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EDITORIAL NOTES

Journal of Consumer Policy's 40th Anniversary Conference: A Forward Looking Consumer Policy Research Agenda

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Consumer policy experts from academia, government, and the private sector gathered from 14-15 September 2018 in the beautiful hillsides of Fiesole outside of Florence, Italy to celebrate 40 years of research published in the *Journal of Consumer Policy*. The purpose of the conference was to discuss the future of consumer protection policy across a diverse set of countries and the likely research themes that will emerge and shape policy formation and legal rules and regulations for the next decades. Revised versions of many of the papers presented at the conference are published in this issue of the *Journal of Consumer Policy*. In this editorial, instead of giving an overview of each of the papers presented at the conference, we distil the key themes that emerged from many of the formal (and informal) presentations and discussions.

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Harmonization and Heterogeneity in Consumer Protection Policy

One of the constant themes throughout the conference was a recognition of the trade-offs between the benefits that come with a more universal cross-country approach to consumer protection law as against the costs associated with legal constructs that do not recognise and bend to local cultural, technical, and economic circumstances. The development of consumer law in the European Union (EU) is one example of such a unification-focussed approach, which also reveals the tensions between the centre (EU) and the periphery (Member States) (Kukovec 2015; Manko 2019). The enlargement of the EU in 2004 went hand in hand with the emergence of an EU consumer law that leaves increasingly limited space for national differences. This has been the consequence of the EU's move from minimum harmonization (which gave some room to the Member States to exceed the level of protection demanded by EU consumer law) to full or maximum harmonization (which requires compliance with the EU-determined level of protection). European consumer law is driven by a one-size-fits-all approach, based on an ideology that consumers throughout the EU, and even in those neighbouring states with whom the EU has concluded Association Agreements, should benefit from identical levels of consumer protection. Such an approach ignores the fact that in many Member States, as well as in neighbouring states, there are often two markets for two different types of consumers, the poor and the rich (Meyer 2020). This is by no means a uniquely European phenomenon – this is also common in the Global South.

From a bird's eyes view, European consumer law appears to be a rather homogeneous block of well-developed consumer rights that could easily serve as a model, or at least as a source of inspiration, for other regions in the world. It presupposes the existence of an open regional market – in EU language, the Internal Market – which requires a high level of consumer protection. The consumer is needed in order to build that market, be it the confident or even the weak consumer (Howells et al. 2017). There is no equivalent to the interaction between market building and consumer protection in the other regional markets around the world. The Mercosur comes closest to a model where market building and consumer protection interact. However, in this region of the world, consumer protection and consumer law are much more loosely linked to market building and promoting consumption. Consumer protection and consumer law carry a strong political message. It suffices to recall the adoption of the consumer code in Brazil which forms an integral part of the democratization process (Lima Marques 2020).

Consumer law in this part of the world is much more "political," it is not only about risk-free consumption but also much more about consumption as a political concept to promote civil rights. It is much harder to identify such a clear label for the role and function of consumer law in Africa (Naude 2020; also special issue of *Journal of Consumer Policy, 41*(4)). First and foremost, the legal world is very much divided between the English and the French speaking part with little to no interaction, due to language barriers. The colonial past is still present in the way in which consumer law is perceived. Quite often, it is the common law that sets the basic standards combined with national consumer codes that cherry-pick from other consumer laws around the world adapted to the particular need of that country. The result is a great diversity even within the English speaking part. What holds true for Africa seems to be true for India. The huge country is tied together by one consumer law and strong national courts, which often use consumer law for promoting more political objectives. However, in India, too, the colonial past is omnipresent as the common law continues to be the basis of the Indian legal system, on top of which the Indian consumer law sits oftentimes uneasily (Reich 2010).

Asia and the United States show some similarities despite their huge cultural differences. The ASEAN countries are intensifying efforts to build a stronger integrated market (Nottage et al. 2019). It goes without saying that the importance of consumer protection increases as the volume of cross-border exchanges grows. Once more, the focus is on the market, albeit in a way that differs from the European understanding of market integration and social regulation. Consumer law and consumer protection in Asia are much closer to the role and function of consumer law in the United States of America (USA). Both Asia and the United States tend to focus on consumer law as a means to increase economic efficiency, downplaying the need for protecting the weaker party. Consumption then turns into a means to promote economic growth. The similarities should not be overstated. Whilst there is a move towards senseless consumption in all countries around the world that submit to consumption growth and economic efficiency as the sole paradigm (Rawls and van Parijs 2003), China stands out in that consumption serves as a substitute for political action. Seen this way, consumer law in China is also a political tool, but not for democratization (Wei 2020).

An editorial 10 years ago outlined what were perceived to be the key questions for international consumer law (Twigg-Flesner and Micklitz 2010). At the conference, most participants shared the view that, in light of the enormous differences in the role and function that consumer law and consumer protection play in different parts of the world, soft law instruments such as the United Nations (UN) Guidelines for Consumer Protection might be more appropriate than, for instance, an international treaty on consumer law (Benöhr 2020; Durovic 2020; Izaguerri 2020). However, a project of the latter kind is not on the current agenda. The very idea of a convention on consumer law raises resistance because such a tool would not allow for full account to be taken of local, national, and regional variations. In many ways, there may be no global "best" practice. Instead, a plethora of related but localised consumer protection regimes may be more suitable. "Soft" law – in the form of legal guidelines, recommendations, or broad model frameworks for local implementation seems the most likely outcome to emerge in international consumer protection law over the coming decade. Even local differences in the respect for markets, the trust of government, the sophistication of schemes that recognises property, and other types of rights will be important factors in the scope of regulation and law that develops.

It is instructive to reiterate the introduction to these guidelines, which were revised and adopted by the General Assembly of the United Nations on December 2015:

> The United Nations Guidelines for Consumer Protection are a valuable set of principles that set out the main characteristics of effective consumer protection legislation, enforcement institutions, and redress systems. Furthermore, the Guidelines assist interested Member States in formulating and enforcing domestic and regional laws, rules, and regulations that are suitable to their economic, social, and environmental circumstances; they also help promote international enforcement cooperation among Member States and encourage the sharing of experiences in consumer protection.

The Guidelines themselves seem to provide clear and specific suggestions for consumer protection policy ranging from consumer financial markets to broad issues of sustainability. Whether they suffice was debated intensively during the conference. Claudia Lima Marques advocated the need for a kind of Brundtland Report that sets out the basic challenges for today's consumer law and comes up with a set of principles that would revitalise consumer

policy around the world (Brundtland 1987). Such a document, provided it would take social and economic differences into account, could help to rouse the sleeping beauty – consumer policy, not least due to the overwhelming importance of private consumption for the society and the economy around the world, which remains in stark contrast to its political and practical importance.

The Digital World, Privacy, and Consumer Protection Paradigms

A key question that arose throughout the discussions and presentations was how the rapid and ever-changing technological advances of the digital age will impact the effectiveness of regulations and laws designed to protect consumers in the marketplace. Two schools of thought emerged.

In the early days of digitalization, the transition from established means of shopping to online shopping was managed in a rather low-key fashion by extending the reach of existing consumer law to the online environment. As we head into the third decade of the twenty-first century, online shopping is ubiquitous, and many novel digital challenges have sprung up which go far beyond a managed transition from the physical to the digital world. The rapid and ever-changing technological advances of the digital age will impact the effectiveness of regulations and laws designed to protect consumers (Goyens 2020) in the marketplace, and will necessitate new and as yet unthought-of solutions. This is not an uncontroversial position; indeed, for many, digital advances are regarded as having a relatively non-disruptive impact on existing legal and regulatory structures. This may be true in respect of at least some of the theories and assumptions underpinning consumer protection policy (asymmetric information between producers and consumers, the issues of adverse selection and moral hazard in markets with incomplete information, search behaviour, and behavioural economics), which may continue to be of relevance for managing new consumer protection issues arising from advances in digital technology. Indeed, digital technology may assist consumers in processing information as search costs may be lowered and cross-producer comparisons facilitated. Howells (2020) argues that much of current consumer law is more than adequate in dealing with any new legal issues of the digital economy, particularly in light of the values such laws embody.

However, such a pragmatic view is, at best, a plea against overly-hasty responses in consumer policy and law to the challenges of the digital world, and there are new challenges that are not necessarily easily addressed by existing consumer protection policies. Advances in technology bring new sophistication tools for potential deceptive marketing practices whilst at the same time presenting new opportunities for regulators to identify such practices. One of the challenges facing enforcement agencies as well as the development of consumer law is the rapid rate of technological change. Legal developments and enforcement mechanisms within government agencies are not necessarily equipped to manage rapid change. Entrepreneurs, on the other hand, distinguish themselves by rapid technological change and can quickly adjust their labour force to have the skill sets necessary for rapid digital advances. This, in of itself, creates an asymmetry that is more problematic in a quickly changing digital environment. These challenges may be understood as "disrupture," as a break between the still existing patterns of the industrialized economy and society.

The combination of consumer law and policy with legal tech opens up entirely new perspectives (Thorun and Diels 2020). Consumer law around the world is very much based on the information paradigm. Consumer information, this is the ideology, is a basic tool to

make rational decisions. The dark side of consumer information is well-known and well-researched. Consumers all too often do not make use of the information, not least because they are overwhelmed. Business which is obliged to provide the information invests considerable resources for a doubtful objective. Despite these deficiencies, legislatures around the world have adopted ever more sophisticated information obligations, with regard to the type of product or services, the type of contract, or the type of legal remedy. Legal tech could help to reduce complexity and elaborate on an information model that is more targeted to the respective consumer needs. In its most developed form, consumer law would then be personalized (Ben-Shahar and Porat, Forthcoming). Whilst personalized consumer law would set an end to the idea of the generality of the law, the equality before the law, personalization also offers opportunities for the furtherance of consumer policy goals. Other examples could easily be added, taken, in particular, from regulated markets, telecom, energy, transport, and finance, where the rules have become ever-more complex. The downside of personalized law is all too obvious. However, it should not be overlooked that the consumer society is full of personalized advertising and personalized prices already today. Business is moving in that direction, mainly in the private law area which leaves considerable autonomy to shape marketing strategies, information obligations, standard terms, and data privacy policies along personal preferences. This debate is still in its infancy.

One of the challenges is the growing importance of scores that rank and qualify consumer behaviour. Credit scores are a widespread tool to establish confidence in lending (Ramsay and Williams 2020). China is reportedly about to establish social scoring as a political tool to observe, monitor, and steer the behaviour of their citizens. Whilst the Western World rejects social scoring, it should not be overlooked that social media has changed the way we communicate. The "like" is omnipresent and when linked to the individual behaviour of the consumer, it is not far away from a milder form of social scoring (Siems and Sithig 2019). Another challenge facing enforcement agencies as well as the development of consumer law is the rapid rate of technological change. Digital technology develops exponentially whereas the human mind is reliant on linear developments, where the experience of the past determines what will happen in the future. Legal rules are usually adopted ex post factum, in reaction to market failures or politically unwanted developments. It is by far clear what kind of consumer law is needed that could help to govern the digital future. It might very well be that a different consumer law is required, a kind of a learning law that allows to experiment, to move back and forth in the search for the most appropriate solution (Sabel and Zeitlin 2008, 2012). Such a law is miles away from the idea of law guaranteeing legal certainty. It will have to be discussed where legal certainty is indispensable and where there is room for experimentalism and by whom, only regulatory agencies or also courts (Sabel and Gerstenberg 2010).

Private law, in particular contract law, provides for the tools that enable and legitimise new forms of private regulation to be built along global value chains. When moved to the cross-national or transnational level, consumer law enforcement becomes ever more difficult and these difficulties cannot fully be mitigated by new forms of regional or even international co-operation between enforcement agencies and consumer organizations. What are needed are new forms of consumer resistance. The digital economy and digital society provide for technical means of collective and individual consumer empowerment though. One such tool could be the digital control of unfair terms, misleading marketing practices, and data privacy policies. It is for the digital society to develop such tools in co-operation between non-governmental organizations and front-running academic research (Lipp et al. 2019).

Closely intertwined with more traditional questions of consumer protection are issues of consumer privacy in a world of big data. Enforcing privacy with a narrow focus that does not take account other consumer protection factors could lead to suboptimal consumer outcomes. Consider, for example, the strict privacy regulations that govern medical and health records in the USA. At first glance, these seem to be very pro-consumer protection. Technical innovation around digital information and the ability to target disease prevention applications, however, can be severely constrained when health data is very much protected. Technologies such as simple text reminders for those who have not properly vaccinated their children – used widely in some countries are much more complex in places with stricter controls on health data. Even where there is general agreement that privacy protections are essential – economic theories of consumer protection suggest these can have some negative consumer welfare implications. For example, preventing health insurance firms from having access to consumer health information appears to protect high-risk consumers. Theories of contracting, however, suggest that insurance companies only need to know the general risk distribution across the population and can use strategic contracting to sort consumers by risk. In these equilibria, full insurance contracts are offered at the same high-risk premiums they would offer with access to full information and large deductible contracts are offered that only low risk consumers are attracted to and are thus denied the opportunity to have full insurance at actuarial fair prices.

A new policy field is emerging "consumer data protection" (Helberger et al. 2017). Today's benchmark is the European General Data Protection Regulation, which entered into force in 2018 and which unfolds impact on the rest of the world, partly due to the judicial activism of the European Court of Justice. It has to be recalled that the law on data protection is even more diverse than consumer law. There are many countries which have a well-developed consumer law, but which do not have data protection regulation. This is true for China and also for countries like Brazil. Seen through the glasses of the Western democratic world, data privacy forms a building block for the existence of a democratic society. The very idea of "consumer data protection" will meet resistance in many countries around the world. This is not to deny that data privacy comes at a price and might lead to tensions between individual preferences and individual needs on the one hand and the collective preferences and collective needs on the other.

The decision to be taken is one about the society we would like to live in. Big data analytics facilitates the personalization of risk. In such a world, each and every consumer would pay for her individual risk and her individual behaviour. Health insurance, like all types of insurance so far, however, is based on the idea of solidarity. The healthy are paying for the ill. The risk is spread. If, however, data privacy allows consumers to prevent insurers, hospitals, and doctors to collect health data, they may hinder medical progress. The legal debate on the link between data privacy and consumer protection between individual rights to get my data protected and the collective needs to get access to the data is only at the beginning.

The example of the overlap between consumer protection and consumer privacy protection is but one indicator of the fact that digitalization cuts across many traditional legal categories. However, these new challenges of digitalisation are insufficiently explored, but will undoubtedly change the way we have to think about consumer law and policy. In particular, we need to develop a clear methodology for addressing these new challenges in a timely manner, but without falling into the trap of creating new laws, which focus on narrow issues in terms of business practices or technology. A new architecture of consumer law, in particular, will have to take a step back from micro-regulation to a macro-level, operating at a higher level of abstraction or generalisation, and adhering to the postulate of technological neutrality.

Behavioural Economics, Sustainability, and the Practice of Consumer Protection Policy

One of the key questions that was raised during the conference was whether consumer protection policy contributes to sustainability or whether such structures work directly against sustainability. In the last two years, the political debate about sustainability has gained pace through the "Friday for Future" movement. This social movement could serve as positive example for the organisation of societal resistance in the new digital world. Without the new technology and particularly social media, it is hard to imagine that the Friday for future movement could have gained such worldwide attention. Looking back, the conference did not devote enough attention to the interplay between consumer law and sustainability or even broader on the triangular relationship between consumer law, sustainability, and digitalisation (Micklitz 2019).

The overall political framework for discussion has already been set in the first revision of UN Guidelines on Consumer Protection, the so-called greening of the UN Guidelines in 1999. There are eight broad objectives described (a–h). The last objective is *(h) to promote sustainable consumption*. Other objectives include *(b) to facilitate production and distribution patterns responsive to the needs and desires of consumers and (g) to encourage the development of market conditions which provide consumers with greater choice at lower prices.*

It is very unclear whether goals b and g are supportive of h. With respect to goal b, markets that respond to consumer needs and desires could ignore the externalities associated with certain types of production and consumption. Moreover, such responsiveness will work to support sustainable consumption only if consumers themselves value products that are more sustainable. These objectives make clear that understanding the preferences of consumers and how such preferences are in accordance with sustainable practices becomes/remains an important topic on the research agenda. With respect to objective g, more consumer choice at low prices can work for or against long-term sustainability. Introducing more sustainable versions of existing products has the potential to shift consumption towards these products. Much of product differentiation, however, is not focused on such attributes and thus not related directly to sustainability. More choices at lower prices could create increases in demand that are directly opposed to objective h.

In 2014, the General Assembly of the United Nations unanimously adopted seventeen Global Sustainable Development Goals (SDGs). They concretise the UN Guidelines and, if taken literally, claim precedence over all other political goals, including consumer policy. It would mean that the 17 SDGs are the yardstick against which consumer law has to be measured and, if necessary, be amended. All of them could be related in one way or another to consumer protection policy. So far, none of the signatory states has initiated any kind of stocktaking, verifying how its consumer laws measure up to the 17 goals. Goal 12 stands out, as it requires "Responsible consumption and production."

Consumer law, however, is very much advocating undisturbed enjoyment. Economic growth requests consumers to replace their technical devices quickly. High turnover consumption goes hand in hand with the rapid technological development.

The call for sustainable consumption is not new. It started already in the 1990s, together with the rising importance of environmental policy. However, the two fields of law (consumer law and environmental law) developed in insolation from one another, as did the respective academic communities. Leaving aside minor attempts to integrate environmental concerns into consumer law, consumer law developed steadily into a tool that serves not only the interest of

the consumers through increased consumer rights but also the interests of economics and politics in total welfare. Taking the SDGs seriously would require a rethink of current consumer law. The EU as one of leading authorities with worldwide influence has published its Communication on the Circular Economy in 2015, as a reaction to the UN SDGs. However, not even the EU is ready to accept the challenge as the most recent adoption of the consumer sales directive in 2019 demonstrates. Sustainability is no more than a reference point in the recitals with limited to no practical importance. A practical first step for re-aligning consumer law with sustainable development is suggested by Mak and Terryn (2020).

One of the major problems is to work out how to convince consumers that buying sustainable products is not only desirable but also *necessary*. Here, behavioural economics has a role to play. Behavioural economics and behavioural science have considerably enriched insights on the opportunities and the limits of a consumer policy that uses by and large a one-size-fits all approach, neither distinguishing between the different types of consumers nor taking consumer behaviour into account (Micklitz et al. 2018). As an example, consider that in some areas government agencies have long considered negative option promotions as a deceptive trade practice. Recognising that some negative option contracts (where one must notify a firm that they do not want to purchase a product) take advantage of consumer inertia and that failure to respond is not necessarily a fully informed voluntary exchange – governments have limited the legal use of these types of offerings rather than seek information provision remedies. This was implemented well before the rise of behavioural economics. So one underlying theme was whether behavioural economics is a relabelling of existing practices or whether consumer protection policies are changing in response to advances in behavioural economics.

When it comes to sustainability, behavioural insights could be taken on board in order to "nudge" consumer in a direction that could eventually contribute in realising the 17 SDGs on the ground and not just in rhetoric (Sunstein and Reisch 2019). There are several opportunities for "nudging" the consumers, e.g., via default rules, although there are potential risks that might result from the impact of "nudging" on consumer autonomy. Consumer history, cognitive psychology, and behavioural sciences demonstrate that consumers are longing for new products and that they are not so easily willing to opt for sustainable consumption, let alone the problem that sustainable products are more often than not more expensive (Trentmann 2016). Therefore, a political plea for sustainable consumption might disadvantage the poor. There is ample evidence that the poor in the South and in the North do not care about sustainability, as they do not have the necessary resources. Developing a sustainable consumer law that preserves autonomy despite the agreement on the overall agreed political will – the SDGs – remains one of the major tasks for consumer law and consumer policy. What is desperately needed is a holistic perspective that unites not only consumer law and sustainability but that also analyses the role and function of the digital economy and society.

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