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Enforcing Consumer Protection Laws

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This chapter adopts a broad conception of enforcement so as to support an analysis and comparison of the various different mechanisms through which the entitlements and responsibilities ascribed by consumer laws may be vindicated. I start by evaluating the different agents of enforcement for consumer law. Whilst it is right to consider the full array of different agents of enforcement, including consumers, businesses, public agencies and NGOs, it is inevitable that consumer law enforcement is chiefly associated with public agencies of the kind widely established in the second half of the twentieth century. Considering different styles of enforcement in consumer law the chief focus in this chapter is on public agencies. I conclude by considering the claim that consumer law entered a 'post-interventionist' phase in the 1980s and consider the extent to which the implications of this trend for enforcement have been or may be realised.

1. Introduction

The implementation of consumer policy, and the vindication of consumer rights, are each dependent on the existence of mechanisms to secure alignment of the conduct of businesses with the applicable legal norms set through legislation and/or judicial decision making. In this chapter I adopt a broad conception of enforcement so as to support an analysis and comparison of the various different mechanisms through which the entitlements and responsibilities ascribed by consumer laws may be vindicated. There are competing theories as to what consumer law should be seeking to achieve in respect of enforcement. For some it is about justice and the tackling of inequalities, whilst for others, particularly within the law and economics approach, the law should be concerned with promoting efficient solutions within market transactions, for example by improving the flow of information on the basis of which consumers make market decisions. Whilst the pursuit of these objectives is sometimes harmonious, it is often revealing of tensions between contrasting positions as to the very purposes of consumer law.

The traditional fields of law affecting consumers, such as tort and contract, and the newer consumer law measures each have associated with them, implicitly or explicitly, mechanisms for enforcing substantive legal rules. The modes and styles of enforcement of consumer protection laws are highly varied in different jurisdictions. Within many systems

the supplementing of ordinary or special private law protections for consumers (in contract and/or tort law) in the second half of the twentieth century brought with it a significant increase in criminal and/or administrative law enforcement, often through national or local agencies. The development of such state enforcement processes requires, as a precondition, a sufficiently strong and wealthy state apparatus and, generally, has only been possible in industrialised countries characterised both by significant elements of ‘consumer culture’ and reasonably strong state capacity for steering the behaviour of businesses which supply consumer markets.

The self-conscious development of the apparatus of consumer law enforcement might lead the observer to think that the mechanisms and institutions and enforcement would be shaped by ideas about what works in regulatory enforcement generally. Whilst this is true up to a point, the enforcement imperative is, in many jurisdictions, qualified by recent concerns to reduce regulatory burdens through the adoption of principles of proportionality in enforcement. Furthermore, if the instrumentalist approach were ascendant we would expect a high degree of convergence between enforcement models, particularly in the European Union where a substantial degree of harmonization in substantive rules has been achieved. Though there are significant forms of procedural innovation within the EU consumer protection regime, patterns of enforcement remain diffuse. That we do not see such convergence suggests that national cultures remain important factors in shaping the ways of enforcement, and thus also significant in explaining variety.

In this chapter I start by evaluating the different agents of enforcement for consumer law. I have organised discussion around ‘agents of enforcement’ rather than around different forms of law because in practice trusted distinctions between private law, administrative and criminal law tend to break down within the consumer law area.¹ Thus it seems more helpful to evaluate the strengths and weaknesses of different agents in taking on enforcement roles. Whilst it is right to consider the full array of different agents of enforcement, including consumers, businesses, public agencies and NGOs, it is inevitable that consumer law enforcement is chiefly associated with public agencies of the kind widely established in the second half of the twentieth century. Thus in considering different styles of enforcement in consumer law the chief focus in this chapter is on public agencies. I conclude by considering the claim that consumer law entered a ‘post-interventionist’ phase in the 1980s² and consider the extent to which the implications of this trend for enforcement have been or may be realised. Though the chapter draws on evidence of developments in consumer law in a number of jurisdictions, the approach of the paper is conceptual and theoretical rather than of a comparative law type.

2. Agents of Enforcement

Enforcement is generally conceived of as encompassing the mechanisms through which businesses or others are held to their legally-imposed responsibilities. A narrow conception of enforcement involves formalised processes of applying sanctions to those in breach of legal norms. This often involves public agencies, following up on monitoring processes

which detect breaches, or on complaints made by those adversely affected. The pursuit of private law rights by adversely affected consumers or competitors may also be conceived of as enforcement. A key difference between agency enforcement and private enforcement is that agencies are likely to pursue the task within the context of wider strategic objectives such as signalling which forms of business behaviour will not be tolerated, and conserving of resources to target priority areas. In contrast, whilst there may be strategic considerations in private decisions to enforce, such actions are overwhelmingly concerned with the narrow self interest of the claimant.³ These differences notwithstanding it is suggested that agency and private enforcement may be complementary to one another in providing variety in the forms through which consumer policy objectives may be achieved.⁴ Somewhat more ambitiously the balancing of strengths and weaknesses of different forms of enforcement may lead us towards ‘optimal enforcement of law’. Shavell, for example, distinguishes not only public from private enforcement, but also regimes which are oriented to compensating harm from those which penalise acts (irrespective of harm) and those which aim to prevent the targeted behaviour occurring.⁵

If our interest lies in understanding the conditions under which businesses comply with their responsibilities then it may be helpful to adopt a wider conception of enforcement which embraces both formal and informal mechanisms through which agencies (and others) seek to promote compliance.⁶ Novel enforcement mechanisms involve third parties – other businesses and non-governmental organisations - in processes of enforcement. Recognition of the limits of both governmental and private rights models of enforcement is likely to make such third party mechanisms increasingly important. Such third party enforcement mechanisms may have particular significance in countries where the state capacity is relatively limited and businesses or NGOs have better information and perhaps also stronger capacity to steer others towards compliance with particular norms. Thus, for example, in countries with limited capacity for monitoring and enforcement of product safety laws businesses which buy products for onward sale in consumer markets may use their contractual and market power to require compliance with national or international product standards. Insurance companies also have a role in aligning risk management practices with compliance with high consumer standards. The enforcement capacity of NGOs is frequently more limited and may be more dependent on informal processes such as the promotion of boycotts of products they judge to be harmful (or of the producers who make them) or “boycotts” of products (or producers) perceived as particular worthy of support.⁷ European Community legislation has sought to formalise the capacity of NGOs in enforcement of a number of consumer protection measures. In the UK distinct legislation empowers designated consumer bodies to make ‘super complaints’ concerning adverse effects of the operation of a market for the interests of consumers, both to the general competition authority and to certain sectoral regulators.⁸ Such super-complaints require a fast-track response from the agency to which they are made.

2.1 Consumers

To the extent that consumer law is concerned with transactions the primary emphasis of enforcement is on the claims made by adversely affected consumers and, to a lesser extent, competitors, in the law of contract and tort. The optimal enforcement approach above suggests that in dealing with harm, consumers may be well placed in terms both of knowledge of wrong-doer and wrong-doing and financial incentives to act as enforcer, for example through litigation.⁹ However, the picture is not one of private law enforcement *simpliciter*. Remarkably varied procedural reforms in many countries since the 1960s have resulted in the creation of more streamlined and accessible tribunals for resolution of private law disputes involving consumers and business and the creation of new remedies has given consumers alternative ways to enforce their legal entitlements. Taken together these reforms have reduced the dependence of consumers on the frequently unrealistic prospect of a court action to vindicate their legal rights. In one category of cases, where damage to individual consumers is extensive, a distinctive trend in some jurisdictions has been towards the use of a variety of forms of class action dealing, for example, with claims relating to harm caused by defective pharmaceutical products. Large claims, organised within a class action, may find the use of ordinary courts more straightforward and valuable, though class actions have not been without difficulties.¹⁰ A further distinct trend in the European Union countries has been the empowerment of agencies and NGOs by legislation to enforce particular areas that would normally be regarded as part of the private law of contract.

Consumer responses to problems with goods and services vary between doing nothing through to complaining to the supplier through to pursuing alternative dispute resolution mechanisms and litigation. These potential responses are gradated in terms of time and cost involved.¹¹ All other things being equal the greater the loss the more likely is a consumer to escalate their complaint to more costly and time consuming processes. However the scale of the loss is not the only factor. Knowledge of consumer entitlements may also play a role, though with larger losses it is more likely that a consumer will seek advice and so become better informed.

The simplest mode of enforcement then is for a consumer to contact a supplier of goods and/or services to indicate their complaint. With many consumer goods the response of retailers is quite routinized with replacements and/or refunds offered and redress sought from the manufacturer by the supplier with little or no discussion of strict entitlements. We would expect such extra-legal routinization where both retailer and manufacturer have brand names which, in the case of relatively inexpensive products, are considered to be best served by responding quickly to consumer complaints in line with consumer expectations. There is a sense in which market concerns with reputational damage stand behind consumers' ability to secure remedies rather than the law. Indeed with many smaller consumer products there would be little prospect of a consumer pursuing a legal claim were a supplier to fail to address a complaint to the consumer's satisfaction, so the threat of legal action is likely to be fairly marginal in any calculation by businesses of their appropriate responses. Technological developments in e-commerce increasingly give both satisfied and dissatisfied customers the ability to exercise their voice through reputational mechanisms

for traders of the kind used on ebay.¹² Intriguingly such mechanisms do nothing for the redress potential of a customer who is dissatisfied, but enable future customers to assess risks of default by traders and to avoid lower reputation traders or discount the prices they are willing to pay to them.

Larger losses, for example economic loss linked to poorly performed services, and personal injuries caused by defective products are less likely to be addressed in such informal and routinized ways. Alternatives to litigation which have emerged in many jurisdictions typically provide an inexpensive means to escalate the claim once the internal complaints potential has been exhausted. Such alternative dispute resolution mechanisms are sometimes provided by the state, as with small claims systems in many jurisdictions,¹³ and in other cases are provided by the terms of contracts or within the structure of a self-regulatory regime, as with arbitration over disputes about various services such as professional services and holidays. The use of mandatory arbitration clauses in consumer contracts is not uncontroversial and is closely regulated in some jurisdictions. The permissive approach of US courts may be contrasted with French legislation which bans such clauses. Other European jurisdictions have intermediate regulatory positions.¹⁴ The technological possibilities of the internet have been recently harnessed to create a new species of online dispute resolution (ODR) targeted in particular at cross-border disputes.¹⁵

The limited capacity of consumers to enforce legal rights through litigation is recognised in the creation of new remedies which need not involve formal enforcement.¹⁶ Such self-help remedies are not, of course, all modern. The right of set-off, for example, is an ancient principle within both civilian and common law systems under which a sum may be deducted from the contract price to reflect failures to fully deliver on the obligations of the other party under the contract. The right can, of course, only be exercised in contracts where the full price has not yet been paid. More modern self-help remedies are available even in a fully executed contract. A key example is the right of the cooling off period provided in many EC consumer protection measures and typically accompanied by a responsibility on businesses to notify consumers of the right and how they may exercise it. Whilst such cooling off periods are often justified as tackling inequalities of bargaining power in high pressure selling contexts such as doorstep and distance sales and consumer credit transactions, it has been argued also that there is an economic justification for such remedies also, where the remedy is oriented to permitting a consumer to escape from a transaction which they entered irrationally.¹⁷

The travel sector has long been recognised as creating problems for dissatisfied consumers because of the gap between any remedy in damages associated with such matters as delay or defective holiday accommodation as compared with the loss that is felt when an annual holiday disappoints.¹⁸ The ‘problem of the consumer surplus’ is recognised in a number of EC measures which provide remedies going beyond contractual damages including repatriation and changes of accommodation.¹⁹

2.2 Businesses

Much of the body of law which protects consumers may also be conceived of as protecting businesses. Most obviously competition legislation has the dual aim of protecting businesses from unfair competition based on monopolistic practice and restrictive agreements, while at the same time protecting consumers from the adverse affects of such practices by way of permitting increased prices or reduced quality of products.²⁰ The capacity of businesses to enforce rules governing anti-competitive conduct pre-dates the introduction of modern competition legislation in many countries. For example, in many civilian systems there were prohibitions on comparative advertising (known as ‘knocking copy’ within the advertising industry) enforceable by competitors. Within the common law systems such prohibitions are generally frowned on, though misleading advertising which passes off a product of one producer as that of another is actionable at the suit of the producer whose business is harmed in tort law.²¹ EC harmonising legislation now requires member states to permit comparative advertising, while regulating it for accuracy.²² American antitrust legislation, famously, incentivises businesses to litigate over anti-competitive conduct by offering the prospect of triple damages to successful claimants. Triple damages is widely available in state consumer protection laws.

Arguably the capacity of businesses to enforce their own contracts is of greater importance to consumer protection than their involvement in enforcing public law provisions. It is through the contracts between manufacturers and their component suppliers and between retailers and distributors and manufacturers that many of the norms governing standards which can be expected of consumer products are set. A key contemporary example is the power of major supermarkets to set and enforce their own standards for such matters as food safety.²³ In many service sectors too contracts have a central role in defining standards. A key example is where service providers operate as a franchise, as is true with many fast food and other chain restaurants. Notwithstanding the theoretical importance of contracts for setting standards, sociological research in both the UK and the United States suggests that where problems do emerge within contractual settings, businesspeople may not be inclined to rely on the letter of their contractual entitlements or to pursue litigation. Rather contracts provide a framework within which exchange occurs, but the response to problems is not dictated by the terms of the contract.²⁴ As noted above, in the case of business to consumer contracts in many instances the reputational advantages of resolving disputes straightforwardly, and the *de facto* circumstance of continuing relations, just as much as between consumers and businesses and businesses and businesses, makes legal enforcement unnecessary and undesirable for the parties involved.

2.3 Public Agency Enforcement

The problem of widely diffused small losses makes private enforcement by consumers unrealistic and inappropriate in many instances. In many jurisdictions the establishment of consumer protection agencies in the 1970s coincided with an intensification of consumer

legislation to address, in particular, false and misleading practices and defective products. The consumer protection fundamental law was adopted in Japan in 1968, for example. In the UK a series of measures targeted at enhancing consumer safety and reducing misleading trade practices in the 1960s, generally enforced by local authorities, were followed with new general fair trading legislation in 1973 which created the Office of Fair Trading.²⁵ Agencies combine the capacity to develop expertise with an independence from the day-to-day concerns both of politics and business.²⁶ Whilst the generic term agency or regulatory agency is often used, there is substantial variation between the agency models which have emerged in different jurisdictions. A fundamental distinction is between those jurisdictions in which consumer protection and competition functions are combined in a single agency (for example the UK and Australia) and those in which the functions are assigned to distinct agencies. The Nordic countries pioneered the model of a separate consumer ombudsman in the 1970s, with a particular focus on providing more rigorous enforcement of aspects of the regime on unfair competition which protect consumers.²⁷

In the United States the federal regulatory agencies, such as the Federal Trade Commission (established 1914) and the Consumer Product Safety Commission (established 1972) combine responsibilities for monitoring markets with power to make and to enforce directly against businesses rules made as secondary legislation. Many other jurisdictions are less willing to give such extensive powers to independent agencies. The 1914 Fair Trade Commission Act places such emphasis on the operations of the Fair Trade Commission that the legislation has consistently been interpreted to preclude any right of private action based on the terms of Act.²⁸ In Japan, though there is a Fair Trade Commission largely concerned with enforcing competition law, the main responsibility for enforcement of consumer legislation lies with government ministries. Whilst the establishment of general consumer protection agencies has been a widespread trend, it is common to find other, more specialized agencies established to address, amongst other things, consumer protection in particular sectors, notably food, financial services and utilities.²⁹ The enforcement activities of these more specialised agencies are outside the scope of this chapter.

Whilst problems associated with unsafe products and misleading trade practices were key factors lying behind the establishment and empowerment of consumer agencies, these new public bodies became also a magnet for other consumer protection issues, and notably problems with vindicating rights of consumers in private law. Accordingly in a number of jurisdictions the enforcement of administrative or criminal law rules is supplemented by powers to address failure of businesses to act consistently with their private law obligations. The technique is exemplified by the implementation of the EC Unfair Terms in Consumer Contracts Directive which combines private law rules (discussed above) with enforcement by agencies and non-governmental organisations.³⁰ The basic technique of this regime is a provision that terms of standard form contracts which are unfair, as defined in the directive and exemplified in an indicative but non-exhaustive list, shall not be binding on the consumer (Article 6). The Directive recognises that the enforcement of this provision would be difficult for consumers in many instances, requiring litigation to assert the right to

ignore a provision for example unfairly tying a consumer into a service contract for an excessive period with penalties for early termination. More practically few consumers are likely to be aware of their rights and if where they are aware they will find much scope for interpretation of whether a contract term is unfair or not within the terms of the directive.

The innovative approach taken in the directive is to require member states to empower agencies and representative organizations to take actions in the courts to prevent the continued use of unfair terms by businesses (Art 7). This is reminiscent of the earlier approach of the Australian Trade Practices Act 1974 which empowers consumers, business and representative organisations to seek injunctive relief, damages or a contractual variation for breach of the general prohibition on misleading and deceptive practices.³¹ The capacity to bring such actions is detached from evidence of any harm to particular consumers. Accordingly such actions are based simply on the putting forward of unfair terms in standard form contracts and do not require proof that consumers have actually been harmed by reliance on such terms. Whilst there has been some litigation testing the powers assigned to agencies and consumer associations in national courts, it seems likely that the main impact of the provisions is to give both groups credible capacity to monitor terms of standards form contracts and to negotiate with businesses over the redrafting of terms which are thought to be unfair. In the UK and the Nordic countries the main emphasis of this proactive regulatory enforcement lies with existing agencies to which the responsibility was assigned, the Office of Fair Trading in the UK, and the Consumer Ombud offices in the Nordic countries. In France a dedicated agency the *Commission de Clauses Abusive* was established to make recommendation to eliminate unfair terms.³² In other member states consumer organisations had a more central role in enforcement. The provision of the Directive was modelled on the German Standard Form Contracts Act 1976 and it had been noted early on that the German Consumer Protection Association used their capacity to negotiate the content of standard form contracts with businesses.³³

More recently the European Union legislator has pulled back from giving choice to member states as to the extent of agency empowerment relative to the empowerment of consumer organisations in enforcement, expressing a clear preference for the former in trans-border enforcement in the Consumer Protection Cooperation Regulation.³⁴ Part of the reason for this is that experience of empowering such organisations lays bare the considerable variety in organisation, capacity and scale associated with such organisations, ranging between the powerful national organisations found in Germany and the UK, to the fragmented local bodies found in some of the Mediterranean member states. The European Commission is addressing this through the establishment of a project to investigate the development of activism by consumer organisations in enforcement – the Consumer Law Enforcement Forum. New guidance for such enforcement activity has been produced.³⁵ But, at the same time, the tide may be flowing against such NGO-enforcement. At least one member state, the Netherlands, concluded that implementation of the Regulation on Consumer Protection Cooperation required the establishment of a state agency, the Netherlands Consumer Authority. This move may be indicative of a wider perception that pressing problems of trans-border enforcement can only be tackled effectively by cooperation between public

agencies. Fairly extensive voluntary cooperation, inspired in part by OECD guidance,³⁶ has been displaced by mandatory cooperation in the EU.

Though the unfair terms directive is a harmonising measure, I note that the implementation of the provision relating to agency and representative organisation enforcement has been implemented in markedly varied fashions across the member states, ranging between ‘administrative measures, collective court proceedings and criminal proceedings’.³⁷ Thus some member states see the provision as an aspect of private law, with new techniques, whereas others have adopted it within their criminal law provisions, albeit with a focus on the content of contracts. Equally, while the Scandinavian and common law countries have well established agencies to engage in monitoring and enforcement, the absence of such agencies in Germany and Austria has given the primacy in monitoring and enforcement to consumer organisations.³⁸ This diversity in implementation begs the question whether the introduction of agency and interest-group enforcement removes this key aspect of the law relating to consumer contracts out of the realm of private law.

2.4 Third Parties - Self-Regulation, Gatekeepers and NGOs

I have noted already the empowerment of consumer associations to enforce consumer protection laws in certain EU measures. The extent of third party enforcement of consumer protection norms more generally is highly varied. The role of third parties extends beyond consumer groups and self-regulatory bodies to include businesses using their ordinary commercial power for enforcement purposes, as with the consumer credit sector. Most jurisdictions in which consumer credit is widely used engage some contractual or statutory mechanism under which card issuers are able to use their intermediary position between consumers and businesses to address, for example, breaches of contract such as non-delivery of goods. In the UK this is achieved through imposing joint and several liability on credit card issuers and businesses for misrepresentation and breach of contract.³⁹ In other jurisdictions dependence is placed on the capacity of card issuers to issue chargebacks to businesses where obligations under contracts are not fulfilled. This gatekeeping enforcement capacity exploits not only the intermediary position of the banks, but also the fact of their continuing relationship with both consumers and business through consumer credit agreements.⁴⁰

Self-regulation appears to have greater importance in some European countries (for example the Netherlands and the UK) and Australia than elsewhere. Whilst self-regulatory regimes may emerge spontaneously they frequently have legislative support or backing. So, for example, the highly varied forms of self-regulation of advertising within the member states of the European Union are backed by EC legislation which permits member states to have regard to self-regulatory regimes in implementing rules on control of misleading advertisements and which also permits agency enforcement of the rules where self-regulation has not been successful.⁴¹ Attempts to enhance complaint handling in the financial services sector internal to firms have been backed by new ombudsman schemes for resolving disputes, some emerging as self-regulatory regimes, others mandated by

legislation. Some agencies, such as the UK Office of Fair Trading, have powers to approve self-regulatory codes, entitling the trade association to use an approved logo, adding to their legitimacy with consumers and thus their value to businesses.⁴²

2. Practices of Agency Enforcement

3.1 Enforcement Powers

In contrast with enforcement by affected parties of their private law rights any powers to enforce consumer protection legislation vested in agencies are likely to be the subject of legislation. Without such legislation agencies would typically lack the power to collect the evidence required to pursue an enforcement action, and the standing necessary to bring the matter before a court. As to the collection of evidence, whilst initial indicators of breaches of legislation may come from complaints agencies will frequently need to follow up to collect evidence for example that prices are misleading in particular shops or that particular products are unsafe. The powers given typically involve the right to inspect premises, to make sample purchases and to make tests of products.

In terms of strict legal enforcement and the application of formal penalties for breach of legislation many jurisdictions require agencies to bring administrative or criminal law proceedings before a court. The North American practice of empowering agencies to apply formal sanctions directly is less common, though it is seen elsewhere in particular sectors, as with financial services regulation in the UK and Ireland.

The possession of formal enforcement powers gives agencies the capacity to negotiate with businesses over their compliance and, as is discussed below, it is not unusual to find that much ‘enforcement’ activity rarely invokes formal enforcement powers, but rather comprises education and advice or ‘bargaining in the shadow of the law’ over compliance. This is formally recognised in those jurisdictions which empower agencies to secure formal undertakings of compliance from businesses, breach of which may then be the subject matter of judicial enforcement. The securing of undertakings is widely used by the Australian Competition and Consumer Commission under the Trade Practices Act 1974 as an alternative to litigation.⁴³ In the United States the Federal Trade Commission has power to seek an administrative consent agreement.⁴⁴ Some agencies extend their capacities also by using publicity for their investigations and enforcement actions to maximise the effect not only in respect of the particular business, but also to encourage the others, and demonstrate to consumers the agency’s commitment.⁴⁵ The giving of publicity to investigatory and enforcement actions is not uncontroversial and agencies are safer in sharing information with the media if they are explicitly empowered to do so by legislation.

3.2 Styles of Legislation

As already noted the form of law used in adopting consumer protection measures is quite varied. A recent OECD study contrasted the legislative styles of four OECD jurisdictions in

the enforcement of consumer protection and identified strengths and weaknesses for each (See Table 1).⁴⁶

Country	Predominant Enforcement Mode	Evaluation	Weaknesses
United Kingdom	Financial penalties imposed through agency application to criminal courts	Generally effective but should make greater use of administrative financial penalties	Penalties imposed by criminal courts often too low to act as deterrent
Australia	Civil remedies through agency application to civil courts	Injunctive relief often effective in stopping illegal conduct	Limited capacity for imposing financial penalties except for most serious cases
Belgium	Financial penalties imposed directly by agencies	Easy and low cost application of financial penalties	Resources insufficient for criminal prosecution of more serious cases
Netherlands	Dependence on self regulation and enforcement of private rights	System works well where cases are simple and businesses benevolent	System dependent on consumer activism; Inadequate deterrent for malevolent businesses

Table 1 Enforcement Modes in Consumer Protection. Source: Adapted from Ogus et al (2006) pp6-7

Amongst the reasons for different forms of law being used are considerations of culture and objectives. Driving both of these considerations is a concern with the nature of criminal law. Where criminal law is deployed it is frequently on a basis that offences created by legislation are ones of strict liability, not requiring proof of the mental element which is required to convict for more traditional offences against the person and property. For some the use of strict liability is simply indicative of the plural nature of contemporary criminal law, and of the emergence of a class of ‘regulatory crime’ capable of being distinguished from the more stigmatizing ‘real crime’.⁴⁷ The abandonment of a mental element in strict liability offences is done precisely to make enforcement more straightforward. If a price is displayed inaccurately it does not matter whether or not the company owning the shop or the shop’s manager intended to give a misleading price indication and it might be difficult to prove. But for many, including some judges, a certain ambivalence about the deployment of the criminal law in this manner is reflected in judgements which seek to reintroduce some mental element into strict liability offences or which act on a sense of injustice at treating those without intent to commit the offence as criminals by using discretion to hand down lenient sentences on conviction.⁴⁸ In these ways there is a risk of the objectives of the strict liability offence being undermined by concerns that courts will not treat wrongdoing with sufficient seriousness. In practice enforcement agencies typically use their discretion to prosecute offences to put forward only those of deliberate and/or persistent wrongdoing, and those where substantial harm has occurred, for example because of the marketing of an

unsafe product. In mounting such prosecutions they are aided by the fact of strict liability and are those more likely to secure convictions, provided they can prove that the prohibited act was carried out by the defendant.

A further doctrinal question that impacts sharply on the real world of enforcement is who should be legally responsible for breaches of consumer legislation. Most legal systems place considerable emphasis on ascribing legal responsibility to those who perform the act which constitutes the wrongdoing, and, by the same token, not making others legally responsible. There are of course exceptions to the principle. A doctrine of vicarious liability for tortious acts is recognised in many systems, and applied, in particular to employers and statutory authorities. In principle it is commonly argued that legal responsibility for breaches of consumer laws should be attached to the enterprises responsible for the business and to the directors of the enterprise. The provisions in many legal systems that it is the company and its directors who shall be responsible implies a theory of enterprise liability three inter-related ideas. First, those who set in motion the context in which wrongdoing occurred shall be responsible. Second, the enterprise is the chief beneficiary of the economic activities in the context of which the wrongdoing took place. Third, through control of hiring, firing and training, whilst at the particular moment of breach no director may have been present and able to prevent it, nevertheless the overall environment is within the control of the business enterprise.⁴⁹ In practice the UK exemplifies a regime where there is little consistency in defining the conditions for legal responsibility.⁵⁰

The recent OECD report concluded that systems dependent on criminal law might be made more effective through greater dependence on administrative penalties and that the efficient administration of such penalties might be pursued through reducing the involvement of the courts in the application of such penalties.⁵¹ The *quid pro quo* for placing greater direct power to agencies to apply financial penalties in domains such as financial services in the UK has been a growth in systems of appeal to external tribunals.⁵²

3.3 Styles of Enforcement

The enforcement of consumer protection laws, as with other areas of agency regulation, is rarely a matter of stringently enforcing every detected infraction. There are both cultural and instrumental reasons for agencies to use formal enforcement powers sparingly. In cultural terms within many jurisdictions relations between regulators and industry are not terribly adversarial and it is congenial to negotiate over responses to infractions rather than to go to court over them. This is an aspect of the phenomenon of low ‘relational distance’ where shared backgrounds and/or high frequency of contact may be expected to result in less stringent enforcement.⁵³ From an instrumental perspective this may make sense too, since formal enforcement is costly and the appropriate use of threats to escalate from informal to formal sanctions may encourage businesses to comply with their obligations. Such a claim does, of course, require an investigation of the circumstances under which such threats might be credible and effective and of the capacity of businesses to comply. The observation of cultural and instrumental reasons for giving priority to informal

enforcement is not necessarily inconsistent with a view that such practices risk undermining the rule of law and give the appearance of giving benign treatment to powerful business interests. Such treatment of those who, within many systems would be classed as white collar criminals, contrasts sharply with the relatively stringent treatment of more traditional criminals within most jurisdictions.

Observers of the culture of regulatory enforcement note that the United States exhibits a tendency towards 'adversarial legalism' within which there is the greatest tendency towards strict legal enforcement of regulatory rules in such fields as environmental and consumer protection.⁵⁴ This contrasts markedly with Japan where much governmental steering of behaviour is said to happen through networks of influence⁵⁵ generating the paradox of 'authority without power',⁵⁶ the essence of which is that the capacity of Japanese government to protect consumers is not based on the capacity for strict enforcement of the law. Regulatory styles must, necessarily, operate within the context of the powers available to the enforcement agency. It is arguable that at least part of the adversarial style of enforcement in the US is attributable to the fact that agencies generally possess wide powers, not only to impose penalties but also to use other remedies such as cease and desist orders. Where agencies are dependent on others for the application of sanctions, as where administrative and criminal penalties require judicial proceedings, the incentive to use the uncertainty about the outcomes of such proceedings on both sides to bargain over outcomes is strong.

The literature which specifically addresses the enforcement of consumer legislation notes the tendency to avoid strict legal enforcement and typically justifies this by reference to claims that this frequently represents an effective use of resources. In Cranston's study of consumer law enforcement in the UK, for example, he found that the power to prosecute was typically reserved for cases where enforcement officers felt that breaches of legislative requirements were deliberate and dishonest. In practice prosecution efforts were targeted at a small number of sectors, such as the sale of used cars, where the persistence of dishonest practices was notorious.⁵⁷ Similarly Grabosky and Braithwaite's multi-sector study of regulatory enforcement in Australia found that most regulatory agencies pursued formal enforcement actions infrequently, favouring informal measures such as education and advice, with the possibility of escalating to threats of formal action to those businesses which did not appear to respond.⁵⁸

The empirical evidence has been debated in terms of the competing merits of compliance approaches which seek, in the first instance, to persuade businesses to comply with their obligations, and deterrence approaches which employ a more stringent approach to infractions.⁵⁹ Other research on regulatory enforcement suggests that the enforcement approach should be tailored to the enforcers' understanding of the capacity of the business involved. For these purposes business can be divided in a three way categorization into those which fundamentally seek to be compliant with the law as one of their operating values, amoral calculators which operate on a cost-benefit basis to achieve organisational goals of profit and growth, who will comply where it makes sense from a cost-benefit

perspective, and incompetents who, whatever their intent, lack the capacity to act in a manner which complies with regulatory requirements.⁶⁰ With the compliant organizations, it is suggested low level approaches based on education and advice are likely, in most cases, to be sufficient to promote modification to behaviour in breach of legislation. With the incompetents such approaches are not likely to be effective. But equally stringent enforcement approaches are unlikely to be effective also. With incompetents it may be that the only sensible action is to seek to remove the business from the market, for example by withdrawing a licence.

With the amoral calculators, it is suggested that enforcement approaches should comprise a pyramid of sanctions ranging between the least stringent education and advice, through warnings and penalties to prosecution and ultimately incapacitation through licence revocation.⁶¹ Where the enforcement agency has the credible capacity to escalate sanctions up the pyramid the rational response of the amoral calculator will frequently be to comply at the lowest level of enforcement. This 'responsive regulation' model builds both on sociological observation of enforcement activity and on the economics of game theory, proposing that with amoral calculators a version of the 'tit-for-tat' strategy under which escalation of enforcement strategies progressively responds to defections from compliance by businesses.⁶² A recent review of consumer protection enforcement in New Zealand concluded that a wider array of sanctions was required in that jurisdiction to generate an effective enforcement pyramid, and recommended the introduction of cease and desist orders (following US and Canadian practice) and court enforceable undertakings (following Australian practice), amongst other proposals.⁶³ It has been suggested that the success of such responsive enforcement strategies is premised not only on the credibility of escalation within the pyramid, but also upon the capacity of enforcement agencies to engage businesses on the morality of their conduct. The absence of political commitment, for example for criminalization of trading offences, might be expected to undermine the commitment of firms to comply.⁶⁴

More radical approaches suggest that businesses are likely to seek to comply minimally with externally imposed rules, and to avoid their more costly implications.⁶⁵ In this context there is value in seeking to stimulate self-regulatory measures by businesses which can then be overseen and steered by public agencies.⁶⁶ Within consumer protection legislation considerable potential has emerged for the promotion of self-regulatory codes. Within Europe self-regulation is an important part of the regime for the control of advertising in most countries. The question of self-regulation is, of course, larger than simply one of enforcement, and substantially outside the scope of this chapter. Traditions of self-regulation vary greatly. Even within the common law countries there is great variety, Australia and the UK placing considerable faith in self-regulation in contrast to the general suspicion of such regimes in the United States. Self-regulatory bodies frequently have great power over member businesses, particularly where membership of the self-regulatory scheme is a *de facto* requirement for operating in a particular market. Accordingly, where self-regulation is regarded as a legitimate part of the apparatus of regulation, it is possible

to operate particularly stringent enforcement, with expulsion of businesses from the scheme being tantamount to a requirement that the business ceases trading.

3. Post-Regulatory Enforcement of Consumer Law

As early as 1992 Norbert Reich asserted that the European states were in a third, post-interventionist phase of consumer policy following the pre-interventionist post-War period and the interventionism of the 1960s and 1970s.⁶⁷ What he meant by this was to suggest that state was, to some extent, withdrawing from attempts to control businesses directly through prescriptive legislation, and was seeking to stimulate consumers, businesses, trade associations and representative groups to take on greater responsibility both for setting and enforcing consumer law norms. I have referred to this trend elsewhere as representing the emergence of a ‘post-regulatory state’.⁶⁸ Reich’s claim has both a normative and descriptive dimension. Normatively it was inspired by observations in the German legal and social theory of the limited capacity of state institutions to control through law the activities of social and economic actors.⁶⁹ Within the discourse of public policy post-interventionist ways of thinking were embraced as part of a neo-liberal agenda to reduce the size of the state generally, and regulatory burdens on business in particular.⁷⁰ In the UK this ideological commitment was followed up with quite sophisticated analyses of how regulatory goals might be pursued with the least burdensome necessary measures.⁷¹ Reich discusses examples of mandatory disclosure regulation, self-regulation by trade associations and empowerment of representative associations as examples of the post-interventionist way of policy making.

One solution to the problem of limited state capacity, from an enforcement perspective, is to place greater emphasis on the behaviour of consumers in ‘enforcing’ norms through their aggregate market behaviour. Such an approach is suggestive of measures which give consumers better information through both education programmes and mandatory disclosure regulation, for example with food labels and consumer credit information. A more radical post-regulatory approach looks to increase information for consumers not through mandatory disclosure but through the emergence of non-state mechanisms. It has been suggested that at least a proportion of consumers in contemporary industrialised countries have concerns about such matters as the environment and fair trade that they exhibit in their purchasing behaviour ‘preferences for processes’, in the sense that they choose, for example, their coffee on the basis not of price and quality, but rather on the basis of whether the producer received a fair price.⁷² Such mechanisms of regulation are dependent on consumers receiving accurate and meaningful information in fair trade labels, and thus create a requirement for typically non-state organisations to establish norms, accreditation and monitoring processes to stand behind credible labelling. Such ‘non-state market driven governance’ does not eliminate hierarchies from the system in favour of markets, but rather deploys non-state hierarchies in support of market processes of enforcement.⁷³ It thus represents a move beyond those consumer protection regimes where mandatory state disclosure rules are supposed to make for better informed consumers and thus better-operating markets, as with consumer credit. Such regimes typically combine

elements of self-regulation with NGO activity and rely not only on consumer purchasing decisions, but also the enforcement of accreditation and monitoring regimes through business-to-business contracts. As discussed above e-consumers are increasingly likely to be empowered to rate businesses they deal with online and to punish those who do not give satisfaction with poor ratings. This sort of governance technique is exciting for the way it harnesses the technology to give future consumers a perspective on the performance of a potential vendor which was previously only available anecdotally through word-of-mouth or media reports.

What is the role of government departments and agencies in such a post-interventionist or post-regulatory world? It is certainly not my position that the state is irrelevant or that its role should fall away. Rather state agencies might be expected to be more modest as to what they can achieve and select modes of action that are more concerned with observing, learning about and steering ordering processes in which they are not the primary driver. The term co-regulation is sometimes used to refer to the role of government in stimulating self-regulatory efforts. Meta-regulation refers to the governmental role in regulating self-regulation.⁷⁴ If it is correct that the knowledge and capacity for effective controls lies with industry, NGOs, businesses and consumers, then the challenge for government is how to harness that capacity and steer it, for example through promoting the development and exchange of information, and changing incentives, such that it delivers on public objectives for consumer law regimes with both a degree of effectiveness matched by a sufficiency of legitimacy.⁷⁵

4. Conclusions

The story of consumer protection enforcement is often told in three parts. The first part comprises the unsatisfactory response both of substantive doctrines and enforcement procedures in private law to the rise of the consumer society. A second phase, in the 1960s and 1970s comprised a legislative response under which agencies were empowered to take a more proactive approach to consumer protection. A third and more speculative part of the story concerns the development of post-interventionist and post-regulatory ways of governing in which the state is accorded a more modest role in stimulating market and community governance forms which are targeted at weaknesses in the state's capacity to deliver.⁷⁶

This narrative, is, of course, a simplification. State enforcement of measures concerned with protecting consumers, such as weights and measures legislation, dates back to antiquity.⁷⁷ Equally non-state ordering of markets through the guild structures pre-dates the establishment of the modern nation states in Europe.⁷⁸ The value of the narrative, accordingly, lies not in its historical accuracy, or otherwise, but rather in its capacity to capture different ways of thinking about consumer protection enforcement and put them to use both in evaluating consumer protection regimes, and in developing proposals for reform.

Evidence of a decisive shift in thinking towards a third, post-interventionist phase is patchy. This is in part because such strategies are vulnerable to be thrown off-course by crises for which, politically, the only possible approach is interventionist. Responses to the BSE ((mad cow) crisis in Europe and the Enron debacle in the United State illustrate this. Secondly there is a certain fragility to the legitimacy of non-state governance mechanisms which appears to be pervasive. In the United States though there is a suspicion of government intervention generally, there is reasonable confidence that public agencies are well constrained by constitutional and administrative law measures requiring the adoption of particular procedures and accountability structures which are frequently lacking in non-state governance regimes. In many European countries there is a pride in the capacity of the state to protect citizens and a suspicion of other instruments often corralled together with the pejorative label of 'privatization'. For many there is a particular importance to the capacity of government agencies to cooperate to tackle the increasingly visible problem of cross-border enforcement, whether through voluntary initiatives or those mandated by the European Union legislature. Third, the policy entrepreneurs who we might think of as critical to the fuller embrace of post-interventionism lack the empirical evidence to show convincingly either the weaknesses of interventionist models or the strengths of post-interventionist models. Consequently post-interventionist structures have the feel of experimental rather than programmatic ventures.

A distinctive enforcement issue which has become more pressing with changing consumption patterns relates to trans-border transactions and disputes. Voluntary (and in the EU mandatory) cooperation between state agencies is likely to grow in order to tackle perceptions that consumers might otherwise be without remedies where fraudulent, unfair or unsatisfactory trade practices adversely affect consumers in other jurisdictions.⁷⁹ It is likely that non-governmental systems for promoting confidence in trans-border transactions will be important in sustaining and growing transnational consumer markets.

Arguably broad-ranging discussion of the variety of modes for vindication of consumer rights has the most to offer in the context of those developing countries where state capacity is limited. In such jurisdictions, to a greater or lesser extent, the option of effective state enforcement of consumer legislation is likely to be limited and the enrolment of consumers, businesses, NGOs and others in developing and enforcing norms may therefore be attractive. Examples of such regimes include NGO-led efforts to promote fair trade in products from developing countries such as coffee and cocoa, and the enrolment of multinational enterprises in the United Nations Global Compact which sets out principles relating to human rights, labour rights, environment and corruption.⁸⁰ Whilst these programmes illustrate the capacity of non-state governance to compensate for weaknesses in state protections, they say little directly about consumer rights. Documented examples of consumer protection regimes led by NGOs or multi-national enterprises are limited. The rapidly developing countries of Asia, with their growing middle class and rising consumerism are likely to be the main territory for innovations in consumer enforcement in the future.

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- ¹ cf Boom, Willem van, and Marco Loos, eds. *Collective Enforcement of Consumer Law in Europe: Securing Compliance through Private Group Action and Public Authority Intervention*. Groningen: Europa Law Publishing, 2007.
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- ³ Exceptions to this arise where a claimant is supported by an NGO or a business initiates or defends litigation with the intention of creating a test case intended to have wider effect than the immediate dispute.
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- ⁶ cf Cafaggi, Fabrizio, and Hans-W. Micklitz. 2007. "Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community." Florence: European University Institute, and in particular the emphasis given to negotiation as a dimension of enforcement, within the framework of litigation and arbitration processes at pp 8ff. Such negotiation is liable to extend beyond simple compliance to encompass the very meaning of the legal obligations. See Reichman, Nancy. "Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Policy." In *White-Collar Crime Reconsidered*, edited by Kip Schlegel and David Weisburd. Boston: Northeastern University Press, 1992.
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