not subject to undue preference or unjust discrimination. The CRTC does not regulate the rates, quality of service or business practice of mobile phone service providers. However, there is an ombudsman for complaints relating to the telecommunications sector.

157 Office of Communications announcement: www.ofcom.org.uk/media/news/2007/03/nr_20070327
158 www.crtc.gc.ca/eng/INFO SHT/t1021.htm
The OECD report that some member countries take steps to protect the interests of minors in the market for mobile phone services; however, no member country has legal provisions dealing specifically with the level of consumption by minors. In the UK, telecoms operators, including mobile phone operators, have agreed a voluntary Memorandum of Understanding for the purpose of monitoring traffic and sharing information after a review of premium rate services by Ofcom. In Australia, a PIN number is commonly used to restrict access by children to adult content services such as telephone sex services.\footnote{OECD, 2007, 'Mobile Commerce', DSTI/CP(2006)7/FINAL.}

*Obtaining redress*

With respect to the handling of complaints, UK providers perform reasonably well. The European Commission report that 58% of UK complainants surveyed said their complaint was 'very well' or 'fairly well' dealt with, which is above the average for the EU-25, and better than for Denmark, Germany and Spain (see Table D.34). Moreover, 42% of UK complainants said their complaint was 'fairly badly' or very badly' dealt with, which is at the average for the EU-25 but still better than for Denmark, Germany and Spain. However, one of the respondents to our questionnaire from the UK pointed to the broader telecommunications market as one in which consumers were unable to gain their desired market outcome, although it is not clear to what extent this applies to mobile phone services.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|c|c|}
\hline
Country & Very well & Fairly well & Total & Fairly badly & Very badly & Total & Do not know \\
\hline
UK & 15\% & 43\% & 58\% & 23\% & 19\% & 42\% & - \\
Denmark & 20\% & 28\% & 48\% & 28\% & 20\% & 48\% & 3\%
\hline
Germany & 17\% & 32\% & 49\% & 34\% & 17\% & 51\% & 0\%
\hline
Spain & 11\% & 40\% & 51\% & 31\% & 13\% & 44\% & 6\%
\hline
EU-25 & 18\% & 38\% & 55\% & 26\% & 16\% & 42\% & 3\%
\hline
\end{tabular}
\caption{Mobile phone services: Consumer perceptions of complaint handling: 'How well was your complaint dealt with?'}
\end{table}

\footnote{European Commission, 2007, 'Special Eurobarometer 260: Consumers' Opinions of Services of Special Interest'.}
Within the UK, every mobile phone service provider must belong to one of two dispute resolution schemes, Otelo or Cisas. These are independent schemes that will consider a complaint about a mobile phone service provider if the problem remains unresolved after an approach has been made directly to the provider. These organisations can make the service provider apologise and/or explain its actions, provide a product or service, or pay the complainant up to £5,000 compensation for any loss the complainant can prove to have suffered.\textsuperscript{161}

5.3 Consumer empowerment in the market for mobile phone services
In this section, we draw together our findings with respect to the market for mobile phone services and assess them against our indicators for identifying the extent of consumer empowerment. Where the availability of data permits, we rank comparator countries against these indicators.

\textit{Indicator 1}: An empowered consumer is a well informed consumer.
\textit{Indicator 5}: Markets that are informationally demanding leave consumers exposed to poor quality outcomes.
\textit{Indicator 7}: A consumer, or group of consumers, is/are disempowered if they are unable to access information relevant to the purchase of goods.
\textit{Indicator 11}: As the complexity of transactions increases and cognitive demands become greater, the gap between realised outcomes and the best possible outcome is likely to increase.

Data on the European countries amongst our comparators suggest that the market for mobile phone services shares several characteristics with the market for personal current accounts. In particular, the market is not one in which we are likely to find fully informed consumers because of the complexity and lack of transparency attached to tariff structures. These characteristics make it difficult for consumers to compare products and identify the optimum package. Thus,

\textsuperscript{161} Which? Magazine, 2008: www.which.co.uk/reports_and_campaigns/audio_visual/reports/phones
when our findings are set against Indicators 1, 5, 7 and 11, we may say for the European countries that the market environment does not provide for a high level of consumer empowerment.

Against this backdrop, UK consumers are more empowered than those in Spain, Germany and Denmark on a metric of how easy they find it to compare products:

\[ \text{UK} > \text{Spain} > \text{Germany} > \text{Denmark} \]

And it can be argued that UK consumers are at least as empowered as those in Spain, Germany and Denmark on a metric of how easy they find it to switch supplier.

**Indicator 2:** Where a choice set exists, the consumer is empowered if:

(i) the choice set includes the 'good' quality outcome;
(ii) in a market where differentiation is important, the options are 'reasonably' far apart in product characteristic space; and
(iii) there is the choice not to engage in a transaction.

(i) and (ii): UK consumers are 'reasonably' well served with respect to choice of operator in this market and, indeed, have the advantage of a more diversified market than exists in some of our comparator countries. This may account for the lower call charges in the UK set against those in comparator countries. However, the complexity of tariffs may act against the ability of consumers to identify the optimum package. It would appear, then, that UK consumers are no less empowered and are, possibly, more empowered than consumers in comparator countries.

Another approach to evaluating the level of consumer empowerment against Indicator 2(i) is in terms of consumer satisfaction with outcomes. Compared to other European comparator countries, the UK does not perform particularly well with respect to consumer satisfaction:

\[ \text{Germany} > \text{Denmark} > \text{UK} > \text{Spain} \]
UK consumers tend to be more inclined to make complaints in this market compared to consumers elsewhere in Europe. But we need to be circumspect in interpreting this finding: it may be indicative of confident, active consumers (that is, greater empowerment), and/or it may signal that there is more to complain about.

*Indicator 3:* The consumer is disempowered in the face of suppliers who are able to exploit monopoly power.

While there is no evidence to suggest that suppliers are able to exercise market power to the detriment of consumers in any of the countries under study, we note that prices may be more transparent to suppliers than they are to consumers and, hence, that there is the potential for collusion. Significant multimarket contact may give further cause for concern since it is an important factor in explaining non-competitive prices.

As we have already observed, the UK market for mobile phones is more diversified when compared with most of the other countries. Moreover, UK consumers benefit from the presence of a national regulator, which would appear to be pro-active in defending consumer interests. On these grounds, it can be argued that UK consumers are at least as empowered as those in comparator countries.

*Indicator 4:* Under certain clearly specified conditions, the 'good' outcome is realised by imposing restrictions on what can be supplied to consumers.

There is no reason to apply Indicator 4 to the market for mobile phone services.

*Indicator 6:* A consumer, or group of consumers, is/are disempowered if they are unable to access the market for a good that is deemed to be essential for participation in society.
Indicator 8: The level of consumer empowerment may be defined by reference to one or more other markets.

It can be argued that telephony (whether fixed-line or mobile) constitutes an essential service on the grounds of social and economic inclusion. Very high levels of market penetration across all seven countries suggest that access is not a major issue for consumers. In terms of the affordability of mobile phone services, the UK performs particularly well:

UK > Denmark > Germany > Spain

There is an issue of whether low-income consumers gain access to the market on less favourable terms; but there is insufficient data to evaluate the size of the problem and to make cross-country comparisons.

Indicator 9: For a given market:

(i) in the absence of any cognitive or informational constraints, consumers are likely to attain good quality outcomes (the standard economic assumption);
(ii) when acting under the constraints of bounded rationality, consumers may attain 'reasonable' outcomes (one behavioural conclusion);
(iii) when acting under the constraints of bounded rationality, consumers may attain poor quality outcomes (a second behavioural conclusion).

As we have observed, the market for mobile phone services is cognitively and informationally demanding. We note that age and educational attainment are factors influencing both the ease with which consumers are able to make price comparisons, and the likelihood of switching provider. But without further detailed information on these factors we are unable to evaluate the level of consumer empowerment against Indicator 9.

162 In support of this view, the European Commission includes telephony in the category of 'services of general interest'; these are goods and services that should be widely available to consumers in good quality and at affordable prices (European Commission, Europa website glossary: http://europa.eu/scadplus/glossary/general_interest_services_en.htm
**Indicator 10:** Consumers are susceptible to poor quality outcomes (moral hazard and/or adverse selection) under conditions of asymmetric information.

Asymmetric information is referred to as an issue for consumers by a Canadian respondent to our questionnaire. However, there is insufficient information available in order to evaluate the level of consumer empowerment for each country against Indicator 10.

**Indicator 12:** The impact of price discrimination on consumer empowerment in a given market is ambiguous.

It is possible that low income consumers gain access to the market for mobile phone services under less favourable terms than other consumers as a result of not having access to a bank account/direct debit facilities. However, there is insufficient information available in order to evaluate the level of consumer [dis]empowerment for each country in this respect.

**Indicator 13:** Consumer [dis]empowerment is greater the [higher]lower are transaction costs.

Search/switching costs are an issue in this market, given the complexity of tariffs and the lack of standardisation and, on these grounds, it can be argued that consumer empowerment is impaired in this respect.

**Indicator 14:** For a given market, the level of consumer empowerment is related to the existence and effectiveness of both formal and informal institutions serving consumer interests.

All European consumers stand to benefit from interventions in the market by the European Commission. However, the UK performs better than European comparator countries with respect to consumer perceptions of how well their interests are protected:
UK > Denmark > Germany > Spain

The UK also performs better with respect to the handling of complaints:

UK > Spain > Germany > Denmark

On these grounds, it can be argued that UK consumers are more empowered than consumers in these three other countries.

In summary, the market for mobile phone services is characterised by factors which work against consumer empowerment — and in all seven comparator countries. But where we have been able to make comparisons, UK consumers would appear to be at least as empowered as consumers in other countries against most of our indicators.

7.0 A commentary on the market studies

It is important to bear in mind that the preceding case studies constitute example applications of the method we have devised for evaluating the level of consumer empowerment in specific markets. As we pointed out at the beginning of this section, markets were selected from amongst those that respondents to our questionnaire identified as problematic for consumers. It is not surprising, therefore, that all four markets raise issues germane to the question of consumer empowerment, in some shared respects (for example, the lack of transparency attached to tariff structures in the case of personal bank accounts and mobile phone services) and in some idiosyncratic respects (for example, the problems posed by credence goods in the case of car repairs/servicing). A different set of markets with different characteristics would result in a different set of findings. Nonetheless, there are some inferences that can be made about other markets and about markets in general on the basis of these studies.

First, comments by respondents to our questionnaire on the effectiveness of interventions designed to raise the level of consumer empowerment/protect consumers from detriment suggest that it is not sufficient for the authorities to intervene and leave it at that. Not all interventions are effective; some are
partially effective and some are wholly ineffective. It is only through the systematic monitoring of outcomes that the impact of intervention becomes clear. Moreover, as we point out under Principle 11 in our discussion of benchmarks, monitoring (not only of complaints but also of outcomes) increases compliance and the efficient use of enforcement resources.

Second, our case studies suggest that the attributes of consumers can be key factors in their capacity to realise good outcomes, particularly where transactions are cognitively demanding. It is beyond the scope of this study to determine the precise ways in which age, educational attainment and socio-economic status are related to the extent to which consumers are confident and active in markets. But the evidence does point to some of the ways in which particular groups of consumers find themselves disadvantaged in some markets. At issue is the tension between the need to protect consumer interests on the one hand, and avoiding over-regulation on the other. Again, we would suggest that monitoring has an important role to play in this regard in ensuring that resources are targeted appropriately and without diminishing the incentives and benefits associated with the development of cognitive skills in consumers (Principle 11). There is also a part to be played by consumer education in raising market skills (Principle 5); in this respect, educational initiatives are to be welcomed, such as the programme to develop financial capability amongst UK consumers devised by the Financial Services Authority.

Third, as we have observed in our discussion of benchmarks, the provision of information is an important plank of consumer empowerment (Principle 4). Our case studies demonstrate some of the ways in which poorly informed consumers are disempowered in markets. For example, opaque prices/tariff structures make it difficult for consumers to compare products and add to the costs of searching and switching; where consumers are discouraged from searching/switching, they fail to exert a discipline on firms and they potentially fail to secure the optimum deal for themselves. We note that some countries have sought to improve the quality of information made available to consumers by suppliers (although not always successfully) and we point to the important complementary role to be played by consumer advice channels (Principle 3).
On the basis of our four case studies, we find the provision of advice channels in the UK to be at least on a par with the provision in comparator countries.

Finally, we would suggest that, in evaluating the level of consumer empowerment, sector-specific case studies are the necessary complement to comparative analysis of consumer regimes: it may be the case that a given regime performs well 'on paper' when set against the benchmarks for its assessment; but the ultimate test of the effectiveness of a regime lies in the quality of the outcomes realised by consumers. In some cases, we have been unable to evaluate the level of consumer empowerment against one or more of our indicators because of insufficient information. This leads us to reiterate a point we made earlier, which is that the ability to identify and deal with consumer detriment calls in the first instance for evidence against key consumer indicators acquired through systematic monitoring of outcomes.
Annexe E  International convergence of consumer protection standards

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1.0 Introduction
In this section, we explore the degree to which there is an international consensus around the principles which should underpin an effective consumer protection regime. In this regard, we explore initiatives which have been pursued by three international organisations: the United Nations (UN), the Organisation for Economic Cooperation and Development (OECD) and the European Union.

2.0 The United Nations

2.1 Background
The United Nations joined the global consumer protection movement in the 1970s\(^1\) when it began establishing various standards and guidelines to protect consumers.\(^2\) In 1977, the United Nations Economic and Social Council (ECOSOC) recognised that consumer protection had an important bearing on economic and social development when it asked the Secretary-General to formulate a ‘survey of national institutions and legislation in the area of consumer protection’ and prepare a comprehensive report containing proposals for measures related to the development and strengthening of consumer protection policies and legislation. By the early 1980s, ECOSOC decided that an international policy framework was needed to provide general guidance and

\(^1\) The consumer protection movement began in the Europe and North America in the 1960s though other ‘waves’ have been identified earlier than this. See J Finch ‘A History of the Consumer Movement in the United States: its Literature and Legislation’ (1985) 9 (1) Journal of Consumer Studies and Home Economics 23. On 15 March 1962, President Kennedy presented his consumer message to Congress which outlined the framework of the modern consumer protection movement through the Consumer Bill of Rights. The Bill outlined four basic consumer rights: the right to safety, the right to be informed, the right to choose among a variety of products and services at competitive prices, and a right to a fair hearing by government during the formation of public policy. See Statement read by President John F Kennedy, Special Message on Protecting the Consumer Interest (15 March 1962). The first World Consumer Rights Day was held in 1982 and is celebrated on 15 March annually to commemorate the President’s speech.

\(^2\) See The Commission on Transnational Corporations’ Draft Code of Conduct for Multinational Corporations (1974) [this was not adopted]; WHO and FAO’s ‘Codex Alimentarius’ Commission; Consolidated list of products whose consumption and/or sale have been banned, withdrawn, severely restricted or not approved by governments, the International Programme on Chemical Safety and the London Guidelines for the Exchange of Information on Chemicals in International Trade etc.
specific objectives in terms of consumer protection.³ In 1981, the United Nations Council requested the Secretary-General to continue prior consultations with Member States and international consumer organisations with the aim of developing a set of general guidelines for consumer protection. The move assisted in reinforcing the increasing recognition that consumer policy issues can no longer be seen as being of purely local concern but must be viewed in the international context.⁴ Draft Guidelines were submitted to the Governments for comment in 1982,⁵ and in May 1983 the Secretary-General submitted to the ECOSOC a further report containing a revised set of draft Guidelines which was followed by extensive discussions and negotiations among Governments on the objectives, specific content and scope of the Guidelines. The various negotiations culminated in April 1985, when the General Assembly unanimously adopted the general Guidelines for Consumer Protection under Resolution 39/85, and requested the Secretary-General to disseminate them to Governments and other interested parties.

Since 1985, the ECOSOC has begun paying increasing attention to the link between environmental concerns and economic and social development especially in the area of sustainable consumption. The UN’s initiatives have, therefore, been heavily influenced by the sustainable development agenda.

In its 57th plenary meeting in 1995, ECOSOC urged all Governments to continue their efforts to implement the Guidelines for Consumer Protection, to create appropriate legal frameworks and establish the means to develop, implement and monitor policies and programmes for consumer protection.⁶ In

⁶ Economic and Social Council 57th Plenary Meeting, 28 July 1995 (Resolution 1995/53)
its 1998 Resolution, the ECOSOC invited Governments to undertake national consultations, with appropriate stakeholder groups, including consumer organisations and representatives of business, trade unions and non-governmental organisations, on Guidelines for Sustainable Consumption.\(^7\)

### 2.2 The UN Guidelines on Consumer Protection\(^8\)

The Guidelines for Consumer Protection provide for an international framework for the development and evaluation of consumer policy with a broad umbrella of objectives.\(^9\) The Guidelines aim to take into account the needs and interests of consumers in all countries, “particularly” those in developing countries, though they recognise that consumers often face imbalances in economic terms, educational levels and bargaining power in different countries. The Guidelines maintain that consumers should have the right to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection. With the above factors as its preamble, the Guidelines set out several objectives.

The first objective is to assist countries in achieving or maintaining adequate protection for their consumers. The Guidelines also intend to facilitate production and distribution patterns responsive to the needs and desires of consumers and to encourage high levels of ethical conduct for those engaged in

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7 ECOSOC Decision 1998/215. It requested the Governments to thereafter submit their views on the proposed new Guidelines to the Secretariat. The ECOSOC also invited the Bureau of the Commission on Sustainable Development to organise, ‘within existing sources’, open-ended consultations among States, and to report thereon to the Inter-sessional Ad Hoc Working Group. The Bureau of the Commission on Sustainable Development was thereafter requested to submit a report on the Guidelines for sustainable consumption to the Council by 1999. A revised text of the UN Guidelines including sustainable consumption was adopted by the UN-Inter-Regional Group Meeting on Consumer Protection and Sustainable Consumption (Sao Paulo, 1998) and on the basis of informal intergovernmental consultations held at the UN in late 1998. The next text was endorsed by the ECOSOC and adopted by the General Assembly in 1999 thus expanding the United Nations Guidelines for Consumer Protection to include new elements on sustainable consumption. The Guidelines intended to spread awareness of the urgency of protecting consumers from environmental and social disasters by inspiring changes in consumption and production patterns.


9 UN Guidelines (n 8) § 1.1(a)-(h)
the production and distribution of goods and services to consumers. The Guidelines also aim to assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers, and to encourage the development of market conditions which provide the consumers with greater choice at lower prices. The Guidelines finally aim to facilitate the development of independent consumer groups and to further international cooperation in the field of consumer protection.

To achieve the above objectives, the Guidelines propound a set of general principles that governments should develop or maintain. The Guidelines observe that governments should set their 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. They go on to set out the specific goals and consumer needs which consumer protection regimes should address:

- the protection of consumers from hazards to their health and safety;
- the promotion and protection of the economic interests of consumers;
- access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- consumer education, including education on the environmental, social and economic impacts of consumer choice;
- availability of effective consumer redress;
- 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; and
- the promotion of sustainable consumption patterns.

The Guidelines require governments to provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies.

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10 UN Guidelines (n 8) § 2
11 In this regard, the Guidelines recognised that unsustainable patterns of production and consumption, particularly in industrialised countries are the major cause of the continued deterioration of the global environment.
They pay attention to the issue of vulnerable consumers, insisting that 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.\textsuperscript{13}

2.3 Consumer rights
The consumer rights identified in the Guidelines which are to be addressed by the Governments include the following.

2.3.1 Physical safety
The Governments were required to adopt measures which ensure that products produced by manufacturers which are available in the market are safe for intended or normally foreseeable use. The Guidelines aim to achieve this by requiring that those responsible for bringing the goods to the market should ensure that they have not been rendered unsafe or hazardous through improper handling or storage. They were also required to instruct the consumers in the proper use of the goods and also inform them of the risks involved in its use. Upon finding a product unsuitable after distribution, the Governments were required to adopt policies which can result in the effective recalling, replacing, modifying or substituting the product within a reasonable period of time or compensating the consumer adequately for the faulty product.

2.3.2 Promotion and protection of consumers’ economic interests
The Guidelines state that Government policies should seek to enable consumers to obtain ‘optimum benefit from their economic resources’. The Governments were to adopt policies which can counter the effects of practices which can adversely affect the economic interests of consumers and the

\textsuperscript{12} UN Guidelines (n 8) § 6 In this regard, the Guidelines state that the potential positive role of universities and public and private enterprises in research should be considered when developing consumer protection policies (ibid § 8).

\textsuperscript{13} In respect of international trade, the Guidelines state that due regard should be given to ensure that procedures or regulations for consumer protection do not become barriers to international trade and are consistent with international trade obligations (UN Guidelines (n 8) § 10)); and instruct all enterprises to obey the relevant laws and regulations of the countries in which they do business. Further to this, the enterprises were to ensure that they conform to the appropriate provisions of international standards for consumer protection to which the competent authorities of the country in question have agreed. It was clearly set out that the Guidelines apply equally to both home-produced goods and services and to imports.
exercise of choice in the market place. To this extent, the Governments had to seek to achieve goals of satisfactory production and performance standards, adequate distribution methods, fair business practices and informative marketing. Governments were to develop, strengthen or maintain measures relating to the control of restrictive and other abusive business practices which may be harmful to consumers, including means for the enforcement of such measures.\textsuperscript{14} Furthermore, Governments were to encourage fair and effective competition in order to provide consumers with a great range of choice among products and services at the lowest cost. Government policies must ensure that a producer has the responsibility of meeting reasonable demands of durability, utility and reliability and adequate availability of after-sales parts and services. Consumers were to be protected from contractual abuses (such as one-sided standard contracts). Promotional marketing and sales practices should be guided by the principles of fair treatment such that consumers should be provided with sufficient and accurate information to enable them to take informed and independent decisions. Governments were to work in close collaboration with manufacturers and consumer organisations to take measures regarding misleading environmental claims, advertising and other marketing activities. Voluntary agreements were to be reached by industry participants and the government to ensure adequate consumer protection. The Guidelines required that Governments should regularly review legislation pertaining to weights and measures and assess the adequacy of the machinery for its enforcement. The Guidelines also required that consumers should have access to accurate information on all aspects of products, particularly about the environmental impact of products and services.

2.3.3 Standards for the safety and quality of consumer goods and services
The Guidelines required that Governments should formulate or promote the elaboration and implementation of standards for the safety and quality of goods and give them appropriate publicity. The national standards were to be reviewed periodically to ensure that they conform to generally accepted international standards. The Guidelines recognised that lower economic

conditions of some nations would have resulted in lower standards, but simply stated that “every effort should be made to raise that standard as soon as possible.” The Governments were also required to encourage and ensure the availability of facilities to test and certify the safety, quality and performance of essential consumer goods and services.

2.3.4 Distribution facilities for essential consumer goods and services
The Guidelines urge the Governments to consider adoption and maintenance of policies to ensure the efficient distribution of goods and services especially when in the case of essential goods and services. The Guidelines were particularly concerned about lack of effective distribution facilities in rural areas.

2.4 Redress and education measures
The Guidelines prescribe certain consumer redress mechanisms and attendant standards. They further require that governments implement consumer education and information initiatives.

2.4.1 Measures enabling consumers to obtain redress
The Guidelines urge Governments to establish or maintain legal and/or administrative measures to enable consumers to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible – taking particular account of the needs of low-income consumers. Governments were to encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner and to establish voluntary mechanisms, including advisory services and informal complaints procedures. The consumers were to be kept informed on available redress mechanisms and other dispute-resolving procedures.

2.4.2 Education and information programmes
The Guidelines place considerable emphasis on the need for consumer education and information programmes. They advocate the development of general consumer education and information programmes, including information on the environmental impacts of consumer choices and behaviour and the possible implications, including benefits and costs bearing in mind the cultural
traditions of the people concerned. The aim is to enable consumers to make informed economic choices, conscious of their rights and responsibilities. They point out to the need to protect vulnerable consumers who may be disadvantaged due to low-income or poor literacy.

The Guidelines urge consumer groups, business and other relevant organisations to be involved in the educational efforts and recommend that consumer education should, where appropriate, become an integral part of the basic curriculum of the educational system. Consumer education and information programmes were to cover important aspects of consumer protection such as health, nutrition, and prevention of food-borne diseases and food adulteration, product hazards and labelling. Consumers were to be kept informed of the relevant legislation and should have access to information as to how to obtain redress. Apart from that, consumers were to be kept informed on weights and measures, prices, quality, credit conditions and availability of basic necessities. Educational programs were to cover environmental protection and efficient use of materials, energy and water. To reach this goal, the Governments were instructed to organise and encourage training programmes for educators, mass media professionals and consumer advisers.

2.5 Sustainable development and international cooperation

In 1999, the United Nations Guidelines for Consumer Protection were expanded to include new elements on sustainable consumption.\textsuperscript{15} The Guidelines intended to spread awareness of the urgency of protection consumers from environmental and social disasters by inspiring changes in consumption and production patterns.\textsuperscript{16} In respect of developing countries they address specific

\textsuperscript{15} United Nations Department of Economic and Social Affairs ‘Expansion of the United Nations guidelines on consumer protection to include sustainable consumption’ 2nd plenary meeting (26 July 1999) (Resolution 1999/7)

\textsuperscript{16} By sustainable consumption, the United Nations intended that the needs of present and future generation of consumers for goods and services should be met in ways that are economically, socially and environmentally sustainable. The Guidelines placed the responsibility of sustained consumption squarely on the shoulders of all members and organisations of society – particularly on informed consumers, Government, businesses, labour organisations and consumer and environmental organisation. The Guidelines provided various direction and guidance to Government, business and consumer and environmental organisations to achieve this goal.
measures to be taken in relation to food, water and pharmaceuticals, identified as ‘priority’ areas in such countries.

The Guidelines also addressed the issue of international cooperation – especially in a regional or sub-regional context, whereby it required governments to develop, review, maintain or strengthen mechanisms for the exchange of information on national policies and measures in the field of consumer protection. Governments are to cooperate in the implementation of consumer protection policies and improvement of the conditions under which essential goods are offered to consumers. Governments were also required to develop international information links regarding products which have been banned, withdrawn or severely restricted. The links were to help ensure that information about products do not vary from country to country in a way that would have detrimental effects on consumers.

The United Nations agenda on sustainable consumption is raised here once again with the Guidelines requiring that governments, international bodies and businesses to work together to develop, transfer and disseminate environmentally sound technologies, including through appropriate financial support from developed countries.17

2.6 Discussion
The Guidelines have received a mixed reception internationally. Sweden unreservedly heralded them as “a major accomplishment… in the economic field…” which would directly benefit “millions of consumers all over the world in their everyday life.”18 The United States, on the other hand, contended that they were not “overly pleased” with the Guidelines, but had joined the consensus because they represented a reasonable compromise.19 The Byelorussian SSR on behalf of the group of East European socialist States

17 Governments were to promote and facilitate capacity-building in the area of sustainable consumption particularly in developing countries and countries with economies in transition. United Nations Chronicle (1985) ‘Guidelines for Consumer Policy Adopted at Resumed Assembly Session’ 5/1/85 U.N.Chron 33 WLNR 508281
stated that they believed that the inter-relationship between consumers and manufacturers was an internal matter subject to national guidelines, and became a matter of international regulation only when it involved international trade. Set in this context, the fact that the Guidelines were adopted unanimously assumes particular significance.\textsuperscript{20}

In 1995 and 1997, ECOSOC requested the Secretary-General to continue with its efforts to implement the Guidelines for Consumer protection and to continue work on the elaboration to the Guidelines to encompass sustainable consumption patterns in cooperation with the other relevant bodies and agencies of the United Nations system, and governments.\textsuperscript{21} The Secretary-General accordingly submitted its Report on the implementation of the U.N. Guidelines by Member States in which he observed that the Guidelines have often been cited by various Member States as a valuable set of principles for consumer protection.\textsuperscript{22} In his 1995 Report, the Secretary-General stated that the Guidelines have had an “impressive impact” on national, regional and international consumer work (although this statement should be qualified by the limited reporting by the Governments).\textsuperscript{23} Of those developed countries reporting, Germany, Sweden, Australia, Norway, Denmark, U.S., Canada, and New Zealand indicated that the Guidelines have had a positive impact on their national consumer policies. Australia appears to have been particularly proactive in implementing the Guidelines. Immediately after their adoption, the Attorney-General requested the National Consumer Affairs Advisory Council to advise him on the extent to which the consumer policy in Australia met with the objectives set out in the Guidelines. In its responding report, the Council pointed out that the consumer policy in Australia have largely met the objectives set out


\textsuperscript{21} ECOSOC Resolution 1995/53; and Resolution 1997/53

\textsuperscript{22} Report of the Secretary-General, Substantive Session of 1995 (E/1995/70); See also Report of the Secretary-General, Substantive Session of 1997 (E/1997/61)

\textsuperscript{23} Only 27 Member States had replied to the questionnaires designed to ascertain the actual utilisation of the Guidelines in national consumer policies and in setting up structures to carry out such policies in 1995. As was noted in the Report itself, clearly the number of responses did not suffice for a full analysis of the status of the implementation of the Guidelines world wide. Having said that, it must be noted that though the respondents were few in number, the responses did indeed cover all regions and consisted of both developing and developed countries.
in the Guidelines, but also identified areas which needed to be considered for improvement.\textsuperscript{24} The Australian Consumer Affairs Council specifically stated that the Guidelines are also useful for countries in which consumer policy is more developed as they represent a framework against which that policy may be evaluated.

The Guidelines have had a major impact on the consumer policies of developing countries.\textsuperscript{25} The Secretary-General’s 1995 Report noted that European Union had funded the Africa Conference on Consumer Protection in 1996. The 1996 Africa Conference organised by Consumers’ International, an international consumer organisation in collaboration with the U.N. Department for Policy Coordination and Sustainable Development helped launch the Model Law for Africa, designed to protect the African consumer and serve as a guide for African Governments in their effort to develop appropriate policies and legislation and enforcement mechanism in the area of consumer protection.\textsuperscript{26} A similar conference was organised in Asia in 1997 by Consumers’ International, in collaboration with the U.N. and other organisations.

Since the inclusion of the concept of sustainable consumption, a further implementation report has been submitted by Consumer’s International and United Nations Environmental Programme. This ‘Tracking Progress’ report observed that of the 53 governments who had responded to the survey, more than third of them were not actually aware of the Guidelines before they received the survey.\textsuperscript{27} There is some criticism from academic circles that the United Nations is becoming an ‘international consumer cop’ or a ‘global nanny’, and that consumer protection should be very much a matter within the exclusive

\textsuperscript{24} National Consumers Affairs Advisory Council (1986) \textit{Australia and the United Nations Guidelines for Consumer Protection} Canberra: Attorney-General’s Department; See Harland (n \#).
\textsuperscript{27} Consumers International & UNEP, Tracking Progress Report “Implementing Sustainable Consumption Policies” (2\textsuperscript{nd} ed.) (2004) at 6, and Appendix 3. U.K. does not feature among the respondents of which 20 were from OECD countries.
preserve of sovereign nations. In this context, it has been observed by this critic that with the Guidelines on consumer protection, the U.N. is moving towards imposing centralised control on the economies of sovereign nations, and that the U.N. should instead stick to its fundamental role of peacekeeper.

The adoption of the Guidelines indicates that there may well be an emergent consensus at the international level of the principles – both procedural and substantive – which should underpin an effective consumer protection regime. There are, however, a number of contextual factors which are readily apparent from the foregoing discussion. First, the consumer protection initiatives pursued by the UN have become intertwined with the sustainable development agenda, in particular the principle of sustainable consumption, and it may be that because of this any consensus is undermined. Secondly, while some countries (both developed and developing) have been proactive in implementing the Guidelines, others have not. Indeed, there is evidence that in some countries awareness of the Guidelines is relatively low. Thirdly, there are some who question whether consumer protection is a matter which falls appropriately within the competence of the UN, and to the extent that this is the case, this tends to undermine the universality of the Guidelines.

3.0 The OECD’s consumer protection initiatives

3.1 Background
The Committee on Consumer Policy of the Organization for Economic Cooperation and Development (OECD) was created in 1969 and is represented by central consumer protection policy authorities of the member states and experts from social organisations as well as entrepreneurs. All OECD member

28 M.L. Weidenbaum, Is the UN becoming a Global Nanny? The Case of consumer Protection Guidelines, (Centre for the Study of American Business, Washington University (Contemporary Issues Series 6) St Louis 1983) 15. The Report claimed that it had actively followed up 150 countries for response to the survey only to receive vast number of requests for information about the Guidelines and the topic of sustainable consumption. The dissemination of information relating to the U.N. Guidelines seems to have failed at several levels as there are hardly any government reports or even academic articles referring to them.
states actively participate in the Committee which works as a forum for the exchange of information and experience in the area of consumer protection. The Committee focuses on the promotion of co-operation among the member states and the implementation of recommendations regarding consumer protection. It also co-operates with non-member countries, consumer organizations, entrepreneurs and academics and carries out intense consultations in order to create efficient mechanisms for increasing the effectiveness of consumer protection.\(^{31}\)

The Committee has produced a wide variety of reports on consumer related subjects ranging from product safety to general economic issues, financial services and marketing practices with the discussion on product safety being one of the Committee’s standing tasks in relation to consumer protection.\(^{32}\) The Committee has taken a number of ad hoc initiatives to co-ordinate national policies and to explore methods of dealing with emergent consumer related problems and issues, in particular focusing on initiatives aimed at encouraging the development of fair and effective mechanisms for resolving disputes between businesses and consumers engaged in cross-border e-commerce.\(^{33}\) These include work in e-commerce consumer protection, electronic privacy and security, online alternative dispute resolution and consumer protection for holders of payment cards.\(^{34}\)

In 1999 the OECD began publishing annual reports produced and submitted by member countries on consumer protection, however, this effort has since 2003

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\(^{31}\) While officially non-members, a number of countries, such as Chile, Brazil, and China, participate in the Committee on an informal basis.

\(^{32}\) Subjects ranging from product safety to general economic issues, financial services and marketing practices with the discussion on product safety being one of the Committee’s standing tasks in relation to consumer protection (Ringstedt (n 30) 467).


been discontinued. The annual reports were structured to review issues which were similar to the issues identified by the UN Guidelines on Consumer Protection. The member states reported on issues relating to:

- institutional development in relation to consumer protection;
- product safety;
- protection of the economic interests of consumers;
- consumer education and information;
- complaints and redress handling; and
- consumer issues related to other policy areas.

3.2 Principles emerging from the OECD’s work

In the following section, we present a review of the OECD policy briefs, guidelines and recommendations, drawing out the key principles which can be discerned from its work on consumer protection regimes. Given the nature of the OECD’s work, there is an inevitable emphasis on cross-border transactions. Nevertheless, the principles emerging from the OECD’s work are applicable to consumer protection regimes more broadly.

3.2.1 Transparency

The Committee works under the broad heading of ‘market transparency and consumer information’ which suggests that transparency is a leading criterion in indicating the effectiveness of consumer protection agencies.

In respect of redress, the Guidelines for Consumer Protection in the Context of Electronic Commerce, adopted by the OECD Council in 1999, calls on businesses, consumer representatives and governments to develop fair, effective and transparent procedures to address consumer complaints and to resolve consumer disputes. The OECD Recommendation on Consumer Dispute Resolution and Redress states that consumers should be provided with clear, comprehensible and accurate information on the procedures, including the process for initiating a complaint and selecting a dispute resolution mechanism, expected costs and duration of the procedure, possible outcomes,

35 www.oecd.org (Publications and Documents)
36 E-Commerce Guidelines (n.34) 1
avenues for appeal and whether the outcome is binding. The Recommendation states that the dispute resolution and redress mechanism should be designed so that they can be used by the consumers with only minimal additional information or help.

Transparency of consumer rights is seen as crucial to promoting “confident consumers”. The OECD Workshop on Consumer Dispute Resolution and Redress stated in reference to payment cardholder protection that providing a payment card network in a transparent manner can increase consumer confidence in the use of payment cards for online purchases, and in the global marketplace more generally. The OECD Report on Mobile Commerce discussed the survey conducted by Consumers International indicating that a lack of transparency deterred consumers from engaging in international commercial transactions.

3.2.2 The consumer protection regime must be appropriately resourced
The Report on the implementation of the 2003 OECD Guidelines on cross-border fraud concluded that although significant progress has been made with regard to tackling cross-border fraud, lack of resources, practical experience and training of enforcement agencies’ officials constrain the achievement of full and effective implementation of the Guidelines. The need for additional financial resources, appropriate training sessions for insufficiently technically skilled staff and language problems have prevented consumer protection agencies of some countries from developing experience in cross-border fraud cases. The OECD Workshop on Consumer Dispute Resolution and Redress

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38 2007 Recommendation (n.37) II.A.5
40 OECD ‘Mobile Commerce’ (2007) DSTI/CP/2006/7/Final 21,22 [This was backed by another survey conducted by the Trans Atlantic Consumer Dialogue reporting similar conclusion] [hereinafter Mobile Commerce]
42 Cross-Border Fraud Implementation Report (n.41) 13. 39
discussed concerns regarding lack of resources for effectively protecting consumers located abroad in relation to cross-border cases.\(^{43}\)

### 3.2.3 Efficient enforcement and redress mechanisms

Efficient enforcement as a factor in effective consumer protection was echoed in the *2007 Recommendation* where it encouraged member states (in relation to dispute resolution and redress mechanisms for consumers acting individually), to provide consumers with simplified court procedures for small claims.\(^{44}\) Being independent, binding and enforceable, small claims procedures offer consumers the main benefits of the judicial system without the high costs, delay and procedural complexities procedures associated with the regular courts. The idea was to offer consumers the opportunity to obtain a judicial determination of their dispute through less formal and expedited procedures than those used in traditional courts which could include simplified proceedings in separate courts or tribunals of limited jurisdiction or simplified proceedings in the regular courts of first instance.\(^{45}\) The *2007 Recommendation* recognised that consumer disputes require tailored mechanisms that provide consumers with access to remedies that do not impose a cost, delay and burden disproportionate to the economic value at stake and at the same time do not impose excessive or disproportionate burdens on society and business.\(^{46}\) The Recommendation also states that these mechanisms should be designed to be sufficiently accessible and easy to use to enable consumers to elect to conduct the procedures without the need for legal representation or assistance as far as possible.\(^{47}\) It

\(^{43}\) OECD 2005 Workshop (n.10 above) at 35. See also International Chamber of Commerce ‘Putting it Right: Best Practices for Customer Redress in Online Business’ (2003) [Seven best practices for customer redress in online businesses one of which was that the consumer protection system should be sufficiently resourced. The other best practices were that the system should be objective and clear; credible and supportive to customers; easily accessible; free; speedy and equitable; and should not deprive the customer of any right he or she would otherwise have.]

\(^{44}\) 2007 Recommendation (n.37) II.A.7 (b). Small claims procedures are designed as informal alternatives to traditional court proceedings to reach the average consumer with a low value claim, and therefore acts as a ‘middle ground’ between formal civil litigation and alternative dispute resolution.

\(^{45}\) 2007 Recommendation (n.37) II.A.7 (b)

\(^{46}\) 2007 Recommendation (n.37) II.A.2; see also Asia Pacific Economic Cooperation ‘Voluntary Online Consumer Protection Guidelines’ (2002) which state that businesses should ‘provide consumers with fair and timely means to settle disputes and obtain redress without undue cost or burden’ and encourage the use of ‘internal mechanisms to address consumer complaints.’

\(^{47}\) 2007 Recommendation (n.37) II.A.3
recommends mechanisms for consumer protection enforcement authorities to obtain or facilitate redress on behalf of consumers.48

The Report of the 2001 Workshop on Consumers in the Online Market Place discussed how good practices at the level of internal complaints handling can lead to the most efficient resolutions for both businesses and consumers.49 It stressed the need for internal complaints handling mechanisms for consumer protection, in order to help settle disputes in a fair and effective way in addition to saving time and energy.50 The OECD 2005 Workshop highlighted internal complaints handling processes as an integral element of consumer dispute resolution and redress system.51 It noted that ‘the efficient and effective handling of consumer complaints at the earliest stage can bring benefits to businesses and consumers alike, alleviating the need for recourse to more costly and time-consuming external mechanisms in a large number of cases.’52 It also noted that alternative dispute resolution holds ‘great promise’ for low-cost and efficient resolution of consumer disputes, especially for cross-border disputes.53 The Report on the Workshop admitted that there has been no comprehensive assessment of the availability, usage and suitability of alternative dispute resolution schemes in OECD member countries.54 However, it discussed a number of surveys of more limited scope which indicate that alternative dispute resolution has not yet fulfilled its potential as a low cost and efficient mechanism for the resolution of business to consumer disputes.55

48 2007 Recommendation (n.37) II.C
50 Berlin Workshop (n.49) 6. See also Asia Pacific Economic Co-operation ‘Voluntary Online Consumer Protection Guidelines’ (2002) which state that businesses should ‘provide consumers with fair and timely means to settle disputes and obtain redress without undue cost or burden’ and encourage the use of ‘internal mechanisms to address consumer complaints.’
51 OECD 2005 Workshop (n.39) 3, 9
52 OECD 2005 Workshop (n.39) 3
53 The Report also suggested that despite efforts to encourage the development and use of ADR, the findings suggest that there is still room for improvement in the development, promotion and use of fair and effective ADR services.
54 OECD 2005 Workshop (n.39) 21
The Report goes on to state that where alternative dispute resolution methods are not successful, or in cases that are not conducive to information resolution (such as cases involving fraudulent or illegitimate businesses), small claims court procedures can offer consumers access to the court system at a cost and burden not disproportionate to the amount of their claim. Though it noted that whilst most OECD countries have small claims courts of some form, the procedures used in these courts vary significantly from country to country in terms of type of procedure, type of dispute and claim that may be heard, monetary thresholds, financial costs to parties, and overall accessibility to consumers.

3.2.4 Effective enforcement and redress mechanisms
The 2007 Recommendation recognised that the availability of effective dispute resolution and redress mechanisms can increase consumer confidence and trust in the online and offline marketplace, encourage fair business practices, and promote cross-border commerce, including electronic and mobile commerce. The Recommendation offers a framework for governments and businesses to help consumers resolve disputes and settle claims, both for individual consumers and groups of consumers, and offers mechanisms for getting money back for wronged consumers. It recommends that national consumer protection agencies have legal authority to obtain and facilitate redress on behalf of consumer victims. The 2007 Recommendation also recommends provision of alternative dispute resolution services including online dispute resolution, by which consumers and businesses engage in and out-of-court process to reach an agreement. Such procedures may include active intervention from neutral third party or even public agency based mechanisms where consumers may be able to submit their complaints against businesses. In fact, fostering the development of effective alternative dispute resolution mechanisms for B2C transactions has been a central focus of the OECD’s

56 The procedures are broadly organised into three different categories: separate courts or tribunals of limited jurisdiction; modified procedures in ordinary courts; and other types of simplified procedures.
57 OECD 2005 Workshop (n.39) 6
58 2007 Recommendation (n.37) II.A.7 (a)
59 2007 Recommendation (n.37) II.A.7 (a)
programme. The potential benefits of alternative dispute resolution mechanisms such as it being effective, timely and cheap alternative to court-based dispute resolution were discussed in the Workshop.

The Guidelines for Protecting Consumers from Fraudulent and Deceptive Practices across Borders recognised the importance of effective dispute resolution and redress mechanisms and called for the development of effective cross-border redress systems. It called for member countries to consider how to ensure effective redress for victimised consumers. The E-Commerce Guideline focused on the development of fair, effective and transparent mechanisms to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, including those that occurred across borders. In this regard it called for businesses, consumer representatives and government to work together to continue to provide consumers with the option of alternative dispute resolution mechanisms. An OECD Policy Brief points out the difficulties faced by consumers to take private legal action to obtain redress in cases of cyber fraud and suggests that consumer protection authorities should step in to ensure that consumers are compensated in cases of fraud online.

In its report Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes the OECD examined best practice in consumer policy in relation to consumer enforcement in order to assess the consumer regimes amongst its member countries are most effective. The Report identified five principal models of enforcement: those relying on the criminal justice system for penalties; those in which the administrative agencies use primarily the civil justice system to obtain sanctions and remedies; those in which the

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60 OECD 2005 Workshop (n.39) 21
61 OECD 2005 Workshop (n.39) 21
63 Fraudulent and Deceptive Practices Guidelines (n.62) 7
64 E-Commerce Guidelines (n.34) VI.B
65 OECD Policy Brief ‘Protecting Consumers from Cyber Fraud’ (Oct 2006) 6
administrative agencies have power themselves to impose financial penalties; those relying primarily on consumer complaints to an Ombudsman, and those relying primarily on self-regulatory arrangements and on the enforcement of private rights. No model was identified as being superior: indeed the Report concluded that due to different legal traditions and cultures, it is highly unlikely that any single model of practices and procedures will provide the most cost-effective means of achieving a high degree of compliance with the law across the OECD countries.

3.2.5 Accessibility: consumer information and advice

In its Policy Brief regarding Protection of Consumers from Cyber Fraud, the OECD states that the ‘first line of defence...is good education’. One of the major issues identified in the Report on Consumer Protections for Payment Cardholders is that consumer education was lacking generally in OECD countries with regard to protections available for payment cardholders. The 2007 Recommendation states that Member countries should cooperate with businesses, industry groups and consumer groups in furthering consumer and business understanding of how to avoid disputes, of dispute resolution and redress mechanisms available to consumers and information on where consumers can file complaints. The importance of providing customers with access to redress mechanisms was stressed in the 2003 Recommendations of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders.

One of the main points that emerged in the presentations and discussions by representatives of governments, business groups and consumer organisations at the Berlin Workshop was that both consumers and businesses need to be educated on consumer protection principles. It was recommended that governments ensure improvement of information to consumers, and in addition

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66 Cyber Fraud (n.65) 5; 2005 survey conducted by the Momentum Research Group found that European consumers were less aware of ID theft than those in the US; The International Consumer Protection and Enforcement Network’s campaign ‘Fraud Prevention Month’ is an awareness campaign taking place on a designated moth every year.
67 2007 Recommendation (n.37) VI.1
68 Cross-Border Fraud Implementation Report (n.41)
69 Berlin Workshop (n.49) 5
ensure that the information provided is in a form accessible for consumers. The importance of consumer education and awareness was reiterated in the third year Report on the Consumers in the Online Marketplace.\textsuperscript{70}

The \textit{OECD E-Commerce Guidelines} highlight the important role of payment cardholder protections and enhanced consumer education in the development of the online global marketplace. Despite efforts to improve the development, promotion and use of fair and effective consumer dispute resolution methods, surveys suggest that lack of consumer awareness and accessibility has an effect on consumer protection issues. For example, the 2004 Eurobarometer survey on access to justice found that 38% of respondents had never heard of bodies, such as arbitrators, ombudsmen, arbitration or conciliation bodies that could offer an alternative to court action.\textsuperscript{71} Consumer education and increasing awareness of businesses and consumers of the consumer protection framework has been cited as important in context of electronic commerce.\textsuperscript{72} This factor has been reiterated in the \textit{Report on Consumer Protection for Payment Cardholders}.

In relation to small claims procedures, the OECD sought information from member countries as to how small claims courts may operate in cross-border cases. While no responding countries had any legal restrictions based on residency of the claimant, there were significant practical and financial barriers (such as travelling to present their case) to using the court procedures of another country to resolve low value disputes. It emerged that in the UK a purely written procedure is also available for claims that are admitted or that are not defended, thus making the small claims procedure more accessible to foreign consumers.\textsuperscript{73}

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\textsuperscript{72} E-Commerce Guidelines (n.34) Part 2 at VIII; See also OECD ‘Radio-Frequency Identification: Drivers, Challenges and Public Policy Considerations’ DSTI/ICCP/2005/19/Final (2006)
\textsuperscript{73} OECD 2006 Consumer Dispute Resolution Report at 28. Some countries make use of communications technologies to allow for remote attendance of parties or witnesses, or the submission of documents. In the UK, there is an online mechanism for money claims for fixed amounts with the County Courts – however, an address in England or Wales is required for receipt of documents.
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3.2.6 Vulnerable consumers

The 2007 Recommendation specifically comments on the special needs of disadvantaged or vulnerable consumers and states that member states should consider their needs and ensure that such consumers or their representatives can access the mechanisms relating to dispute resolution and redress.\(^74\) The Recommendation specifically states that when designing education and awareness initiatives, special consideration should be given to the needs of disadvantaged and vulnerable consumers.\(^75\)

Security and privacy issues of vulnerable consumers have been identified and addressed in other OECD reports. For example, the Report on Mobile Commerce deals extensively with issues relating to the protection of minors using mobile services.\(^76\) Privacy and security issues have been addressed in various guidelines in an attempt to guide the development of policies in relation to security threats and vulnerabilities whilst valuing privacy and individual freedom. Reports on Mobile Commerce, Guidelines for the Security of Information Systems and Networks, Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data provide some striking examples addressing this issue.\(^77\)

3.2.7 Collective action issues

The 2007 Recommendation covers issues where a number of consumers allege that they have suffered economic harm as a result of the similar conduct of the same entity or related entities and where it is neither practicable nor efficient for consumer to act individually to resolve their disputes.\(^78\) It specifies that member countries should ensure that consumers in these cases should have access to mechanisms that provide for the collective resolution of those disputes.\(^79\)

\(^{74}\) 2007 Recommendation (n.37) II.A.6
\(^{75}\) 2007 Recommendation (n.37) VI.2
\(^{76}\) Mobile Commerce (n. 40) 28
\(^{77}\) Mobile Commerce (n.40); OECD ‘Guidelines on the Protection of Privacy and Transborder Flows of Personal Data’; OECD’s 2002 ‘Guidelines for the Security of Information Systems and Networks’
\(^{78}\) 2007 Recommendation (n.37) II.B.1
\(^{79}\) 2007 Recommendation (n.37) II.B.1
regard to collective action, member countries are to ensure provision of such mechanisms which are transparent, efficient, and fair to both consumers and businesses.\textsuperscript{80} Member countries are required to ensure that reasonable measures are taken to inform consumers of the initiation of cases so that consumers can take reasonable steps to either include themselves or exclude themselves from such collective action.\textsuperscript{81} Dispute resolution and redress mechanisms for consumers acting collectively include but are not limited to actions initiated by individual consumers, or consumer organisations or also by consumer protection enforcement authorities.\textsuperscript{82}

The \textit{2006 Consumer Dispute Resolution and Redress in the Global Marketplace Report} also identifies collective action lawsuits as playing an important role in addressing market failures and providing consumer with access to remedies in cases where they would not have an incentive to act individually.\textsuperscript{83} The Report also highlights the presence of collective legal action by consumer organisations which provide a mechanism to prevent or remedy wrongful conduct by a defendant that may otherwise go unchecked.\textsuperscript{84} In complex cases of fraudulent or deceptive practices affecting large number of consumers, especially in cross-border situations, the Report recommends that consumer protection agencies be empowered to recover monies wrongfully obtained by traders. In this regard, the Report points out the unique position of government consumer protection agencies which may have at their disposal investigative and other enforcement powers that are not available to private litigants.\textsuperscript{85}

\subsection*{3.2.8 Cross-border consumer protection issues}

One major point addressed in OECD guidelines is that most existing domestic frameworks for consumer dispute resolution and redress were developed to address domestic cases and are not always adequate to provide consumers...
with remedies across borders.\textsuperscript{86} The \textit{E-Commerce Guidelines} point out that the inherently international nature of the digital networks and computer technologies that comprise the electronic marketplace make it necessary to have a global approach to consumer protection as part of a transparent and predictable legal and self-regulatory framework for electronic commerce.\textsuperscript{87} Hence, it becomes necessary for member states to adopt an internationally co-ordinated approach in order to exchange information and establish a general understanding about how to address e-commerce issues. The Guidelines therefore stress the need to devote “special attention to the development of effective cross-border redress systems.”\textsuperscript{88} The OECD has also recommended global cooperation in relation to effective consumer protection in the context of global electronic commerce.\textsuperscript{89} A similar line was taken at the \textit{OECD Workshop in Berlin} as one of the main points that emerged in the presentations was that international cooperation among all stakeholders is critical. The Report pointed out the “internet is global, as is e-commerce. To ensure effective consumer protections, stakeholders must work together across national boundaries.”\textsuperscript{90} The Report goes on to point out how important it is for the stakeholders to reach out to non-member countries.\textsuperscript{91} The Berlin Workshop calls for governments to make provisions for more information gathering and sharing amongst countries in order to serve the cause of effective monitoring of policy function. Attention is to be paid not only to safeguards pledged but also to consumer experiences and response of businesses in practice in case of consumer dispute. There is no doubt that the OECD is keen to promote measures which help facilitate cooperation between Member countries with regards to issues relating to consumer protection.\textsuperscript{92}

The \textit{OECD Policy Brief on Cyber Fraud} stresses the importance of strengthening international cooperation in order to detect and stop fraudulent

\textsuperscript{86} OECD Global Marketplace (n.83) 8  
\textsuperscript{87} E-Commerce Guidelines (n.34) 1  
\textsuperscript{88} E-Commerce Guidelines (n.34)  
\textsuperscript{89} E-Commerce Guidelines (n.34) Part 4  
\textsuperscript{90} Berlin Workshop (n.49) 5  
\textsuperscript{91} Berlin Workshop (n.49) 6  
\textsuperscript{92} For example, since 1975 the OECD supports the operation of a notification system on product safety measures. This exchange of information relating to new safety regulation, guidelines, product bans and recalls and product safety research project acts to promote product safety cooperation at an international level. The transparency contributes to harmonisation of product safety measures and also assists in the reduction of barriers to trade.
activities online as cyberspace does not respect national borders. The OECD Cross-Border Fraud Guidelines recognise the importance of protections for payment cardholders, especially for unauthorised and fraudulent payments in cross-border transactions. The 2007 Recommendation also addressed the issue of cross-border disputes whilst making recommendation on consumer dispute resolution and redress and provided detailed practical ways to deal with cross-border issues.

The Report on the implementation of the 2003 OECD Guidelines on Cross-Border Fraud pointed out that member countries have diverse consumer protection systems, involving different laws, enforcement procedures and roles for judicial authorities, and rely to varying extents on civil, criminal and administrative law. If a good system is not in place, cross-border fraudsters take advantage of limitations in the cross-border application and enforcement of consumer protection laws especially as the location of fraudsters can be difficult to determine. To address these challenges, the Guidelines pointed out that there is a need for a common framework to develop ‘closer, faster and more efficient co-operation among consumer protection enforcement agencies’. The relevant guidelines made a series of recommendation to combat this issue including:

- Establishing a domestic system for combating cross-border fraudulent and deceptive commercial practices against consumers
- Enhancing notification, information sharing, and investigative assistance
- Improving the ability to protect foreign consumers from domestic businesses engaged in these practices and vice versa
- Considering how to ensure effective redress for victimised consumers and
- Cooperating with relevant private sector entities.

93 Cyber Fraud (n.65)
95 2007 Recommendation (n.37) III
96 The Guidelines pointed out that although there exist certain international mechanisms for judicial cooperation and criminal law enforcement cooperation, these are not always appropriate to consumer protection.
The Guidelines indicated that there is a significant need to improve the cooperation occurring directly between consumer protection enforcement agencies.

The *Report* also pointed out the necessity to improve the effectiveness of judicial remedies in cross-border consumer cases.\(^97\) It recommended member countries to improve international and bilateral arrangements to facilitate judicial cooperation in the area of consumer protection. The Report noted that some legal and regulation regimes differentiate between domestic and cross-border transactions. In an era where cross-border transactions are breaking down barriers between national jurisdictions, this issue can be especially important. The Report pointed specifically to UK where there ‘may’ be more comprehensive protections for domestic transactions than for cross-border transactions.\(^98\)

### 3.2.9 The importance of “best practices”

A further area of importance is the necessity of elaboration of guidelines on specific principles in order to guide businesses to comply with the principles and to aid consumers in realising the full extent of their safeguards. The Policy Brief also recommends measuring the impact of consumer education to help identify best practices and to improve methodologies for designing and running further campaigns.\(^99\) The Berlin Workshop state that such further explanation ‘could come in the form of a catalogue of best practice examples or similar document.’\(^100\) Anna Fielder of Consumers’ International pointed out in the Berlin Workshop that building up a catalogue of best practices to accompany the

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97 OECD Global Marketplace (n.83) 7
98 It quoted the decision by the UK High Court which held that Section 75 of the United Kingdom Consumer Credit Act 1975 which provides consumer protections for product related difficulties do not apply to overseas credit card transactions. See also OECD (2004) ‘The Istanbul Ministerial Declaration on Fostering the Growth of Innovative and Internationally Competitive SMEs’; See also EC ‘Report on the Review of the European-Judicial Network and future Perspectives for Improved European Union Consumer Assistance’ (2003) at 17, which reported that in all member countries there was a need for development of ADR services with cross-border competence. By contrast it pointed out that the United States cardholders doing business with merchants outside the United States are covered by the same federal legal protections as those afforded them when trading with merchants within the United States.
99 Cyber Fraud (n.65) 7
100 Berlin Workshop (n.49) 6
Guidelines for Consumer Protection in the context of e-commerce would help in doing away with the need to go through ‘arduous rounds of negotiation’.

Considerable emphasis has been placed on self-regulatory mechanisms and industry-based initiatives. The *2006 Report on Consumer Dispute Resolution and Redress in Global Marketplace* recognises that in addition to laws and regulation, important protections are also provided by industry practice through such means as industry codes, card network requirements and individual issuer initiatives. With regard to industry codes, the Report stated that in a number of member countries the industries have implemented self-regulatory codes that contain provisions relevant to card-related protections and rights and responsibilities of the parties to the card system. These codes are developed by the industry in partnership with governments and consumer representatives. The Report also noted that major card networks impose obligations on their issuers to provide protection that may exceed those required by national laws and individual card issuers have in some cases supplemented the requirements imposed by the card networks to provide additional protections for consumers. The Berlin Workshop also stressed on the necessity of ‘Best Practices’ documents in addition to Guidelines in order to help businesses to comply with the principles and to aid consumers in realising the full extent of their safeguards.

### 3.2.10 More research on consumer protection

Another important area covered by the OECD is in relation to research. The Berlin Workshop pointed out that “more information gathering and sharing should be encouraged…” in order to enhance consumer protection. It was pointed at the Berlin Workshop that data is also needed to be able to put consumer protection problems into a broader context of consumer empowerment. The OECD Policy Brief on Cyber fraud also stress the necessity for more research to help measure the scale of current obstacles to the development of business-

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1. OECD Global Marketplace (n.83) 15-16
2. Berlin Workshop (n.49) 5
3. Berlin Workshop (n.49) 6
4. David Fares, Berlin Workshop (n.49) 9

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470 | Benchmarking the UK Framework Supporting Consumer Empowerment |
to-consumer digital market and to establish priorities for enforcement. The 2007 Recommendation recommends the setting up of mechanisms for collecting consumer complaints and analysing marketplace trends.

3.3 Discussion and conclusions
While the focus of the OECD’s work in this area, by virtue of the nature of the organisation, has been on issues relating to cross-border transactions, it has engaged in a number of important consultation exercises across member countries, resulting in broad level principles which should underpin consumer protection regimes.

The following points can be distilled from the foregoing discussion:
- In respect of “confident consumers”, the importance of transparency of the regime, both in respect of the nature of consumer rights, and the effectiveness of redress mechanism;
- The need for appropriate resourcing levels, including training for staff;
- Efficient redress mechanisms:
  o A broad recognition that litigation costs are often disproportionate to the loss in question, with the consequent need to provide loss-cost solutions, including small claims;
  o Emphasis placed on the importance of internal (firm-based) complaints-handling mechanisms, reducing costs for both consumers and firms;
  o ADR is considered to show “great promise” as an alternative to court-based mechanisms, although there is still great unexploited potential.
- Effective enforcement:
  o Recommendation that consumer protection agencies have standing to litigate on behalf of consumers;
  o Underlined the potential importance of ADR;

105 Cyber Fraud (n.65) 6
106 2007 Recommendation (n.37) V.1, V.2
Recognised that there are various models of enforcement, and questions over enforcement design are sensitive to the different legal traditions and cultures of countries.

- Stressed the importance of education as the “first line of defence” – the importance of information applies to both businesses and consumers;
- Underlined the need to take into account the special needs of vulnerable consumers, especially in terms of access to redress mechanisms;
- Recognised the pervasiveness of the collective action problem, called on the adoption of clear and transparent procedures for group litigation and enforcement by consumer protection agencies (particularly in respect of complex fraud cases);
- Underlined the potential importance of best practice and the need to encourage industry-based initiatives (e.g., self-regulation);
- Called on more research on consumer behaviour in order that consumer protection issues can be considered in the broader context of consumer empowerment.

4.0 The European Union’s Initiatives on consumer protection

In this section we review the initiative pursued by the European Union in respect of consumer protection. There are two levels to this inquiry. First, principles and standards can be derived from the procedural and substantive content of EC law and policy addressed to consumer protection. Secondly, in pursuing the harmonisation of consumer protection within the internal market, the Community institutions have looked across the Member States’ consumer protection regimes with a view to promoting policy learning and ultimately greater convergence.

4.1 Background

The European Consumer Protection Charta passed by the European Council in 1973 enumerated consumer rights as being the right of consumer protection and assistance, the right of compensation for damages that affect the consumer, the right to information and education and the right of
representation.\textsuperscript{107} The Resolution of the Council of Ministers in 1975 defined a preliminary programme for a consumer’s protection policy wherein they enumerated consumer rights to fall in five major categories.\textsuperscript{108}

- The right to health and safety protection;
- The right to protection of economical interests;
- The right to compensation for damages;
- The right to information and education;
- The right to representation.

These Resolutions lacked political/institutional recognition which could have only been provided by means of Treaties. Though references relating to consumers can be seen in the Treaty of Rome, consumer protection per se was not addressed directly.\textsuperscript{109} The Treaties of Maastricht and Amsterdam provided the requisite legislative competence for consumer protection measures in the form of Articles 153 and 95 EC.\textsuperscript{110} Article 153 stipulates that the “Community shall contribute to protecting the health, safety and economic interests of consumers as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.”\textsuperscript{111} It also provides for greater consideration to be given to consumer interests in other EU policies. Article 95 is the legal basis for the measures of harmonisation which have as their object the establishment of the internal market.\textsuperscript{112} It emphasises the objective of a high level of consumer protection taking into account any new developments based on scientific facts. Since then, the European Commission developed soft law initiatives in the field of consumer protection, and has worked to provide harmonization in the field of consumer protection in

\textsuperscript{109} S Weatherill  \textit{EU Consumer Law and Policy} (Edward Elgar Cheltenham 2005). For details relating to the evolution of consumer policy in Europe see Chapter 1.
\textsuperscript{110} It is the Maastricht Treaty, which “introduced consumer protection as a formal EC legislative competence for the first time”. Weatherill (n.109)
\textsuperscript{111} Article 153EC
\textsuperscript{112} Article 95EC
Consumer Policy is now part of the European Union’s strategic objective to help improve the quality of lives of its citizens and various instruments are used to achieve this (such as EC legislation, cooperation with the national authorities, common actions, co-regulation between consumer and business organisations, good practice guidelines and support of consumer organisations). In the Green Paper on European Union Consumer Protection in 2001 the Commission committed to deliver a system of regulation that:

- achieves as high as possible a level of consumer protection whilst also keeping costs to business to a minimum;
- is as simple as possible and is sufficiently flexible to respond quickly to the market, and which involves stakeholders as much as possible; and
- provides legal certainty and ensures its efficient and effective enforcement, especially in cross-border cases.

The EU Consumer Policy aims to provide essential health and safety requirements, empower consumers to understand policies that affect them and to make an input into these policies by building their capacity to promote their interests, and to safeguard economic interests to ensure a high level of protection. Another major aim of the EU Consumer Policy is to set a ‘coherent and common environment ensuring that consumers are confident in shopping across borders throughout the EU.’ It regards that consumer policy cannot be developed in isolation without taking into account other areas of law such as the internal market, environment and sustainable development, transport, financial services, competition, agriculture, external trade. Hence, EU consumer policy intends to systematically integrate consumer concerns into all relevant EU policy areas.

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113 Weatherill (n.109)
115 COM (2001) 531 final
117 EU Consumer Policy Strategy 2002-6 (n.116)
118 EU Consumer Policy Strategy 2002-6 (n.116)
The three objectives of the EU consumer policy strategy for years 2002-2006 were (a.) a high common level of consumer protection (b.) effective enforcement of consumer protection rules, and (c.) involvement of consumer organisations in the development of national consumer policies. An ex-post evaluation of the impact of this EU consumer policy strategy indicated that member states have either ensured that the policy concerns of the EU have been included in the national consumer policy agenda or have made the national policy compatible with the EU strategy.\textsuperscript{119} Despite some evidence of convergence of EU and national consumer policies, it was found, nevertheless, that the focus of national agendas on different priorities could be limiting the impact of the EU strategy.\textsuperscript{120}

4.2 EU Consumer Policy Strategy 2007-2013

The EU Consumer Policy Strategy 2007-2013 identified three main objectives in relation to consumer protection.\textsuperscript{121} It aimed to empower EU consumers with an intention to boost competition significantly. The document recognised that ‘[e]mpowered consumers need real choices, accurate information, market transparency and the confidence that comes from effective protection and solid rights.’ The second objective was to enhance EU consumers’ welfare in terms of price, choice, quality, diversity, affordability and safety. Thirdly, the policy aims to protect consumers effectively from the serious risks and threats that they cannot tackle as individuals. In achieving the three objectives the Commission was to be guided by the relevant articles of the Treaty. This was also reflected in the operational objectives of the new consumer financial 2007-2013 which sets out the legal framework for EU consumer policy expenditure in the period covered by the strategy:


\textsuperscript{120} Ex-post Evaluation (n.119)

\textsuperscript{121} Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions ‘Consumer Policy Strategy 2007-2013: Empowering consumers, enhancing their welfare, effectively protecting them’ COM (2007) 99 final
“To ensure a high level of consumer protection through a simple legal framework, improved evidence, better consultation and better representation of consumer’s interests.

To ensure the effective application of the rules notably through enforcement cooperation, information, education and redress.”

The priorities of the EU Consumer Policy Strategy 2007-2013 with intent to achieve the objectives above were identified as:

4.2.1 Better monitoring of the consumer markets and national consumer policies
The Policy document recognised the need for greater development of monitoring tools and indicators to assess market function in consumer terms. It was felt necessary for policy makers to develop a more sophisticated understanding of consumer behaviour to devise better regulation. It stated that tools were needed to monitor markets in terms of core outcomes such as safety, satisfaction, price and complaints but also to monitor better the integration of the retail internal market and the effectiveness of national consumer policy regimes. In this regard, the Policy document felt that it was necessary for consumer and competition policy makers and enforcers at EU and national level to cooperate more closely to further their common goal of consumer welfare.

In this regard, the action that EU intended to take was to develop consumer-oriented monitoring of the internal market. Indicators and statistics were to be developed in the area of level of cross-border trade, price convergence or divergence, legal compliance, confidence, consumer complaints, prices, access and satisfaction. A task force has been established within the Health and Consumer Protection Directorate-General specifically to monitor markets and expand the evidence base for consumer policy by improving EU-wide collation and analysis of data. This has led to the first edition of the Consumer Markets Scoreboard122, which will subsequently be published annually. The Scoreboard

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is intended to identify where markets are not working well for consumers and where intervention may be appropriate.

Work is expected to be developed in order to gain a richer understanding of consumer behaviour, in particular to understand how rational consumers are in practice and how new technologies and marketing practices affect them.\textsuperscript{123} It aims to develop a more systematic monitoring of national consumer policies using benchmarks. The Policy document identified a significant lack of consumer and demand-side statistics.\textsuperscript{124}

### 4.2.2 Better consumer protection regulation

The Policy document stated that though the existing consumer protection at EU level guarantees core consumer protection in all Member States, the EU contribution to national consumer protection regime is not widely known to consumers. Initially most of the existing EU consumer rules were to be based on the principle of ‘minimum harmonisation’ with the legislation explicitly recognising the right of Member States to add stricter rules in addition to the EU rules. However, it was felt necessary during the Consumer policy strategy 2002-2006 that this approach should be changed to reflect ‘full harmonisation’ whereby legislation should not, within its given scope, leave room for further rules at national level.\textsuperscript{125} This was felt necessary in order to achieve a well-functioning internal market.

\begin{itemize}
\item \textsuperscript{123} The Seventh Framework Programme for Research and Technological Development (FP7) was to be used to increase understanding of consumer behaviour. For example, funding is made available under research strands on food, agriculture and biotechnology (theme two) and socio-economic sustainable development: Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013)
\item \textsuperscript{124} Eurostat plays a significant role in gathering ‘hard’ consumer data, such as that on comparable prices and validating ‘soft’ statistics. In the safety area, the European Information system on ‘Risks from Chemical Products released from Consumer Products/Articles’ provides evidence on the risks related to the safety of products and services.
\item \textsuperscript{125} EU Consumer Policy Strategy 2002-6 (n.116)
\end{itemize}
The Policy document indicates that the Commission will also address problems relating to particular Directives or report on the operation of other Directives.\textsuperscript{126} It also will co-finance operational functioning of European level consumer organisations and will support national consumer organisation (in particular, organisations of new Member States) through training in core skills and also specialised subjects in an attempt to improve consumer protection regulation.

\subsection*{4.2.3 Better enforcement and redress}

The Consumer policy strategy 2002-2006 placed a strong emphasis and this was to be continued in the current policy strategy whereby it called for action from consumers, traders, media, consumer NGOs, self-regulatory bodies and public authorities. These several actors were to act on implementing the initiatives that have already begun and filling up gaps which existed in addition to ensuring coordination and coherence. The Commission was to monitor the effectiveness of national enforcement regimes through ‘surveys and other tools’.\textsuperscript{127}

The Commission intends to continue to work together with Member States to achieve timely and uniform transposition of the Unfair Commercial Practices Directive.\textsuperscript{128} It hopes that the Consumer Protection Cooperation Regulation will bring about immense changes in the way enforcement authorities in the Member States cooperate among themselves and with the Commission. With regard to redress mechanisms the Commission aims to reinforce the monitoring and encourage the use of the existing recommendations which establishes a number of minimum guarantees for alternative disputes resolution.\textsuperscript{129}

\subsection*{4.2.4 Better informed and educated consumers}

The Policy document has on its priority list the aim to add significant value to national, regional and local efforts to inform and educate consumers through

close cooperation with the Member States. In particular it regarded that the European Consumers Centre network could be developed further as EU’s interface with consumers.130

4.2.5 Putting consumers at the heart of other EU policies and regulation
The Policy document went one step further when it indicated that consumers were directly affected by many EU policies such as the internal market, enterprise, environment, financial services, transport, competition, energy and trade. Though it felt that progress has been made in the integration of consumer interests notably in product safety, transport, telecommunications, energy and competition – for the future it aimed to further these achievements in order to make integration of consumer interests more systematic.

4.3 Convergence and the emergence of EU level principles for consumer protection
As part of the ex post evaluation of EU consumer policy the Commission made a number of recommendations about how EC and national consumer policies could be improved to the benefit of consumers. The main points are summarised here.

4.3.1 Transparency
The European Commission aims to create consumer markets which are competitive, open, transparent and fair. An ex post evaluation of the impact of the EU consumer policy 2002-2006 observed that different priorities of member states could pose a “threat” and currently the debate was whether to prioritise safety of goods and services versus market transparency.131 Apart from consumer issues, the European Commission in general believes in high levels of transparency in governance as can be seen from the European Transparency Initiative.132

130 EU Consumer Policy Strategy 2007-13 (n.121) 8
131 EU Consumer Policy Strategy 2002-6 (n.116)10
4.3.2 Regime to be appropriately resourced
The *ex post* evaluation of the impact of the EU consumer policy strategy 2002-2006 recommended that the new member states authorities should increase their financial contributions to consumer organisations to help them develop information campaigns and to monitor enforcement of Community legislation.\(^{133}\) It further stated that consumer organisations were to be adequately resourced in relation to competences, skills and finances in order for them to contribute effectively to the high level of consumer protection and to the enforcement of consumer protection rules.\(^{134}\)

4.3.3 Efficient enforcement and redress mechanisms
In a number of countries dispute resolution processes exist which do not involve the courts, although the private customer retains the legal right to go to court if he/she is dissatisfied. The Council of Ministers has indicated its interests in alternative dispute resolution mechanisms by calling upon the Commission to promote and support such mechanisms without prejudicing the consumer’s option for seeking judicial redress.\(^{135}\) The European Commission published a Recommendation setting out principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.\(^{136}\)

4.3.4 Effective enforcement and redress mechanisms
One of the main objectives of the Consumer Policy strategy for 2002-2006 was effective enforcement of consumer protection rules and it had as its priority the development of an administrative cooperation framework between Member States and of redress mechanisms for consumers. The EU Cross-Border Cooperation Regulation establishes minimum standards for national enforcement authorities with focus on the need for effective enforcement and redress.\(^{137}\) This Regulation requires Member States to link up their national enforcement authorities and enables them to take coordinated action against

\(^{133}\) EU Consumer Policy Strategy 2002-6 (n.116) 11  
\(^{134}\) EU Consumer Policy Strategy 2002-6 (n.116) 12  
\(^{136}\) COM(1998) 198  
traders who target consumers across EU borders through the Internet, direct mail, telephone or other methods and deceive them.

**4.3.5 Accessibility: consumer information and advice**

The European Consumer Centres Network (ECC-Net) aims to promote consumer confidence by advising citizens on their rights as consumers and providing easy access to redress in cross border cases.\(^{138}\) The Commission intends to encourage the development of modular, high quality education courses in consumer issues at post graduate level.\(^{139}\) The Commission pointed out the need for information and data for general public especially accurate data on the safety of goods and services to make informed decisions. In this regard the Commission provides detailed information on relevant issues for consumers through its ‘Dialogue with citizens’ publications and website.\(^{140}\) The ex-post evaluation of the impact of the EU consumer policy 2002-2006 found that whilst EU policy of consumer information and education had a great impact on the national agendas of new member states, it was considered irrelevant and having had little effect on the policy agendas of older member states.\(^{141}\)

**4.3.6 Collective action issues**

The Injunctions Directive has established a common procedure to allow consumer bodies to stop unlawful practices that harm the collective interests of consumers as enshrined in EC Directives.\(^{142}\) The Commission will report on the

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\(^{139}\) EU Consumer Policy Strategy 2007-13 (n.121) 11

\(^{140}\) Citizens Signpost Service: [http://ec.europa.eu/citizensrights/front_end/index_en.htm](http://ec.europa.eu/citizensrights/front_end/index_en.htm)

\(^{141}\) Ex-post Evaluation (n.119) 8

Injunctions Directive in 2007 and launch a public consultation concerning its impact. It will also consider action on collective redress mechanisms for consumers both for infringements of consumer protection rules.

4.3.7 Cross-border consumer protection issues

The ex post evaluation of the EU consumer policy strategy for 2002-2006 observed that it is important to consider consumer protection issues in the context of increasing cross-border activities. The EU Consumer Policy Strategy for 2007-2013 recognises that the internal market has the potential to be the largest retail market in the world. It acknowledged that a stronger consumer dimension is needed to improve consumer protection in the ‘fragmented’ internal market where goods and services are increasingly interlinked especially by means of e-commerce. The EU consumer policy in general considers it necessary to ensure that internal market rules and practices promote consumer confidence in cross-border transactions. To protect consumers at a cross-border level, the EU introduced the Unfair Commercial Practices Directive to deal with issues concerning unfair business to consumer commercial practices in the internal market. The Regulation on Consumer Protection Cooperation relates to cooperation between national authorities responsible for the enforcement of consumer protection laws.

As noted above, the Cross-Border Cooperation Regulation has set up an EU wide network between enforcement bodies to tackle traders engaging in misleading advertising, or other scams related to package holidays, timeshares

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145 In 2006 26% of consumers made at least one cross-border purchase in the previous twelve months according to the Special Eurobarometer No.252 ‘Consumer Protection in the Internal Market’; 57% of EU retailers sell through e-commerce and 49% of them would be prepared to sell cross-border in at least one EU country according to Flash Eurobarometer No.186 ‘Business Attitudes towards Cross-Border Sales and Consumer Protection’.
146 Unfair Commercial Practices Directive (n.128)

4.3.8 Best practices
In its 2002-2006 consumer policy strategy, one of the objectives of the Commission was to involve consumer organisations in EU policies and it sought to achieve this goal by setting up of education and capacity building projects.\(^{148}\) The ex-post evaluation observed that the member states were in favour of more intense cooperation between the states and Commission in relation to dissemination of best practices and exchanges on the policies and their coherence which they regarded as contributing to further convergence of policies.

4.3.9 More research on consumer protection
The EC recognises that consumer policy needs to be backed by relevant information and data in order to adjust policies and prioritise in the most appropriate way.\(^{149}\) The EC acknowledged that a more comprehensive, systematic and continuous effect is needed to develop a suitable knowledge base as an essential tool for policy makers.\(^{150}\) It stated that due to the diversity of consumer issues, comprehensive consumer related information and data has to include quantitative data (such as on consumption, living conditions, and other socioeconomic aspects), data linked to consumer activities (such as on

\(^{148}\) EU Consumer Policy Strategy 2002-6 (n.116); In the UK, though the consumer organisations are well supported financially by the authorities, they are not involved with implementing policy measures adopted by the public authorities as it does not come within the remit of these bodies. See United Nations ECOSOC Second International Forum on Market Surveillance and Consumer Protection ‘Consumer Policies of Some of the Member States of the European Union’ TRADE/WP.6/2005/2/Add.1 Also see country papers at http://europa.eu.int/comm/consumers/reports/nat_reports_en.htm

\(^{149}\) C 137/3 at 2.2.2 (A knowledge-based policy)

\(^{150}\) (n.149)
the participation to consumer associations), consumer economic interests (such as on prices) in addition to qualitative data provided by opinion surveys on consumer attitudes, knowledge and satisfaction.)¹⁵¹ The EC felt that monitoring of consumer complaints and their handling would provide better information about consumer interests and market response. In an attempt to develop its ‘knowledge-base’ on consumer information, it publishes the Consumers in Europe – facts and figures¹⁵², and Eurobarometer surveys provide information on cross-border consumer problems and consumer information and representation.¹⁵³

The ex post evaluation of the EU consumer policy 2002-2006 indicates that there is room for the Commission to play a greater role in elaborating a knowledge base in support of consumer policy.¹⁵⁴ It further recommended that the Commission and Member States are to develop a more systematic collection, exchange and analysis of data and information in support of the consumer policy. This concerns mainly ‘consumer behaviour patterns, market functioning, price surveys, market structures, consumer complaints, cross-border trade, benchmarking of member states consumer policies to identify the most effective and efficient practices etc.’¹⁵⁵ The evaluation report indicated that though some member countries value the concept of evidence-based or risk-based consumer policies, others (especially new members) seem to confuse this concept with providing information and education to consumers.¹⁵⁶ The Commission’s Health and Consumer Protection Directorate-General has created an internal task force specifically to create the Consumer Markets Scoreboard¹⁵⁷ and monitor markets to improve EU-wide collation and analysis of data¹⁵⁸ (see above at 4.2.1).

¹⁵¹ (n.149) 2.2.2
¹⁵² http://ec.europa.eu/consumers/strategy/facts_en.htm
¹⁵³ (n.152)
¹⁵⁴ Ex-post Evaluation (n.119) 10
¹⁵⁵ Ex-post Evaluation (n.119) 11
¹⁵⁶ Ex-post Evaluation (n.119) 24
¹⁵⁷ Consumer Markets Scoreboard (n.122)
4.4 Discussion and conclusions

A number of points can be summarised from the foregoing discussion. First, as the EC has noted, the different focus and priorities of national agencies has tended to limit the effectiveness of the EU consumer strategy. In order to address this, the Commission is committed to a systematic monitoring of national consumer protection policies. Second, it suggesting how best to address resources to consumers’ needs, regard should be had in particular to those situations where consumers cannot act effectively as individuals to protect their interests. Third, in order to promote the quality and effectiveness of consumer protection regulation, there is the need to develop a more sophisticated understanding of consumer behaviour. Fourth, the Commission has stressed the need for wider use of ADR schemes and, in the context of cross-border trade, has stipulated minimum standards such schemes should meet. Fifth, the Commission has stressed the need for high quality consumer education and information schemes. To this end, the Commission has stressed the need for the appropriate resourcing of consumer organisations (in particular in the new accession states). It has also advocated that such organisations should be able to pursue the collective interests of consumers where there are significant impediments to their enforcing their rights individually (this is especially the case in the context of cross-border trade). The Commission has underlined the need for greater cooperation as between enforcement agencies in different Member States. Finally, the Commission has committed itself to contribute to the development of risk-based approaches to consumer protection. Considerable emphasis has been placed on the importance of prioritising resources which, in turn, depends upon the development of greater policy learning and understanding of how consumers act within markets.

There have nevertheless been some notes of dissent from Member States. Calls for harmonisations of consumer protection not been received without criticism: some older Member States have feared that the objective of the 2002-2006 strategy of ‘high common level of consumer protection’ may result in them
having to lower their level of protection for the purposes of harmonisation.\textsuperscript{159} There is some evidence of disagreement over how interventionist consumer protection regimes should be. The UK authorities, for example, have stressed the difference which should be made between a ‘high level’ of common consumer protection and an ‘appropriate level’ taking account of constraints on business, the need for associated simplification in other areas, and more effective enforcement.\textsuperscript{160}

\textsuperscript{159} EU Consumer Policy Strategy 2002-6 (n.116) 23
\textsuperscript{160} EU Consumer Policy Strategy 2002-6 (n.116) 23-24
References


References to UN, OECD and EU documents appears in the text and footnotes.
Annexe F  A Statistical Pen Sketch of the Countries under Study

Contents
1.0 Introduction
2.0 Potentially vulnerable consumer groups
3.0 Internet access
4.0 Consumerism
5.0 Information and sources of information

1.0 Introduction
This section provides a statistical overview of the countries under study: Australia, Canada, Denmark, Germany, Spain, the UK, and the USA. We also include some data relating to European Union countries only. We make no claims for completeness; the aim is simply to provide a socio-demographic context to the report against which findings may be interpreted and, hence, we have selected only those indicators that we perceive to be particularly relevant to consumption practice.

In the first instance, we report on population size and GDP per capita. Table F.1 shows that Denmark has the highest GDP per capita, followed by Australia and then Canada, while Spain has the lowest.

Table F.1: Population and GDP: 2008

<table>
<thead>
<tr>
<th>Population (Millions)</th>
<th>Australia</th>
<th>Canada</th>
<th>Denmark</th>
<th>Germany</th>
<th>Spain</th>
<th>UK</th>
<th>USA</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>21.245</td>
<td>33.38</td>
<td>5.465</td>
<td>82.12</td>
<td>45.63</td>
<td>61.018</td>
<td>304.999</td>
</tr>
</tbody>
</table>

GDP per capita, current prices (USD)

<table>
<thead>
<tr>
<th></th>
<th>Australia</th>
<th>Canada</th>
<th>Denmark</th>
<th>Germany</th>
<th>Spain</th>
<th>UK</th>
<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>49,271</td>
<td>47,066</td>
<td>63,898</td>
<td>44,488</td>
<td>35,558</td>
<td>46,432</td>
<td>46,541</td>
<td></td>
</tr>
</tbody>
</table>

Source: International Monetary Fund (IMF), 2008.

2.0 Potentially vulnerable consumer groups
Some groups, or subgroups, of consumers are particularly susceptible to detriment in their interactions in markets; these include the elderly, those living in rural areas, low-income consumers, and the unemployed. Table F.2 provides data relating to the size of these groups.

Germany has the highest proportion of elderly citizens (18.8%), followed by Spain and the UK, while the USA has the smallest proportion (12.3%). Germany also has the highest proportion of people living in rural areas (24.8%), followed by Spain (23.3%) and then Canada (19.9%), while the UK has the lowest proportion (10.3%).

Consumers can be disadvantaged in many markets by low incomes. The USA has the highest proportion of people living under the median income level (17.0%), followed by Spain (14.2%) and then the UK (12.5%), while Denmark has the smallest proportion (5.6%). Another (proxy) indicator of potential disadvantage is provided by employment status. Spain has the highest unemployment rate (8.1%), followed by Germany (6.5%) and then Canada (6.1%). The UK ranks fourth amongst the seven countries with an unemployment rate of 5.4%, while Denmark has the lowest rate (3.6%). Disparities in income distribution between the countries under study are quite modest: the share of income accruing to the poorest 10% of the population ranges between 1.9% and 3.2%.

Table F.2: Potentially vulnerable consumer groups

<table>
<thead>
<tr>
<th>Population</th>
<th>Australia</th>
<th>Canada</th>
<th>Denmark</th>
<th>Germany</th>
<th>Spain</th>
<th>UK</th>
<th>USA</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>ages 65 and above (%)</td>
<td>12.7</td>
<td>13.1</td>
<td>15.0</td>
<td>18.8</td>
<td>16.5</td>
<td>16.0</td>
<td>12.3</td>
<td>2005</td>
</tr>
<tr>
<td>Rural population (%)</td>
<td>11.8</td>
<td>19.9</td>
<td>14.4</td>
<td>24.8</td>
<td>23.3</td>
<td>10.3</td>
<td>19.2</td>
<td>2005</td>
</tr>
<tr>
<td>Population living below 50% median income (%)</td>
<td>12.2</td>
<td>11.4</td>
<td>5.6</td>
<td>8.4</td>
<td>14.2</td>
<td>12.5</td>
<td>17.0</td>
<td>(2000-2004)</td>
</tr>
<tr>
<td>Unemployment</td>
<td>4.4</td>
<td>6.1</td>
<td>3.6</td>
<td>6.5</td>
<td>8.1</td>
<td>5.4</td>
<td>4.7</td>
<td>2007</td>
</tr>
</tbody>
</table>
Consumers with poor literacy skills are likely to be disadvantaged in decision-making as a result of their limited access to information relevant to transactions. Table F.3 shows that Denmark has the smallest proportion of the population lacking functional literacy skills (9.6%), while the UK has the highest proportion (21.8%).

### 3.0 Internet access

Given the growing importance of the internet as a source of information relevant to consumption decisions, we include data on internet/broadband access. In a survey of 25 member states of the European Union, approximately two-thirds (63%) of citizens said that they had easy access to dial-up internet services through a slow connection over the telephone line, while a slightly smaller 60% stated that they had easy access to broadband internet services (European Commission, 2007b). The same survey found that people in rural areas are disadvantaged in this respect compared to those in large towns: 52% of EU citizens in rural areas found it easy to access broadband as compared with 70% in large towns. With respect to the seven countries under study, Table F.3 shows that Denmark has the highest proportion of internet subscribers (34.6 per 100 of the population), while Spain has the lowest (16.6).

### 4.0 Consumerism

Table F.3 includes variables that might act as proxy indicators of the level of consumerism. Thus, the UK has the highest number of mobile phone subscribers per 100 of the population (116.4), while Canada has the lowest (52.5). However, people's perceptions as to whether a given service is important in their daily lives vary widely from country to country and from one socio-demographic category to another. For example, mobile phones are 'very

<table>
<thead>
<tr>
<th>Share of income or consumption poorest 10% (%)</th>
<th>2.0</th>
<th>2.6</th>
<th>2.6</th>
<th>3.2</th>
<th>2.6</th>
<th>2.1</th>
<th>1.9</th>
<th>2007</th>
</tr>
</thead>
</table>

important’ for 61% of Finns compared to an EU-wide average of 39%. And 59% of young people consider them to be ’very important’ compared with 20% of those aged 55 and over (European Commission, 2007b).

The USA has the highest advertising expenditure as a percentage of GDP (1.3%), followed by the UK (0.8%), while Spain has the lowest (0.4%). The USA also has the highest advertising expenditure per capita (561.7 USD), followed by Denmark (280.9 USD) and then the UK (280.3 USD), while Spain, again, has the lowest (124.3 USD).

**Table F.3: Other socio-demographic factors**

<table>
<thead>
<tr>
<th>People lacking functional literacy skills (% aged 15-65)</th>
<th>Australia</th>
<th>Canada</th>
<th>Denmark</th>
<th>Germany</th>
<th>Spain</th>
<th>UK</th>
<th>USA</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internet subscribers (per 100 people)</td>
<td>17.0</td>
<td>14.6</td>
<td>9.6</td>
<td>14.4</td>
<td>Not avail.</td>
<td>21.8</td>
<td>20.0</td>
<td>(1994-2003)</td>
</tr>
<tr>
<td>Broadband subscribers (per 100 people)</td>
<td>32.7</td>
<td>24.7</td>
<td>34.6</td>
<td>24.2</td>
<td>16.6</td>
<td>27.7</td>
<td>21.3</td>
<td>2006</td>
</tr>
<tr>
<td>Total telephone subscribers (per 100 people)</td>
<td>19.5</td>
<td>23.6</td>
<td>31.7</td>
<td>18.1</td>
<td>15.4</td>
<td>21.7</td>
<td>19.3</td>
<td>2006</td>
</tr>
<tr>
<td>Mobile phone subscribers (per 100 people)</td>
<td>145.8</td>
<td>116.6</td>
<td>164.1</td>
<td>169.5</td>
<td>148.8</td>
<td>172.5</td>
<td>134.6</td>
<td>2006</td>
</tr>
<tr>
<td>Total advertising expenditure per capita (USD)</td>
<td>97.0</td>
<td>52.5</td>
<td>107.3</td>
<td>103.6</td>
<td>106.4</td>
<td>116.4</td>
<td>77.4</td>
<td>2006</td>
</tr>
</tbody>
</table>

2006
### Total advertising expenditure as a % of GDP

<table>
<thead>
<tr>
<th>Year</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>0.7</td>
</tr>
<tr>
<td>2006</td>
<td>0.6</td>
</tr>
<tr>
<td>2006</td>
<td>0.7</td>
</tr>
<tr>
<td>2006</td>
<td>0.7</td>
</tr>
<tr>
<td>2006</td>
<td>0.4</td>
</tr>
<tr>
<td>2006</td>
<td>0.8</td>
</tr>
<tr>
<td>2006</td>
<td>1.3</td>
</tr>
</tbody>
</table>


### 5.0 Information and sources of information

We report on two findings from an attitudinal survey of European countries conducted on behalf of the European Commission: 'Eurobarometer 67, Public Opinion in the European Union' (2007a). This study covers 31 countries or territories: the 27 Member States of the European Union (the EU-27), three candidate countries (Croatia, Turkey and the Former Yugoslav Republic of Macedonia) and the Northern Part of Cyprus. The survey employed multistage random sampling, with face-to-face interviews undertaken with a total sample of 30,231 respondents.

Question A23a asked respondents: *Do you think that in [our country], people are well informed or not well informed about the measures taken at the European Union level concerning the following topics?* Sixteen topics were given to respondents to consider, including 'Consumer protection' which appears ninth in the list given in Figure F.1 below.
As a guide to the kind of information sources consumers may defer to, Figure F.2 gives the responses to Question A25 which asked respondents: *When you are looking for information about the European Union, its policies, its institutions, which of the following do you use?* The internet appears third in the list, and its use rose from 23% of respondents in 2006 to 28% in 2007.
Figure F.2: When you are looking for information about the European Union, its policies, its institutions, which of the following sources do you use? - % EU

- Television: 63% (2007), 70% (2008)
- The Internet: 28% (2007), 22% (2008)
- Discussions with relatives, friends, colleagues: 21% (2007), 22% (2008)
- Other newspapers, magazines: 15% (2007), 15% (2008)
- Never look for such information, not interested (SPONTANEOUS): 13% (2007), 12% (2008)
- Attending conferences, fairs, meetings: 4% (2007), 3% (2008)
- Telephones (Info lines, Europe Direct, etc.): 1% (2007), 1% (2008)
- Other (SPONTANEOUS): 1% (2007), 1% (2008)
- DK: 1% (2007), 1% (2008)
References

European Commission, 2007a, 'Eurobarometer 67, Public Opinion in the European Union'.

European Commission, 2007b, 'Special Eurobarometer 260, Consumers' Opinions of Services of General Interest'.

International Monetary Fund, April 2008, 'World Economic Outlook', ESDS International, (Mimas) University of Manchester.


Annexe G The Questionnaire

Potential respondents to the questionnaire were selected from the population of those involved in the promotion of consumer interests in each of the seven countries under investigation: Australia, Canada, Denmark, Germany, Spain, the UK and the US. Individuals were approached by means of email in the first instance with a brief explanation of the study and a request for assistance. To enhance the response rate, respondents were assured that their responses would not be attributed to named individuals or to their organisations. Once an individual had agreed to participate, a copy of the questionnaire was forwarded to them so that they had time to consider their responses prior to a telephone interview. In order to maximise consistency, researchers conducting the telephone interviews were instructed to adhere to the text. Telephone interviews in which responses to the questionnaire were collected lasted between 30 and 120 minutes. These interviews were conducted in English for Australia, Canada, and the UK, and in respondents' own language in the case of Denmark, Germany and Spain. (US respondents declined to respond directly to the questionnaire but sent a text response addressing some of the questions.)

The questionnaire was semi-structured in design and comprised 56 questions. The questions were designed to elicit both quantitative and qualitative data. Some of the questions were attitudinal in that they sought to elicit respondents' perceptions of the consumer protection regime; and some of the questions aimed to elicit evidence that would support/challenge the findings from desk research.

We elicited completed questionnaires from 21 individuals, plus a 'combined' response from several representatives in the US. Respondents were affiliated to competition and regulation authorities, consumer organisations, industry, and academia. Approximately half of the individuals approached declined the invitation to participate in the study. Table 1.1 lists the number of respondents by country.
<table>
<thead>
<tr>
<th>Country</th>
<th>Number of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>3</td>
</tr>
<tr>
<td>Canada</td>
<td>3</td>
</tr>
<tr>
<td>Denmark</td>
<td>3</td>
</tr>
<tr>
<td>Germany</td>
<td>3</td>
</tr>
<tr>
<td>Spain</td>
<td>4</td>
</tr>
<tr>
<td>UK</td>
<td>5</td>
</tr>
<tr>
<td>US</td>
<td>1 combined response</td>
</tr>
<tr>
<td></td>
<td>21 + 1</td>
</tr>
</tbody>
</table>
CS2 Questionnaire: Researcher version

Thank-you for agreeing to participate in our study of consumer protection regimes across different countries inside and outside Europe.

The study has been commissioned by the UK's Department for Business, Enterprise and Regulatory Reform (BERR). We attach a covering letter from BERR that provides additional information about the Department.

The Principal Investigator for the project at the Centre for Competition Policy is Dr Michael Harker (email: M.Harker@uea.ac.uk).

As part of the study, we would like to know about the legal and institutional arrangements for consumer protection in [name of country] and about any final consumer markets in which detriment arises.

As I explained to you, I would like to know your responses to a set of questions. I will telephone you for a discussion of your responses at [time/date], unless you prefer to give your responses in writing and submit them by email. If you are able to give your responses by telephone, I anticipate that the call will last approximately 40 minutes. I would appreciate it if, prior to the telephone call, you would take some time to read through the questionnaire and to prepare your responses. If anything is unclear, please don't hesitate to ask me for further clarification. Similarly, if there are any issues that you believe to be pertinent to the study but that are not covered below, I would appreciate it if you would raise these with me.

Be assured that your responses will not be attributed to you or your organisation when the results of the study are written up (unless you indicate otherwise). If you prefer, I can submit my write-up of your responses for you to check its content for factual accuracy.

[Researcher name]
Centre for Competition Policy, University of East Anglia.
Researcher name@uea.ac.uk
Guidance: As part of the project, we are conducting an element of “peer review”: respondents are going to be asked to comment on their perceptions of the strengths and weaknesses of the consumer protection regime in their country. We are gathering the views of key actors in the field of consumer protection and we hope to be able to draw inferences about what works and what does not work in each context.

The questions in Section 1 are intended to be neutral as regards the institutional and enforcement framework (e.g., it should not matter whether the country adopts primarily a court-based rather than administrative enforcement model).

Naturally the answers represent the informed views of the respondent, but they are bound to be subjective to a degree. Where appropriate, please prompt for further information and evidence in support of responses. For example, suppose the respondent ‘strongly agrees’ with the statement that the effectiveness of the consumer protection regime is regularly monitored; you might then ask: "Can you tell me when the regime was last monitored' and/or 'What does monitoring involve?'.

Our aim in Section 2 is to identify the specific issues and the specific markets in which consumers are particularly vulnerable to detriment, with a view to exploring these further in Part 2 of the project.
Section 1: Institutional aspects of the consumer protection regime

In this section of the questionnaire, we are interested in your views on institutional aspects of the consumer protection regime and how these feed into its operation and effectiveness. By 'consumers', we mean final consumers.

Q.1 Is consumer advice quickly and easily available to most consumers? Please circle the appropriate response: YES / NO

Q.2 Is consumer advice available via an appropriate delivery vehicle (e.g. face-to-face, telephone, internet)? Please circle the appropriate response: YES / NO

Q.3 Is consumer advice easily understood by most consumers? Please circle the appropriate response: YES / NO

If NO, in what respects is it not easily understood?

____________________________________________________

Q.4 On balance, is the amount of information provided to consumers about the consumer protection regime excessive, about right or too little? Please circle the appropriate response: EXCESSIVE / ABOUT RIGHT / TOO LITTLE

Q.5 Does the average consumer know what the arrangements for the protection of consumer interests are? Please circle the appropriate response:

Guidance: If the respondent queries what is meant by the 'average consumer', point out that you mean most consumers. (There are questions later that focus on particularly vulnerable consumers.)

If NO, please explain; for example, are some of the arrangements too complicated for consumers to understand?

____________________________________________________

Q.6 Does/do the lead agency/ies have a sufficiently high public profile for consumers to know of their existence? Please circle the appropriate response: YES / NO

Q.7 Are children routinely taught in school about consumer policy (e.g. about consumer rights and how to seek redress)? Please circle the appropriate response:
YES / NO

If YES, what aspects of consumer education are being taught?

__________________________________________________________

Q.8 Are the legal rights enjoyed by consumers clear to them?
Please circle the appropriate response: YES / NO

If NO, which areas lack clarity?

__________________________________________________________

And are consumers able to find out about their rights easily (eg via an appropriate agency)?

__________________________________________________________

Q.9 Do consumers have a statutory right to be represented within policy making?
(Eg do consumers have a right to be consulted about enforcement priorities?)
Please circle the appropriate response: YES / NO

If YES, how and where do consumers have a right to be represented?

__________________________________________________________

If NO, would the effectiveness of the regime be improved if consumers did have a right to be represented? And, if so, how and where?

__________________________________________________________

Q.10 Are there other less formal and non-statutory ways in which consumers can influence policy-making?

If YES, how and where is consumer influence exercised?

__________________________________________________________
If NO, would the effectiveness of the regime be improved if consumers could influence policy-making in less formal and non-statutory ways? And, if so, how and where?

__________________________________________________________

__________________________________________________________

Q.11 Do the different agencies involved in the protection of consumer interests interact with one another? For example, do staff from the different agencies meet up regularly? Is information shared? Please circle the appropriate response: YES / NO

If YES, please comment on the level, and the kind, of interaction:

__________________________________________________________

__________________________________________________________

If NO, would the effectiveness of the consumer protection regime be improved if there was more interaction amongst the different agencies? Please circle the appropriate response: YES / NO

Q.12 Where non-statutory guidelines for the protection of consumers are issued (eg best practice guidelines), are they followed by firms? Please circle the appropriate response: ALWAYS / SOMETIMES / NEVER

What are the consequences for firms if guidelines are not followed?

__________________________________________________________

__________________________________________________________

If guidelines are not always followed, why is this the case? For example, are the incentives inadequate? Are guidelines too complicated?

__________________________________________________________

__________________________________________________________
continued …
Q.13 What factors do you take into account in evaluating the effectiveness of the consumer protection regime in your country? Please list as many factors as are appropriate in order of importance:

Factor:

Most important
1
2
3
4
5
6
7
8
9
10

Least important

Additional Comments: __________________________________________

________________________________________

Q.14 Does the consumer regime face targets intended to drive its performance? Please respond by circling the appropriate response:

YES / NO

If YES, are these targets challenging? YES / NO

Comment/details:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
Q.15 (i) What do you understand by the notion of 'consumer empowerment'?

____________________________________________________________________________________

(ii) What factors do you take into account in evaluating the overall level of consumer empowerment in your country? Please list as many factors as are appropriate in order of importance:

<table>
<thead>
<tr>
<th>Factor:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>5</td>
</tr>
<tr>
<td>6</td>
</tr>
<tr>
<td>7</td>
</tr>
<tr>
<td>8</td>
</tr>
<tr>
<td>9</td>
</tr>
<tr>
<td>10</td>
</tr>
</tbody>
</table>

Additional Comments: ________________________________________________________________

____________________________________________________________________________________

Q.16 What (if any) cultural factors affect the level of consumer empowerment, and how?

Prompt: The effectiveness of a regime will depend in part on the consumer culture in a given country so, if the respondent is hesitating, you might ask: 'Are consumers informed and confident enough to pursue their rights?'

____________________________________________________________________________________

____________________________________________________________________________________
Q.17 In your opinion, which three countries (including your own, if appropriate), provide the best arrangements for supporting consumer empowerment? Only include countries within your assessment where you have sufficient familiarity with their arrangements.

_____________________
_____________________
_____________________

Guidance: Respondents are not being asked to rank countries; however, please indicate if the respondent voluntarily provides a ranking or points to a clear leader in the field.

Q.18 *European countries only*:

Guidance: see Appendix 2 to CS1 Guidance for details of this Directive. Please note if the respondent seems unfamiliar with this Directive.

How much, if any, progress has been made in implementing the Unfair Commercial Practices Directive? Please circle the appropriate response:

FULL IMPLEMENTATION / SOME PROGRESS / NO PROGRESS

If the Directive has yet to be fully implemented, why is this the case?

__________________________________________________________
__________________________________________________________

Do you anticipate that full implementation of the Directive will make a difference to the effectiveness of the consumer protection regime? Will consumers be better off?

__________________________________________________________
__________________________________________________________

Q.19 Are there any advantages to a general rule to ‘trade fairly’? Please circle the appropriate response:

YES / NO

If YES, what are the advantages?

Prompt: … that is, rather than a more specific rule-based approach.
Please indicate the extent to which you agree with each of the following statements by circling the appropriate response:

**Q.20** The consumer protection regime is adequately resourced.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.21** Consumers are provided with adequate information relating to the consumer protection regime.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.22** Enforcement mechanisms are easily accessible to consumers.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.23** Consumers persist with a complaint after an initial failure/brush off.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.24** Staff within enforcement and support agencies are competent at dealing with the complaints brought to them by consumers.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.25** Staff are clear about the procedures to use to address the complaints brought to them by consumers.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.26** Agencies responsible for the protection of consumer interests are quick to respond in the event that they become aware of an area of significant consumer detriment.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.27** Consumers can easily obtain redress in the event of genuine complaints.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.28** Consumer advocacy organisations are effective at securing benefits for consumers.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>
Q.29 The *effectiveness* of the consumer protection regime is regularly monitored.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.30 Problematic markets are regularly monitored by enforcement agencies to ensure consumer interests are being served.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.31 Arrangements for the protection of consumer interests work well for the *average* consumer.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.32 Arrangements for the protection of consumers work well for those who find it difficult to get the best outcome when making a transaction in a specific market.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.33 Consumers are experienced at *shopping around* for the best deal.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.34 Consumers are experienced at *switching supplier* in the event that a better deal is available.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.35 Adequate incentives are in place for firms to provide consumers with the *necessary correct information* required by consumers to make informed decisions.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.36 The imposition on firms of a *general duty to trade fairly* makes consumers better off.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know

Q.37 The consumer protection regime provides enforcement mechanisms that encourage compliance.

Strongly disagree  Disagree  Agree  Strongly agree  Don't know
**Q.38** Penalties imposed on firms for non-compliance are *designed to deter*.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.39** Despite the best efforts of the consumer protection regime, a significant proportion of consumers will always be prone to detriment in some markets.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

**Q.40** Consumer enforcement agencies are prepared to take up cross-border cases for consumers.

<table>
<thead>
<tr>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly agree</th>
<th>Don't know</th>
</tr>
</thead>
</table>

*Guidance: note different format of next statement.*

**Q.41** The burden imposed on firms by the consumer protection regime is:

<table>
<thead>
<tr>
<th>Very low</th>
<th>Low</th>
<th>Just right</th>
<th>High</th>
<th>Very high</th>
<th>Don't know</th>
</tr>
</thead>
</table>

Continued …
Section 2: Market issues
In this section of the questionnaire, we are interested to know about any markets in which you feel *the average consumer* is particularly prone to detriment under the existing consumer protection regime, and about the effectiveness of any intervention.

Q.42 (i) Please *identify* any markets in which consumers are particularly prone to detriment and then provide your answers to the following questions:

(ii) What *form* does consumer detriment take? (eg do consumers pay too much? Do consumers choose goods that are inappropriate in kind or quality?);

(iii) What is the *source* of consumer detriment? (eg transactions are too complex, consumers are poorly informed, high search/switching costs);

(iv) Does this apply to any consumer groups in particular? (eg low-income consumers, the elderly).

(i) Market: (ii) Form of consumer detriment: (iii) Source of consumer detriment: (iv) Particular group affected:

Additional Comments:___________________________________________
________________________________________________________________
Q.43 (i) Please *identify* those final consumer markets that have been the subject of some form of intervention, and then provide your answers to the following questions:

(ii) What *form* did intervention take? (eg the imposition of price controls, the introduction of cancellation rights, industry codes of practice)

(iii) What was the *purpose* of the intervention? (eg to increase switching activity, to improve access to the market, to prevent mis-selling)

(iv) On a scale of 1 – 3, how *effective* has intervention been?
   1 = intervention has been completely effective
   2 = intervention has been partially effective
   3 = intervention has been completely ineffective
   (9 = too early to form a judgement)

(i) Market: ____________________________ (ii) Form of intervention: ____________________________
(iii) Purpose of intervention: ____________________________ (iv) Effectiveness of intervention: ____________________________

Additional Comments: __________________________________________
                      __________________________________________
Q.44 There are a number of consumer issues that have arisen in markets in one or more countries; these issues are as follows:

• transactions that exhibit a lack of transparency;
• transactions that exhibit high search costs and/or high switching costs;
• the use of pressure selling techniques;
• the choice of a provider under conditions of asymmetric information;
• consumer inertia in choosing between alternative suppliers;
• consumer lock-in as a result of pre-existing customer-supplier relationships; and
• differential access to the market and/or differential terms for low-income consumers.

We would like to know if any of these issues have arisen in your country and, if so, in which markets and whether there has been any intervention to improve the level of consumer protection.

(i) Please can you identify those markets (if any) in which the issues given in the table have arisen, and then provide your answers to the following questions:

(ii) What form has been taken by any intervention?

(iii) On a scale of 1 – 3, how effective has intervention been?

1 = intervention has been completely effective
2 = intervention has been partially effective
3 = intervention has been completely ineffective

(9 = too early to form a judgement)

<table>
<thead>
<tr>
<th>Issue:</th>
<th>(i) Market/s:</th>
<th>(ii) Form of intervention:</th>
<th>(iii) Effectiveness of intervention:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transactions exhibiting lack of transparency</td>
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<td>Transactions exhibiting high search costs</td>
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<td>Transactions exhibiting high switching costs</td>
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<td>The use of pressure selling techniques</td>
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<td>Choice of a provider under conditions of asymmetric information</td>
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</table>

Guidance: It's possible that issues/markets that have appeared in response to earlier questions will resurface here. The emphasis of this question is slightly different so, at the risk of some repetition, please encourage the respondent to answer in full.
Consumer inertia in choosing between alternative suppliers
Consumer lock-in as a result of pre-existing relationships
High level of exposure to detriment of low-income consumers

Additional Comments:_________________________________________

Q.45 What factors do you take into account in evaluating the effectiveness of market interventions in your country? Please list as many factors as are appropriate in order of importance:

<table>
<thead>
<tr>
<th>Factor:</th>
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<tbody>
<tr>
<td>Most important</td>
</tr>
<tr>
<td>1</td>
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<td>3</td>
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<tr>
<td>10</td>
</tr>
<tr>
<td>Least important</td>
</tr>
</tbody>
</table>

Additional Comments:_________________________________________

Prompt: It may help to focus on a recent intervention: in that particular case, how did you reach a judgement as to whether intervention improved the level of consumer protection?
Q.46 Consumer attributes
Are there any groups, or sub-groups, of consumers that are particularly prone to detriment? If so, why? And in which markets are these consumers particularly prone to detriment?

__________________________________________________

__________________________________________________

__________________________________________________

Section 3: Practical enforcement issues.
Finally, we would like to acquire an understanding of how your country's consumer protection regime operates for the average consumer from a practical point of view.

Q.47 If the consumer decides to seek some form of remedy in respect of a small transaction, what is her best course of action?

__________________________________________________

__________________________________________________

Q.48 How likely is it that an average supplier would provide redress without the consumer taking further action?
Please answer by circling the appropriate response:

Highly unlikely Not very likely Quite likely Very likely Don't know

Q.49 Is the size or reputation of the supplier likely to be a factor in the supplier's decision whether or not to provide redress?

__________________________________________________

__________________________________________________

Q.50 If the supplier refuses to provide redress, what is the consumer's best course of action?

__________________________________________________

__________________________________________________
Guidance: Note any monetary threshold that applies to Qs.51 – 55.

Q.51 In respect of a small transaction, how likely is it that a consumer will take the issue to court? Please answer by circling the appropriate response:

Highly unlikely    Not very likely    Quite likely    Very likely    Don't know

Q.52 How long is it likely to take before a decision is made by the court?

Q.53 Are there any alternative dispute resolution mechanisms (other than the courts) available to the consumer?

(i) _______________________________________________________

(ii) _______________________________________________________

Q.54 How likely is the consumer to pursue any of the alternative mechanisms you have identified in Q.53? Please answer by circling the appropriate response:

Highly unlikely    Not very likely    Quite likely    Very likely    Don't know

Q.55 What are the advantages and disadvantages of turning to the alternative mechanisms you have identified in Q.53? For example, do they take more/less time to reach a conclusion? Are they more/less difficult for the consumer to access?

________________________________________________________

________________________________________________________

Q.56 Do you have any additional comments in respect of practical problems consumers have in enforcing their rights/obtaining redress?

________________________________________________________

________________________________________________________

***

This is the end of the questionnaire.
Once again, thank-you very much for your time and attention.
Interviewer: ________________________________
Length of interview: _______________________
Interviewer comments: _______________________
_____________________________________________________________________
_____________________________________________________________________
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