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An Examination of Consumers’ Economic Rights Across Borders

By Sarah Yeomans

Doctoral Thesis

Submitted in partial fulfilment of the Requirements for the Award of

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Abstract

The field chosen for this study is that of European Union policy on consumer protection. Its focus specifically relates to the ability of EU citizens as consumers to exercise their economic rights across borders within the Single Market. The study principally examines consumer protection policies, but takes account of the role of EU competition policy in monitoring and shaping the market framework. The study explores not only the legal embodiment of these consumer rights, but the ability of consumers to access them in practice; thus the study also focuses on issues related to the enforcement of consumers' economic rights and their realisation in practice.

The purpose of this study is to enquire into the principal reasons for the rise of the consumer domain in the EU policy-making frame. It is argued that the Commission has become increasingly aware of the disaffection with which many EU citizens view the process of integration. It has tried to improve the functioning of EU consumer protection policy, with particular reference to the exercise of consumers' economic interests across borders, as a way of legitimising the Single Market in the eyes of the consumer. A central component of this strategy has been the use of the rhetoric of the 'citizen consumer'. The Commission has attempted to compensate for the constraints under which it operates with regard to proper enforcement in respect of consumers' economic rights by complementing the indirect measures based on competition policy with a combined approach of direct measures, based on legislation, soft-law and de-centralised initiatives.
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CHAPTER 1

INTRODUCTION TO THE STUDY

Focus and Scope of Study
The field chosen for this study is that of European Union (EU) policy on consumer protection. Its focus specifically relates to the ability of EU citizens as consumers to exercise their economic rights across borders within the Single Market. The study principally examines consumer protection policies, but takes account of the role of EU competition policy in monitoring and shaping the market framework. The study explores not only the legal embodiment of these consumer rights, but the ability of consumers to access them in practice; thus the study also focuses on issues related to the enforcement of consumers' economic rights and their realisation in practice.

The purpose of this study is to enquire into the principal reasons for the rise of the consumer domain in the EU policy-making frame. By means of a case-study approach, developed in greater detail below, the study sets out to test this hypothesis that the Commission's capacity to oversee the proper enforcement of EU consumer protection is constrained by the remit of its actions as proscribed by the treaties. The Commission has become increasingly aware of the disaffection with which many EU citizens view the process of integration. It has tried to improve the functioning of EU consumer protection policy, with particular reference to the exercise of consumers' economic interests across borders, as a way of legitimising the Single Market in the eyes of the consumer. A central component of this strategy has been the use of the rhetoric of the 'citizen consumer'. The Commission has attempted to compensate for the constraints under which it operates with regard to proper enforcement in respect of consumers' economic rights by complementing the indirect measures based on competition policy with a combined approach of direct measures, based on legislation, soft-law and de-centralised initiatives.

This thesis therefore includes the study of the role and behaviour of the European Commission as policy actor, supervisor and agent in three different contexts. The first
context deals with a series of specific Commission initiatives designed to bolster consumer protection. The second two contexts represent sectors of the Single Market—the market for cross-Channel travel and the market for cars.

Limitations on the Field of Study

The protection of the consumers' economic rights, in comparison with foundation policy areas of the EU, such as the Common Agricultural Policy or Competition Policy is of relatively recent origin. It has developed in parallel to consumer policy on health and safety issues and is located within the same Directorate for Health and Consumer protection. However, the focus of this study deliberately excludes provisions dealing with health and safety. EU health and safety legislation has been seen by policy-makers as an absolute right. The protection of consumers' health and safety has therefore been dealt with through the public domain, i.e. national public bodies have been principally responsible for overseeing the implementation and enforcement of EU health and safety legislation. Moreover, since 1986, in particular, much of the work related to consumers' health and safety has been dealt with as a result of the standardisation process, a necessary step in the creation of a 'level playing field' for suppliers and for the completion of the Single Market. The protection for consumers' economic rights has developed more slowly, though in parallel with consumers' health and safety policy. The essential point is that the task of health and safety protection has been taken out of the hands of the private EU consumers. Arguably, policy-makers have responded to the field of health and safety in this way because of the fear of a backlash from voters in the case of problems encountered in this field. However, matters affecting consumers' health and safety have very different characteristics compared with matters affecting their economic rights. Health and safety problems often potentially affect a substantial population; consumers in these cases tend to rally to a common purpose and react as a cohesive group - moreover, such issues often excite a high media profile. Matters affecting consumers' economic rights, on the other hand, lack the same urgency, the same danger of bad publicity and the mobilisation of large and angry sections of the electorate. Although some information on the earlier background to the development of consumer policy in the EU has been included by way of providing a context, the 1986 Single
European Act has been taken as the starting point for the study. This date was chosen because 1986 represents the renewal of the drive towards the integration of the member states' national markets into a Single European Market and, as such is a key date for the focus of the study.

First, the study is limited in its focus to the EU context. Therefore any attempts to generalise from it will need to take account of the unique features of the EU political framework, especially the particular model of governance adopted by the EU. Second the study is set in a particular time-frame, which represents a distinctive stage in the development of the European union – a stage involving moves towards both a Single Market and a single currency. Any attempt to generalise from the study will need to take account of the distinctive circumstances of the EU political system during the period covered. Despite these caveats, it is reasonable to claim that some of the findings and the methodology of this research might well apply to other policy areas in the EU and to other research foci.

**EU Consumer Protection: Definition and Rationale**

**Distinction Between Consumer Protection and Competition Policies**

In their more modern form, consumer protection policies developed in most westernised mixed economies from the 1950s onwards, mainly in response to the growth in economic and technological development, to the increase in product availability and consumer choice and to the increase in individual wealth and disposable income (Howlett: 1994). The argument as to whether consumer protection policy is necessary at all remains a bone of contention for both academics and politicians and continues to colour the rationale behind different approaches to consumer protection. One school of thought holds that the consumer is adequately protected by market regulation in the form of anti-trust and competition legislation. Some argue that consumer protection policy can act to restrict the consumer's ability to exercise choice. The counter view holds that, even under circumstances where the consumer is protected by market regulation, the consumer may still be disadvantaged in a number of ways. Swann (1979) and Duggan (1998) capture the essence of these two positions in the following passages. Duggan asks:
....what does "protection" mean? One school of thought holds that consumers are best protected by laws, which facilitate their freedom of choice. This suggests that consumers need protection against fraud and other forms of exploitation in the bargaining process, but it also suggests that consumers should bear the responsibility for their own mistakes. (Duggan: 1998: 469)

On the other hand, Swann argues:

One of the oddities of anti-trust literature is the degree to which it ignores aspects of the consumer interest. It is true that policies designed to foster and maintain competition have the consumer in mind. Thus, one can see competition as a device for keeping prices down to consumers by putting pressure on profit margins and by stimulating greater productive efficiency and technological change. On a grander scale, one can see it as an ingredient necessary for the achievement of an overall optimum allocation of resources. In all these senses, competition does envisage the consumer as the ultimate beneficiary. But, where much conventional literature seems to be deficient is in its apparent assumption that if the government, through the operation of its legal and administrative organs aims to create conditions of effective competition, then it is doing all it needs to do. The consumer can be safely left to get on with it. (Swann: 1979: 265)

The view has prevailed in most western mixed economies that a degree of consumer protection is needed, alongside market regulation, in order adequately to safeguard the consumer and many countries now possess an array of national consumer protection measures.

**Rationale Underpinning the EU Dimension in Consumer Protection**

If consumers are protected already by fairly comprehensive national protection frameworks, what then is the rationale for developing an EU consumer protection policy? Assuming that EU legislation produced in the consumer domain does not simply replicate at a higher level that which already exists at national level, what purpose does it serve? It
has been suggested that the Commission is always eager to expand its sphere of competencies into new policy areas in order to extend its power and influence (Tallberg: 1999). Whilst this assertion may contain more than a grain of truth, there is an alternative view which sets a clear logic for the development of consumer protection at the EU level.

The advent of the Single Market brought a new urgency to thinking on consumer protection. The Single Market presents a range of opportunities for consumers: it represents the integration of a multiplicity of markets and, in principle, broadens enormously both the scope of consumer choice and the capacity of the consumer to access the best deals under the best conditions across national boundaries. This can only happen, however, if the consumer is confident of being able both to access those deals and conditions, and if the consumer is also confident of being able to obtain legal redress in case of dissatisfaction.

National consumer protection systems are themselves far from perfect and consumers continue to experience problems due to a number of factors; for example a lack of knowledge as to their rights, imperfections in the institutionalised framework of the redress mechanisms or the cost of gaining redress the difficulty in enforcing court decisions. The addition of a cross-border element to this equation adds a new dimension of complication to the whole issue of consumer protection. As Sauphanor explains, an EU consumer protection policy is necessary because market mechanisms at the community level are even less capable of protecting consumers than they are at national level. He goes on to cite Bourgoignie’s analysis of the situation:

'the difficulties for consumers of one country to be informed as to the offers, products or services available abroad, the reinforcement of the diversity of offers, the rise in the level of risks from faults and accidents linked to the extension of consumers' abilities to use cross-border products and services, the development of trans-frontier methods of sale and marketing, the creation of European instruments of credit and payment, new barriers to access to justice, uncertainty as to the applicable law and the applicable competent jurisdiction in cases of transfrontier litigation....' (Sauphanor: 2000: 321, citing Bourgoignie: 1992).

(My translation.)
The point of developing an EU consumer protection policy, therefore, is not to replicate that which already exists at national level, nor is it a case of the Commission attempting to extend the scope of its competencies for the sake of extending its power-hold. An EU consumer policy is intended to bolster policy in the member states, to ensure a common minimal standard of protection across the Community and to address problems faced by consumers of an intrinsically cross-border nature.

However, this study reveals a second, more recent dimension to this policy, which was also conceived by the Commission as a way of legitimising the Single Market project in the eyes of EU consumers.

Having outlined the rationale underpinning EU policy in this field and before setting out the substantive research issues to be addressed, it is necessary to clarify the term 'consumer'. The consumer protection plans issued by the Commission clearly define their understanding of the consumer as the non-profit making consumer; i.e. not business. A number of documents make this quite clear. For instance, Directive 1999/44/EC of the European Parliament and of the Council of 25th May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees states: "consumer shall mean any natural person who, in the contracts covered by this directive, is acting for purposes which are not related to his trade, business or profession" (European Parliament and Council: 1999b: 3). This definition is significant since it defines the consumer explicitly in the private capacity of the end-consumer and specifically excludes any element of business or professional consumption from the definition. The definition and conceptualisation of the consumer in this thesis is directly in line with this official definition.

Having defined the scope and purpose of the study and having clarified the main foci, it is now appropriate to consider the principal research questions to be addressed.

**Research questions**

From this overview, it is possible to formulate four inter-related research questions, which shape the direction of this study. These are set out below:
First, the study asks whether the Commission's increased attention to the ability of citizen-consumers in the EU to exercise their economic rights across borders in the Single Market was used as a means of legitimising the Single Market in the eyes of the citizen? This question focuses on the Commission's motivation in raising the profile of the protection of consumers' cross-border economic rights.

The Commission was impelled by evidence of decreasing support for the process of EU integration to find ways of re-invigorating citizen support. The increased attention to the economic rights of citizen consumers formed part of this more general strategy.

Second, the study analyses the extent to which, as part of this strategy, the Commission used the rhetoric of the 'citizen consumer' as a device to court citizen support for the single market project. This second question examines the development of the rhetoric of the citizen-consumer and explores the Commission's use of this rhetoric.

Third, given the institutional constraints imposed upon the Commission's capacity to supervise proper enforcement at member state level, how has the Commission attempted to compensate for these constraints in the domain of consumers' economic rights? To what extent has it been successful? The third question proposes an analysis and assessment of the enforcement strategies adopted by the Commission in this field.

Finally, in order to draw together the responses to the above three questions, the study examines how far it is possible to demonstrate the existence of a connection between the issues of enforcement, citizenship and legitimacy, in the context of the EU framework, with particular reference to policy in the domain of consumers' economic interests.
The final question invites an exploration of the argument that, in this context, the issues of enforcement, citizenship and legitimacy are interdependent and have been consciously interwoven by EU policy actors, seeking to re-invigorate citizen support for the process of EU integration.

**Research Framework**

In order to address these questions, a research design for the study has been adopted comprising both a 'top-down' and a 'bottom-up' approach. First, the top-down approach attempts to evaluate the success of the Commission in overcoming constraints imposed upon it by the member-states in terms of its ability to supervise enforcement. The bottom-up approach involves examining selected case studies in the light of initiatives adopted by the Commission (particularly DG24 and the Internal Market DG) which are intended to enable citizen-consumers to exercise their economic rights in the single market. The initiatives will be selected from three of the policy categories, already identified by DG 24 in their policy documents, as areas intended to "bolster the consumer confidence necessary to support the implementation of the Single Market project" (EC: 1990: 5). These categories, chosen for their particular relevance to the consumer's economic interests, are those of information and education, transparency and enforcement.

The 'top-down', 'bottom up' approach is also reflected in the two principal conceptual constructs used to support the investigation. The 'top-down' analytical approach is represented by the 'Principal-Supervisor-Agent' model, which is used to characterise the EU framework of governance. The 'bottom-up' approach is represented by the notion of the 'citizen-consumer', which conceptualises the intended beneficiary of consumer protection policy.

**The PSA Framework**

The 'top-down' approach highlights the peculiar relationship between the Commission and the member-states, which has resulted in an uneven power-sharing arrangement, where the member-states delegate certain tasks to the EU institutions on the one hand, and yet constrain their capacity to carry out those tasks on the other.
An over-arching conceptual framework, relating to relevant aspects of EU policy enforcement, suggested by Jonas Tallberg, offers a useful paradigm within which to locate the particular investigations suggested by the questions listed earlier. Tallberg summarises the basic premise of P-A theory as follows:

The analytical core of P-A theory is the principal-agent relation, which in its simplest version arises whenever one party (principal) delegates certain functions to another party (agent). This act of delegation immediately gives rise to a problem, however, as the agent might decide to pursue its own interests rather than those of the principal — 'to shirk' in the P-A vocabulary. The principal may reduce the likelihood of such shirking by engaging in monitoring of the agent's actions and by threatening to impose sanctions if undesired behaviour is undetected. (Tallberg: 2000:106)

However, Tallberg notes that the simple P-A model, does not adequately capture the complexities of the relationship between the EU institutions and the member-states at the enforcement stage. He therefore extends the model to incorporate a third actor — the supervisor (the P-S-A model). According to Tallberg's version of the P-S-A model, the member states (multiple principals) delegate to the Commission and the Court (supervisors) a limited supervisory role "enforcing the implementation of and compliance with EC law as delegated to the individual member states (multiple agents)" (Tallberg: 2000: 106). Member-states thus have a dual role as both principals and agents. The states first operate collectively to produce decisions in intergovernmental bodies and then they act individually to implement and carry out those decisions within their national legal and administrative frameworks. The supranational institutions are engaged by the states as supervisors in order to monitor the behaviour of the states (as agents) and to ensure that they enforce and comply with EC rules and laws. This model serves as a 'conceptual lens' through which to view the behaviour of key policy actors and through which to examine the structural relationships between the member states and the Commission.
The 1990s witnessed an increasing focus on the part of the Commission on matters of direct concern to EU citizens as a result of a manifest fall in the level of citizen support for EU integration. It is in the context of this general concern to address the problem of citizen dissatisfaction that the emphasis on the citizen-consumer should be seen. The 'bottom-up' approach focuses on the individual consumer as citizen and market actor. The term 'consumer-citizen' was coined by the Commission and surfaced in EU documents during the early 1990s, although the concept can be traced to statements issued in earlier periods (for example, as far back as the first consumer programme of 1975). The term refers to the notion of the collection of rights that citizens should be able to exercise generally as consumers in the Single Market. The notion of exercisable rights links directly to the field of enforcement. Citizens cannot exercise their rights if they cannot find or access the means to enforce them.

The study intends to concentrate on the citizen-consumer in the cross-border context, because the purpose of the Single Market from the point of view of citizen-consumers is that they should be able to use it to their full advantage, exercising their rights anywhere in the EU. However, as the study will show, the issue of accessing and enforcing consumer rights across borders is complex, fragmented and difficult.

Methodology
The study adopts what is essentially a case-study approach, covering a defined aspect of EU consumer policy as set out above. It embodies elements of three models proposed by Eckstein as valid methodology in this field (Eckstein: 1992). The first is what Eckstein defined as a Disciplined-Configurative approach, which involves the use of established or provisional theoretical constructs in order to increase opportunities for comparison and generalisation. In this study the concept of the citizen consumer and the P-S-A model of delegation are the particular theoretical constructs, which support this element of the methodology. The second is a Heuristic approach, which can be "deliberately used to stimulate the imagination towards discerning important problems and possible theoretical solutions" (Eckstein: 2000: 137). Heuristic case-studies may occur in series and so lead to a step-by-step, case-by-case, building-block pattern of progress in the development of
theoretical constructs. This study has focussed on recent developments in EU consumer policy, which have not yet widely attracted the attention of researchers. The study also addresses the connections between policy outputs and outcomes, an approach which has been somewhat neglected. Eckstein argues that the Disciplined-Configurative and Heuristic approaches often combine well together in the same study. This study is designed to take advantage of this supportive combination, by using the selected theoretical constructs as 'lenses' through which to view the research questions and the evidence, whilst seeking to shed light on the practical application of these constructs as research tools in this field. The study also incorporates a third element, the Plausibility Probe, which, as Eckstein explains, is where a case is used as an instrument with which to "probe the plausibility of candidate theories". This is a stage of inquiry, preliminary to testing and may be used to help identify promising lines of research, which may justify greater future expenditure of resources (Eckstein: 2000: 140). This study examines the plausibility of using empirical analyses and case-studies as vehicles through which to approach the evaluation of the outcomes of policy strategies and initiatives. The inclusion of the two specific cases of the car market and the market for cross-Channel travel provides for an element of assessment of outcomes 'on the ground'. This strategy helps to probe the utility of the approach of examining policy outputs in the light of outcomes. The combination of the three case-study elements is intended to enable the study to contribute to the theoretical development of the field in terms of concept development, causal explanation and research design.

The study also includes an element of 'process-tracing', a term proposed by George and McKeown (1985) and adopted by Tallberg in his thesis (1999). Process tracing involves the attempt to reconstruct actors' definitions of the situation and to trace the influences principals, supervisors and agents may exert upon each other. This approach is developed with reference to the public statements of key policy actors and the interview data arising from investigation of the realisation of the enforcement process. This overall approach to the study has been chosen as particularly appropriate to the nature of the research questions and to the particular research subject, since it allows for detailed scrutiny of a set of closely connected problems within a coherent structure. It promotes treatment in depth, tapping into sources at a variety of levels and representing different,
but relevant constituencies. An approach involving wider comparison would run the risk of according too little of the research effort to an attempt to detect and explain the particular relationships, specific motivations and causal factors at work. The literature on research methods strongly suggests that a qualitative, case-oriented approach promotes a type of exploration, especially suited to teasing out these phenomena. The research methodology is reviewed in the concluding chapter (eight).

Research Instruments Employed

The study uses a range of contrasting and complementary research instruments and materials designed to provide evidence that can be cross-referenced in the light of the issues raised in the research questions. Since the key research questions deal with matters of motivation, rationale, strategy and outcomes, the instruments adopted are ones designed to elicit evidence to illuminate these aspects of political behaviour within a particular field of the EU system of governance. The early stages of the research process involved a review of academic literature in the relevant field, particularly that related to the key research questions. This was a continuing process during the course of the research as was the review and analysis of official documents in the field. The review of academic literature provides evidence of the conceptual context in which the study is set and of the degree of support to be found in the work of other researchers for the analysis undertaken in this study. It offers critical insights into the analysis, a proven 'sounding board' against which to evaluate data and argument and offers a safeguard against 'tunnel vision' in the study process.

As the focus of the study narrowed, it became appropriate to extend the survey of official documentation to include the scrutiny of speeches, press releases, debates and public statements by key policy actors. The review of official documents and statements of policy actors was intended to explore differing perceptions of the issues raised in the research questions. It was also designed to highlight the responses of policy actors. For the empirical research embodied in Chapters Five, Six and Seven this range of research methods was extended to include structured interviews with officials at EU and UK national level seeking primary evidence of processes of implementation and enforcement of selected EU initiatives designed to protect consumers' economic interests.
The interviews were also intended to reveal evidence of the strengths and weaknesses of the strategies in use. A number of interviews were undertaken on condition that confidentiality should be maintained. Consequently, in order to protect the identity of the officials interviewed, the study invokes the principle of anonymity, although, in each case, the constituency from which the evidence arises is made clear. Chapters Six and Seven, in particular, involved the exploration and analysis of primary case-study material, focussing on the implementation and enforcement of EU initiatives in the Single Market for durable consumer goods (in this instance cars), and on the market for a service (cross-Channel travel).

*Evaluation of Usefulness of Sources*

The research tools were carefully selected to correspond to the appropriate task in hand at each stage of the research process. The evaluation of primary material provided both an excellent source of detailed and up to date information as well as revealing the concerns, intentions and in some circumstances the contradictions of key policy actors. The interviews provided an excellent way of obtaining additional otherwise unavailable information and insights into the policy process. The interviews also provided a way of cross checking the validity and reliability of information already obtained through other means.

Finally, the review of secondary literature provided a starting point for the gathering of information. It helped to provide the study with overall analytical and conceptual frameworks which gave direction to the study. The secondary literature also provided a sounding board against which to review the development of ideas and arguments. Because the study involved the review of a variety of literature fields; that of the consumer, EU consumer protection policy, enforcement and implementation and citizenship and legitimacy, not to mention theoretical and methodological frameworks, it was decided that the literature review should be separated out into the appropriate relevant chapters, so that each individual review would relate clearly to the arguments and subject matter of the specific chapter at hand. On balance, it was felt that the alternative strategy of reviewing all of the secondary literature in a separate chapter, ‘out of context’, might lead to repetition and potential confusion.
Complications arising from the methodology

The study faces two methodological problems from the outset. The first arises due to the fact that the study is contemporary and focuses on a rapidly developing aspect of consumer protection policy – that of the enforcement of consumers' economic rights across borders. The empirical research on certain aspects of the study depends on the pace of development of the initiatives under examination. The second complication arises due to the overlap between consumer protection policy and competition policy, insofar as this confuses the jurisdictional boundaries of these two policy areas thus making it difficult for the researcher in some instances to locate the true source of a given consumer problem.

Plan of the Study

In order to realise the aims underpinning this study, in the light of the methods outlined above, the thesis is organised into the following main sections.

The first part, Chapter One has explained the purpose and rationale of the study and has outlined the conceptual frameworks and methodology adopted.

The second part consists of a group of chapters (Two, Three and Four) dealing with the contextual background and the conceptual frameworks underpinning the study. In Chapter Two the historical background is explored in order to place the focus of the study within the framework of the development of EU integration. In Chapter Three the peculiar nature of the enforcement procedures in the EU is explored and implications of those procedures for this study examined. In Chapter Four the development of EU citizenship and citizens' rights are outlined. The relevance of these, along with the issue of enforcement and the concept of the citizen-consumer are explored using a combination of secondary literature and European Commission documentation. The purpose of adopting this approach was to use the materials both as a means of generating information and as a way of cross-referencing the Commission's position and perspective on relevant issues with analyses provided in the secondary literature.

The third part is largely empirical and comprises one chapter (Five), which examines selected Commission strategies to reinforcing the abilities of consumers to exercise their economic rights across borders, and Chapters Six and Seven encapsulating the two
specific case studies. The fourth section embodies the conclusions to the study, summing up the findings and drawing inferences for future research activities in this field.
CHAPTER 2

THE DEVELOPMENT OF EU POLICY IN THE CONSUMER DOMAIN

Introduction

The development of EU policy in the consumer domain has been slow and uneven. Whilst some progress was made early on in this field in the areas of health and safety, other areas, notably consumers' economic rights, enforcement, access to justice and information were much slower to develop. During the first years of the EC's existence (1950s and 1960s), consumer policy was largely under-developed even at national level. Moreover, the primary concern of both national and Community policy-makers in the first instance was to integrate the European market for the supply-side. Harmonising health and safety regulations was a key aspect to facilitating this process although, as this chapter explains, even here progress was generally retarded by the reluctant attitude of the member states. The protection of consumers' economic rights was largely neglected until the late 1980s, when evidence from opinion polls (Young: 1997: 216-7) and opposition to the Maastricht Treaty (1992) alerted both national and community policy-makers to the indifference of many EU citizens towards the process of integration.

In response to this awareness Community policy-makers set out to enhance common policy areas of perceived interest to citizens (for example, social, environmental, food, and health and consumer protection policies). The development of consumers' economic rights is therefore to be viewed within this context. Community attention to this policy area was also designed to improve consumer protection at both national and EU level, in order to encourage states with relatively poor records of consumer protection (for example, Greece and Portugal), to increase their efforts and to provide EU consumers with minimal levels of protection when shopping across borders. During the mid to late 1990s enforcement of consumer protection and consumer access to redress became the main focus of EU policy-makers within the field of consumer protection. Successive studies and reports demonstrated the economic losses to the business and employment
sectors of poor consumer confidence in their ability to exercise their full rights in the internal market. Citizens' access to rights in policy areas of direct relevance to their daily lives, also begins to emerge as an important weapon in the Commission's strategy to win citizen support for European integration.

The purpose of this chapter is to contextualise in detail the development of consumer protection within the wider framework of EU integration. The analysis below broadly follows a chronological sequence, exploring the development of consumer policy in three inter-related aspects: the treaty bases, institutional development and the emergence of 'soft-law' initiatives. The chapter sub-divisions follow the time-span between the major treaty revisions, namely 1957-1986, 1986-1992, 1992-1997, 1997-2000 and 2000 to the present day.

It is not possible to understand the pattern of development of EU consumer policy without reference to the Treaty provisions. At each stage of the integration process, these provisions define the limits of supranational action. These limits particularly affect the emergence of EU consumer policy in its own right.

The institutional developments illustrate the standing of consumer affairs in relation to other EU policy areas, giving an indication of the priorities of the policy-makers and of stages in the development of this policy area.

The emergence of soft-law has been integral to the development of policy in the consumer domain. In the absence of a separate treaty title for consumer policy, soft-law initiatives (action plans, policy programmes) have provided a motor for policy development in this field. Thus the body of actions and of legislation built up due to the soft-law strategic programmes represent a vital aspect of consumer policy.

Whilst there is a whole realm of material and literature relating to the role played by the European Court of Justice in the consumer aspect of the internal market, this study focuses particularly on the Commission's role with regard to consumer protection policy and on its relationship with the member states. Much of the work accomplished by the ECJ has already been researched and well-documented by a number of authors (e.g. Tallberg:1999, Stone-Sweet, Caporaso: 1998, Tridimas: 1996). For this reason, the work of the ECJ is treated selectively in this study. Leading cases, which have a direct bearing
on the research questions in Chapter One are reviewed in Chapter Four; therefore they have not formed part of the framework of the historical developments reviewed in this chapter.

In line with the definition of the scope of the study adopted in Chapter One, this chapter will not explore consumers' health and safety legislation since these do not have a significant bearing on the research questions. Instead, this chapter focuses on legislation and other courses of action taken by the Commission affecting consumers’ economic rights and their enforcement. Rights to information, education and access to justice are also be analysed in some detail, since many of these issues are integrally linked to the effective enforcement of their economic rights.

The chapter focuses on an examination of the historical context through Commission texts and documents. This approach has been adopted for a number of reasons. First, the secondary literature on EU consumer policy tends to be thin on the ground and often gives an account of consumer policy that is broad or that is slanted towards an examination of one particular aspect. Second, Commission texts provide a wealth of information and are the obvious starting point to give detailed overview. Third, the texts also provide the Commission's perspective/version of policy strategies and directions i.e they provide a base-line against which to adopt a critique. Also, because the study concentrates on the Commission's role in supervising the enforcement of consumer policy, these documents are the Commission's record of this process and are therefore central to the focus of this study. Fourth, an alternative way of examining consumer policy would have been to look at the rulings of the ECJ; but alone this would have provided an incomplete and uneven picture. This approach has already been adopted by a number of authors; moreover the most important rulings are examined in Chapter Four.

**Development of Consumer Policy 1957-86**

The Treaties of Rome (1957) was concerned with establishing the fundamental criteria deemed necessary for the creation of the Common Market. Policy areas, such as consumer and environmental policy, were seen as largely superfluous to the achievement of this objective. Member states wished to limit the extension of Community
competencies and were concerned to safeguard their sovereignty. Moreover the treaty was created prior to the popularisation of consumer affairs as a cogent policy area within the governmental frameworks of the member states. Consequently, the interests of consumers do not appear to have figured prominently in the minds of those who originally framed the treaty. Significantly, the development of a coherent consumer policy was initially impeded, owing to the absence of an explicit legal basis in the Rome Treaty providing for the development of an independent community consumer policy (Micklitz & Weatherill: 1993: 291). In accordance with the Treaty, consumer policy could only be developed within the context of the overall aim of achieving the Common Market (Micklitz & Weatherill: 1993: 285).

*Treaty of Rome*

The Rome Treaty served as the basis for the foundation of the EC and shaped its operation for a period of twenty-nine years until the Single European Act (1986). It includes only four explicit references to consumers. Conveniently, these fall into two distinct categories, one dealing with the Common Agricultural Policy (CAP) and the other with abuse of monopoly power.

Article 39 includes a list of five objectives for the CAP, the fifth of which is 'to ensure that supplies reach consumers at reasonable prices'.

Article 40 requires that the common organisation of agricultural markets 'shall exclude any discrimination between producers or consumers within the community.'

Both of these articles are significant because they represent an implicit mandate on the part of the EC institutions to act on behalf of the consumer in supporting the latter's direct economic interests in the agricultural field. It is interesting that the prices of other essential consumer goods, such as fuel, petrol and clothing, were left to the dictates of market forces. Perhaps the explanation lies in the unique character of the CAP in setting target prices for many agricultural products and in the need to reconcile consumers to its high cost. Perversely, the focus on food policy stemmed not from any commitment to protect consumers per se, but from the determination of policy-makers to protect European farmers from the effects of low-cost imports. Rather, the official justification
for this policy argued that it was an essential safeguard against possible future food shortages. Insofar as it benefited consumers, this was a secondary consideration.

Another aspect of the Rome Treaty impinging on consumer protection is the treatment of abuse of monopoly powers. Parts of Articles 85 and 86 refer explicitly to the effects on consumers of monopolistic practices. For instance, one of the conditions set out in Article 85 (3), for exempting an agreement between firms from the prohibition of Article 85 (1), is the requirement that it allows consumers ‘a fair share’ of the resulting economic benefit. Article 86 contains a list of examples of potential abuses by dominant firms, including prejudice of consumer interests.

In addition to these provisions, Young emphasises the importance of Articles 2, 100 and 235 of the Treaty of Rome in developing consumer policy initiatives in the early years of the community’s existence, although he recognises the lack of specific commitment to consumer protection per se and the limitations imposed by such an indirect approach (Young: 1997: 209). Article 2 represents a broad-based statement of intent regarding the wider purpose of creating the Common Market; it clearly envisages the raising of living standards of European citizens as a consequence of the Common Market (Simmonds: 1977: 62)

Article 100 sets out the rules governing the Community decision-making process, which until revision under the Single European Act in 1986 (introducing qualified majority voting – in article 100 a) were adopted on the basis of unanimity, which slowed down the decision-making process. In any case, during the economically lean period of the 1970s to the mid 1980s, member states with high levels of consumer protection (for example, Britain and Germany) had significant vested interests in resisting attempts by the Community to develop a coherent and comprehensive Community consumer policy. They feared that a common policy in this area would lower their own consumer protection standards and would help to introduce unwanted commercial and industrial competition. They were thus prepared to use the unanimity principle as a blocking or delaying device (Young: 1997: 212).

Whilst Article 235 creates the possibility for extending the remit of Community objectives beyond the letter of the treaties, such an extension would have to be based on a
proposal by the Commission and would be subject to a vote by the Council using the
unanimity procedure. In practice, unsurprisingly, in the field of consumer policy, this
provision has been used sparingly.

In sum the EEC treaty, with its emphasis on trade protection, concentrated much more
directly on the supply side of the market than on the demand side. Given the paucity of
references to consumer policy in the treaty, it is hardly surprising that this policy area
remained underdeveloped until the mid to late 1980s.

**Institutional Developments 1957-1986**

The first significant developments to take place in consumer affairs at the European level
were in the development of European consumer groups. Initially, European consumer
groups (that is groups from the member states) were brought together to form European
umbrella associations. As Young notes: “initially, European level co-operation [on
consumer policy] among family associations and among trade unions was organised by
the respective international organisations” (Young 1998: 157). He further observes that
the European groups were not intended simply as forums for exchanging information, but
had a role in monitoring developments affecting consumers and in seeking “to influence
legislation on behalf of their members” (Young: 1998: 157).

In June 1961, during a series of seminars organised by the Commission for Consumer
Organisations, Commissioner Mansholt (Vice-president of the Commission and
Commissioner for Agriculture) explicitly recognised the EC’s imbalance in the
representation between producer and consumer interests and called for consumer groups
to organise themselves at the European level. As a result of the meeting, the BEUC
(Bureau Européen de l'Union des Consommateurs - European Consumers' Association)
was founded in September 1961 and the Commission’s Contact Committee for Consumer
Questions was created in April 1962. The Contact Committee was composed of
representatives from the major European consumer groups - BEUC, COFACE
(Confederation of Family Organisations in the European Community), EURO-COOP
(European Community of Consumer Co-operatives) and EO/IFCTU. The purpose of the
Committee was to involve consumers in the policy-making process (Young: 1998).
In April 1968, a small Consumer Affairs Unit was established within the Competition policy directorate DGIV. According to Young this represented “the first step to institutionalise consumer policy at the EC level” (Young: 1997: 210). Locating the consumer affairs unit within the Competition directorate was commensurate with the view that the best defence of consumer interests was an efficient market model regulated by effective competition policy. Moreover, the absence of a separate title for consumer policy in the Rome Treaty rendered it both difficult and politically undesirable to afford it a separate institutional identity at this time. It is, however, significant, that the Commission saw the institutionalisation of consumer policy as a desirable step reflecting pressure exerted by the European Parliament.

In 1972 at the Paris summit, the member states’ leaders approved the adoption of an EC consumer protection policy. During the course of the meeting, the leaders expressed the desire to broaden the focus of the founding treaties to include policy areas with a more popular appeal, such as social, environmental and consumer policy. The accession of Denmark, Ireland and Britain in 1973 brought renewed impetus to the development of a common consumer policy, due to the strength of their own domestic consumer movements and the significantly higher levels of protection in Denmark and the U.K. It was hoped that this measure, along with improved environmental and social policies would make the EC seem more relevant and acceptable to the peoples of Europe (Young: 1997). The Environment and Consumer Protection Service was also created in that year, although Young, critical of the effectiveness of this body, notes that the service lacked adequate resources (Young: 1997). Young suggests that the reason for this lies in the fact that many member states viewed consumer policy as belonging to the realm of domestic policy and did not favour its development at EC level. This was particularly true of provisions relating to consumers' economic or legal interests (Young: 1997: 212). The Contact Committee for Consumer Questions was also re-formed in 1973 as the Consumers' Consultative Committee (CCC). Once again composed of representatives from the four main European consumer groups, its task was to give advice to the Commission in consumer affairs, especially concerning legislative measures (Maier: 1993: 362-3). Because the CCC was established on the basis of a Commission decision it was intended as an advisory body to the Commission alone; its opinions were not to be
addressed either to the Parliament or to the Economic and Social Committee (ECOSOC). Although the CCC lasted in this form until 1989, Maier suggests that its work was largely ineffective, because its members were not sufficiently active in defending its opinions and because the Commission did not publish CCC opinions and could, in any case, disregard them. Therefore the views of the consumer representatives were not widely disseminated. Finally in January 1981 a new directorate for the Environment, Nuclear Safety and Consumer Protection was created. However, Young remains critical of this development claiming that the new Directorate General emphasised environmental issues rather than consumer protection and that the consumer protection directorate was under-funded and under-staffed (Young: 1997: 212).

**Soft Law 1957-1986**

The term ‘soft-law’ refers to the range of documents outlining policy strategy, stating policy intentions or recommending particular courses of action, not having the force of actual legislation; for example, Commission programmes, Council resolutions, Green Papers, White Papers, and declarations. Soft-law initiatives have been an important tool at the Commission’s disposal for expanding the scope of its competence with regard to consumer policy and have been used to lend strategic direction and impetus to community consumer policy from the earliest stages. Such initiatives were particularly useful for expanding policy parameters before consumer "policy" was specifically included in the treaties themselves. They have therefore also been instrumental in keeping the momentum going in consumer policy.

Prior to the SEA, consumer policy was created via a mix of harmonisation laws, soft-law and by assessing the validity of national consumer laws impeding trade (Weatherill: 1997). Prior to the inclusion of a separate title for consumer policy in the Maastricht Treaty (1992), soft law was the principal mechanism used for advancing Community consumer policy. As indicated earlier, the programmes were initiated as a result of a decision made by Heads of Government meeting in Paris in 1972 during which they requested the Commission to elaborate a consumer protection policy programme. This was followed in April 1975 by a Council Resolution on a preliminary programme for a
consumer protection policy (OJ 1975 C92/1). The resolution was based on key points from the 1962 Kennedy declaration on consumer rights and included: the right to protection of health and safety, the right to protection of economic interests, the right of redress, the right to information and education and the right of representation. This resolution was the "first attempt to provide a systematic basis in Community law for the protection of the consumer interest" (Micklitz & Weatherill: 1993: 292-293). Indeed, these categories have provided the basic framework for successive consumer programmes.

The first programme provided a very clear rationale for developing a Community consumer policy. The rationale was to a large extent based on the Commission's perception of the increasing inequality in the market place between consumers and suppliers and of the inadequacy of the market alone to redress this imbalance (Council: 1975: 2).

However, neither this programme, nor the following programmes until the mid-1980s appear to have had much impact in developing the Community's consumer policy. As Micklitz and Weatherill point out, the reference to a notion of consumer rights in the 1975 Council resolution appeared to indicate the Council's recognition that the consumer interest should go beyond the narrow focus for consumers provided by the Treaty of Rome (Micklitz & Weatherill: 1993: 293).

In May 1981 the second consumer protection programme was adopted (Young: 1997). It bore considerable similarity to the first and continued to emphasise the notion of consumer rights (Micklitz & Weatherill: 1993). The 1981 programme also included measures to improve consumer information and redress (Maier: 1993).

To summarise, although this period was predominantly characterised by the absence of a Treaty basis on which to develop a direct and overt consumer protection policy, an embryonic consumer policy did begin to emerge from 1975 onwards. This was mainly a result of the activities of the European consumer associations and also the Commission's pro-activity in developing consumer policy through soft law instruments after the 1975 Council resolution.

By the mid eighties, pressures to revive the pace of European economic development, coupled with the Commission’s own interest in reviving the project of European integration, led to the first major treaty revision since 1957. After years of so-called ’Euro-sclerosis’, the Commission won the backing of the member states to support a project to complete the internal market. Drake (2000:88) explains that the most significant reasons for renewed interest in integration largely stemmed from an economic rationale, she claims:

Europe was falling behind in global competitiveness, unemployment was rising and was higher than in competitor countries (especially the US and Japan). Europe, moreover, had also dropped behind in high-technological development and business circles – and more significantly, business leaders – were calling for concerted action.

The project was intended to revive the process of European integration and to boost the EC’s flagging economies. (Moravcsik: 1991)
The White Paper on Completing the Internal Market (Cockfield Report: COM (85) 310 Final) confirmed the disappointing progress of the seventies and early eighties and roundly criticised the protectionist actions of member states. It pointed out that during periods of recession, far from diminishing, ‘non-tariff’ barriers multiplied as governments sought to protect their economies, not only against competition from third countries, but also from other member states. It also highlighted the increased use of public funds to support non-viable companies. This was particularly evident in the case of services (EC: 1985:5).

The White Paper recalled the three main objectives of completing the internal market: first, the welding of individual markets into one single market of (then) 320 million people; second, ensuring the further expansion of the market and third, ensuring that the market is flexible. It further stressed in bald economic terms the advantages in getting rid of border controls, commenting: "the maintenance of any internal frontier controls will perpetuate the costs and disadvantages of a divided market" (EC: 1985:6). The
Cockfield Report affirmed the need for 'a strong and coherent' competition policy to prevent the continued partitioning of the single market, stemming not only from protectionist state interventions, but also from restrictive practices of firms. It further stressed the need for other policy areas to interact with the internal market, and emphasised in particular transport, social, environment and consumer protection policy (Commission: 1985: 8).

However, on the freedom of the citizen consumer to shop as a matter of course across borders, the document was much less positive. The report makes an astonishing distinction between "genuine" travellers and those who crossed borders to go shopping" (EC: 1985: 44). Such distinctions, appearing in a document apparently utterly committed to the notion of a single market only serve to emphasise the quite different attitudes prevailing towards the exercise of citizen consumers' economic rights compared with those of enterprises. Once again, the 'supply side' bias showed itself in unmistakable terms.

**Single European Act**

The Cockfield report projected that the Single Market programme would encourage the development of economies of scale by increasing competition and promoting specialisation. The resulting Single European Act (SEA) focused heavily on meeting the needs of the supply-side of the market and was indeed strongly lobbied for by the suppliers themselves. Green Cowles describes how the European Round Table of Industrialists lobbied the member state governments with the following message when they showed signs of wavering interest: “support the single market programme or European industry will invest elsewhere” (Green Cowles: 1997: 130).

However, the pressure of trans-national business interests alone provides an incomplete explanation of the renewed impetus towards integration. Moravcsik, for instance, suggests a number of other factors which help to set the creation of the SEA in a fuller context (Moravcsik: 1991). Macro-political factors included the importance of inter-state bargains between Britain, France and Germany, particularly after the election of the Thatcher government in 1979 and a French right-wing coalition in 1986, giving rise to a
climate sympathetic to the liberalisation of the European market. Moreover, it was
during this period that France and Germany exploited the threat of a two-track Europe,
excluding Britain from the fast-track, to persuade the British government to support
closer integration. In the light of flagging interest in integration, the EC institutions,
themselves, took the opportunity to exert pressure at all levels to re-invigorate the

The SEA set the conditions for the attainment of an integrated internal market by 1992
and in particular introduced Article 100a, which provided for the introduction of
Qualified Majority Voting regarding decisions to be taken in respect of the completion of
the Single Market. This mechanism would speed up the decision-making process. It is,
however, significant that at this stage, there was still no serious attempt to balance the
supply-side orientation of the SEA with an explicit provision for the development of a
community consumer policy. As with the Treaty of Rome the consumer was seen by
policy-makers as the ultimate indirect beneficiary of the single market.

Nevertheless, Article 100a(3) contains a brief explicit reference to consumer protection
stating that “The Commission, in its proposals envisaged in paragraph 1 concerning
health, safety, environmental protection and consumer protection, will take as a base a
high level of protection.” The inclusion of this clause is important because it added to the
small catalogue of direct Treaty references to the consumer. It also provided a link
between the Single Market and consumer protection. The reference to a ‘high level of
protection’ was designed to pacify member governments’ fears that Article 100a might
undermine states with a good record of domestic consumer protection. The inclusion of
Article 100a (4), however, also provided member states with a mechanism for obtaining a
derogation from Community legislation under certain limited circumstances.

It appears, in any event, that the small scope given to the protection of consumer interests
by the SEA was not maximised by the Commission. Very few specific measures
designed to protect consumers were put in place in the years immediately following the
launch of the SEA, though numerous measures on consumer safety were agreed. Even
these measures, according to Young, “were largely adopted with an emphasis on
removing barriers to trade rather than ensuring consumer safety” (Young: 1997: 214).
According to Young, Karel Van Miert, Commissioner for Consumer Policy in 1990, “observed that ‘consumer policy is lagging behind in the march towards the single market.’ The reason he gave for this was that the inclusion of consumer issues in the Commission’s legislative programme would have overloaded the already ambitious single market.” (Young: 1997: 214). This explanation highlights the extent to which the role of the citizen consumer was undervalued in respect of the contribution an effective demand-side ought to make to the efficient workings of the Single Market. Had the consumer's role been taken more seriously, one might have expected it to have figured more centrally in the whole programme. However, the explanation for the absence of progress in this policy area, may further be attributed to the difficulties experienced by those formulating the treaty in obtaining the agreement of the member states to the revision of the original Rome Treaty. A number of states, notably Britain, wished to safeguard their sovereignty. Therefore the SEA was limited to aspects of integration, such as the liberalisation of the member states' markets, upon which, everyone could agree. Thus the extension of the competencies of the supranational bodies was limited to those areas immediately necessary for the realisation of the Single Market.

Institutional Developments

Whilst the SEA failed to include any specific provision with respect to consumer policy, the period running up to 1992, the due date for the completion of the Single Market, was marked by a change in the priorities of EC policy-makers. EC policymakers feared that problems concerning the implementation and enforcement of Single Market legislation would threaten to undermine the whole project (Tallberg: 1999). In addition, there was concern both within the Commission and amongst the Member States that EU citizens viewed the project of EU integration with suspicion. More emphasis therefore was given to policies seen by policy-makers as popularising the integration process. Consumer policy benefited from this general concern and it was accordingly given a higher profile. Evidence of this change may be seen when, in February 1989, the Commission decided to upgrade the Consumer department from within the DG for the Environment, Nuclear Safety and Consumer protection, making it into an independent service within the
Commission (the Consumer Policy Service). Maier remarks that the CPS owed its existence to a recommendation included in the 1989 three year action plan presented by the pro-active Commissioner Karel Van Miert - the first Commissioner to be charged with consumer affairs as his main task. Although it was not yet considered important enough to become a directorate in its own right, the head of the service was given the status of Director General, in recognition of the probable elevation of the service to the rank of DG at a later stage. The CPS had a number of principal functions. First, it was charged with the task of administering the Community consumer policy budget. Second, it was to assess all Commission measures touching on consumer interests. Third, it had a role in formulating some of the measures intended primarily to protect consumers' interests. Fourth, it organised information campaigns directed at European consumers and fifth, it provided the CCC with administrative services (Maier: 1993).

Consumer representation also developed in response to the growing importance of other related aspects of market integration. For example, enhanced consumer representation in European standardisation was born out of two related developments: the increased importance of standardisation work in the European integration process, and concerns as to the impartiality of standardisation and regulation especially given the increased participation of private agencies in the harmonisation process. The role performed by the European standardisation agencies increased considerably after a Council decision was issued in May 1985 delegating to them much of the detail concerning the approximation of national standardisation rules and regulations (Young: 1997). The Commission, in its 1990-92 action plan, explained the logic of improving consumer representation with direct reference to the importance of securing the confidence of EU citizens and their support for standardisation - one of the principal mechanisms for achieving the Single Market (EC 1990: 6).

In a further initiative, in 1989, the Commission decided to upgrade the Consumers' Consultative Committee to Council status and to enlarge its functions; the number of CCC members was also increased. In addition to the 16 representatives from the four main European consumer groups, there were now 17 representatives from national consumer organisations and six Commission nominated independent experts (Maier: 1993). However, in spite of these changes, the CCC failed to perform its tasks

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adequately. Young remarks that “Disagreements among its constituent groups, its slow response time, and a lack of regard for it within the Commission all impeded its influence” (Young :1997: 229). Furthermore, the CCC’s membership had been extended to 48 and was slow and bureaucratic. It was not until 1995 that a more appropriate response to the institutional problems of the CCC was conceived.

**Soft-law 1986-1992**

During this period, soft-law initiatives began to take on a more dynamic aspect with the substitution of phased action plans for the earlier series of consumer protection programmes. This change of nomenclature was more than cosmetic and reflected a more general renewed impetus in the Commission to improve administrative support for existing consumer policies and to sustain pressure for further action. However, consumer policy at this time is best understood within the framework of the drive towards the Single Market.

The Single Market Programme was adopted in June 1985, as a result of the Cockfield White Paper discussed earlier and the Commission subsequently produced a document entitled ‘A New Impetus for Consumer Protection Policy’ which it submitted to the Council as the Third Consumer Protection Programme (two others were published in 1975 and 1981). The document concentrated on consumers’ ability to exercise choice in the Common Market. It emphasised product safety and health standards and the need to integrate consumer interests in other areas of Community policy (Maier: 1993). Comparing the 1986 document with previous programmes, Micklitz & Weatherill draw attention to an apparent shift in policy emphasis, commenting:

“The discourse has moved more towards the consumer as the beneficiary of the process of market integration. Consumer choice rather than consumer rights has emerged as the dominant theme.”(Micklitz & Weatherill:1993: 294 citing Reich: 1992: 25” – my emphasis)

It might, however, be argued that effective choice is dependent on the existence of an effective administrative and legal infrastructure to protect consumers’ rights, enabling
them to select and access goods, services and suppliers without market hindrance. However, the 1986 resolution must be understood within the context of the SEA; an agreement whose principal raison d'être was market liberalisation. The discourse of 'consumer choice' reflected the popular market liberalisation ideology that had made the SEA project acceptable to the right-wing governments of a number of the principal member states. It is interesting to observe that as the experiences of the Single Market project began to bite the emphasis in later documents shifted towards rectifying the imperfections of the market by improving the ability of consumers to enforce their economic rights. Thus the shift from 'consumer choice' back to 'consumer rights' might be interpreted as an acknowledgement by EC policy-makers of the limitations of an approach to consumer protection based mainly upon regulation by market forces.

**Action Plan 1990-1992**

In May 1990 the consumer policy unit published the first in a series of three-year consumer policy action plans. This first action plan (COM (90) 98 Final) covered the period from 1990-1992 and clearly recognised the importance of consumer access across borders: "To achieve full benefit from the internal market, it is necessary that its citizens be prepared to use the market by purchasing goods and services available anywhere in it." (EC: 1990:14). The plan offered a number of policy areas as focal points for action during the ensuing three years. The four areas, consumer representation, consumer information, consumer safety and consumer transactions were chosen “because of their importance in building the consumer confidence necessary to support the implementation of the internal market” (EC:1990:5). The overall emphasis of the plan was directed towards a consideration of the position of consumers relative to their ability to take advantage of the Single Market. It is interesting to note at this stage the Commission's growing concern to make the Single Market palatable to the EU consumer as a citizen. This concern may be viewed against the wider context of attempts by the Commission and the member states to equip EU citizens with direct and accessible rights. These issues along with the emerging status of the citizen-consumer are explored in detail in Chapter Four.
Importantly, with reference to the main thrust of this study, the theme of building consumer confidence was particularly applied to the concept of cross-border consumer transactions. The Commission's rhetoric of the consumer as 'citizen' clearly indicates its recognition of the importance of equipping the consumer with trans-border market-based rights as a means of legitimising the Single Market in the eyes of the 'citizen consumer' (EC: 1990). The rhetoric was also complemented by specific actions; for example, the plan highlighted the importance of transposing a number of existing directives into national law related to strengthening consumers' economic rights and their ability to use the internal market. In this respect the plan emphasised consumer problems caused by differences in conditions of sale across the member states, especially differences in contract laws allowing for potentially damaging terms in the small print. The possibility of adopting Community-level models of contract conditions was suggested - an early hint at the later Unfair Contract Terms Directive (1993) and the European Directive on the Sale of Consumer Goods and Associated Guarantees (Directive 1999/44/EC). The necessity for improving consumer redress was also emphasised, with particular reference to the possibility of group actions in the future, i.e. the empowerment of consumer organisations or administrative agencies to take action on behalf of consumers. Again, this hinted at a later Directive on Injunctions for the Protection of Consumers' Interests in 1998 (98/27/EC). Another aspect of cross-border transactions addressed in the document was the potential benefits and dangers for consumers posed by the increased use of new technologies for long-distance transactions. The Commission's desire to devise ways of safeguarding consumers' interests with respect to the new technologies was again linked to the issue of consumer confidence; without confidence the economic benefits presented by the new technology would not be realised. The Commission's vision was to bear fruit in the later Directive on the Protection of Consumers in Respect of Contracts Negotiated at a Distance (European Parliament and Council Directive 97/7/EC 20 May 1997).

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1 Implementation of the product liability directive, 85/374
Misleading advertising directive 84/540
Credit directive 87/102
Door stop selling directive 85/577
Food labelling directive 79/112
Toy safety 88/37
Integrally linked to the issue of consumer confidence was the Commission's strategy of educating and informing consumers, which it intended to pursue by promoting cooperation between consumer organisations and member states' education systems in exchanging materials to improve teaching. Importantly as part of its information strategy the plan notes Commission support for three pilot projects, establishing European consumer information and advice centres in selected border regions; this was the start of the European Consumer Centre network.

With regard to the Commission's policy on market transparency, the action plan especially emphasised the need for improved transparency for consumers regarding the banking, insurance and financial sectors, possibly, through recourse to Community legislation. The need for proposals to assure transparency in cross-frontier financial transfers and payments, further stressed the Commission's concern for the consumer's ability to access goods and services across borders.

The plan's consistent emphasis on the need to reassure the citizen-consumer recognises the essential role of citizen support for the realisation of the Single Market. However, whilst some of the above targets are specific and unambiguous, others are much less directed, apparently expressing vague good intentions. The plan often lacks precise details as to how objectives are to be achieved. The plan clearly recognises the importance of information, transparency and access to redress in the development of consumer confidence in cross-border transactions. However, Young (1997:216) is critical of its effectiveness:

The ESC [Economic and Social Committee] criticised the Commission's first three year action plan on consumer policy (1990-3) for assuming that 'the final objective [of EC consumer policy] is the achievement of a single market'. As a result, the wave of legislation in the early 1990s left gaps, most notably in the areas of consumers' economic and legal rights (ESC, 1993). As a consequence of these shortcomings, consumers have largely failed to recognise the promised benefits of the SEM (BEUC, 1995b; ESC 1995).

**The Treaty on European Union**

The SEA had set a deadline of 1992 for the completion of the Single Market. Inevitably, the realisation of the project gave rise to implications and consequences, which were not foreseen in 1986 (Corbett, R: 1993). For example, it became increasingly difficult for member states separately to regulate a number of key areas, notably, environmental standards, banking, consumer protection and taxation, without distorting the market. However, by the early 1990s it became evident that these codifying and 'tidying-up' processes lacked the political magnetism to serve as an engine for further progress on integration. It was to larger political projects that the European leaders looked to achieve this end. The main thrusts of the Maastricht Treaty were in the areas of economic and monetary union, including the creation of a single currency, an autonomous European Central Bank, mechanisms to promote a common foreign policy and, particularly relevant to this study, the creation of a framework for common citizenship. However, it was the first of these thrusts, which became the main vehicle for change at this time.

However, the Maastricht Treaty did represent a significant breakthrough for consumer policy. As the completion of the Single Market approached and as many national trade regulations were removed, regulatory gaps in consumer protection began to appear. Young claims that this provided renewed pressure to 're-launch' the EC's generic consumer protection policy (Young: 1997: 216).

In response to these concerns, the Treaty on European Union included, for the first time, a separate Title (Article 129a) recognising Community competence to develop a Consumer Protection Policy. (Young: 1997).

The Title contains the following provision:

1. The Community shall contribute to a high level of consumer protection through:
   a. measures adopted pursuant to Article 100a in the context of the completion of the internal market;
   b. specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.
In addition to the specific provisions contained in article 129a, the Maastricht Treaty contained a provision, which altered the institutional balance of power in favour of the Parliament. Article 189b effectively gave the Parliament co-decision making powers with the Council across a number of areas specified in the treaty, including consumer policy.

Theoretically, the inclusion of the Title meant that the Community was free to take a more holistic approach to the development of a consumer policy since it no longer had to be tied to the adoption of measures intended to enhance the functioning of the single market (Weatherill: 1997). However, Bourgoignie (1998:447) contests this interpretation on the grounds that paragraph 1 (a) of Article 129a continues to obfuscate the Commission's mandate to act independently in the field of consumer policy by maintaining a link between consumer policy and the Internal Market. The result of this confusion may be seen in the limited use of this treaty provision as a basis for the adoption of directives. For instance, in 1994 Article 129a was used as the basis for a Council and Parliament decision to make the European Home and Leisure Accident Surveillance System (EHLASS) permanent (Young: 1997) and, again, in 1998 it was used as the basis for a directive on price indication (EC:1998c:7); however, proposals to base other directives, for example on timeshares, distance selling and guarantees, on Article 129a were initially discussed and then abandoned.

Both Weatherill and Bourgoignie suggest that part of the problem for advancing consumer policy may still lie in the difficulty of obtaining agreement amongst the member governments for specific consumer protection measures (Weatherill: 1997, Bourgoignie: 1998).

**Institutional Developments**

During the early 1990s successive revelations about inadequate national responses to consumer concerns about food safety across a variety of products came to light. New evidence on the transmission of Bovine Spongiform Encephalitis, gave rise to a new
order of public anxiety stretching across the EU. As seen earlier, the Maastricht Treaty had already given consumer policy an independent status in a separate title. However, the problematic process of ratifying the treaty in certain member states, for example Denmark and the UK, along with a more general concern of Commission actors to popularise the image of the EU and the need to address the public backlash to successive food safety scandals, led to the recognition of the need for action at the EU level. However, it was not until March 1995 that the Consumer Policy and Consumer Health Protection Directorate (DG XXIV) was created. It is significant that the new directorate specified consumer health protection as 50% of the area of responsibility defined by the title. Nonetheless, this development represented, a significant step in the realisation of the drive to enhance the status of consumer policy in that this area now merited a degree of autonomy and status previously denied to it.

A further aspect of the Commission's response to increased evidence of consumer concerns with respect to health and safety may be seen in renewed efforts to promote better consumer representation on bodies concerned with product standardisation. In 1990 the Commission published a Green paper on the future development of standardisation; however, progress to enhance consumer representation was delayed because of contention between the EC and the standardisation bodies as to the form that representation should take (Armstrong & Bulmer: 1998: 164).

The resulting structural innovation was ANEC (European Association for the Coordination of Consumer Representation in Standardisation). Created as an independent body in February 1995, ANEC is “composed of eighteen national members, one selected by the consumer organisations of each member state of the EU and European Free Trade Area...and four representatives from the CCC and two from the Consumer Consultative Council from the EFTA Secretariat.” (Young:1998:167)

In spite of the improvements that ANEC has brought to the problem of consumer representation in standardisation, Armstrong and Bulmer note some enduring problems. In particular they mention that “access [by consumer representatives] is also needed to the policy-making structures of the European standards agencies and the Commission.” (Armstrong & Bulmer: 1998:165)
Limited resources and funding are also highlighted as problems, in spite of help from the Commission in the form of funding.

In a further initiative, in 1995, the Commission disbanded the CCC and re-invented it as the Consumer Committee. The new CC was much smaller, with only one representative from each European consumer group and each member state. Young criticises these reforms on the grounds that "the latest reform still does not address the more fundamental issue of the place of such a body in the EU's policy structure." (Young: 1997: 230-231)

**Soft-law 1992-1997**

**Action plan 1993-1995**

The second consumer action plan (COM (93) 378 final) covered the period 1993 to 1995 and was divided into two main sections. The first comprised an introduction and review of the Community’s activities during the period 1990-1992 and the second set out Community priorities for action during the period 1993-1995. As with the first consumer action plan discussed earlier, the second concentrates on the consumer’s ability to benefit from the single market; significantly, the second paragraph formally introduces the term "consumer-citizen" for the first time, (EC: 1993c: 2). The introduction summarised in general terms ways in which the 'citizen-consumer' had already benefited from the Single Market, reiterating the importance of making the internal market accessible to the consumer. As with the first plan, the second emphasised consumer confidence as integral to the success of the internal market (EC:1993c: 5).

As part of its strategy to build consumer confidence, as in the previous plan, this later document specifically mentions the need to improve consumer information and consumers' access to justice. The plan described progress on a number of important actions undertaken during this period on these issues. Particularly relevant to this study were the pilot projects establishing a number of transfrontier centres for consumer information and counselling. The creation of these transfrontier centres marked the beginning of the Euroguichet network (European Consumer Centres), which represented
an attempt by the Commission to bolster consumers access to their rights across borders. This initiative is examined in detail in Chapter Five and explores the success of the Commission's strategy in decentralising EC rights to consumers through selected initiatives. Regarding access to justice, the Commission specifically encouraged the creation and testing of a number of pilot projects for simplifying the settlement of consumer disputes at national level. For example, a pilot project was initiated in Dundee, which led to the establishment of a small claims procedure before the Scottish courts. Another such project was initiated at Deinze and Marchienne-au-pont in Belgium (Commission: 1993a: 9). These projects anticipated the Commission's growing focus on small claims procedures and alternative dispute resolution mechanisms in the later 1990s. Again, a fuller examination of this aspect of the Commission's work is to be found in Chapter Five.

The review section further included an appraisal listing the legislative instruments and specific actions adopted during that period. The most significant of which, for the purposes of this study, was a Council Directive aimed at enhancing consumer protection with respect to package travel, holidays and tours (Council Directive 90/314/EEC). It is significant that, even at this stage, the Commission had already identified the gap between policy intentions and the reality experienced by the citizen-consumer at ground level as problematic and worthy of attention in the quest to secure citizen confidence. To this end, the Commission recalled the essential part played by the member states in achieving and monitoring proper implementation evidently in an attempt to prompt them to offer their full support (Commission: 1993c: 11). In particular, the plan complained of concealed disparities in the member states' transposition rates of directives and also "the extent to which national implementing measures [had] been communicated without reference to the actual state of application of these measures." (Commission: 1993c: 12).


An amendment to directive 87/102/EEC concerning the approximation of laws, regulations and administrative provisions of the member states concerning consumer credit (Council directive 90/88/EEC (22/2/1990) was also adopted.
This admission is clear evidence of the Commission's recognition of the special nature of monitoring cross-border practices and of enforcing provisions designed to protect consumer rights. Two authors (Tallberg: 1999, 2000a, 2000b; Jordan: 1999) have already attempted to analyse the institutional constraints and ambiguities which exacerbate the problems of enforcement. These institutional arrangements have clear implications for this thesis and are examined in greater detail in Chapter Three.

The introduction to this Action Plan also stated its intention to make use of the new powers given to consumer policy in the Maastricht Treaty (article 129a). As with the first plan, a review section listed the legislative instruments adopted during the period of the first Action Plan. Further progress had been made regarding the protection of consumers with respect to package travel, holidays and tours (Council Directive 90/314 EEC of 13 June) and some progress had also been made regarding the adoption of a directive on unfair terms in consumer contracts (Council Directive 93/13/EEC of 5th April 1993).

The two main tasks for the second action plan were to consolidate existing Community legislation and to pursue “selective priorities to raise consumer protection and to make consumers more aware of their rights” (EC: 1993c: 7).

The plan outlined four specific areas for action: consumer information; access to justice; improved concertation and financial services.

The projected actions to be taken both in the field of consumer information, and representation showed considerable continuity with those of the previous plan. For example, emphasis was laid on the need to educate the consumer. Consumer organisations in the member states were pin-pointed as the principal mechanisms for achieving this aim with Commission support.

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The role played by the consumer transfrontier centres was also highlighted and the Commission pledged continued support for the project. Existing centres at Lille, Luxembourg, Barcelona, Gronau, Aix-la-Chapelle/Eupen/Heerlen and Vale do Ave were to be supplemented by the creation of four more centres in 1993 at Marseilles-Turin, Flensberg, Kehl and Vittoria. The activity of these centres was to be enhanced by a new Commission policy to improve communication between the various information networks. The European Consumer Centres are important in the general context of the Commission’s aims directly to connect with the citizen consumer and to provide the citizen with information about rights targeted to facilitating cross-border transactions. Given the precariousness of consumer protection enforcement and access to justice, particularly across borders, and given the Commission’s limited role in direct intervention, these centres have since become important mechanisms in the Commission’s strategy to assist the consumer, providing information, advice and assistance; their significance is elaborated in Chapter Five.

Action to be taken in the fields of access to justice and the settlement of disputes seemed, in particular, to be prompted by the Sutherland report, which emphasised “the increase in the number of disputes of a transfrontier nature involving consumers” (EC: 1993c: 22). The report recommended a survey of the then prevailing conditions relating to accessing justice in the Community and suggested solutions to ensure the protection of consumers' rights, involving the creation of out-of-court conciliation procedures. The Commission announced its intention to draft a Green Paper on access to justice during 1993, which it later did. The Green Paper (COM (93) 576 Final) examined the particular difficulties facing consumers in gaining redress in cross-border disputes involving relatively small sums of money and examined ways of simplifying the settlement of these disputes.

**Consumer Action plan 1996-1998**

In 1995 the Commission published the third action plan covering the period 1996-1998. Entitled “Priorities for Consumer Policy 1996-1998,” (COM (95) 519 Final) it set out directions for consumer policy during that period. In the introduction, the plan stated an intention to “deal with the broad range of consumer issues, not just those related to the internal market project”, which recalls the wider remit given to the Commission to act in
this field by the TEU (EC:1995a:101). The document, however, is atypical of the action plan series in that it did not include a section attempting to summarise or evaluate progress made by the previous plan. Instead, the evaluation exercise appeared to have been temporarily postponed and in 1997, the Consumer policy DG began to publish a series of annual reports. These documents were primarily concerned with reviewing and evaluating progress in the field of consumer policy and the work of the consumer policy DG. Their creation might account for the lack of a review section in the 1996-8 action plan.

The introduction made special reference to consumers’ concerns about public services, financial services and food safety. Consumer information and education was also mentioned as an important theme, since poor consumer information and education compound enforcement problems (EC :1995a:103); that is to say, consumers need knowledge in order to protect themselves (EC:1995a:102).

The document states the Commission’s intentions to complement and support the work of member states although it clearly indicates that consumer education in particular is the responsibility of the member states.

Adequate implementation of internal market legislation was again noted as an important priority and the document indicated that the Commission would be considering actions in response to the Green paper on access to justice and guarantees.

The need to improve certain aspects of financial services, in particular consumer information and aspects of the consumer credit market were singled out for mention. Other areas for priority action included the need to liberalise public services, the need to inform and educate consumers, with regard to opportunities presented by the information society, adjustments in the regulatory system to cover consumers in the new electronic market, and the need to improve consumer confidence in foodstuffs.

1997 Annual Report

The 1997 Annual Report (EC: 1997a) comprised a review of the progress achieved by the DG over the course of the year. One of the principal purposes of the 1997 review was to communicate to the wider interested audience (national policy-actors, researchers,
academics, journalists, consumer organisations) information concerning the reorganisation of DGXXIV which took place in the light of the recommendations of the European parliamentary committee of enquiry into the BSE crisis (1997). This connection is highlighted in the introduction to the report: "One of DGXXIV's major challenges since its restructuring has been the increasing workload following its new health protection mission. A substantial part of its efforts was devoted to the relevant activities of the European Parliament and, principally, to the work of the European Temporary Committee on the follow-up of recommendation on BSE." (EC:1997a: 1).

The reorganisation reflected the Commission's heightened concern to ensure consumer safety and, according to the Commission, to reassure the citizen-consumer. Much of the document was concerned with a description of the work of the numerous scientific committees and the newly established food and veterinary office.

Nevertheless, a more generalised account of progress in specific sectors was included. Regarding the protection of consumers' economic interests, the Directive on Distance Selling (97/7/EC) was adopted in May 1997 and the Directives on 'Comparative Advertising' (97/55/EC) and 'Price Indications' (98/6/EC) were adopted in October 1997 and February 1998. A Directive on Trans-border Injunctions in Consumer Related Infringements (98/27/EC) was going through a second reading. This directive is significant in providing greater legislative protection for consumers across borders and is discussed in greater detail in Chapter Five. Studies were also being conducted into the likely economic impact of directives on 'Price Indication' and 'Guarantees' (1999/44/EC).

More importantly for the focus of this study, evidence of progress was also provided particularly with regard to legal matters and the development of consumer information, education and representation. For example, in terms of monitoring the transposition of existing legislation, the report listed a number of instances where transposition was unsatisfactory and where 'reasoned opinion' letters had been sent to member states. Work focused, in particular, on the directives governing time-shares, unfair contractual terms, package travel and consumer credit. Moreover, the document noted that the Unfair Contractual Terms Directive (93/13/EC) and the Package Travel Directive (90/34/EC) had necessitated the opening of a number of infringement procedures.
With regard to enforcement issues, DG XXIV continued to pursue a number of strategies which included the adoption of two policy documents: a working paper on the enforcement of European Community legislation (27/3/1998) drafted by DG XXIV and a final version of a Communication on the out-of-court settlement of transborder consumer disputes. The latter document proposed two initiatives, namely: a recommendation establishing criteria for the creation and functioning of out-of-court procedures, applicable to consumer disputes and a standard claim-form for consumer disputes. Again, the significance of these developments is examined in detail in Chapter Five.

DG XXIV also continued to encourage a policy of transparency in the availability of information and data regarding the application of consumer legislation, and of administrative co-operation between the member states. To this end and in collusion with the member-states, it created a new database - CLAB Europa ('Clauses abusives') showing a collection of case law regarding unfair terms in consumer contracts in the European Economic Area (EEA). The database provided information about contract terms considered to be unfair within the different member states of the EU and was made available both to the member states' administrations and to the general public.

With regard to consumer information, as a result of an unfavourable review of the effectiveness of the 17 Euro-guichets supported by the Commission in 1996, only 10 were to continue to receive funding. Their remit was to be widened from dealing solely with cross-border issues to handling a broader range of consumer affair.

In 1996 the Commission published a supplementary Action Plan (COM (96) 13 Final) focussing specifically on consumer access to justice. It noted the problems widely encountered by consumers, reviewed existing procedures to facilitate consumer access to justice and explored potential Community initiatives for facilitating redress across borders (EC: 1996). These matters are dealt with in Chapter Five.

This period was dominated by concerns for food safety, especially BSE, although Salmonella in chicken and eggs and the presence of anti-freeze in German wine also gave cause for alarm and this is shown in the re-organisation and enlargement of DGXXIV. That apart, the emphasis in the 1996-1998 Action Plan was on enhancing the enforcement of consumer legislation through improving the availability of information and access to
justice. In response to evidence of the unsustainable costs involved, the period saw the genesis of initiatives designed to support the individual consumer in cross-border redress. Nevertheless, this emphasis still reflected the overall policy of relying on individuals to take appropriate action for themselves, in order to protect their rights.

**Consumer Policy 1997-2000**

*The Amsterdam Treaty 1997*

In contrast to the previous SEA and Maastricht treaties, the Amsterdam Treaty (European Communities: 1997) lacked a clear focus (Dehousse: 1999: 23). Having achieved enlargement to fifteen member states in 1995, the negotiators at Amsterdam were faced with the commitment to further accession negotiations, expanding the Union up to 25 members by 2004. It was thus mainly the pressure to proceed with enlargement negotiations that drove forward the process of treaty re-negotiation. There was a reluctance amongst the member states at the Amsterdam IGC to address the constitutional and institutional consequences of such a major restructuring. Those member states, intending to adopt the single currency were particularly anxious not to destabilise the third stage of the project's implementation (Dehousse: 1999: 25). Dehousse also argues that there was growing disillusionment with the functioning of the new European economy, in particular with the failure of governments to compensate for the contraction and relocation of traditional industries and with the economic rigours experienced in those states struggling to meet the economic criteria of entry into the single currency.

In the absence of consensus on a larger political objective, in the field of social and economic affairs, the treaty focused on a series of relatively low-key constitutional and institutional reforms (Dehousse: 1999). It was out of this context of minor reform that - along with strategies to promote an adaptable labour market, to support, across the Union, efforts to improve levels of training and re-employment, and to protect services of general public interest - the provisions on consumer protection should be seen. These all had the virtue of appearing politically 'safe', of promoting low level consensus and of rendering the EU reforms potentially more palatable to discontented electorates. The
strengthening of consumer policy in the treaty involved one significant amendment and a number of other minor institutional changes outlined below.

One of the most salient features of EU Consumer policy is that it is ‘horizontal’ in nature. Consumer interests cut across a variety of policy sectors. This poses problems for EC policy actors in terms of monitoring and influencing policies which affect consumers, but which fall outside of the remit of the consumer policy DG’s competencies. The Treaty of Amsterdam made formal provision, for the first time, for the integration of consumer interests in other policy areas, through section 2, the so-called ‘horizontal clause’. In addition to the commitments made to consumer policy in Article 129a EU, the revised article (renumbered 153), included references to the promotion of consumers’ rights to “information, education and to organise themselves in order to safeguard their interests.” (European Communities: 1997: 40)

It also included an important reference to measures allowing a role for the Commission in monitoring the consumer policy pursued by the member states.

**Institutional Developments**

As we have seen in the 1997 Annual Report, the Parliament’s Temporary Committee of Inquiry into the EU’s handling of the BSE crisis published a report, which was “highly critical of the organisation of public health responsibilities within the Commission.” (CEG: 1997: 2) In particular, the committee “highlighted the lack of an integrated approach which hampered the co-ordination and efficiency of the Commission services concerned” (CEG: 1997: 2). Previously, food safety had not been viewed as a policy area in its own right and competence for food safety had been spread across a number of DGs, including industry, agriculture and consumer policy.

The EP Committee made a number of recommendations. It suggested that the transparency of scientific committees advising the Commission should be increased and confined to an advisory role. The committee also called for the creation of a Public Health Protection Unit “responsible for the exercise and co-ordination of powers aimed at ensuring effective action on matters of food law, food quality and hygiene, human and animal protection and consumer protection.” (CEG: 1997: 2).
Significantly, the committee emphasised that the new unit should be separated from industrial and agricultural interests. As a result of these recommendations, DG XXIV was renamed 'DG for Health and Consumer Protection'. Scientific committees were thenceforth to report directly to DG XXIV and the Rapid Alert System for Dangerous Products moved from DGIII to DG XXIV (CEG:1997). The units primarily responsible for food policy and animal and plant welfare were considerably expanded, strengthened and relocated to DG XXIV. The over-arching objective behind these changes was to help promote confidence in EU citizens regarding food policy. Again, the Commission's reaction should be understood within the broader drive to 'connect' with the citizen.

Innovations in consumer representation during this period were principally directed at directly involving the citizen-consumer to a greater extent in the policy process. The Commission attempted to do this by strengthening the role of consumer representation in the policy process and by making consultation at both the policy formulation and feedback stages more widely accessible. One of the objectives, for example, was to encourage greater co-ordination and exchange of information between national and European consumer organisations and the Commission. The principal mechanism for achieving this objective was the Consumer Assembly. The first Consumer Assembly was convened by the Commission in 1998 in Brussels and was intended as an annual event. Attended by the main consumer organisations of the member states and the EU applicant countries, its purpose was to provide an arena for direct communication between consumer groups and the Commission. The Assembly facilitated discussions on the latest developments and trends across the wide arena of consumer interests providing the Commission with a policy feed-back system (DG XXIV Consumer Policy and Consumer Health Protection (1998)). The Assembly represented a small step in facilitating the exchange of information between interested parties and representatives of diverse consumer groups from different member states. However, since it is not formally a consultative forum, its impact on the policy process is likely to be limited.
Soft LAW 1997-2000

Soft-law documents during this period demonstrate an increasing emphasis on enforcement, again reflecting growing recognition in the Commission that adequate enforcement was an essential precondition for the effective functioning of the Single Market. Furthermore, the Commission recognised that citizen-consumers' image of the EU would be vastly improved if they were seen to exercise, in practice, rights the Single Market theoretically conveyed. A further aspect of improving the functioning of consumers' economic interests may be seen in the increased attention to the integration of consumer interests into other EU policy areas. This follows significantly from the specific inclusion in the Amsterdam Treaty of a clause, noted above, expressing the need to integrate consumer interests in other EU policy areas. Sections devoted to the integration of consumer interests in other policy areas are given greater emphasis in Action Plans and Reports during the post Amsterdam period as the section below illustrates.

Annual Report 1998

As with the 1997 report, the 1998 Annual Report (EC:1998d) concentrated on food safety issues and much of the report was concerned with the work undertaken by the scientific committees, the risk assessment unit (concerned with food safety) and the Food and Veterinary Office. In the light of a Working Paper on Enforcement in EU Consumer Legislation (SEC (98)527 Final), examined below, DGXXIV took a number of specific actions. For example, an attempt was made to strengthen inter-governmental co-operation within the framework of the existing IMSN (International Marketing Supervision Network) – an international body created for the purpose of the exchange of experience and best practice between national enforcement bodies. These exchanges took place over the course of three meetings during 1998. In addition to these developments a variety of initiatives continued in the fields of consumer information and education. Nonetheless, some significant progress was made regarding the enforcement of consumers' economic rights. The adoption of the Directive on the Injunction for the Protection of Consumers' Collective Interests (1998/27/EC) was a key element in the development of an effective legal instrument for consumers to gain redress, particularly
(and critically) across borders. The directive also took an important step towards offering consumers a more powerful voice against suppliers by empowering consumer organisations and/or other appropriate administrative bodies to tackle issues on behalf of consumers' collective interests. The advantages of such bodies over the individual consumer may be clearly discerned by comparing their relative resources and expertise. Further progress through the EU policy process of the Directive on the Sale of Goods and Associated Guarantees (1999/44/EC) demonstrated a further commitment on the part of the policy-makers to strengthen consumers' rights when engaging in cross-border transactions (Chapter Five explores the implications of both of these directives in greater detail). The opening of a number of infringement procedures also indicates heightened interest on the Commission's part in tackling member-states' non-compliance or inadequate compliance with the implementation of Community consumer legislation.


1998 also saw the publication of two more Commission working documents; one which sought to evaluate and review the achievements accomplished in consumer policy to date, and an analytical document, which concentrated on the Community's problems with regard to the enforcement of European consumer legislation. Both contained a number of interesting insights into the problematic nature of implementation and enforcement of EU consumer legislation.

The renewed impetus with regard to the enforcement of consumer legislation may be viewed in conjunction with the Commission's wider attempts to improve the functioning of the Single Market through improved enforcement mechanisms. The Internal Market DG, in particular, had been engaged in a campaign to improve implementation and enforcement of Single Market legislation, principally through the strengthening of the infringement procedures (under articles 169 and 171) provided for in the treaties. These are principally aimed at the member states' administrations themselves and attack cases of non-implementation (transposition) or poor implementation of Community legislation.
The introduction to the Commission’s Working Paper on Enforcement of European Consumer Legislation (EC: 1998f) clearly highlights the enforcement of consumer protection as a Commission priority. The implications of this position are examined in detail in Chapter Three.


As with the previous documents in this series, the Fourth Action Plan (COM (1998) 696 Final) covering the period 1999-2001, was organised according to the predominant themes of consumer information and representation, consumer health and safety and consumers' economic interests. At the outset the plan included an explicit statement of the connection between Article 153(1) of the Amsterdam Treaty and the structure of the Action Plan. (EC: 1998b)

The principal theme running through the Commission’s policy strategy in consumer information, remained the consumers’ ability to protect his/her own interests by being informed as to the specific rights conferred by the Community on the consumer. The document states: “helping consumers to help themselves is an essential part of policymaking” (EC: 1998b: 8).

Specific actions to be taken by the Commission included continued support for consumer associations (including financial support) and systematic consultation of consumer associations in the policy-making process. The document stated the Commission’s intentions to encourage greater co-operation at national level and to strengthen the capacity of consumer associations to take collective legal action by ensuring that they have the adequate expertise to undertake such matters. This was seen as essential for the proper functioning of the 1998 Directive on Injunctions for the Protection of Consumers’ Interests (98/27/EC).

Other actions again demonstrate a high degree of continuity with policy objectives expressed in previous action plans. The Consumer Committee was to be routinely consulted regarding enforcement, training and information campaigns. The plan expressed an intention to encourage further the participation of consumers in the Commission’s Consultative Committees and other relevant forums. The development of
the 'Permanent Dialogue between Citizens and Business' was to be enhanced through the setting up of sectoral-based ad-hoc and informal dialogues. The establishment of a consumer hotline was envisaged for consumer associations to call the Commission with queries. Finally, the role of the Euro-guichets was pinpointed for further development and their work was to be integrated within the framework of the aims and intentions outlined above.

With regard to consumers' economic interests, the principal priority listed was the need to improve enforcement and implementation of existing Community legislation. The document stated:

Enforcement is a priority in a dynamic market in which it is increasingly hard to keep pace with new products and services. The Commission recognises that ineffective enforcement will undermine the best intentions of EU legislators. Enforcement is also the critical issue in relation to soft law or self regulation agreements. (EC: 1998b: 17)

Significantly, in its strategy to improve enforcement and implementation, the plan expressed a number of key points, which recall a number of familiar and recurrent themes from past policy documents. The points listed mainly centred on notions of a decentralised and 'soft' approach to enforcement. This approach again reflects the constraints under which the Commission operates. For example, the plan emphasised the need to improve administrative co-operation, which is essentially a strategy based on intergovernmental goodwill. Specific action envisaged under this heading included the improvement of transposition of EU law by encouraging informal dialogue among the member states prior to transposition with the aim of addressing particular problems. The document noted that transposition was to remain principally the responsibility of the member states, although the Commission would aid the process by facilitating and encouraging administrative co-operation within and between the member states, the Commission and consumer associations, and also by encouraging the co-ordination of enforcement by national agencies. The strategy concerning co-operation was to be
further facilitated by efforts on the part of the Commission to improve the exchange of information and co-operation between the EU members of the International Marketing Supervision Network. Another aspect of the overall strategy to improve enforcement was to enhance the effectiveness of soft-law and to promote dialogue between business and consumers. Specifically the plan envisaged the compilation of reports on the effectiveness and state of implementation of a number of directives affecting consumers' economic interests. In addition to these, the plan expressed intentions to examine and report on cross-border complaints in comparative advertising by the end of 1999 and to continue comparative price surveys in order to identify sectors in which the internal market is not working properly. Finally in this regard the plan expressed the Commission's intentions to support the implementation of measures outlined in the Communication on out-of-court settlement.

The final elements in the Commission's strategy regarding the enforcement of consumers' economic rights included the need for a balance between regulatory and non-regulatory approaches, and the need to integrate consumer concerns more systematically into the wider policy-making process. To this end, the Commission committed itself to a review of existing legislation and to a number of unspecified proposals to plug existing gaps in the regulatory framework. The Commission also expressed its intention to take further general steps to ensure the effective integration of consumer interests into the wider policy-making process. This plan included for the first time, following the provisions of the Amsterdam Treaty, proposals for the horizontal inclusion of consumer economic interests in the development of other EU policies. The Commission concluded by committing itself to a first step in maintaining the right balance between liberalisation and measures central to sustaining real consumer choice- particularly quality and transparency of information in services of general interest (EC: 1998b).

*Directorate General Health and Consumer Protection Annual Report 1999*

Once again the 1999 Annual Report was dominated by routine reporting mainly of the concerned with 1, health, 2, public health, 3, public animal and plant health and 4, food and veterinary matters. The sections dealing with consumers' economic interests
constituted the minor part of the report. The most significant development pertaining to the protection of consumers' economic interests was the work begun by the Consumer DG to improve the statistical and factual resources available to policy-makers for the process of monitoring and evaluation. This involved in particular the collection of data of prices in the internal market and consumer satisfaction with reference to services of general interest e.g. transport, telecommunications, postal services, energy, water, audio-visual services. Although this work is in line with the general policy commitments of the Action Plan, it reflects none of the detailed commitments set out in that plan. The report goes on to specify some initial steps – the formation of a working group and the initial conference to promote the integration of consumer policy into other areas. However, progress was not impressive. In some specific areas namely telecommunications, postal services and air transport, some progress was made in ensuring that the internal market 'has consumer concerns at heart' (EC: 1999d). Of these, the work on telecommunications was the most significant recognising the need to incorporate universal access, complaint handling and redress into the proposals for the next stage of telecommunications liberalisation.

On the protection of consumers' economic interests in cross-border transactions, the main focus of this study, the Report recorded limited progress. The most significant development reported was the transposition into state law of Directive 1999/44/EC on the Sale of Consumer Goods and Associated Guarantees, embodying the principle that consumers should enjoy specific after-sales legal rights throughout the EU. Although this provided some evidence of progress, it fell short of generalising consumer protection in the case of cross-border sales.

**General Framework for Community Activities in Favour of Consumers 1999-2003**  
*(Decision 283/1999/EC of the European Parliament and Council)*

Finally, in 1999 the European Parliament and Council issued a joint decision establishing a Community framework in favour of consumer activities. The purpose of this framework was to create a legal instrument allowing the Commission to offer financial support to a range of consumer initiatives to support and supplement the policies pursued
by the member states. The decision is important to this study because it enabled the Commission to promote a number of initiatives specifically designed to help consumers to access their economic rights across borders. The most significant of these initiatives are reviewed in Chapter Five.

**Consumer Policy 2000 onwards**

*Treaty of Nice (2001/C 80/01)*

The Treaty of Nice (European Communities: 2001) was principally concerned with questions associated with EU enlargement and common Foreign and Defence policies. It contained no specific provisions pertaining to the advancement of consumer policy. The only reference that might be thought of as having any relevance is contained in a revision to Article 100. Whilst the above provision was certainly framed to cover a wide range of possible circumstances, it might arguably be used in situations such as the emergence of a food related crisis. Under such exceptional circumstances, the revised provision might be used to the benefit of consumers. However, the Treaty as a whole represents no significant extension to existing provisions relating to protection of consumers' economic interests.


The development of consumer policy during this period is best seen within the wider context of attempts by the Commission to address evidence of citizen dissatisfaction with the workings of the union. These issues are addressed in the Commission White Paper on European Governance, entitled "Enhancing Democracy in the European Union", published in October 2000. The document examined ways in which the processes of governance might be improved in the EU. It was compiled in response to a number of identified challenges: the challenge posed by enlargement, by the notion of a "democratic deficit" and the challenge posed by the institutional inadequacies of existing governance arrangements. The document had a number of objectives; the most relevant, for the
purposes of this study, are examined below. First, the document expressed the intention
to improve citizens' perception of the EU especially with regard to criticism concerning
its "democratic deficit" (EC: 2000g: 5).

This was to be achieved mainly through improved communication between policy-actors
and citizens; encouraging citizens to become better informed with respect to issues and
developments occurring at the EU level of governance. Information and education
campaigns were intended as the key mechanisms for realising this goal. Improved media
coverage of EU politics along with special conference activities open to the general
public in the different member states were to form the principal means for realising this
objective. The document expressed the Commission's specific intentions to concentrate
their efforts on improving the transparency of scientific and technical information for
citizens, especially with regard to the sensitive issue of food safety.

Second, the document aimed to examine ways of reforming the processes of preparing
and implementing Community rules and policies. Again, the document confirmed the
Commission's intention to:

Reform the processes for preparing and implementing Community rules and
policies to ensure that they are pertinent and coherent. This includes improving the
interaction between public and private actors and between different geographic
levels of responsibility. (EC: 2000g: 5)

The analysis of this objective formed the majority of the study. The document suggested
a number of ways in which the institutions might improve the EU's regulatory
framework. First, the Commission stated its intentions to involve key sub-national policy
actors earlier in the process of policy-formulation. It also expressed its commitment to
creating adequate arrangements for evaluating the effectiveness of rules ensuring the
independence and transparency of the evaluation mechanisms for the EU institutions.
Second, the Commission aimed to improve the management of the regulatory framework
by examining ways of increasing the amount of decentralisation of EU executive
responsibilities, particularly in respect of tasks needing "thorough scientific knowledge and for the management of programmes." (EC: 2000g:10). Two possible methods were suggested. The first, 'horizontal decentralisation' would "respond to the need for an authority free from all national leanings to elaborate technical viewpoints that are coherent and uniform at Community level..." (EC: 2000g: 10). This approach should involve a more extensive use of agencies. The alternative approach was "vertical decentralisation" involving a "much more flexible application of the rule... giving a greater margin of assessment according to local situations... Vertical decentralisation involves more power sharing of responsibilities with national, regional and local authorities, in particular on Community policies with a strong territorial impact (environment, transport, regional policy.)" (EC: 2000g:10)

Third, the Commission emphasised its intention to promote "coherence and co-operation within a 'networked' Europe" (EC: 2000g: 11) recognising the increasing importance of co-operation between networks of actors.

Once again, the trend towards improved co-operation reflects a general strategy already instigated in the field of consumer policy as Consumer Policy Action Plans demonstrate. Indeed it is within the wider framework of improvements to the system of EU governance and attempts to improve EU citizens' perception of the integration process that many of the initiatives to improve enforcement in the domain of consumer policy should be ultimately viewed.

One of the greatest difficulties that an outside observer encounters in assessing the impact of the consumer policy programmes is in the way in which the policy objectives and achievements are laid out. The format of the annual reports often seems to bear little relation to the lay-out of the initial policy programme, making it difficult to link actual achievements to the stated aims and objectives. In effect, the annual reports provide an often generalised summary of the year's progress, but without necessarily clearly stating whether or not the aims and objectives have been achieved. 

Bourgoignie (1998: 444) commenting on the effectiveness of the action plans, concludes:
These programmes provide the foundations for an active and ambitious policy of consumer protection at community level and establish the legislative framework required for this purpose... Although on the political level, a clear choice was thus taken at Community level in favour of a specific and coherent programme of action with regard to consumers, the process of actually giving substance to these intentions, has, unfortunately, been well below expectations. The legitimacy of the basis for action by the community in this area remains uncertain because the action plans adopted remain simple political declarations and are not Community acts of a mandatory nature.

Soft law

The general principles set out in the White Paper were taken up in the field of consumer protection; much of the soft-law documents issued during this period concentrated on creating mechanisms to assist consumers to enforce their economic rights across-borders. This strategy involved the development and financial support of a number of specific initiatives in this field, in particular, the European Extra Judicial –Network (EEJ-Net - a co-ordinated cross-border network of national alternative dispute resolution (ADR) bodies). The strategy also involved the continued support of the European Consumer Centres, the development of a European Consumer Complaints Form, a proposal for a Directive on Unfair Commercial Practices (2003) and a proposal for a Regulation on Consumer Protection Enforcement Co-operation (2003). These initiatives form the principal subject of Chapter Five where they are explored in considerable detail. The initiatives were encompassed by a number of supportive documents, reaffirming the general principles underpinning the policy and establishing connections between the individual initiatives. For example, the Commission Communication on "Widening Consumer Access to Alternative Dispute Resolution" (COM (2001)161Final) extended the common principles for out-of-court bodies involved in the consensual resolution of consumer disputes adopted previously in Recommendation 98/257/EC on the Principles Applicable to Bodies Responsible for Out-of-Court Settlement of Consumer Disputes. These principles, in support of initiatives such as the EEJ-Net, embodied criteria of
impartiality, transparency, effectiveness and fairness. The purpose of the initiatives, as we see in Chapter Five, was to bolster consumers’ confidence in exercising their economic rights across borders in the Single Market and to meet citizens’ expectations of the integration process.

**Conclusions**

From the historical analysis above, a number of inferences may be drawn, which account for the slow and uneven development of EU consumer policy.

From the beginning, the creation of the Common Market rested on a supply-side approach. This is evidenced by the lack of treaty provisions for the development of consumer policy until the Maastricht Treaty in 1992. The Single Market project was largely a response to unemployment, to globalisation, and the demand from the business sector for market liberalisation. The project was consequently conceived in a manner, which favoured supply-side interests. There was no real attempt to balance the interests of consumers against those of the suppliers through the SEA. The consumer was seen as the ultimate beneficiary of the development of the market. Until Maastricht, developments which benefited consumers tended to be linked to the Single Market process and concentrated on the harmonisation of health and safety measures. Policy aimed at enhancing consumers’ economic interests played a “catch-up” game.

Consumer policy has also suffered from a lack of institutional advocacy; this has been both a symptom and a cause of slow development. It may be said to be a symptom, insofar as the lack of institutional advocacy has been the result of low political priority. The low priority accorded by policymakers to this area has resulted in the allocation of relatively poor resources, low prestige and the late development of institutions. Inadequate, under-resourced institutions, with little standing, have themselves served to impede progress in this policy field. The same may be said of arrangements for institutionalised consumer representation; under-resourcing, and low priority, coupled
with organisational problems, have helped to reduce the effectiveness of such representation in driving forward the consumer protection agenda.

In any event, the Commission's ability to pursue agendas that run contrary to the perceived interests of the member states is limited. One of the Commission's primary aims is to promote further integration and it looks for policy pathways that will help to accomplish this end. In its attempts to build such pathways, the Commission concentrates on issues and projects on which the majority of actors can agree. This practice tends to result in the pursuit of consensus politics. The development of consumer policy may be interpreted in this light. For example, the protection of consumers' health and safety was integrally linked to the principal mechanisms used to achieve the Single Market (i.e. harmonisation, standardisation and mutual recognition). Initially, the rationale for improving the protection of consumers' economic interests was weaker; building consensus for action in this area therefore took more time.

The lack of political advocacy is probably the single most important factor in retarding the development of consumer protection policy and underpins many of the problems described above. Young certainly maintains that "[t]he reluctance of member governments to cede responsibility for consumer protection to the EU has restrained the development of a fully fledged common consumer policy and is the key to explaining the shape that European policy has taken." (Young:1997: 207)

Renewed interest in consumer policy was born out of a change in the political climate, brought about by the mounting concern of both national and EU policy actors to evidence of general citizen dissatisfaction with the project of European integration. Reinforcing consumer protection may be viewed as part of a wider policy to alter citizen perceptions of EU integration by addressing areas seen by policymakers as having a direct impact on citizens' lives. The creation of a culture of citizenship and of citizens' rights during the 1990s was the Commission's response to this problem, though some have interpreted this strategy as opportunistic and manipulative. For instance, the Consumers in Europe Group observed:
The development of consumer policy was minimal until the Commission saw it as a useful policy to strengthen the establishment of the internal market. Since then, EU consumer policy has had some limited success thanks to the Commission’s attempts to give a “human face” to the process of economic integration, which from the outset has been biased in favour of producers. (CEG: 1999 b: 5)

Integrally linked to the creation of a culture of citizens’ rights and legitimacy, is the issue of enforcement. The history of consumer policy demonstrates an increasing preoccupation with redress and enforcement throughout the 1990s and into the 21st century. The Commission, limited in its ability to engage in detailed monitoring by treaty provisions and inadequate resources on the one hand and by the emphasis on private redress in safeguarding consumers’ economic interests, on the other, has sought to adopt an increasingly decentralised approach to these problems. Thus, in part, the Commission has relied on the pro-activity of the well-informed citizen-consumer to enforce their economic rights in the Single Market. The links between the central themes of citizenship, legitimacy and enforcement are explored in Chapter Three on enforcement, Chapter Four on the citizen-consumer and Chapter Five, which examines selected EU initiatives to protect consumers.
"To govern is not to write resolutions and distribute directives: to govern is to control the implementation of the directives." (Joseph Stalin, quoted in Jordan: 1999: 69)

Definition of implementation and enforcement
The terms 'enforcement' and 'implementation' are sometimes used in a fluid manner. Implementation is occasionally applied in a broad sense and is taken to mean putting decisions into effect at ground-level. This understanding of implementation subsumes the notion of enforcement, although in fact, the two are quite separate.

When discussing the notions of implementation and enforcement with reference to the EU, however, it is important to take into account the specific connotations that the vocabulary assumes within that context. From and Stava (1993) suggest that it may be useful to distinguish between notions of administrative implementation and notions of legal implementation. They understand legal implementation to mean the transposition of EU legislation into national legislation. They describe administrative implementation as connoting "the idea that some administrative unit is actually applying the decision or directive" (From and Stava: 1993: 60).

The notion of enforcement within the context of the EU usually refers to its powers to supervise the effective implementation of EU legislation at the national level. Because of the restricted nature of those powers, discussion about EU enforcement often centres on the formal procedures available to the Commission and the European Court of Justice to ensure member-state compliance with EU legislation and with Treaty provisions. Except for a minority of policy areas, once EU legislation has been incorporated into national law, enforcement is taken to be the responsibility of the member-state. The EU's role in monitoring enforcement, has therefore been largely restricted to ensuring that proper legal implementation has taken place.
This chapter addresses aspects of the third and fourth research questions set out in Chapter One. With regard to the third question:
Given the institutional constraints imposed upon the Commission's capacity to supervise proper enforcement at member state level, how has the Commission attempted to compensate for these constraints in the domain of consumers' economic rights? To what extent has it been successful?
The chapter sets out the institutional constraints on the Commission's ability to supervise proper enforcement and gives an account of how the Commission has attempted to compensate for these constraints. With regard to the fourth question:
How far is it possible to demonstrate the existence of a connection between the themes of enforcement, citizenship and legitimacy, in the context of the EU institutional framework, with particular reference to policy in the domain of consumers' economic interests?
The chapter demonstrates the connection between the rise in importance of enforcement and the political objective of the completion of the single market. Because it was such a major political objective, the completion of the Single Market came to be viewed by Commission and member-state policy actors as integral to the legitimation of the process of EU integration. Without adequate enforcement, the success of the Single Market would not have been assured. Citizen support for the Single Market presents a further dimension to the issue of legitimacy. Evidence of citizen alienation and dissatisfaction explored in Chapters Four and Five led both sets of policy actors to court citizen support for EU integration. Improving EU policy performance through enhanced enforcement, particularly in policy areas viewed by policy actors as having a human dimension (such as social, environmental and consumer policy) was a key mechanism for achieving this aim. Furthermore, one of the ways in which the Commission sought to improve enforcement was by decentralising to individual citizens the capacity to enforce their EC rights within the member states. Thus citizens were not only targeted by the EU for their support but, insofar as they were active in enforcing their rights, became a means of achieving legitimacy by helping to improve enforcement and thus policy performance.
This chapter has a number of objectives: first, to describe the role of the Commission and the Court in supervising the implementation and enforcement of EU legislation in the member-states; second to examine the relationship between the EU institutions and the
member states in implementation and enforcement; third, to offer an account of how the supervisory role of the Commission and the ECJ has developed; fourth, to offer an explanation for the rise in importance of the enforcement/implementation phase of the governing process in recent years; fifth, to review the literature on enforcement in the EU in order to position the arguments of this thesis within the context of the broader academic debate.

Role of the Supranational Institutions in Enforcement
The institutional arrangements, which characterise the relationship between the EU supranational institutions and the member-state governments, are unique. They reflect a peculiarly uneven division of competencies between the different levels of governance for the different stages of the policy-making process. This uneven sharing of powers is deliberately built into the EU's institutional design in order to help preserve the member-states' sovereignty and because the EU lacks sufficient resources adequately to carry out implementation and enforcement. This is the key to understanding the problems that the supranational institutions face in attempting to ensure that the policies constructed and adopted in Brussels have the intended effect at ground level in the member-states. The powers of the Commission to initiate and influence the creation of policies are by no means matched by its ability to enforce and implement policy. Quoting the work of Maria Mendrinou, Jordan notes that:

The Commission is a particularly precocious entrepeneur. Constantly on the lookout for opportunities to expand its competence in areas regarded as peripheral by the member states. But when it comes to putting the *acquis communautaire* into effect at the national level, the Commission is on a steep upward slope, possessing neither the political resources nor the legal competence to delve substantially into national affairs. This begs the question of why the architects of the EU constructed an international organisation with an in-built "pathology of non-compliance".

(Mendrinou: 1996 quoted in Jordan: 1999: 70)
Although the Commission does have certain powers to supervise the enforcement and implementation of policy at ground level, its ability to do so is impaired for a number of reasons. First, the Commission has a limited legal basis on which to act in the field of enforcement. The founding treaties apportioned a somewhat circumscribed role for the Commission in this respect. For instance, Jordan explains: "...Article 130r(4) makes it abundantly clear that, subject to strictly limited and carefully delineated expectations, member states are primarily responsible for undertaking the implementation of measures adopted by the Council" (Jordan:1999:74).

Article 211 (formerly Article 155) entrusted the Commission with the task of being the legal 'guardian of the treaties', with the responsibility for ensuring that member states complied with the treaty provisions. Moreover, Article 10 (formerly Article 5) of the EEC Treaty imposes upon the member states the duty to implement legislation adopted by the Council. According to Grant, Matthews and Newell, the obligation to achieve treaty objectives comprises three components. First, the states must establish rights and obligations at national level as described in the text of legislation. Second, they must amend contradictory national legislation and, third, they must create the necessary structures ensuring that the terms of legislation are carried out. (Grant, Matthews & Newell :2000: 70)

The third component is particularly important to the success of the policy intentions. Unless the necessary structures are put in place and are carefully monitored, there is no guarantee that policy objectives will be achieved. Evidence from initiatives examined in Chapter Five, suggests that this is a particular problem in the field of consumer policy. Article 226 (formerly Article 169) empowers the Commission to take action against states that fail to comply with treaty provisions, a process which ultimately entails referring cases of non-compliance to the ECJ. Only the Commission can initiate such a procedure. The role of the ECJ, as defined in Article 164, is to "ensure that in the interpretation and application of this Treaty the law is observed". The Court may determine whether or not member states are complying with treaty provisions; however, it cannot initiate the infringement process. The procedure, by which cases of non-
compliance are handled, is not specified by the Article, and the Commission has preferred to develop a largely informal approach to dealing with such cases. Its reasons for doing so must be understood in the context of the Commission's overall position in the model of supranational governance. In many respects, the Commission is in a weak position with regard to forcing member states to comply with treaty provisions. The Commission has a limited supervisory role in enforcement, moreover that role is delegated to it by the member states themselves. Therefore the Commission finds itself in the invidious position of trying to tame the forces that grant it independent powers; also, as an unelected body, the Commission is conscious of the need to behave in a circumspect manner. Consequently, the Commission largely prefers to bargain and negotiate with member-states to redress problems of non-compliance and only tends to open formal legal proceedings against a state with the ECJ as a last resort.

There are currently four stages to the Article 226 infringement process. During the first stage the Commission writes an informal letter to the member-state asking for an explanation. If the state fails to provide an adequate response, the Commission sends an official Article 226 letter, to which the state is obliged to respond. At the third stage, the Commission sends a 'reasoned opinion' to the state, outlining its justifications for beginning legal proceedings against the state and, at the fourth stage, the Commission presents the case to the ECJ. (Tallberg:1999, Jordan: 1999)

Jordan, however, notes the reluctance with which the Commission initiates the fourth phase of the 226 procedure:

Even when formal proceedings are initiated, something like 80% are settled before they go to court (CEC, 1997, p. 8). Court cases tend to be long-winded, extremely complicated, stretch the Commission's meagre resources and endanger the good will of the states. Decisions to take cases to the Court are not taken lightly. They must be sanctioned by the Commission's legal service and receive support from the College of Commissioners. (Jordan:1999: 81)
If, as a result of the court's proceedings, a state is found to be in breach of the treaties, and still fails to comply with the court's rulings, a further Article 226 process may be initiated under the provisions of Article 228 (formerly Article 171). The ability of the supranational institutions to secure compliance from recalcitrant states was reinforced in the 1992 Treaty on European Union, which amended Article 228. The amended procedure enabled the Commission to impose financial penalties on non-complying states, providing that the ECJ returned a judgement of non-compliance on the completion of the second hearing under the Article 226 procedure. Under these circumstances, the amended procedure allows the Commission to propose the amount of the penalty to be paid by the state, although ultimately it is the Court's role to decide whether or not to impose the sanction. The decision of the member-states to agree to a revision of Article 228 at the 1991 Inter-governmental Conference (IGC) reflected their growing concern for the success of the internal market project at a moment when incidences of non-compliance, in part, brought about by the strains of the completion of the internal market, were on the increase (Tallberg: 1999: 175-8).

Another reason cited for the Commission's limited scope in enforcement is the limited administrative resources at its disposal. The Commission is a relatively small bureaucracy, a situation that both reduces its capacity to carry out fast and effective monitoring and strongly encourages it to leave the task of implementation and enforcement largely to the administrations of the member states. Moreover, the Commission lacks sources of independent information on which it can rely for an accurate picture as to how EU legislation is being enforced and implemented in practice. The power-sharing arrangements have the effect of dissociating the supranational institutions both geographically and politically from the ground level of enforcement and implementation in the member-states. Moreover, in recent years the logic of devolving tasks to the lowest level of governance has been reinforced by formally enshrining the notion of subsidiarity in the Maastricht Treaty.

Jordan claims that "In many respects, the tension - or what Weiler (1981) terms the 'dualism' - between the intergovernmental and supranational aspects of the EU is more starkly revealed in the implementation phase than in any other" (Jordan: 1999: 77-78). He argues that tension has arisen from the conflicting objectives of the policy actors who
shaped the EU, and that the resulting system of governance is an uneasy compromise between, on the one hand, a supranational legal system created by policy actors with largely federal beliefs, and, on the other, a system of policy implementation that is dominated by the member-states (Jordan: 1999: 77-78).

He further suggests that enforcement was always a problem for the EU even during the early years of integration. Citing Macrory (1992), he claims that the member-states had a tendency to view directives more in terms of policy commitments than legally binding instruments: "In advance of a firm indication from the ECJ that directives were binding in their entirety, a distinctly de minimis view of European law prevailed." (Jordan: 1999: 74).

**Development of the Supervisory Role of the Commission and the ECJ**

In response to the perceived inadequacies of the centralised enforcement procedures, described in the passages above, the supranational monitoring bodies have, in recent years, attempted to strengthen the enforcement of EU law by reinforcing the capacity of individuals to enforce their EU rights in the national courts thus creating an effective decentralised tier of national enforcement. Tallberg characterises this as: "A boosting of decentralised enforcement became the supranational supervisor's solution to the problem of inadequate enforcement means at the centralised level." (Tallberg: 1999: 196).

The groundwork for a decentralised system of enforcement had already been laid via a number of leading decisions issued by the ECJ during the 1960s. In 1963 a judgement passed down by the ECJ in the Van Gend En Loos case stipulated that EC law created legally enforceable rights for individuals (i.e. the principle of direct effect) which they could invoke before national courts. Moreover, this position was reinforced in 1964 as a result of the decision in Costa v. ENEL, which first established the principle of the supremacy of EC law over national law (Tallberg: 1999: 199).

During the late 1980s and 1990s, the Commission and the ECJ worked to strengthen the decentralisation of enforcement; the ECJ through the development of case law and the Commission through measures launched in policy programmes, aimed at strengthening the structure of decentralised enforcement. Central to the ECJ's success in reinforcing
decentralisation was the establishment of the principle of state liability. Prior to the establishment of this principle, national courts were limited as to the circumstances under which they could grant damages to individuals who had suffered as a result of state non-compliance.

The principle of direct effect only provided a remedy in the individual case, where Community acts clearly conferred directly enforceable rights. Many EU directives did not fulfill the requirements of direct effect... As it stood in 1990, the decentralised enforcement system therefore provided neither an adequate protection of individual's EC rights, nor effective sanctions to deter member states from non-compliance. (Tallberg: 1999: 207)

The ECJ established direct effect in its 1991 decision on the Francovich case. The case regarded the failure of the Italian government to implement a directive intended to protect employees in the event of the employer's bankruptcy. The ECJ recognising that individuals had no recourse to financial compensation, argued that an individual's rights would be weakened in circumstances where they could not obtain compensation from states that had violated their treaty obligations. A further number of high profile court cases (Brasserie du Pecheur, Factortame III and Dillenkofer) helped to confirm and elucidate this ruling (Tallberg: 1999). The effect of these decisions has been to strengthen the position of the individual EU citizen, in enforcing their rights at national level.

The Commission also adopted a number of measures in its policy programmes, which aimed to reinforce the Court's activism with regard to decentralising enforcement. As Chapter Two demonstrated, in 1998 the Commission published two working papers analysing past achievements in consumer policy and explaining its enforcement strategies in this field. The document on past achievements provided a particularly illuminating passage concerning the legislative instruments used to realise consumer policy. An important distinction was drawn between the different approaches employed for the creation of legislation affecting consumers' health and safety compared to those used for legislation affecting consumers' economic rights. Legislation affecting consumers'
health and safety is dealt with through public law, whilst consumers’ economic rights are protected largely (although not exclusively) through private law mechanisms. The Commission distinguishes between a 'public' system where public authorities are responsible for enforcement through mechanisms of public law (investigative powers, administrative authorisations, etc) and a 'private' system where enforcement is left to individual consumers, businesses or organisations through civil law remedies (EC: 1998f: 13). This effectively means that national governments are viewed as having obligations to intervene in the market with regard to matters pertaining to consumers’ health and safety. Their obligations regarding the protection of consumers' economic interests are more restricted, since these are left, to a much greater extent, to individuals to enforce through private actions in the courts. The 'Past Achievements' document explains the reasons for the differences in the choice of legal instrument:

Private law directives with an individual enforcement of rights conform more to consumer policy favouring economic reasoning, because the private law system of individual enforcement of rights is traditionally regarded as the counterpart to a market economy system. (EC:1998c: 6)

On the other hand, this system can work to the disadvantage of the consumer because the costs involved in gaining redress often outweigh the benefits, as Chapter Five exemplifies. Moreover, although private law mechanisms give a degree of flexibility to consumers, insofar as they themselves are left to decide whether or not to pursue a particular matter, this flexibility might in fact disadvantage them because the defendant is normally in a better negotiating position. Private law mechanisms generally favour consumers who are well educated in respect of their rights; hence the close correlation between access to justice and consumer information/education. Public law, on the other hand, normally used to enforce health and safety legislation, takes these problems away from the consumer because it relies on government intervention. Moreover, public law is used to enforce health and safety matters because states generally take the view that they are under a moral obligation to protect consumers' health and safety and that issues of this nature are too important to be left to the dictates of market forces. However, the
document notes that public law is not always flexible enough to respond directly to the requirements of the plaintiffs (EC:1998c: 6).

The Commission's choice of legal instruments has significant implications for the ways in which it conducts policy for consumers’ health and safety concerns on the one hand, and their economic interests, on the other. Because it is primarily left to well-informed consumers to protect their economic rights, access to redress, information and education, represent the main pillars in the Commission's strategy for safeguarding consumers' economic interests (EC:1998c:1). As the working paper on enforcement points out:

Generally, these directives [concerned with consumers’ economic interests] do not give the Commission any specific powers, nor do they foresee any specific procedures for monitoring. Moreover, non-safety directives normally aim to give rights to consumers, which they can invoke against enterprises. (EC:1998f:12)

The working document on enforcing consumer legislation specified several categories of problems facing consumers. These are first, differences between national systems of enforcement; second, differences between member states in the follow-up of the practical application of the directives; and third, difficulties with respect to access to justice for individual consumers and cross-border problems.

These categories are elaborated below:

1. **Differences between national systems of enforcement**

The document explained that a number of enforcement problems were associated with the variation in the application of the two systems of public and private law directives. As the document explains:

These two systems are normally applied in a mixed form by the Member states. These systems do not only vary between the Member states with respect to one
directive, but also within each Member state with respect to different directives and even to different provisions of the same directive. (EC:1998f: 13)

An example of the differences, resulting from the variations in application of public and private law, can be seen in the Unfair Contract Terms Directive (93/13/EEC). Some countries (in this case, Portugal, UK, Sweden, Denmark and Ireland) leave certain of the directive’s objectives in the hands of the public authorities, whilst others (notably Germany and Belgium) leave the matter of redress to private actors. Where redress is left to private actors, again, certain countries (e.g. Germany) place the consumer in a more favourable position by subsidising consumer associations. In contrast, other countries (e.g. Belgium) place consumers in a more difficult position - not only are Belgian consumer associations not subsidised, they are obliged to pay the costs of court proceedings even if they win. In this manner, member-states themselves might be regarded as deliberately contributing to the uneven state of affairs confronting European consumers attempting to gain legal redress.

Variations in the provisions open to individual consumers to gain redress across the member-states, also makes for an uneven playing field with regard to gaining access to justice.

2. Member states’ follow up of the practical application of the directives

Another problem, identified in the document, regarded the Commission’s lack of information as to the member-states’ follow up of practical application. The document explained that, generally, the Commission is not informed as to arrangements pertaining to the practical application of laws implementing EU directives. Moreover, “[i]n some cases, this follow up does not exist at all, in particular when the practical application is made by courts or other bodies responsible for the settlement of disputes” (EC:1998f: 14).

3. Access to justice

The document described the Community’s basic strategy towards the protection of consumers' economic rights, in the following terms; European directives aim to give
consumers rights, which they can use against suppliers. Failure or difficulty in gaining redress leads to failures in the enforcement of EU law at national level. As already noted, variations in the application of directives and variations in the nature of provisions for consumers to gain redress complicate the situation.

The document further included an outline of initiatives adopted by the Commission, aimed at improving the situation regarding the enforcement of EU consumer legislation. The Commission's actions have primarily consisted of a mixture of elaborate information campaigns aimed at a variety of audiences (EU citizens, businesses, the legal profession), coupled with initiatives to improve the level of intergovernmental administrative cooperation between the member states (establishment of contact points, work exchanges, databases) and initiatives designed to improve judicial redress within and across borders (e.g. establishment of EE-J-Net, directive on injunctions for consumers' economic rights). These initiatives have important implications for this study as it is argued that, in the absence of more direct supervisory powers, the consumer DG has attempted to bolster consumer enforcement through recourse to these more decentralised initiatives. The significance of this line of policy is explored in greater detail in Chapter Five, which examines the effects of the EEJ-Net and Injunctions Directive along with other relevant selected initiatives (European Consumer Centres, European Complaints Form, proposal for an Unfair Commercial Practices Directive and the Regulation on Consumer Protection Enforcement).

The Growing Importance of Implementation Issues

Mendrinou, writing in 1996 about the problem of non-compliance and the Commission's role in monitoring enforcement, offers a rationale that seeks to put into context the Commission's behaviour with regard to its enforcement strategies since its inception. She explains the choices of the Commission and the member states in terms of a 'strategic game' that she charts with the help of a matrix designed to show the highest and lowest preference outcome of each 'player' after a treaty violation has occurred. Mendrinou refers to a number of events that have influenced the course of EU integration, such as enlargement, the 'empty chair' crisis or the single market project. She offers these in part-explanation for the Commission's strategic choices, arguing that these events have
provided opportunities or constraints to which the Commission has been obliged to respond. Until the mid 1960s, it was rational for the Commission to avoid strains in its relations with the member states by settling for a policy of restraint, despite pressure from the EP for a more determined use of its monitoring powers. Mendrinou explains:

...The protectionist tendencies as a result of the economic strains of the early and mid 1970's, along with the first enlargement, added new supporters of a more rigorous enforcement policy against a background of asymmetries in compliance records among states. Moreover, the prospect of reinforcing and expanding its policies through the Court was particularly attractive for the Commission (Stein 1981: 24-27). From the late 1970's, under the Jenkins Presidency the Commission pursued a more rigorous policy of enforcement. The Commission began to review its monitoring powers as means for strategic action that would both increase its policy-making capacities and support integration. (Mendrinou: 1996: 15-16)

Mendrinou further explains that the introduction of the SEA and the Single Market Programme greatly reinforced the Commission's hand in monitoring the enforcement of EU law. She claims that the "attainment of the 1992 deadline required maximum effectiveness from national and supranational administrations. The Commission's opting for the best strategy, which instigated a rigorous monitoring policy, had a further advantage, as states' best outcome under this Commission strategy was compliance. An important contributing factor has been the increasing reliance on the national courts as a tier of enforcement." (Mendrinou:1996: 16)

A number of authors concur with Mendrinou's analysis of the situation. Jordan, for example, reports that during the 1980s awareness grew, particularly in industrial circles of the need for a comparable regulatory environment in order to create equal competition (Jordan: 1999). The need for adequate enforcement of EU legislation was also recognised by Lord Cockfield in the 1985 White Paper (Com (85) 310 final) who commented on the increasing commitment of the heads of the member states to the completion of the internal market. According to Cockfield, after years of "eurosclerosis":

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...the mood has begun to change, and the commitment to be rediscovered: gradually at first, but now with increasing tempo. The Heads of state and Governments at the European Council meeting in Copenhagen in 1982 pledged themselves to the completion of the internal market as a high priority. The pledge was repeated at Fontainebleau in June 1984; at Dublin in December of that year; and most recently, in Brussels, in March 1985. (EC:1985: 5)

Tallberg also traces both the surge in enforcement problems and the Commission's interest in tackling those problems to the Single Market Programme. He explains that the Single European Act aimed to speed up the creation of the Single Market by introducing the more rapid Qualified Majority Voting process for policy areas associated with the Single Market. Prior to the Single European Act, the decision-making process in the EU had been hampered by the principle of unanimity. The new procedure had the effect of rapidly increasing the body of existing legislation, which put added pressure on the EU institutions to supervise the application of the new legislation in the member-states and arguably helped to create the conditions for a rise in implementation and enforcement problems. In essence, the increase in legislation created an implementation and enforcement backlog which rendered the problem more visible. As Tallberg remarks: "When the Commission and the ECJ embarked on a crusade to strengthen EU enforcement in the early 1990s, they did so for a clear and identifiable reason. This reason was the European internal market and the rampant compliance problems threatening the realisation of this project." (Tallberg:1999: 107).

The process of creating the Single Market put considerable pressure on the member-states' administrative, legal, political and economic machinery. As Tallberg again explains: "the process of eliminating these [largely non-tariff trade] barriers imposed palpable adjustment costs and strains on the member states" (Tallberg:1999: 117). He argues that in order to implement these measures, states were obliged to "refashion domestic regulatory regimes, overturn existing practices, and frame new relationships with the economic operators of the market" (Tallberg: 1999: 120).
Tallberg more specifically addresses three types of strains on the economic, political and administrative structures of the member-states, which help to explain the member-states' slow speed of adjustment to enforcing Single Market regulations.

The first concerns the capacity of states' legislative and administrative arrangements to cope with transposing a large amount of EU legislation within a relatively short space of time. Tallberg also mentions the adjustments that states had to make to already long established administrative behaviour and practice. Whilst this task could be made even harder by administrative actors reluctant to embrace changes, the states needed the administrative capacity to bring about reforms as a prerequisite to success. Mendrinou further elaborates on this theme and argues that the significant differences in the comparative administrative arrangements of the member states contribute towards implementation problems (Mendrinou:1996).

The second strain that Tallberg identifies refers to the state's role in the economy and to the government's ability to intervene in the market. By agreeing to adopt common standards through EU regulations and harmonisation, the states were agreeing to limit the scope of their capacity to influence their domestic economies, by denying themselves the use of a number of previously well-used economic instruments, for instance, company rescue plans based on state-aid. The reluctance of some states to abandon such strategies is well illustrated by the political furore in the EU over the French Government's Alstom rescue plan (2003).

The third strain, partly a concomitant of the policies associated with the second strain, concerns the increased pressure that economic operators in the member-states found themselves under. Whilst the programme of liberalisation that the Single Market heralded worked to the benefit of some companies, it did not do so for all. Weaker companies suffered from the increase in competition, and whereas previously, they might have approached the domestic government in the hope of obtaining a subsidy, the member-states had agreed under the terms of the new treaties to abolish state subsidies. Financial hand-outs to companies in difficulty, therefore, became a matter of political contention between the member states and the EU. According to Tallberg, the Commission recognises that governments tend to succumb to domestic pressure from industries anxious to delay the transposition of EU legislation. He takes up Weatherill's
point that, on the one hand, parties adversely affected by Community policies, look to 'their' governments to dilute their practical effect, and that, on the other, governments tend to yield to such pressure where the interests prejudiced by their imperfect compliance lie beyond their own borders (Tallberg: 1999:123).

A second reason for the increased amount of attention given over to solving problems posed by poor implementation was the increased perception both within the Commission and amongst the member-states of the need to legitimise the Single Market in the eyes of the consumer. Citizens were particularly targeted in their capacity as consumers because of the centrality of the completion of the Single Market to EU integration. The legitimacy of the Single Market needed to be secured by the support of citizen-consumers. General evidence of citizen alienation towards the EU coupled with mounting evidence that EU consumers were not able to maximise the benefits of the Single Market, particularly across borders because of problems caused by inadequate enforcement and redress arrangements, led Commission policy actors to target this policy area for improvement. This is an important theme and will be explored in greater detail in Chapters Four and Five.

**Literature on Enforcement**

Having established the relevance of the issue of enforcement to this study, it is further desirable to examine how this issue has been treated in the contemporary academic literature in order to position the focus of this research. The majority of the literature that seeks to analyse the EU policy process has so far tended to concentrate on the policy initiation and formulation stages, neglecting the role of the EU institutions in implementing and enforcing EU legislation at the national level. This is an observation confirmed by a number of authors writing recently on implementation and enforcement (Tallberg: 1999, Knill and Lenschow :2000).

However, the EU is not the only field of study to have suffered neglect in this respect. Certain authors claim that research into implementation and enforcement has been late to develop in a number of fields. For example, Jordan writes: "The EU was by no means unique in neglecting the implementation of policy. Implementation has often been the poor relation of policy analysis, only emerging as a separate focus of sustained academic
study in the late 1960's" (Jordan: 1999:71). Knill and Lenschow also confirm that research in implementation and enforcement has been late to develop in other fields of study, notably international relations and regime analysis (Knill and Lenschow: 2000:1). Furthermore, much of the literature on enforcement has been approached from a legalistic angle. Most of it has concentrated on the formal procedures that the Commission and the Court use to deal with instances of non-compliance. For example, Evans (1979) examined in detail the Commission's discretion in applying the 169 procedure, as did Dashwood and White (1989) and Audretsch (1986), who concentrates on enforcement through the 169 procedure. Others focus on the effect of particular ECJ rulings (e.g. Josephine Steiner (1993) on the effect of the Francovich case) and on the role of the Court (e.g. Eric Stein (1981) in extending the principle of direct effect; Pescatore (1983) also comments on direct effect). There is another small body of literature that has approached the issue of enforcement and implementation from a political science perspective. Again, the bulk of this literature has concentrated on the formal procedures available to the Commission and the Court for dealing with instances of non-compliance and on the legal implementation of EU legislation. Relatively little has been written about administrative implementation and even less research has been conducted into the limitations to the Commission's formal supervisory role or of its consequences for the practical enforcement of laws at state level.

Whilst it is true to say that, so far, political scientists have concentrated on policy-initiation and formulation, largely neglecting issues concerned with enforcement and implementation, a few authors have written in this field. Several different approaches to understanding and studying implementation and enforcement have been advocated. Citing the work of Haigh for example, Jordan distinguishes between notions of formal and practical compliance (Jordan:1999). He takes the notion of formal compliance as referring to the accurate transposition of EU legislation into national law. Practical compliance refers to the practical implementation and enforcement of those laws at ground level. Jordan notes that the majority of studies conform to the former description and concentrate on assessing the extent to which EU legislation has been correctly enacted at national level and for example, whether the responsible administrative machinery was put in place. Some contributions conforming to Jordan's former
description have centred on the study of the application of the Article 169 procedure (for example; Mendrinou:1996, Jonsson & Tallberg :1999). Others have addressed the issue of enforcement from a number of different perspectives. Tallberg, for example, focuses primarily on the capacity of the Commission and the Court to act autonomously in enforcement and implementation, i.e. to exceed the formal limitations of their competencies to supervise enforcement, as proscribed by the treaties (Tallberg:1999, 2000a, 2000b).

However, Jordan (1999:72) remarks on the limitations to this approach: "What such studies conspicuously fail to address, however, is the 'real' implementation problem: delivering political outcomes". Citing the work of both Easton (1965) and Weale (1992), Jordan explains the difference between policy outputs and policy outcomes. Policy outputs are "'the laws, regulations and institutions that governments employ in dealing with policy problems'" (Jordan quoting Weale:1992:45, in Jordan 1999: 72). Policy outcomes are "'the effects of those measures on the state of the world'" (Ibid).

Jordan also mentions another approach to studying enforcement/implementation problems suggested by Weale. Weale argues that enforcement and implementation problems can be caused by policy actors failing to adopt an appropriate course of action at the policy formulation/implementation stage of the policy process. Weale argues that alternative ideas that fail to be made into legislation, or even fail to be considered as options for legislation, may be important in explaining deficiencies in outcomes.

However, Jordan remarks on the potential difficulties of adopting such an approach. He criticises Weale's proposals on the grounds that studies of this nature would be both normative and hypothetical and obtaining a clear answer might prove difficult.

In addition to this, the field of EU environmental policy has proven particularly fruitful with regard to articles on enforcement (for example, Jordan:1999, Knill and Lenschow :2000, Grant, Matthews & Newell: 2000). Whilst these articles tend to focus on particular problems in enforcing EU environmental legislation, they also comment more widely on generic issues relating to the enforcement of EU legislation and, as such, provide a useful added source of information. As we have seen, Jordan links the peculiarity of the governing arrangements between the EU institutions and the member states to the Commission's limited capacity to supervise effectively the enforcement of
EU legislation. Previdi (1997) also associates the notion of regulatory anomalies with the EU's peculiar institutional arrangements. He lists five atypical characteristics of the EU's regulatory system. Of these, two are particularly relevant to this study: the first is the lack of clear separation of legislative and executive powers. Previdi argues: "The Commission.... does not actually wield executive power. Rather, executive responsibility is exercised by the member governments...." (Previdi:1997: 69). The second refers to the lack of precise separation between EU and national competences: "Devoid of a formal delegation of competences – such as occurs in a federal state or in a country where regulatory powers are devolved to local governments – the Treaty on European Union (TEU) struggles to define this principle of separation of competences known as subsidiarity." (Previdi:1997: 70). These atypical characteristics are exemplified in later chapters of this study and Previdi's analysis supports aspects of the findings in the concluding chapter.

Tallberg makes a number of similar observations in his thesis. He draws upon an extended principal-agent model to help explain the peculiar position, with regard to enforcement, in which the EU institutions find themselves. Insofar as this study partly focuses on approaches taken by the Commission to bolstering enforcement in the member-states, it is perhaps worth reviewing the relevant tenets of Tallberg's arguments: of particular significance is the notion of the conflicting roles that the member-states play. Tallberg notes that the states have a number of potentially conflicting preferences, which he describes using the Principle-Supervisor-Agent vocabulary:

First, as principals, they [the states] want to see the policy proposals agreed to in the Council properly implemented and complied with, and to this end they need to equip the Commission and the Court with the necessary enforcement powers. Second, and also as principals, member states are anxious to protect state sovereignty, and this obviously puts a limit on the desire to delegate fiercer enforcement weapons to the supranational supervisors. Third, as agents, member-states prefer to soften the adjustment demands of new EU policies on national political, economic and administrative structures. All EU member states hold all three kinds of preference (Tallberg: 2000a: 107).
Tallberg explains that the Commission is constrained by the fact that it is ultimately answerable for its actions to the member-states, which can, and have vetoed or diluted various proposals that it has put forward for strengthening the EU institutions' capacity to impose sanctions on non-complying states. Even if the Commission were to go beyond the limits defined by the member-states, it is difficult to envisage how the actions of the Commission would either go undetected or unchecked. The Commission appears to have very little in the way of effective sanctions that it can impose on companies or individuals who seek to undermine the integrity of the internal market. It can, for example, 'name and shame' states that fail to implement directives; it can begin an enforcement procedure against a state. However, as Tallberg suggests, the majority of cases are dealt with by the Commission through a process of communication with the state in question, largely negating the necessity for the Commission to refer the case to the ECJ.

Perhaps the most comprehensive study of the implementation of Community law was that undertaken by Siedentopf and Ziller (1988). They analysed the implementation of seventeen different directives across the member states, comparing differences in practical implementation and the modus operandi of the various states' administrations. They analysed in detail the various stages of implementation from the preparatory phase to the incorporation of the directives into national law and finally to administrative application and control (Siedentopf and Ziller: 1988: 57). One of their most important findings centred around the idea that good enforcement infers the incorporation of interested parties during the early policy-making stages. This is a conclusion with which From and Stava also concur (1993). When applied to the enforcement of consumers' economic interests, this observation makes for an interesting point of analysis. Consumer representation, as Chapter Two illustrates, is relatively weak during the policy formulation stages, particularly compared with those of supply interests. Furthermore, not only are consumer interests under-represented at this stage, unlike many other policy areas, the protection of consumers' economic interests is largely enforced through private means, leaving the responsibility for enforcement with the individual. Therefore, those responsible for the practical enforcement of consumers' economic interests are the weak
and atomised consumers themselves, who failed to be sufficiently consulted during the earlier stages of the policy-making process. Jordan makes a number of observations regarding the evolution of EU environmental policy, which it might be argued, to a certain extent, mirrors initiatives undertaken for the protection of consumers' economic interests. For example, he comments:

...the Commission understands full well the political constraints it is under and has learnt to think tactically and act cautiously ... Reflecting the post-Maastricht demands for greater subsidiarity, the over-arching theme is one of fostering 'joint responsibility' among actors, complementing the top-down approach to enforcement. (Jordan: 1999: 84)

This approach would seek to strengthen consultation, increase national reporting, improve auditing and encourage the use of non-regulatory instruments. Furthermore, he continues: "Wilkinson (1992, p.226) observes that better consultation and the use of soft (that is non-legislative instruments) allows the Commission to achieve the environmental objectives without being seen to interfere directly in the affairs of the member states." (Jordan :1999: 84).

Conclusions
It is possible to discern a similar trend towards an increasing reliance on co-operation and co-ordination between the member states and the Commission in the field of EU consumer policy. For example, the creation of the EEJ-Net, the strengthening of the International Marketing Supervision Network (IMSN), the Commission-funded pilot projects for rapid out-of court settlements, the Karolus exchanges, as well as the various information-based initiatives, such as the 'Citizens First' sign-posting system or the European Consumer Centres, indicate that the Commission has adopted a similar approach to reinforcing the decentralised enforcement for the protection of consumers' economic interests at national level.
The existing literature tends to focus on the formal procedures available to the Commission and to the Court as set out in the treaties. It does not really address the
Commission's limited attempts to bolster proper enforcement at state level. Although Tallberg does begin to analyse the Commission's attempts to reinforce decentralised enforcement of Single Market legislation, his analysis is by no means exhaustive and its aim is primarily to detect the extent to which the supranational bodies are capable of acting independently of the member-states, rather than to evaluate how successful the Commission's strategy has been. Neither does the existing body of political science literature focus on case studies of proper enforcement across particular economic sectors in an attempt to gauge whether or not proper enforcement at state level is inhibited in certain sectors, by the strength of corporate interest representation. Nor does the literature deal with how the Commission is monitoring this.

The present study holds that the Commission has been largely unable to create a comprehensive and coherent regulatory framework which can adequately address the enforcement of consumers' economic interests because of a variety of factors, including treaty obligations, the division of competencies between the EU and the member-state, as well as the sectoral and jurisdictional limitations of the legal instruments used to deal with consumers' economic interests across the member-states. Until the adoption of the Injunctions Directive in 1998, consumers' economic interests across borders were largely enforced by individuals through private means rather than by public bodies. In order to ameliorate this situation, the Commission has engaged in a variety of non-legislative, as well as legislative, initiatives aimed at improving enforcement largely (although not exclusively) through co-operative ventures.

Moreover, until the mid-1990s the ability of consumers to enforce their economic rights had not been high on the EU agenda. As Chapter Two demonstrates, more attention was initially paid to enforcing the supply side of the regulatory framework with a view to ensuring the success of the Single Market project. Recently, evidence of citizen dissatisfaction has induced the Commission to try to improve the capacity of consumers to exercise their economic rights particularly across borders. The main purpose of the next chapter (Four) therefore is to examine the Commission's growing pre-occupation with citizen perceptions of the Single Market, with particular reference to consumer policy. The purpose of Chapter Five is critically to evaluate selected initiatives created in order to bolster the exercise of citizen-consumers' economic rights across borders and
address unfavourable citizen perceptions of the Single Market. Chapters Six and Seven attempt to exemplify the impact of these governance structures and on consumer protection strategies in selected market sectors.
CHAPTER 4

THE CITIZEN-CONSUMER

Introduction
The main purpose of this chapter is to examine the contentions set out in the first two initial research questions:

First, the study asks whether the Commission's increased attention to the ability of citizen-consumers in the EU to exercise their economic rights across borders in the Single Market was used as a means of legitimising the Single Market in the eyes of the citizen?

Second, the study analyses the extent to which, as part of this strategy, the Commission used the rhetoric of the 'citizen consumer' as a device to court citizen support for the single market project.

In other words the purpose is to analyse the contention that the Commission has sought to use consumer policy as a means of altering citizen perceptions of the Single Market as essentially biased in favour of the supply side. The following analysis is predicated on the widespread notion that the EU is currently suffering from a legitimacy deficit that the Council, the Parliament, but in particular the Commission have been trying to address since the late 1980s. It is argued that apparent citizen opposition and apathy during the 1990s, both in response to the Treaty on European Union and to wider issues, led both national and EU actors belatedly to address citizens' concerns, particularly in respect of the Single Market. They did so because of the centrality of the Single Market to the wider project of EU integration. If the legitimacy of the Single Market is questioned, then, arguably, the wider project of EU integration will be undermined. The EU has sought to address these problems by developing the relationship between the citizen and the Union through the creation of citizens' rights, in particular seeking to elevate these across a variety of policy areas, perceived to be of concern to citizens. The EU strategy
has been both to widen the scope of citizens' rights and to deepen them by increasing their practical efficiency. The aim of strengthening the consumer's hand has been approached through structural policies to improve market performance on the one hand and through enhanced consumer protection enforcement and redress mechanisms on the other. The 'persona' of the citizen has consequently become one of the central planks in the EU's pursuit of self-legitimation. It is argued here that the 'citizen consumer' has become an increasingly important device for the Commission in its attempts to enhance the legitimacy of the Single Market. The term 'citizen consumer' is to be interpreted quite literally as EU citizens acting in their capacity as consumers and in particular refers to the consumer rights that the EU has accorded its citizens. Reich, (1998: 432) not only acknowledges the concept of the citizen-consumer, but even goes so far as to suggest the existence of a 'European economic constitution' which comprises an "(incomplete and dynamic) body of laws which protect the ordinary European citizens in their economic role of consumers, in their functions as ecologically responsible subjects and in their individual and collective access to courts of law in case of need of protection". This policy reflects the Commission's recognition that consumers are an important constituency because the very success of the Single Market relies in part on consumers having full and unfettered access to the Single Market. In the early 1990s the Commission foresaw a number of beneficent economic effects consequent upon fuller consumer participation – a downwards pressure on prices, an incentive for the growth of small to medium enterprises (often cited by the Commission as the likeliest potential area of economic growth), which in themselves might be expected to improve employment levels.

A central component of the argument in this chapter, therefore, draws upon a critical examination of the Commission and Council's construction and use of rhetoric relating to the citizen-consumer in key policy documents. Later chapters will compare the rhetoric with the effects experienced by consumers at ground level.

The development of citizenship within the EU, in particular the emergence of the concept of the citizen-consumer, provides a conceptual framework within which to consider both the citizen's role itself and the Commission's attempts to improve perceptions of its performance. This chapter therefore comprises three parts. The first
part examines the basis of the EU's legitimacy and explores the connection between the concept of citizenship and legitimacy. The second part seeks to provide an overview of the development of 'European Union citizenship' and discusses the relevance of the concept of the citizen-consumer, within the wider conceptual frame of 'the market citizen'. The third part attempts to analyse the Commission's practical use of the concept of the citizen-consumer in its attempt to enhance the legitimacy of the single market.

**Consumer Citizenship and the Legitimation of EU**

The assertion that the Commission has used the 'citizen-consumer' as a device in order to legitimise the single market in the eyes of the citizen merits further investigation; it is desirable to put this claim into the wider context. Since 1957, the creation of the internal market has been the lynch-pin of European integration; this has been especially the case since the Single European Act (1986) and the Treaty of Maastricht (1992). Given the dominance of the concept of the Single Market, the acceptance and acknowledgement of the success of this project, above all other, may be said to be necessary in order to confer legitimacy upon the EU as a whole. Conversely if the Single Market does not function to the benefit of its citizens, as it is designed to do, then they may well doubt its relevance to their lives and to call into question the legitimacy of the whole EU venture. As it is the Commission's role, in particular, to ensure the effective functioning of the Single Market, it is likely to be the Commission's legitimacy that will be particularly threatened by failure in this task.

It is perhaps appropriate to begin this analysis by establishing the criteria for the legitimacy of the EU and in particular, the Commission. Beetham and Lord (Beetham & Lord :1998) attempt to establish such criteria. They conclude that the EU requires 'direct legitimacy' based upon the same criteria as those normally applied to liberal democratic nation states. Their claim is that only a direct model of legitimacy, based on liberal democratic principles, will be sufficient to secure the support of the majority of citizens for the authority of the EU. They contend (Beetham & Lord :1998: 23) that 'direct legitimacy' should be based on three particular criteria: identity, democracy and performance, which they define in the following terms: "effective performance in respect
of agreed ends, democratic authorisation accountability and representation and agreement on the identity and boundaries of the political community respectively".

They also discuss the implications of the 'indirect democracy' model, suggesting two alternative routes to legitimation. On the one hand, they claim that the acceptance of the authority of the EU by the member-states – themselves recognised as legitimate liberal democratic entities - confers legitimacy on the EU. On the other hand, they discuss the possible legitimation of the EU via technocratic means. The technocratic approach contends that the public good is ensured by professionals, who are insulated from, and not biased by, democratic and, in particular, electoral politics. Beetham and Lord are critical of both of these routes on a variety of grounds; they criticise the first on the basis that the EU's rules and regulations impinge directly on citizens' daily lives in a variety of ways and therefore may require their direct co-operation and acceptance. They criticise the second, technocratic approach because it precludes citizens from participating in the process of choosing between competing policy priorities, which, they claim, is one of the basic activities underpinning liberal democracies.

Beetham and Lord conclude therefore that, because the EU in many respects lacks sufficient direct legitimacy, it suffers from a legitimacy deficit, a claim, which according to Moravcsik (2002:605), is a position widely accepted amongst both EU citizens and the academic fraternity. It is instructive to examine the nature of this 'legitimacy deficit'. Most authors only focus on one particular aspect. Of the three components that Beetham and Lord identified as central to legitimacy (democracy, performance and identity) a number of authors have concentrated on notion of democracy and the EU's 'democratic deficit'. Wiener and Della Sala, for example, compare demands for effective citizen participation with the lack of effective constitutional provisions to facilitate participation (Wiener & Della Sala :1997). Lodge concentrates on the deliberate misinterpretation of the 'democratic deficit' by the member states in their reaction to the disappointing message conveyed to them by citizens in the wake of opposition to the Maastricht treaty (Lodge: 1994). She claims that politicians deliberately misinterpreted a debate, which centred on democracy as one, which centred on the transparency of the Commission. This strategy had the benefit of side-stepping the real issue, which was how to make the EU decision-making mechanism more accountable and how to facilitate greater
involvement of citizens in the process of supranational governance, and which, instead, shifted responsibility and blame on to the Commission. National politicians used to their advantage popular mistrust of the Commission in order to divert public attention away from the lack of national accountability in EC governance (Lodge: 1994).

Most authors appear to agree that there are insufficient opportunities for direct democratic participation at the EU level. The problem with this particular avenue of legitimacy is that, because of the constitutional set-up of the EU and because of the reluctance of member states to concede more authority to it, this deficiency cannot be easily rectified. The EU is only a system of governance, not a government. In spite of attempts to increase democratic accountability and participation through other routes, in the wake of the EU White Paper on Governance (EC: 2001a), increased transparency, increased opportunities for 'interested stake-holders' to contribute to the decision-making process, or to regulate jointly particular policies/decisions, are still in the process of development and their success or failure is, as yet, untested. These criticisms of the EU's lack of direct democracy are therefore likely to hold good for some time to come.

On the subject of identity, the equation becomes even more complicated. Identity may be said to be dependent on a variety of factors; some authors emphasise the importance of common ethnic roots, some a common language or common historical experiences. As Beetham and Lord (1998) point out, the EU is peculiarly deficient in these respects, having no common language, lacking a common ethnic basis and having, as their common historical experience, significant periods of inter-state conflict. However, some authors have pointed to the sharing of certain fundamental values such as liberal-democratic or Christian values. Identity may also depend on a long-developed emotional attachment to the myth of a particular nation or locality; such an attachment may be supported and nurtured by geography, climate, culture as well as the trappings of identity - national anthems, flags, currency etc. Although it is thought that identities may be partly artificially constructed – as in the US - the EU lacks many of the other essential components that might help to nurture the idea of a common identity. As Ulrich Haltern (Haltern: 2001: 6) comments:
In nation states, some legal texts – constitutions – embody ideal historical meaning which links the present to the past, to some point of origin, like a revolution and the consecutive writing of the constitution. Such texts constitute states as 'imagined communities' and continue them over time. They can claim loyalty as their source of moral support because they are 'ours'. Union texts are not ours. They are just texts, empty shells with no roots. Rather than an embodied set of meanings they are seen as a set of ideas without the power to make a claim upon the citizen. They do not bear deep social meaning. In the Union, there is nothing to remember, and hence nothing to maintain. Union texts do not constitute a collective self; rather they constitute a common market. Markets cannot tell us who we are...

The EU has attempted to construct some notion of common identity based on certain superficial symbols; but as Haltern (Haltern: 2001: 4) comments, without the backing of the more solid components of identity, such symbols are more likely to alienate than to encourage EU citizens. He argues that the Commission fails to understand why Europeans feel alienated from the Union:

The answer is right there, in its face on its own web site. Look up the European anthem... the countless Jean Monnet awards, the European Woman of the Year awards, The European years of Whathaveyou (cinema, culture, the environment...) look these things up and you will have an instinctive understanding of the citizens' complete indifference towards "their" Union.

It remains to be seen whether the creation of a new EU Constitution will go some way towards remedying this sense of alienation. However, although the argument for developing a sense of EU identity might be tenuous if based on the traditional tenets, Beetham and Lord (1998) argue that it is possible to view a common identity based, not upon the past, but on present and future commonalities. According to their argument the notion of successful policy outcomes becomes intrinsically linked to the creation of identity. They contend that some prospects for a common identity might be built on "the construction of a common European citizenship and agreement on a shared political
They argue that "the guarantee of key rights to all European citizens across the European political space, wherever they happen to live and work: civil and political rights, basic economic, social and cultural rights, equality of respect and opportunity regardless of social or national differences" (Beetham and Lord: 1998: 29), would be central to such a conception of citizenship. This theory is supported by a number of authors who point to the acquisition of rights as a major component of EU citizenship.

In this respect, identity is strongly related to and dependent on successful outcomes – in essence this is what Beetham and Lord (1998) have defined as the third component of legitimacy – performance. If direct democracy in the EU is relatively weak, and identity is both embryonic and potentially dependent on performance, then it might be argued that the EU's legitimacy currently rests disproportionately upon performance - outcomes. Horeth (1999:250-251) is strongly supportive of this line of argument. He claims that the current debate on legitimacy concentrates too heavily on input mechanisms and argues that the legitimacy of a political system depends on its capacity to achieve the citizens' goals and solve their problems.

The Union, after all, enjoys utilitarian support through the economic welfare, which it facilitates. Not all human behaviour can be explained by economic motives, but experiences have shown that people can be won over by favourable economic conditions... As long as the efficiency and effectiveness of European policy-making leads to more noticeable benefits than costs the utilitarian support of large parts of the European population, and hence the membership in the Community, is unlikely to be questioned.

These analyses of the legitimacy of the EU appear to be shared by leading EU politicians. For example, Romano Prodi (the Commission President) set out the problem of citizen perception very succinctly in a speech which might be regarded as rhetoric, but which clearly demonstrates his sensitivity to the issue:
I am committed to closing the gap between rhetoric and reality in Europe. People want a Europe that can deliver the goods. This Commission is committed to deliver. (Prodi : 2000a)

This utilitarian perception of EU citizenship is shared by Everson. Everson, (1995:90) however, points to the dangers inherent in performance-related legitimacy, with special reference to the case of the market citizen. She characterises the EU dilemma as a community of self-interested market citizens, who owe no allegiance to the Union which created them and who may, at some future date, withdraw their support. Everson argues that the initial self-interest of a minority group of large business interests formed the basis for EU integration at a time when the Commission was having difficulty in obtaining the support of the member states for a more positive form of integration. Thus, integration was based upon the removal of barriers to trade – a strategy which the Commission fully supported. However, Everson claims that the establishment of the supply-side of the market was not an indication of the success of the Single Market, but merely an indication that the market was open. She argues that the practical realisation of the Single Market depended upon "the willingness of large numbers of consumers themselves to engage in trade with those cross-border entrepeneurs. The person of the consumer thus became integral to Community strategies, and various aspects of the internal market citizen's character were accordingly translated into the secondary Community legislation designed to shape the newly opened internal market." (Everson :1995: 87).

These perceptions fit closely with the preliminary analysis earlier in this chapter. The implication of this analysis is that the development of the role of the consumer-citizen, in some senses, became the logical response of the Commission to the overdeveloped supply-side model of the market. However, the examination of the history of EU consumer policy in Chapter Two demonstrates the limitations to these claims. In practice, EU consumer policy has been slow to develop and limited in its impact constrained by the lack of political support given to this policy area by the member states.
Burgess, (2001: 109) suggests that the use of issues of popular concerns to citizens, such as consumer protection, health, food safety or the environment as legitimising devices, is not simply unique to the EU. Burgess claims that EU consumer policy was elevated to a higher status in the 1990s as part of an attempt at self-legitimation by institutions seeking new ways of securing the confidence of the citizen.

**European Union Citizenship**

Having argued that the citizen consumer comprises a central plank in the EU's quest for self-legitimation, it is important to try to set the concept of the citizen consumer within the wider context of the development of EU citizenship. There are fundamental differences between EU citizenship and national citizenship as the two are built on different premises; this has implications both for the legitimacy basis of the EU and for the status of the citizen consumer. Citizenship in the modern sense of the term is linked with concepts of nationality and statehood. Commenting on the work of T.H. Marshall, Bulmer and Rees (Bulmer & Rees :1996: 31) highlight this point: "Citizenship describes the rights and obligations associated with membership in a social unit, and notably with nationality."

Moreover, citizenship is linked to ideas of inclusion and exclusion - drawing boundaries, which may be geographical or ethnic in nature in order to define the scope of these social units. For example, citizenship may be based on place of birth or on the nationality of the parents. However, this is not how EU citizenship should be understood. The EU is not a state; there is no one directly democratically accountable EU government to which citizens might be said to owe allegiance. Rather mechanisms exist at EU level for the collective governance of the EU, constitutionally endorsed and provided for by the member states. One cannot be a citizen of a system of governance; EU citizens are therefore citizens of the EU by virtue of the fact that they are already citizens of one of the signatory states. There is thus a certain dislocation between the status EU citizen and the EU governing mechanisms. As discussed earlier, citizenship in the conventional sense often relies on a number of characteristics to which the EU cannot lay claim. It is not essential for a nation state to be legitimised and validated by a long gestation period (such as the UK); indeed, it is not uncommon for some nation states to come into
existence rapidly, as the result of revolution, as did, the United States or Italy. The rapidity of the birth of new nation states does not necessarily undermine their legitimacy if they are popularly created and popularly endorsed.

The EU, on the other hand, although it came into existence quite rapidly, was not popularly created by the people themselves but created by their political representatives. Not only can the EU not lay claim to the tenets of conventional citizenship, outlined above, it cannot lay claim to direct popular derivation. EU citizenship, therefore, is based primarily on a set of laws, rules, regulations and economic foundations agreed by the member states, the majority of which rest on the creation of the Single Market. As the EU has based its legitimacy in large part on the conferred legitimacy of the member-states, which itself rests on liberal democratic principles, the EU is obliged to operate accordingly. Indeed, possession of the basic characteristics of liberal democratic government is a key requirement for countries seeking EU membership. As one of the foremost characteristics of liberal democracies is that they are based on the rule of law, and as EU citizenship rests principally on a set of legal rights, it might be argued that it is essential for the EU to provide citizens with rights that are accessible and enforceable through law. This line of argument brings us to the role of the citizen consumer within the general concept of EU citizenship. If it is accepted that EU citizenship, in the main, is based on a set of legally enforceable rights, it then becomes possible to discern different categories of citizens' rights: political rights, social rights, economic rights. Wiener and Della Salla (1997) coined the term 'fragmented citizenship' to describe this particular framework. Because the development of different policy areas in the EU depends on the political support of the member-states, the various policy areas have developed unevenly. EU citizenship, linked as it is to the development of rights in different policy areas, may consequently also be conceptualised as having developed unevenly.

Formal notions of citizenship embodied in the treaties have only existed since the ratification of the Treaty on European Union (1992). It is arguable, however, that the concept of citizenship can be traced back as far as the Treaty of Rome in the form of the 'acquis communautaire' – the accumulated collection of rights that citizens have developed since the EU's inception. A number of authors have argued that the basis of
these rights were the 'market rights' implied in the four fundamental freedoms (Everson:1995, Bartle:2002 and Downes:2001)
Warleigh, citing Taschner, (2001:22) argues that the Commission played an important role in creating a union citizenship based on 'market rights' by referring cases to the European Court of Justice. This view is supported by Marias (1994:3), who also argues that the ECJ played a critical role in this process by ruling, in opposition to the member-states, that the Rome Treaty differed from other international laws and that the member states could not prevent the EU from directly creating rights for citizens, rather than acting through the member states. Marias (1994:3) comments: "... the Community, stated the Court, constituted a new legal order of international law the subjects of which comprised not only member states but also their nationals. Community law therefore, concluded the Court, was not only imposing obligations on individuals but was also intended to confer rights upon them".

Marias argues that the decision of the ECJ in the Van Gend en Loos V. Nederlandse Administratie der Belastingen case (1963) was critical in establishing the concept that citizens could freely exercise the economic and social rights conferred upon them by the treaty. Marias argues that the pro-activity of the ECJ in this respect during the 1960s and mid-1970s contributed considerably to the investment of EU citizens with substantial rights.
However, Warleigh, whilst acknowledging this trend, takes a more circumspect view of EU citizenship and notes the lack of political drive to the creation of a formal sense of citizenship (for example, through treaty provision) at this stage. He argues that the early years of EU integration afforded the citizen no significant role in the integration process, because the view taken by the majority of policy actors was that the success of the integration process would rest on its efficiency and on the appreciation by citizens of the beneficial impact of the union. During the 1960s and 1970s, policy actors saw the process of elite mobilisation and the support of interest groups as more important than direct popular endorsement.
Nonetheless, both Warleigh and Marias argue that the 1980s brought a change in strategy with regard to citizenship on the part of the Commission and leading actors in the
member states. He contends that, following the economic slow-down of the early 1980s, successful regeneration of the member states' economies depended on the creation of the Single Market. Both national and EU politicians began to view individuals as important to the realisation of the single market in terms of transferable labour. Greater labour mobility required that migrants should be able to access welfare provisions in their host state. The deepening of citizenship rights through the provision of social and labour rights thus enabled the member-states to create a connection between the citizenry and the union without having to restructure the union along federal lines. As Marias (1994:4) concludes:

It was in the framework of this political system, the creation of which was sealed by the Maastricht Treaty that the citizens of the union were called upon to play an important role, that is the role of the legitimation basis of the system. Granted with citizenship of the Union, they were asked to support the Union decisively in order to enlarge their own material basis through the market.

This statement sets out unambiguously the implicit bargain between the citizen and the Union. On the one hand, the continuing benefits of the Single Market for citizens were viewed as dependent on their support for EU integration. On the other hand, however, the reciprocal can also be argued: support for the political legitimacy of the Union depended on the delivery of tangible economic benefits arising from the development of the Single Market.

Marias, like Warleigh, argues that in the late 1980s the economic and social dynamic of the Union spilled over into the political arena. Citizens' legitimation of the Union was intended to be sealed by granting citizens certain core political rights not based on economic relationships which were formalised in the European Union Treaty in 1992. Article 8 of the TEU formalised, for the first time, the concept of Union citizenship. It confirmed the idea that citizens are entitled to benefit directly from the rights conferred on them by EU treaties. The article re-asserts citizens' rights to move and reside freely within the EU. The majority of the article, however, is devoted to the creation of political and diplomatic rights for EU citizens. For example, it extends limited political
participation to EU migrants by allowing citizens in host states to vote and to stand as
candidates in municipal and European Parliamentary elections. It also provides for EU
citizens in third countries, in the absence of representation from their own state, to
receive diplomatic protection from representatives of any other member-state
Although this extension of the political rights of EU citizens seemed, in some way,
designed to seal a contract of legitimacy between the citizen and the EU's institutions,
endorsing the process of integration, it is difficult to imagine why it should be expected to
have such an effect in practice. For the great majority of EU citizens, these rights must
remain largely tangential, theoretical and symbolic. Rey Koslowski (1994: 369) explains
why the Commission felt the need to extend democratic rights to EU migrants in the
years shortly preceding the Maastricht treaty (1992). Koslowski, quoting statistics
obtained from Eurostat maintains there were 4.9 million EU nationals living in other EU
member states in 1993. He cites this as the main reason prompting the Commission to
push for the inclusion of political rights in the Maastricht Treaty and quotes from a
Commission document which states (Koslowski : 1994: 369)

At present over four million Community citizens are deprived of the right to vote in
local elections simply because they are no longer in their member state of
nationality. In a Community of member-states whose basic common characteristic
is that they are all democracies, implementation of one of the four fundamental
freedoms provided by the Treaty has, by virtue of national legislation, led indirectly
to the loss of certain political rights. This paradox in the building of Europe cannot
be allowed to continue if the principles underlying the democratic political systems
of the Member States are to be respected.

Although 4.9 million citizens is undeniably significant, compared to the total population
of the EU, it is minute in its proportions. On January 1st 1993, the total population of the
EU reached 368 million 935 thousand 291 ("Total Population on 1 January –Annual"
Eurostat (14/5/2003) http://europa.eu.int/comm/europstat). In percentage terms, rounded
up to the nearest million (i.e. 369 million), this works out at just over 1% (1.3279133%).
Furthermore, the number of people choosing to avail themselves of the right to vote is
likely to fall well below that of 4.9 million, given that neither local nor European elections are popular events and given the trend towards voter abstention generally.

**The Notion of 'Market-Citizen'**

From the above overview it is possible to discern two trends in the creation of the EU citizen. The first relates to the period up to the mid-1980s. During this period, citizenship was developed through the case-law of the ECJ, ruling on the basis of the four freedoms, as discussed above. This concept of citizenship, which some authors have called 'market citizenship' (Everson:1995, Marias:1994: Bartle: 2002) was based on the development of rights which were themselves derived from the market logic of the Rome Treaty. The citizen's support for EU integration was at this stage taken for granted; the EU's legitimacy was not questioned, consequently the need for citizen support as a basis for legitimising the EU was not considered important. Therefore there was no politically driven incentive to promote a sense of citizen identification with the EU. The second trend, illustrated above, stems from a greater self-conscious effort on the part of policymakers to use citizen support as a basis for legitimising EU integration. It is argued here that, whilst the notion of the citizen-consumer might be thought of as having its roots in the market emphases of the first phase, it was in fact the second trend that helped to promote this particular area of citizen's rights. However, to engage in such a discussion is to accept without question the notion that citizenship may extend beyond the concept of political rights, incorporating economic or market rights. This is not an assumption that should be taken for granted; the validity of this position is examined in a later section.

**Citizenship Based on ECJ Case-law**

The first trend in this process may be detected in a sequence of ECJ judgements between 1984 and 2001. However, as a precursor to a discussion of the early impact of the ECJ in developing citizens' market rights, one should first pose the fundamental question - what connection is there between the Common Market and the notion of citizenship? In answer to the above question, it may be useful to consider briefly the role of markets as an abstract notion.
Effective markets depend on a number of pre-existing conditions, which often reflect taken-for-granted assumptions about the larger political context. Without the institution and definition of certain social mores in legal terms – the right to own and exchange property, for example – the whole basis of market operations would be undermined. Rudimentary commercial frameworks may come into existence simply by virtue of common consent, between buyers and sellers, regarding the establishment of conventions governing their transactions. However, in complex societies, the authority and support of an overarching political entity, such as a city or a state, have become essential elements in the smooth working of free markets. In principle, market actors do not need to be citizens in order to undertake their roles – visitors or tourists may be market actors, but not citizens. However, the complexity of modern societies has led, in practice, to the creation of social, economic and legal frameworks in which the status of the market actor becomes important. The concept of the 'market citizen' is therefore also important because the increasing complexity of the economic context makes it necessary to define more clearly the status and rights of market actors.

The Treaty of Rome sets out four fundamental freedoms: the free movement of persons, capital, services and the right of establishment, which a number of academics have interpreted as forming the basis of an early and limited concept of community citizenship, which they call 'market citizenship'. However, on inspection it seems desirable to qualify this term. First, the four freedoms were not simply accessible to individual citizens, but some, at least, are also available to market actors in general, (for example, corporate legal entities) which do not rank as citizens in the normal sense. Second, the notion of citizens' rights implies a certain degree of exclusivity. Whilst it would be true to say that the original six enjoyed the benefits of these added exclusive rights within a geographically and legally defined area, over time the EU's external barriers have weakened with, for example, the general lowering of barriers to international capital movements.

Some writers have indicated that some EU rights do not fit exactly with common notions of citizen's rights. Downes suggests that, in origin, these might best be termed 'rights akin to citizenship' (Downes: 2001). However, these rights, originating in the four
freedoms to engage in market activity, have, over time, become generalised, partly as a result of ECJ judgements (Downes quotes the cases of Luisi and Carbone v. Ministero del Tesero (1984) and Cowan v. Le Tresor Public (1989)).

These two cases established two separate, but related principles, significantly generalising the notion of market citizen. In the first, the principle was established that consumers should have freedom of movement to search the market for desired goods and services, rather than to limit this freedom to the activities of producers in search of customers. This had the important effect of eroding the producer-orientation of the founding treaties.

In the second, a further closely related principle was established. This case concerned Cowan, a British tourist, staying with relatives in Paris, who claimed redress from the French criminal injuries compensation scheme after having been attacked near a Metro station. His claim was refused on the grounds that he was neither a French national nor a resident, so he challenged the decision at the ECJ under Article 12 EC. The significant feature of this judgement is that Cowan was deemed to be engaging in economic activity merely by travelling to a neighbouring EU state. This, in effect confers a general right of citizenship with regard to freedom of movement, since any cross-border travel must imply a minimal level of consumption in the host-state.

From 'Market Citizen' to 'Consumer Citizen'

The second trend, identified above, explores the political dynamic underpinning the explicit recognition of the need for the EU to connect with the citizen and to concentrate on policy areas which affect the citizen in demand-side as well as supply-side roles.

Since early notions of community citizenship derived their legitimacy largely from the predominantly economic goals of the Common Market, it is hardly surprising that the emerging nature of EU citizenship has been shaped in different periods by the prevailing economic pressures of the time. For example, Weiner and Della Sala (1997) report that, since the 1970s politicians have been seeking to encourage popular support for European integration. These authors have briefly charted the development of an EU citizenship discourse since the 1970s. They remark, for example, that during the 1980s Commission politicians tended to link citizenship themes to the movement of workers across borders
in an attempt to promote flexibility in the labour market. This response might be viewed as reflecting the concerns of politicians during a period of politically engineered economic liberalism throughout much of Western Europe. The emphasis on creating identity through the establishment of reciprocal administrative arrangements, aimed at facilitating the movement of workers across borders, might be viewed as being in line with a supply-side response to widespread unemployment. In this economic climate, the rights of citizens as consumers were largely neglected. Thus, in the late 1970s and 1980s emphasis was placed on freedom of movement of workers.

In the later 1980s and 1990s, more emphasis was placed on citizens' concerns with regard to consumer, social, health and environmental rights. The explanation for the rise in importance of these policy areas is various and differs across policy areas, although the desire to connect with the citizen appears to be one of the key motivations. Bomberg, Peterson and McCormick, for example, relate the growth in emphasis on environmental policy to a heightened awareness amongst both politicians and the public of the increased salience of environmental issues (McCormick :1999, Peterson & Bomberg:1999). Nevertheless, it is significant that Peterson and Bomberg specifically relate the growth of environmental regulation to the need to create a 'level playing' field in the single market by eliminating trade distortions between the member states (Peterson & Bomberg: 1999).

Thus, in the case of environmental policy, politicians could claim to be responding both to public and international environmental concerns, whilst addressing the economic priorities of the Single Market.

Similarly, in the field of social policy, whilst the 1980s saw a revival of this policy area relative to the economic imperatives of the Single Market, the 1990s have witnessed social policy moving beyond the narrow economic logic of the internal market (Borchardt: 1995: 64-65). Whereas social policy in the 1980s was primarily linked with the Community's objective to use the Single Market to boost the EC's economy and tackle unemployment, in the 1990s social policy had become part of the Community's response to citizens' perceptions of the Single Market as a predominantly producer-oriented phenomenon. Thus, the Commission began to promote social policies that go beyond the economic imperatives of the Single Market. For example, their policy on promoting gender equality also includes commitments to combating violence against
women and their policy against ethnic discrimination is of a generalist nature, and is not simply oriented towards discrimination in the work-place (EC: 2000: 20-21). In a similar way, the growing profile of consumer policy during the late 1980s, throughout the 1990s and into the 21st century shows a similar pattern. The rhetoric issuing from Community policy documents demonstrates an apparent anxiety to connect with the citizen and recognition of the importance of citizens' support, as consumers, for the ultimate success of the Single Market. The changing attitude of the politicians towards consumer policy and its altered status is noted, for example, in the Commission's first three-year action plan on consumer policy (EC: 1990), which overtly links the importance of consumer policy to the creation of the internal market. The Commission document states:

In 1985 a programme was launched to give a new impetus to consumer policy. This coincided with the publication of the white paper on the internal market and increased consciousness of the importance of addressing consumer concerns in the concentrated preparations of the Internal Market. Many of the measures, which, the Community has taken in recent years have addressed consumer interests. However, with the imminence of 1992, pressure has been applied by the Council of Ministers of November 9th, 1989, for a further effort to intensify activity addressed to the consumer. (EC: 1990: 2):

As Chapter Two demonstrated, the Consumers in Europe Group support this view and have linked the inclusion of a separate title for consumer policy in the Maastricht Treaty to attempts by the Commission to soften the supply-side image of the Single Market (CEG: 1999b: 5). The argument that the new impetus to bolster consumer policy was politically driven by both the Commission and the member states' politicians is also supported by evidence concerning the timing of consumer legislation and regulation. An examination of the amount of legislation and documentation produced in the field of consumers' economic rights from 1970 to the present day clearly demonstrates the additional attention given over to this policy area in the light of the completion of the internal market. For example, it is significant that before 1980, only one official document relating to consumers'
economic rights was produced - a Council Resolution was passed in June 1979 regarding the indication of the prices of foodstuffs and non-household products. During the period, 1984-1990, eight pieces were published, four Council directives, two Commission recommendations, one Council resolution and one Council recommendation. During the period 1990-2000, fifteen documents were produced; two Council regulations, two Council directives and four Parliament and Council directives, three Commission regulations, one Council framework decision, one Council resolution, and two Commission recommendations. From 2000 onwards (i.e. only three years at the most), seven documents have been produced, three directives, one council framework decision, one Council resolution, one Commission decision, and one Commission regulation. This clearly demonstrates a steady increase of legislation and official documentation pertaining to consumer policy.

The specific contexts that favoured the rise in importance of these policy areas were accompanied by a general climate of malaise on the part of citizens towards the EU. Lodge, for instance, notes that with regard to the ratification of the Maastricht Treaty, the notion of citizenship and issues concerned with legitimacy and transparency in the EU became focal points for politicians in the wake of evidence of public dissatisfaction with European integration and with the EU institutions. Public opposition to the ratification of the Maastricht Treaty in Denmark and France exposed a more serious level of euro-scepticism than politicians had previously anticipated. As Lodge explains:

> During the ratification of the Maastricht Treaty on European Union (TEU), it became clear that not only were people mystified by some of its terminology (such as the concept of subsidiarity) but that they were becoming increasingly alienated from the idea of the European Community. (Lodge: 1994: 343)

Apart from the food-related scandals of the period (Burgess: 2001:98), public dissatisfaction was further fuelled in the mid-1990s by revelations regarding the Commission's mismanagement of its own internal affairs, which resulted in the resignation of the Santer Commission. Renee Cordee (2000:13) makes this point quite clearly when she explains:
Until fairly recently, EU leaders regarded consumer protection more like a lover than a spouse, good for the occasional passionate encounter but without meaningful commitment. The Union devoted only limited resources to consumer policy as recently as a decade ago...Several food scares and a new Commission later, policymakers have realised that it would be political suicide to ignore the Union's largest, most powerful vocal population. After all, each of the EU's 375 million citizens is either a current or future consumer.

The political reaction to the bad publicity generated by the food scandals and by the failures of the Santer Commission was rapid and decisive. In response to the food crises, there was a well-publicised internal reorganisation of policy competencies in the Commission. This led to the separation of competencies for aspects of food control from the more commercially orientated DGs and the re-housing of animal, plant and public health controls within the consumer policy directorate. Moreover, the Commission's capacity for scientific analysis and veterinary controls was significantly expanded in response to consumers' concerns (Cordee (2000:13).

In response to the crisis provoked by the Santer Commission, the new Commission president, Romano Prodi (in office from 1999), paid significant attention to wooing back EU citizens. This strategy is evidenced in his speeches (Prodi: 2000a), for example, in a speech to the European Parliament in February 2000 he claimed:

"Honourable members, action speaks louder than words. Effective action by European institutions is the greatest source of their legitimacy. The greatest threat to popular support for Europe is to continue multiplying unfulfilled promises. It is not Euroscepticism we should be worrying about: it is public apathy, based on the perception that we talk too much and do too little. (Prodi, R: 2000a)"

It is also evident in his commitment to improving EU governance (although, obviously, this was partly intended as a response to the prospect of enlargement). Commission and
national politicians have further been unnerved by the general level of political apathy of EU citizens; by increased abstentions in general elections and poor turn-out in EP elections, and by the rise of right-wing extremist parties in certain EU countries (notably Italy, Austria, France, Belgium and Holland). This is evident in the introduction to the White Paper (EC: 2001a: 3) on European Governance, which recognises that, on the one hand, Europeans want their political leaders to find solutions to the major problems of contemporary societies, but are increasingly distrustful and distant from European politics and institutions. It concludes:

The problem is acknowledged by national parliaments and governments alike. It is particularly acute at the level of the European Union. Many people are losing confidence in a poorly understood and complex system to deliver the policies they want. The Union is often seen as remote and at the same time too intrusive. The Irish 'no' highlights the impact problems on many people. This was reflected not only in the final outcome of the referendum, but also in the low turn-out and the quality of the debate which preceded it.

However, in terms of the overall history of the EU, politicians have been slow to respond to citizens' concerns. This is clear from the amount of time that it has taken for policy areas such as environmental, and consumer policies to become established; even when policy actors did belatedly respond, there is evidence of a degree of reluctance and cynicism in their actions. In some instances, they have tended deliberately to misinterpret the causes of public dissatisfaction, responding inappropriately to public concerns, as Lodge reports with regard to citizens' concerns over the democratic deficit in the wake of the Maastricht ratification (Lodge: 1994). Other ways in which politicians have attempted to avoid effectively addressing citizens' concerns are by arming them with rights that are either peripheral to the majority (as in the case of political rights afforded by the Maastricht Treaty), difficult to enforce (for example cross-border consumer rights), or which have an ulterior motive (as in many social, environmental and some consumer rights) – that of serving the producer interests of the internal market.
Member states appear to have pursued this strategy because they have been unwilling to make concessions that would affect their level of control.

**Evidence and Analysis of Official Documents and Reports of Interested Parties**

Having established the context for the argument that the Commission has used the rhetoric of the citizen-consumer as a legitimating device, one aimed at redressing citizen perceptions of the Single Market as unbalanced in favour of producers, the purpose of this section is to examine the accuracy of the above analysis with reference to material drawn from Commission documents. In other words, what evidence is there in the official documentation that the Commission tried to bolster consumer policy, using the rhetoric of the citizen-consumer, in order to legitimise the single market in the eyes of the consumer? Indeed, this analysis is supported by other academics writing on the subject. Burgess (2001:108), for example, notes:

> In retrospect, the EU...is unashamed of locating its discovery of consumer concerns in the need to sell the internal market as something more than a business proposition. Charting the emergence of consumer policy, a recent Community publication explains that: "...it became gradually accepted that there was a need to recognise and enhance the rights of consumers. In order to avoid the perception that the concept of European integration existed exclusively for the benefit of industry, EU consumer protection initiatives evolved as a corollary to the internal market programme which culminated in 1992. (EC, 1998:9)

In tracing the emergence of the rhetoric on the citizen-consumer, one surprising result to emerge is that, although the notion of the citizen as consumer is used variously throughout the Commission's documentation on consumer policy, the actual term 'citizen consumer' only appears once - in the Commission's Second Action Plan for Consumer Policy 1993-95 (EC: 1993c), discussed in Chapter Two. This second plan shows a marked change of emphasis vis-a-vis consumer confidence, compared with the first. The first referred only to the need to "reassure [consumers] that their interests are properly
represented" and emphasised "considerations of physical and economic safety" (EC: 1990: 2). The second took a much more instrumental view and conceded:

All in all, it is essential that the advent and deepening of the larger European market make itself felt in consumers' everyday life in the shape of tangible benefits. It is only thus that the internal market will win their confidence and finally succeed. (EC: 1993c: 5)

In 1993, the Commission issued a Green Paper (EC:1993a:7) "Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market" in which it explicitly makes the connection, not only between the promotion of consumer protection policy and the credibility of the Union in the eyes of the citizen, but critically links in to this equation the enforcement of consumer rights and consumer redress:

There are two reasons for opening the debate with a Green Paper devoted to "consumer access to justice". These can be summarised as follows:
Firstly, the credibility of European construction in the public eye. Consumer protection is a domain of Community law that affects all European citizens in their everyday life, and which thus brings European construction "closer" to them – the gap between law and reality, summarised under the rubric "access to justice would hence correspond to the disparity between the overarching principles of a "People's Europe" and the everyday experience of the European citizen...

The Action Plan for 1996-8 showed another interesting shift of emphasis. Whereas the Second Action Plan spoke of the success of the internal market in terms of consumer confidence, its successor explicitly recognised the possibility of manipulating consumer confidence to promote wider popular support for the EU in general. Referring to consumer information, the plan comments: "The benefit which will accrue will not just have a market effect but also public attitudes to the European Community in general will be greatly improved as realisation of the relevance of its work to citizens' well-being sinks in." (EC:1995a)
Action Plans for other policy areas reflected a degree of consistency in the application of the strategy of bolstering citizen support through the delivery of tangible outcomes. For instance, the Single Market Action Plan of June 1997 states:

The Single Market stands or falls on confidence: confidence that all the key rules are in place; that they are fully and fairly applied; that problems will be addressed quickly; that the ground-rules for fair competition are fully respected; confidence for consumers in the reliability of goods and services and of information; confidence for smaller companies, the employment generators, that the market can work for them; confidence that each and every government is committed to making it work. Doing business, moving, living, working in the Union "without internal frontiers" should become as easy as within any member state. (CSE :1997: 1)

The Consumer Policy Action Plan for 1999-2001 saw consumer policy as 'coming of age', along with other policy areas directly affecting the lives of ordinary citizens. Evidence of awareness of the implications for the wider political context, to be found in the previous plan, was reinforced and broadened by the recognition that "political currents driving the growth of consumer policy are part of a wider political trend for policies that deliver effective solutions to the problems faced by the general public." (EC: 1998b:1)

Moreover, for the first time the planners admitted the need to establish an appropriate regulatory framework to foster consumer confidence, though this proposed measure was limited to the monitoring of electronic commerce. However, the plan revealed evidence of a hidden agenda harking back to earlier producer-oriented policy formulations. The planners remarked:

Consumer confidence is essential for successful businesses. Policy measures to reinforce consumer confidence are, therefore, essential to economic prosperity and
any additional costs for business are generally outweighed by the overall benefits for them of improved consumer confidence in the market. (EC:1998b:4)

Thus, in the midst of a plan to enhance consumer confidence in the Single Market in particular and the EU in general, there is evidence of a return to the once-dominant tendency to view developments largely through a 'supply-side lens'.

However in spite of repeated commitments on the part of the Commission in favour of bolstering consumer rights, it seems that, in general, EU citizens have proved less open to manipulation than the politicians hoped; the latest Action Plan still characterises EU citizens as "increasingly alienated from the EU and its processes and institutions". (EC:2002e:10)

It draws the same inferences as earlier plans and argues that "future EU consumer protection policy should both produce concrete benefits for citizens in their daily life, but goes on to recognise explicitly the need to engage consumers in the development and implementation of that policy". This approach seems to reflect the general strategy of improving EU governance, set out in the White Paper (EC:2001a).

The introduction of the single currency represented a unique opportunity to win enhanced citizen approval for the EU, as a result of the tangible benefits expected to accrue. The Commission recognised that this departure represented a critical moment in the development of the single market; one which required more than the simple adoption of a common currency. Evidence of awareness of citizen dissatisfaction is obvious in the conscious reference to the risks of a collapse in citizen satisfaction set out in the 2001 Green Paper on Consumer Protection which noted:

The circulation of the Euro notes and coins beginning in January 2002 gives a huge opportunity to develop the consumer single market. If it is not taken, citizens will be left with the impression that the EU's core project – the internal market – is an irrelevance to their daily lives and simply a project designed to serve the interests of business." (EC:2001b:3)
Once again, there is evidence of an overt recognition of the connection between the economic benefits actually accruing to citizens as consumers via the working of the Single Market and their willingness to continue to support the EU and its institutions in general. Indeed the above extract suggests a growing anxiety of EU Commission officials that failure to deliver the promise of economic pay-offs for consumers could lead citizens to perceive the Single Market as terminally unbalanced in favour of business and thus prompt a critical erosion of support for the whole EU project.

It may be that the Commission's use of the rhetoric of the 'citizen-consumer' is not aimed directly at the citizen (one has to ask the question, how many average citizens actually read Commission documents addressing consumer rights issues?) but at member states' politicians. The rhetoric of the 'citizen consumer' may have been intended to prompt national politicians into supporting Commission objectives with regard to consumer policy. As Chapter Three explained, the support of the member states in achieving Commission objectives is critical, as the Commission needs member states to approve its policy propositions and relies upon their close co-operation to put policy decisions into effect at ground level. The member-states are the key mediators between the EU and its citizens. The language of the 'citizen' has tended to be presented by the Commission as a non-specific imperative, one which is paraded as a conspicuous justification to national politicians of their undeniable obligation 'to put the citizen first'.

Conclusions

The explicit appearance of the concept of 'the citizen-consumer' in the development of the model of EU citizenship was relatively late. It is only recently that this aspect of the citizen role has been emphasised in academic or political discourse. Before the late 1990s, it is noticeable that the notion of the citizen-consumer appears to have been largely absent from the common discourse on citizenship at the EU level (ESC :1996). Its inclusion in academic literature also appears to have been very limited, although Reich has taken up this theme (Reich: 1998). The relative absence of a discourse on the 'citizen-consumer' seems all the more curious given the centrality of the Single Market project to European integration. Of all the transnational activities that European citizens
engage in, it might be thought that making purchases, in one form or another, would be the activity in which they are most frequently involved.

An essential element of a constitutional democracy is that citizens should be able to exercise and enforce their rights. Enforcing their rights implies more than access to redress mechanisms. It also implies that the systems created by the framework of law should work to deliver the protection they promise. Reich makes this point when he comments: "there is no doubt that the European Union/Community as it stands has, despite its contradictions and limitations, developed an impressive set of consumer and citizens' rights in a broad sense. Enforcement, however, is still weak..." (Reich :1998: 467).

It appears that the rhetoric has, however, amounted to more than 'hot air'. The rhetoric on the citizen consumer has been translated in some areas into formal policy commitments and EU legislation. This is clearly evinced in a number of principal documents. For example, in a Resolution of 28th June 1999, the Council entered into a commitment to promote consumer policy in the EU in the following terms: "...the consumer policy of the Community should support and supplement the policy pursued by the Member States and Member States may adopt or maintain in force more stringent provisions – which must be compatible with the Treaty – to ensure a higher level of consumer protection;"
(Council:1999:1)

Rather more significantly, the same Resolution formally called upon the Commission to:

...continue its active policy aiming at the maintenance of market transparency and market balance in the interests of the consumer, in particular in the area of the information society, electronic commerce, distance selling, financial services and the opening to competition of public utilities; continue as part of this policy to work on the protection of the legal interests of consumers including in particular their easy access to redress procedures... (Council:1999: 2)

This Resolution is very significant in that it represents an overt admission by politicians of the member-states that, hitherto, the Single Market has been so unbalanced against the interests of consumers that a major policy drive is essential to redress the balance. It is
also significant in that, although specific commitments are made to tackling this imbalance, initially in specific areas – information society, e-commerce, distance selling, financial services and public utilities – the commitments to transparency and market balance are general and may be expected, in principle, to apply right across the market. This policy has been carried forward by Directives aimed at the areas listed above. A month before this Resolution was adopted, the EU had already published a new Directive on guarantees and redress in the case of defective goods which embodied a clear commitment to promote cross-border sales. This was followed a year later by a Directive on electronic commerce and again, in September 2002, by a Directive on the distance marketing of consumer financial services. Nonetheless, the use of rhetoric, policy commitments and even the publication of Directives does not necessarily mean that the intentions contained therein are translated effectively at ground-level. Successful performance relies upon another, less easily traceable strand of political will – implementation and enforcement. The ensuing chapters will attempt to relate the rhetoric of the Commission and Council's commitments towards citizen consumers with the reality that they experience at ground level, through the examination of selected Commission initiatives and through two case-studies of consumer experiences in specific market sectors.
CHAPTER 5

REVIEW OF SELECTED EU INITIATIVES ON CONSUMER POLICY

Introduction

The previous chapter examined the concept of the citizen-consumer and explored how the Commission had invented the rhetoric of the citizen-consumer in an attempt to strengthen the legitimacy of the Single Market in the eyes of the consumer. It was argued that an essential component of improving legitimacy was by ensuring that consumers could access the rights granted by the Commission through adequate enforcement and redress mechanisms. The Commission's desire to address matters of concern to citizens as consumers is both a response to perceptions of consumer dissatisfaction or inertia and also to the results of studies undertaken on the part of the Commission of the inadequacies of cross-border consumer redress systems. These will be considered in greater detail below.

The Commission has adopted a multi-layered approach in its attempt to improve the functioning of the Single Market for its consumers. The scope of the Commission's supervisory capacity is limited by the EU treaties, as are its powers actively to enforce EU laws on the ground. As explained in Chapter Three, the nature of EU regulation involves a power-sharing arrangement in which competencies and responsibilities for different parts of the regulatory process are divided between the different levels of EU governance. The majority of enforcement and monitoring powers are consequently devolved back down to the level of the member states themselves. Thus, in addition to EU regulations and existing national legal provisions, EU directives, once incorporated into the national legal systems, become applicable in the national courts as national law. The EU has adopted this approach because of the diversity of the states' different legal traditions and because of the complications that would arise from attempting to develop
EU legislation that automatically fits fifteen (or more) legal systems. However, the effect of this approach has been largely to cut the Commission out of the supervisory and feedback loop as to what is happening at ground level. The approaches adopted by the Commission to bolster enforcement and monitoring, have therefore been a mix of legislative and non-legislative measures and it is possible broadly to categorise the Commission's approaches into two main types: first, dispute resolution/information based measures and second, legislative measures designed specifically to cover cases relating to cross-border consumer problems.

The present chapter is designed to respond specifically to the research foci in Chapter One, in exploring how the Commission, limited in its abilities to monitor implementation and enforcement at ground level, has attempted to compensate for the constraints under which it is obliged to operate. The chapter also aims to describe and examine the functioning of these strategies in order to make some assessment as to the success of these measures.

The chapter falls into two broad sections. The first section offers an analysis of the rationale behind the Commission's increased focus on policies to facilitate cross-border enforcement and redress of consumer problems; the second section concentrates on the initiatives that formed the main back-bone of the Consumer Protection and Health Directorate's approach (DG SANCO). The initiatives to be examined in the second section comprise the following: European Consumer Centres (gradually developed since the early 1990s), the European Extra Judicial Network (2000), and the European Consumer Complaints Form (1999); these three initiatives may be broadly categorised as dispute resolution/information measures. In addition to these, are a number of legislative measures including the Directive on Injunctions for the Protection of Consumer Interests (1998); the Sale of Goods and Associated Guarantees Directive (1999); the proposal for a directive on Unfair Commercial Practices (2003); and the proposed regulation on consumer protection co-operation (2003). These have been chosen because they are directly designed to improve the enforcement and access to redress of consumers' economic rights across borders.
**Rationale for Action**

*Problems Faced by Consumers in Cross-Border Claims*

An appropriate starting point for this chapter is to establish and examine the main problems that continue to face EU consumers in fully accessing the Single Market, as perceived and addressed by the Commission. In essence, consumers face two major obstacles. First, consumers suffer from inadequate redress mechanisms in cross-border cases, which places them at a serious disadvantage in accessing the single market, as the authors of a report written for the Commission suggest:

The results of the ... study on the Cost of Judicial Barriers for Consumers in the Single Market could be summarised as a non-existent single legal market for consumers... A rational actor would not pursue a cross-border consumer claim within Europe in court. (Feldtmann, Von Freyhold & Vial :1998:1)

The authors attribute the inaccessibility of judicial redress for both end-consumers and, small to medium enterprises (SMEs) to the costs and to the time that cross-border cases take to resolve. They observe that the cross-border judicial redress mechanisms are particularly ill-suited to the types of low-cost transactions that end-consumers and SMEs tend to engage in (Feldtmann, Von Freyhold. & Vial :1998: 279). The second problem that faces consumers across borders is that of the limitations to the jurisdiction of national legal systems and legal bodies. The two sets of problems are examined in some detail below.

Consumer organisations by and large are not prepared to help in international cases and except for a few regional institutions created for consumers to support them in cross-border cases, consumers have to rely on the existing legal structures of the member states to pursue claims (Gessner: 1998, Weatherill: 1999). This may be due to the fact that consumers lack the resources to undertake such tasks, or because they do not have the legal basis to act in this kind of capacity. Weatherill (1999:719) comments: "Cross border consumers are likely to be deterred by an unfamiliar legal system; representative
agencies in the state where loss is suffered typically lack capacity to take legal action because they are not the national bodies of the offending country; agencies in the state whence the practice originated typically lack an interest in pursuing the matter since 'their' consumers are unaffected. These obstacles present increasingly significant threats to consumer confidence in the viability of the integrated market. Consumers pursuing cross-border claims usually have no prior experience of such an undertaking and are faced with unfamiliar legal and court proceedings. The Commission 1993 Green Paper on Consumers Access to Justice (1993a:59) concurs with the above analysis and notes the further complications posed by the submission of documents which must cross borders; for instance, problems posed by the translation of documents and the enforcement of judgements.

Even if consumers were to attempt to enlist the aid of a lawyer in order to pursue a cross-border consumer court-case, they would still encounter significant barriers. Most lawyers refuse to take on international cases and those that do deal with business disputes, because they are more lucrative. Few lawyers have experience of cross-border consumer claims either because they refuse to deal with them or because few consumers have brought such cases before lawyers (Gessner:1998). Moreover, lawyers' fees are too expensive for the majority of consumers to justify pursuing a cross-border court case. The costs of pursuing a legal claim for 2,000 Ecu vary across the states. Consumers can pay anything from 980-6,600 Ecu (Gessner: 1998). Given that even a successful plaintiff would have to pay a portion of the costs, the cost of litigation generally outweighs the benefits that might accrue from a successful court-case.

The time factor presents another element to the problem posed by cross-border consumer litigation. Gessner (1998:335) estimates that: "Whereas some member states offer proceedings which take a year or less, the courts with jurisdiction over small claims in Ireland and in Italy, in particular, need several years to resolve a dispute. The average duration of a cross-border civil suit in Europe is almost two years at the defendant's residence and six months at the plaintiff's residence."

Although the creation of the Rome (1980) and Brussels (1968) Legal Conventions were intended to iron out problems posed by differing legal traditions and jurisdictions, their impact for consumers has been patchy and limited. The Rome Convention deals with the
area of conflict of laws and is an instrument of international law. It helps to make decisions regarding the correct applicable law in cases of conflict of laws. However, there are exceptions and the Convention does not cover all situations; for example, certain areas of conflict in contractual relations such as consumer credit are not covered. The Brussels Convention deals with issues arising from the jurisdiction and execution of judgements in civil and commercial matters. According to the European Consumer Law Group (ECLG: 1998:316):

It [the Brussels Convention] also contains certain consumer protection rules in Art 13-15. The Protocols accompanying the Convention give national courts of appellate level the possibility to refer questions of interpretation to the European Court of Justice: thereby some legal problems have been settled or will be settled with particular importance to consumer cases...

The European Consumer Law Group (ECLG:1998:318) claims that the one of the most ineffective mechanisms for consumers in cross-border cases is the “exequatur” procedure provided for in the Brussels Convention. This procedure normally only has positive economic benefits for consumers in litigation cases of over 2,000 Ecu; for the majority of consumer purchases which fall below this threshold, cross-border litigation falls outside of the remit of the Brussels Convention. The ECLG (1998:318) view this as a denial of justice for everyday consumer matters. They note moreover, that the Convention in this respect contrasts with Art 6 (1) of the Convention on Human Rights to which the EU is indirectly bound by Art F (2) of the Maastricht Treaty and Art 6 (2) of the Amsterdam Treaty. The ECLG (1998:318) argues that:

...traders may, due to the increasing internationalisation of the legal profession which has been intensively promoted by the Commission, easily take consumers to court in whatever country best suits their interests, provided the Court is competent according to the jurisdiction rules of the Brussels convention. Law enforcement is therefore highly asymmetrical in consumer matters – quite in contrast to the objectives of the Internal market and consumer policies of the Union.
Gessner (1998:336) comes to the following conclusions with regard to the Brussels Convention:

A theoretical assessment leads to the conclusion that conventions like the Brussels Convention are ineffective tools for accomplishing the harmonisation of law and legal cultures in Europe. Only exceptionally, legal certainty can be reached through legislative action alone. In most legal cultures, legal actors do not base their confidence in fulfilment of legal obligations on a programme, but rather on persons (relational contract) or on roles and institutions. European law has largely neglected these levels of providing legal certainty. In the context of cross-border claims, little has been done to foster access to foreign lawyers and to foreign courts. And courts are insufficiently equipped to deal with international cases...

The problem of the geographical barriers posed by legal jurisdictions is also mentioned in the Commission's Green Paper on Access of Consumers to Justice (1993a: 67). The Paper describes the situation facing those engaged in cross-border litigation in the following manner and notes the inadequacies of the Brussels Convention in providing an effective remedy, in particular the problem of the non-portability of legal instruments:

At present we are faced with the following paradox: the organisations/authorities of the place where the harm occurs do not have the capacity to act (the locus standi being reserved under the lex fori to the national organisations); the organisations/authorities of the place where the measure is to be enforced do not have an interest (in the legal sense) in bringing an action (the interests of national "consumers" are not affected by a practice addressed to "foreign" consumers). Rebus sic stantibus, it is enough to shift the locus of unlawful practices beyond the border represented by lex fori, to be virtually out of reach of any action for an injunction. The purpose of the Brussels Convention (Article 24) is perverted and the principle of non-discrimination (Article 7 of the Treaty) would appear to be
jeopardised, in so far as the lex fori reserves the right of action to "national" organisations.

Gessner (1998:335) estimates that consumers suffer from considerable adverse macroeconomic effects as a result of the uncertainties posed by cross-border consumer redress. He argues that because consumers are deterred from making significant cross-border purchases by the prospect of difficulties that they might encounter in case of cross-border litigation, international trade within the internal market is significantly lower and the price level for goods and services is consequently higher. This analysis is also supported by similar conclusions arrived at by the Commission's Extended Impact Assessment on Unfair Consumer Practices attached to the proposed Directive on Unfair Commercial Practices of 18th June 2003 (EC:2003d:2).

In his socio-legal study into the current state of cross-border consumer redress, Gessner and a team of researchers based at Bremen University, financed by the EU Commission, concluded that existing mechanisms for handling cross-border complaints and litigation have been "highly ineffective and unsatisfactory from an internal market and a consumer protection point of view" (1998:317-318). Gessner (1998:335) continues: "A single market will not become reality without trustworthy, accessible and effective legal institutions. The structures offered for cross-border civil litigation are far from showing these qualities."

**Consumer Inertia and the Commission's Response**

**Evidence from Studies and Working Parties**

The Commission has collected a large body of evidence as a result of green papers, commissioned research studies and from expert working groups which support the idea that effective consumer enforcement and access to redress are integral to the success of the Single Market. Research in this field dates back to the early 1990s and was first dealt with in the Commission's 1993 Green Paper on Access to Justice (COM (93)576 Final). Subsequent documents, the Commission Green Paper of 1996 on Consumers' Access to Justice (COM (1996) 13 Final), the 2001 Cardiff Report (COM (2001)736 Final), the
2001 Green Paper on Consumer Protection (COM(2001)531 Final), the Commission's Response to the Green Paper (COM(2002)289 Final) and the impact assessment research reports connected with the proposed Directive on Unfair Commercial Practices (2003), further explain and justify the Commission's rationale for improving monitoring and enforcement of consumer policy at EU level. The results of these documents are discussed in some detail below.

In the 1993 Green Paper, the Commission recognised the need for action to improve consumer redress and enforcement on a number of grounds: first, on the legal grounds that in a system of governance based on the rule of law, citizens acting in whatever capacity (including the consumer capacity) have the right to access effective legal redress mechanisms. According to the Green Paper (1993a:5): "Access to justice is at once a human right and a prerequisite for an effective legal order – any legal order, including the Community one."

Second, the Green Paper (1993a:6) also recognised that the Community faced particular problems with regard to providing its citizens with effective civil law protection, especially in the realm of consumer protection. Whilst acknowledging the non-discriminatory principle that EU citizens have the right to access to justice anywhere in the EU, the paper notes the practical problems to this posed by the geographical limitations of national legal jurisdictions and legal procedures (1993a:12).

The Economic and Social Committee (EC, 1993a:12) also concurred with this analysis in its Opinion on Consumer Protection and Completion of the Internal Market (adopted 26 September 1991). The Opinion affirms:

The problems of access to the courts, which the creation of a European area will pose are far from having been resolved. If there is a dispute, the single market will be replaced by 12 – or even more – legal systems, all jealous of their independence and sovereignty.

Furthermore, the Green Paper (1993a:7) recognised the need for effective remedies in cross-border consumer protection cases on the grounds that access to effective redress
mechanisms was likely to have a long-term beneficial effect on the functioning of the Single Market and the EU economy by deterring future offenders.

This point is also taken up in the Commission's 2001 Communication on "Widening Consumer Access to Alternative Dispute Resolution" (COM (2001)161 final). Here, the Commission specifically argues the case for improved consumer access to alternative resolution dispute procedures in the following terms:

The possibility of using alternative mechanisms to the courts can also prevent disputes from arising by providing an incentive for parties to settle before the need to formalise their problems with a third party. Thus the mere presence of these procedures may motivate the prevention of problems. This is not just a question of promoting consumer confidence but also ensuring there is effective competition and access to the Internal Market for business, especially SMEs. (EC: 2001g:3)

During interviews with some officials of the Commission, it was made clear that, in their view, the acid test of the success of the Single Market is not whether large numbers of European consumers make a habit of physically trading across frontiers, but whether they are able to access goods and services at comparable prices and under similar conditions of sale as consumers in other parts of the market. However, evidence from the Cardiff Report indicates that this is not generally the case in that the market continued to show significant internal price differences, due to 'economic' not 'geographical' causes. On average, price differentials were between 30-40% and this order of difference cannot simply be explained in terms of the cost of transport. For certain products the figure was much higher, for example, the maximum price difference for Gillette shaving foam gel was 132%, the maximum difference for Ajax surface cleaners was 281% and the maximum price difference for Evian mineral water was 328% (GFA: 2002:44). The Commission concluded that the continuation of these price divergences would clearly benefit certain companies which may well resist increased transparency and competition (EC: 2002g). One of the Commission's arguments in favour of improving consumer access to justice and redress mechanisms across borders has rested on the notion that an
improvement in the situation regarding the enforcement of consumer rights would boost consumer confidence to engage in cross-border shopping activities. This would in turn help to reduce price differences across the member states by reducing the potential for businesses to segment the market across state boundaries: offering significantly different prices and conditions of sale to nationals of one state as opposed to another. Effective consumer enforcement and redress have therefore been identified by the Commission as key mechanisms for ensuring the successful functioning of the Single Market.

Given the general propensity of businesses to shield themselves from competition and to disregard, where possible, uncomfortable pressures from consumers, it is difficult to understand which mechanisms would promote price convergence unless it be the market force exerted by consumers who 'shop around' and who make the time and effort to seek out the best price. In the context of a Single European Market, this means consumers who actually do cross frontiers in search of a 'good deal'. In reality, 'economic safaris' may only be worthwhile in the case of significant purchases, but the increasing use of the internet as a market space provides a mechanism for 'shopping around' across frontiers at little cost. Evidence of consumer awareness of price differentials does not guarantee that suppliers will bring about a convergence of asking prices; evidence of changing patterns of consumer behaviour is usually necessary in order to promote price convergence.

There is no logic to the notion that prices will converge in the Single Market unless consumers have the power to shop across borders with confidence. They will not do so readily unless there are effective enforcement mechanisms and regulatory market mechanisms to protect them. It would be sufficient for the mechanisms to exist and for businesses to be aware that consumers could and would use them in order for businesses to become more circumspect in their treatment of price differences across borders.

**Evidence from Euro-barometer Opinion Surveys and European Consumer Centres**

It is important to note that the Commission's evidence was not simply based on expert analyses. The Commission also based its rationale for action on evidence that filtered upwards - from the experience of the consumers themselves and from the European consumer centres, although it is true that this information was still collected and interpreted by the Commission. DG SANCO (the Consumer DG) commissioned a
number of independent studies in preparation for the proposal for the Directive on Unfair Commercial Practices (EC:2003d). One of these – undertaken by GFA Management (2002:31) - studied cross-border shopping trends based on evidence from a number of Euro-barometer polls on cross-border consumer shopping habits. The report appears to provide confirmation of many of the suspicions upon which the Commission had previously based its analysis. The report, based on information gathered for Euro-barometer 57.2 – 2002 concluded that even after the introduction of the Euro, purchasing across borders was still the exception for European consumers. The report claims that cross-border shopping by consumers has not been significant so far. It found that 13.3% of respondents had bought or ordered products and services for private use from shops or sellers in another EU country in 2002 compared with 10.3% in 1991 and the study concludes that this figure represents stagnation. However, the evidence from the Euro-barometer is not altogether straightforward as it excludes data regarding the purchase of travel, accommodation and meals. In view of the fact that the study revealed, unsurprisingly, that the majority of consumers engage in cross-border purchases whilst on holiday, or whilst visiting for purposes other than shopping, it seems peculiar to disregard these categories. It would be safe to assume that if these purchases were taken into account, the amount of business to consumer transactions taking place across borders would rise considerably. Moreover, if the respondents of the Euro-barometer are to be taken as a representative example of the EU population then 13% should not be discounted as an insignificant figure. Whilst 13% represents 2.7% net growth, compared to 1991, it actually represents comparative growth of 26.2%. Thus over a quarter more consumers in 2002 engage in cross-border shopping compared to 1991. 13% means that 1 consumer in 7.6 engages in cross-border shopping (GFA Management: 2002:31). The report appears to bias deliberately the information obtained to minimise the scale of the increase in cross-border shopping. This point is significant and has been used as an argument both in favour of and against improving enforcement and redress mechanisms for consumers across borders. The Commission, for example, has repeatedly argued that cross-border shopping should be encouraged as a way of bringing down prices in the EU and stimulating economic growth, especially for small to medium enterprises.
Another important aspect of the GFA report and a third rationale for action dealt with consumer perceptions of obstacles to cross-border shopping. Again, based on evidence gathered by the Euro-barometer polls and surveys and gathered during a survey of European Consumer Centres, consumers reported a number of areas which they identified as obstacles to cross-border trade. In Euro-barometers 35.1 (Spring 1991) and Euro-barometer 43.1 (summer 1995) (GFA:2002:66-67) consumers were asked what they saw as the three main obstacles to buying or selling (transactions) with another EC member state. The consumers were allowed to choose their three most important obstacles from a list of nine. The results of the Euro-barometers were compared in the report and the importance of the obstacles were ranked in order from 1-9 in terms of the most to the least important. The results from each were remarkably similar.

Both questionnaires reported that difficulty in exchanging the product or in getting it repaired ranked first as an obstacle to cross-border shopping (53% of respondents named this as a major obstacle in 1991 compared to 54% in 1995). The second most important obstacle named was language difficulties (39% of respondents in 1991 and 37% in 1995). The third most important was difficulty in settling disputes (29% in 1991 and 33% in 1995) and the fourth was difficulty in obtaining information and advice (27% in 1991 rising to 29% in 1995). In its interpretation of the evidence, the report distinguished between non-policy induced and policy-induced obstacles. It suggested that the first two obstacles listed, described as practical problems, related more to distance than cross-border problems. Of the second two - relating to conflict settlement, consumer advice and the need to reduce consumer uncertainty, the report suggested that these were more appropriate problems to be tackled from a policy point of view (GFA:2002:68).

The only Euro-barometer after 1995 to enquire about trends in cross-border shopping was EB 57.2 (May/June 2002). In this EB (GFA:2002:68-69) both questions and methodology differed from the previous ones. This time only respondents less confident in buying from a supplier across borders were asked about the reasons for their lack of confidence. Respondents were given eight possible reasons for their lack of confidence and were asked to rank the reasons from 1-4. In a separate survey (May 2002) (GFA:2002:70) twelve European Consumer Centres (ECCs) were themselves treated as respondents and asked to reply to a similar set of questions. Again, the ECCs were asked
to rank the given reasons on a scale of 1-4 (4 = very important, 1 = not at all important). According to both EB 57.2 and ECC survey (May 2002) the most pressing obstacle was the difficult resolution of after sales problems such as complaints, returns, refunds and guarantees. Both the EB and the ECC survey ranked this issue as the most important; on a scale of 1-4, the EB rated this issue 3.57 and the ECC 3.92. The second most pressing obstacle was 'difficulty to take legal action through the courts' – both ranked this as second in importance (EB 3.47 and ECC 3.83). The EB rated 'Greater difficulty to ask public authorities or consumer associations to intervene on one's behalf' as third (3.41), whereas the ECC rated 'lack of information about consumer protection laws in other EU countries' as third (3.33). Importantly, both the EB and the ECC survey emphasised access to justice problems and information problems as the most important obstacles to cross-border trade (GFA: 2002: 70). A detailed break-down of the ECC survey revealed that the majority - eleven out of twelve ECCs - viewed 'difficult resolution of after-sales problems such as complaints, returns, refunds and guarantees' rated 4 (very important). And ten out of twelve thought that 'difficulty to take legal action through the courts' also rated 4. (GFA: 2002:72).

In an earlier Euro-barometer 56.0 (2001), it was revealed that 89% of consumers thought that the level of protection afforded consumers should be the same in all member states, i.e. harmonised. The report claims that this evidence "has been interpreted [by Eurobarometer survey 56.0, 2001] as a clear mandate for strengthening consumer protection throughout the Union" (GFA:2002:74). Support for this view also came from the ECCs themselves. In the ECC survey referred to above, consumer advisers were presented with three hypothetical scenarios designed to encourage consumers to shop across-borders. They were then asked to assess how the willingness of consumers to shop across borders would change depending on each of the three scenarios. Scenario A consisted of updating EU regulations, no new directives but stronger enforcement. None of the ECCs thought that this strategy would have any impact on the status quo. Scenario B advocated a form of minimum harmonisation of EU legislation with new sector specific directives and stronger enforcement. Three of the ECCs thought that this would lead to higher cross-border consumer participation, two thought it would lead to lower participation and six thought there would be no change. The last scenario (C) suggested
full harmonisation of EU legislation based on a general clause on fair commercial practices, plus sector specific directives and stronger enforcement. All of the ECCs thought that this would lead to higher cross-border consumer participation (GFA: 2002:77). The evidence demonstrates a high level of support for a significant strengthening of the Commission's strategy on cross-border consumer protection. In addition to the documents examined above, a number of events organised by the Commission (and involving a wide sweep of interested parties) promoted and supported the idea of making consumer redress and enforcement easier across frontiers. Towards the late 1990s the use of alternative dispute resolution bodies was increasingly widely supported as an alternative to court procedures. For example, the Commission Communication on "Widening Consumer Access to Alternative Dispute Resolution" refers to the support of the participants of the Internal Market Forum (28-29 November 2000) for improved Alternative Dispute Resolution procedures:

The importance of confidence, both for consumers and business was highlighted at the Internal Market Forum organised jointly by the Commission, the French Presidency and the European Parliament on 28-29 November 2000. Attended by over 4000 participants there were loud calls for out-of-court measures for resolving disputes which worked as the courts were seen as too expensive and time consuming (EC: 2001g:2).

Working groups were also convened on the promotion of consumer confidence, particularly with respect to forms of alternative dispute resolution mechanisms for e-commerce. These reunions included the Commission Hearing 4-5 November 1999 on "Electronic Commerce: Jurisdiction and Applicable Law" and the Commission workshop on Out-of-Court Settlement Systems for E-Commerce 21 March 2000 (EC: 2001g:5). Thus, as the above section demonstrates, in prioritising the enforcement of consumers' economic interests across borders, the Commission was reacting to strong evidence from a variety of sources stressing the need to build consumer confidence in the internal market.
Evidence of Political Support for Action in Consumer Redress and Enforcement

Evidence of political support from the Council of Ministers and the member states themselves presents a confusing and mixed picture, particularly during the earlier years of the development of EU consumer policy as the passages below demonstrate. On the one hand, the Council produced a range of Resolutions recognising the need for improvements in this capacity. The earliest Resolution to recognise the significance of barriers to consumer redress in the cross-border context was issued in April 1975 as the "preliminary programme of the European Economic Community for a Consumer protection and Information Policy" (Council: 1975). The recognition of these barriers was reiterated in subsequent Council Resolutions in 1981 (Council: 1981) on the occasion of the second EEC consumer protection and information policy programme, in 1986 in 'Future guidelines for Community policy for the protection and Promotion of Consumer Interests" (Council: 1986), and in 1989 in "Future priorities for re-launching consumer protection policy" (Council: 1989). A further Council Resolution (1987) expressly concerned with consumer redress came belatedly in response to Communications from the Commission on the subject. The Commission initially sent a Communication to the Council in 1985 (COM (84)692 final), which was followed by a Resolution in the European Parliament (EP: 1987) and, finally, a supplementary Commission Communication on 7th May 1987. It might be viewed as significant that the Council response came in a Resolution dated 25 June 1987 – a delay of over two years from the first Commission Communication on the subject matter, and clearly prompted by the Commission's supplementary Communication. The Resolution invited the Commission to complete its analysis of the problem taking into account the enlargement of the Community to include Spain, Portugal and Greece. On the other hand, evidence of actual improvements to this area of policy-making was slow to materialise at ground level. For example, despite the existence of international legal conventions aimed at harmonising the field of civil disputes across frontiers (Brussels 1968, Rome 1980, the Hague Convention 1965 and the Hague Convention 1970), by 1993 none of these conventions were in force in all of the member-states (Commission, 1993:59). The Brussels Convention was delayed because four of the signatory states had not ratified it. The extension of the Rome Convention to Spain and Portugal was delayed because by 1993
the Netherlands was the only state which had ratified it. The Hague Convention (on the service abroad of judicial and extra-judicial documents in civil and commercial matters) was signed by all the member-states, but by 1993 not ratified by any of them. Finally the Hague Convention of 1970 (regarding the taking of evidence across borders in civil or commercial matters) was only ratified by eight member-states.

However, further evidence of renewed support for improved co-operation in civil and commercial justice may be seen in the inclusion in the Treaty establishing the European Community of Article 61(c) which provides for the Council to adopt measures relating to judicial co-operation in civil matters. Article 65 (c) of the Treaty specifically mentions that these measures should aim to eliminate obstacles to the good functioning of civil procedures. The Treaty of Amsterdam also lent further support to the creation of a European legal space. Furthermore, numerous European Councils have reaffirmed their commitment to the improvement of alternative dispute resolution (ADR) systems, for example in Vienna, in December 1998, and in Tampere, October 1999.

The Tampere Council (devoted to the establishment of an area of freedom, security and justice in the EU) was also highly significant in other important respects with regard to achieving concrete improvements in the EU legal system. For example it led to the adoption of a Council Regulation (EC No 44/2001) which replaced the Brussels Convention, and helped to simplify jurisdiction problems in legal cases spanning the EU borders. Moreover, the adoption of a Regulation solved the problem of ratification and incorporation by the member states because it applied to the states directly. The Tampere Council also led to improvements in the co-operation of national enforcement bodies by establishing a network of national authorities with responsibility for civil and commercial law (a European legal network). The network consists of representatives of the states' judicial and administration authorities who meet several times during the year in order to exchange information and experience. The Tampere Council was also key to the establishment of minimum standards to ensure an adequate level of legal aid in cross-border cases throughout the Union (Commission: 2002: 2). Thus, the Commission's preoccupation with improving cross-border consumer redress and enforcement mechanisms may be viewed as being in line with a more general determination within the
Community to improve the legal situation in the EU, particularly with respect to legal problems across borders.

This chapter thus far has attempted to explain the rationale underpinning the Commission's increased preoccupation with cross-border redress and enforcement since the 1990s. Evidence from reports and studies, as well as evidence filtering upwards from consumers themselves combined gradually to persuade the Commission (particularly the Consumer DG) of the need for action. Political support from the member states for improved enforcement and redress presents a mixed picture during the 1980s and early 1990s, although the European summits in Vienna and Tampere demonstrate a greater and clearer commitment to improving the functioning of a European legal space, especially with respect to legal problems which cut across borders. In response to mounting evidence of cross-border consumer problems, the DG for Consumer Affairs began to take action, devising a range of decentralised legislative and non-legislative measures aimed at reinforcing the ability of consumers to enforce their Community economic rights. The second part of this chapter examines a number of these key cross-border initiatives in order to provide some evaluation as to how effective the Commission's strategy has been, in this respect. These illustrate some of the ways in which the Commission has attempted to overcome the institutional constraints under which it has been obliged to operate in this field.

Commission Initiatives

Overview of the Consumer and Health Policy Directorate's Strategy

The Commission began its strategy of developing easier and less expensive redress mechanisms for consumers across borders by initially supporting national projects for small claims procedures during the late 1980s and early 1990s — for example, the small claims courts in Dundee, Scotland, and Lisbon, Portugal. These were complemented during the early 1990s with the embryonic system of European Consumer Centres — providing information, advice and assistance to consumers engaged in cross-border activities. This system was refined and developed over the course of the decade especially towards the late 1990s and was supported by the development of coordinated
systems for the exchange of information on ADR mechanisms available at national level. The late 1990s also witnessed the increased reliance of the Commission on directives (with the objective of enforcement), which have an in-built cross-border dimension to them such as the Injunctions Directive 1998 (98/27/EC) and the Directive on Guarantees 1999 (1999/44/EC). The initiatives analysed below are divided into non-legislative and legislative measures and, within these two categories, are examined in chronological order.

**European Consumer Centres (EuroRuichets)**

In 1991 DG SANCO (then DG XXIV) began to establish a pilot programme of cross-border information projects for consumers, primarily in border regions. Initially, centres were established in Lille (France), Gronau (Germany), Luxembourg, Mons (Belgium), and Barcelona (Spain), and were co-funded by the Commission. By the end of 1996, 17 centres were operating in the EU in addition to those already mentioned. These comprised: Bilbao (Spain), Bolzano (Italy), Dublin (Ireland), Flensburg (Germany), Guimaraes (Portugal), Kortrijk (Belgium), Montpellier (France), Patras (Greece), Santiago di Compostela (Spain), Torino (Italy), and Veurne (Belgium). In the light of an evaluation of the centres conducted in 1997 by Wilhelm Consulting (1997), an organisation working on behalf of the Commission, four of the centres closed and a number of other adjustments were made to the operation of the ECCs designed to improve the highlighted defects. Many of the centres were relocated to more central locations and the remit of the centres was also broadened so that it dealt with European consumer issues more generally, rather than just trans-border issues. In 2001, there were 11 ECCs – Vienna (Austria), Helsinki (Finland), Lille (France), Gronau (Germany), Kiel (Germany), Dublin (Ireland), Howald (Luxembourg), Lisbon (Portugal), Barcelona (Spain), Vitoria (Spain) and London (UK). By 2002 this number had risen to 14, with a centre opened in Stockholm (Sweden) and another opened in Rome (Italy). The ECC project was designed to provide consumers with information about cross-border consumer issues and consumer protection, to respond to queries and requests from consumers about such issues and to provide, where necessary, assistance and legal advice in settling cross-border disputes between consumers and businesses. The centres were
also mandated to co-operate with each other and to carry out cross-border comparisons on consumer related issues. The project was underpinned by a well-defined political rationale, namely to connect the citizen-consumer with the single market project. This is clearly stated in the 1997 evaluation report (Wilhelm Consulting:1997:10):

The key issue for the increasing participation of consumers in the single market is awareness building. The public image of the Single Market is to a wide extent still that of the Single Market for European Producers. National trade policies and Community support programmes for the promotion of international business corporations at the EU level have successfully established the European dimension in trade and commerce. Further progress in the development of the Single Market, however, will also need the active participation of the consumers in the European-wide exchange of goods and services. This requires improved consumers' awareness of potentials in the Single Market. The pilot projects have been successful in contributing to this target in an efficient way.

Although the ECCs in existence in 2003 may largely be viewed as having successfully contributed to the information and knowledge of EU citizens, particularly across borders - (for example, in 2002 the centres were contacted more than 102,000 times, which represents an increase of 8% on the figure published in 2001(ECC: 2002:9)) - this was not entirely the case in 1997 at the time of the first evaluation report. A number of factors have affected and continue to affect the success of the project as a whole, as an examination of the 1997 evaluation report and annual activities report of 2001 and 2002 reveal.

The starting point for this discussion should be a brief outline of the outcome of the 1997 evaluation report as this gives an immediate insight as to the level of success achieved by the ECCs by 1997. The centres were assessed according to a detailed evaluation check list of 15 criteria4 (Wilhelm Consulting:1997:5). For each of the criteria, the centres were

4 "Location, infrastructure and available resources:
Regional location, Local support (quality of premises), Political support, Technical equipment, Communication facilities, Quality of man-power resources, Capacity of available man-power, Available working languages... (cont. over page)
evaluated on the basis of their own individual merits. The centres were marked on a points system – each criterion carried a maximum of 2 points and a minimum of minus 2 – thus the maximum score possible was 30 and the minimum minus 30. Of the 17 projects only 8 were evaluated as successful: Lille (27), Luxembourg (26), Bolzano (21) Gronau (21), Dublin (20), Barcelona (20), Montpellier (16) and Patras (16). 5 were deemed partially successful: Bilbao (15), Flensburg (10), Kortrijk (9), Torino (7) and Guimaraes (6). Further Commission funding was to be with-held until improvement or re-organisation of the project. Finally, four centres failed the evaluation and the Commission withdrew their funding; these were: Santiago di Compostella (1), Pontevedra (-7), Mons (-10) and Veurne (-13).

The report cited a variety of reasons as to why a number of the centres had either fully or partially failed the evaluation. For example, lack of financial and manpower capacities were cited in the case of Flensburg, Guimaraes, Kortijk and Torino; concentrating on activities that were too narrow, "neglecting a large variety of complementary measures for the dissemination of European Consumer Information" (Wilhelm Consulting:1997:6) was attributed to the centres in Torino, Bilbao and Guimaraes. Other factors cited included "low operational capacity as well as the local horizon of activities performed by the Antennas in Santiago di Compostella, Pontevedra, Mons and Veurne" (Wilhelm Consulting:1997:6).

Although in some instances (Santiago di Compostella, Pontevedra, Mons, Veurne and Guimaraes) peripheral location was cited as one of the factors in the failure or partial failure of some of the centres, the majority of the criticisms centred on poor management or poor operation of the centres. More general criticisms of the project as a whole suggest deficiencies not simply in the way in which individual centres or countries managed their projects, but in the way in which the Commission set-up and managed the projects.

Achieved results and the effectiveness of operation:
Management of the project, Action planning and performance, Public relations, Acceptance among consumers, General impact, Transborder dimension (co-operation schemes), European dimension (co-operation schemes)" (Wilhelm Consulting:1997:5):
The general criticisms are noted in the following terms (Wilhelm Consulting:1997:8):

1. Co-operation within the network of pilot projects is still weak and is left to the individual initiative of the project managers and the involved experts.
2. A common European-wide project – or network identity is missing. The Centres use various project names and logos which do not show any relation between these projects to the public.
3. The continuity of the project operation could not be guaranteed because of delays occurring in concluding annual project contracts, reporting to and payment from DG 24.
4. Vagueness of strategic pre-conditions and operational scopes misled some of the pilot-projects.
5. Operational co-ordination and monitoring of performed actions were often missing.
6. The same subjects (e.g. car purchase, time-share) were sometimes dealt with by several projects independently of each other.

One inference that may be drawn from the above criticisms is that the Commission allowed the projects to develop on a basis which was too ad-hoc and did not give enough clear centralised direction to the centres at the outset. Another possible explanation (and one which is suggested by the criticisms) might be that not enough monitoring of the operation of the centres was taking place, either by national bodies or by the Commission, and/or that communication in the monitoring process between the different levels was inadequate.

Evidence from the ECC's Annual Activities Reports in 2001 and 2002 confirms that the success of the centres depends primarily (apart from adequate funding and good location) on good management of the centres and adequate monitoring. The case of the UK ECC in the 2001 report would appear to offer a prime example of this. Both the 2001 and 2002 reports are organised on the basis of a résumé of activities offered by each ECC in which their main activities - projects, publications, publicity efforts, number of complaints dealt with and categories of complaints - are documented. There is also a
table of compiled statistics showing a breakdown of complaint categories. The only country to provide no statistical evidence for the table in either the 2001 or 2002 report was the UK. (It should be mentioned at this point that, unlike ECCs in other member states, the UK ECC is housed and integrated within the existing system of the Citizens Advice Bureau - CAB). Furthermore, the UK ECC report of 2001 differs significantly from those of other countries and would appear to demonstrate both a lack of good will in executing the requirements of the report, and a lack of coherent management in the collection of relevant data and lack of interest in publicising the UK ECC. In contrast to the very detailed evidence presented by the ECCs in other countries, the UK offered very little specific information as to its role as an ECC other than to report rather opaquely on the number of enquiries and cases that it had dealt with. Much of the information provided seemed mixed up and indistinguishable from the activities and tasks performed by the CAB in its national capacity – although significant information was provided about that. There were no details of actions specifically undertaken by the UK ECC in its role as an ECC, the list of publications and press releases demonstrated an entirely national slant and there were no details regarding efforts to publicise the UK ECC. Moreover, the opening lines of the report state: "The UK does not provide direct access for individual consumers but [there] is a help desk for 15,000 Citizen Advice Bureaux and other consumer advice bodies" (UK ECC: 2001: 1). In contrast to the other ECCs, the UK ECC does not provide the consumer with its own web-site. Access to the ECC facility is provided through the CAB system – via telephone, e-mail, drop-in centres and the CAB web-site. However, there is no indication on the CAB web-site that CAB offers the ECC facility. Even if the consumer were well informed enough to search for the UK ECC on the web (and this would involve his/her being aware of the title of the facility) they would reach a dead-end once connected to the CAB site. The UK ECC contribution to the 2002 activities report did appear more conventional and did explain its activities and dealings with individual consumers with greater clarity. It also gave some details as to projects that had been carried out in respect of its role as an ECC (ECC:2002:43).
The example of the UK ECC raises continuing questions as to the monitoring capacity of the Commission with regard to the ECCs and also the EEJ-NET (discussed below). According to evidence collected during an interview with an official of DG SANCO (25/6/2003 see p.254), the Commission engages in regular monitoring activities of the ECCs. There is a system of reporting whereby the ECCs have to send a financial report and a report of their activities to the Commission. According to the official, the Commission engages in daily contact with all partners in the network. It also organises seminars and work-shops to discuss particular problems and conducts on the spot checks of the centres to ensure that they meet the correct standards. Nevertheless, as the example of the UK ECC clearly demonstrates, monitoring alone may be insufficient unless the Commission is able to enforce its decisions – this point is further examined in the passage on the EEJ-Net below.

**European Complaints Form**

One of the potentially significant mechanisms, which the ECCs piloted, was the European Complaints Form. This initiative was developed as a result of the Commission “Communication on the Out of Court Settlement of Disputes” (EC: 1998a) itself part of the drive towards creating effective ADR mechanisms for use across borders, and launched by the Commission as a pilot project between May 1999 and August 2000. The countries participating in the project were Austria, Belgium, Finland, France, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden. Consumer defence organisations in each of the countries acted as co-contractors and took responsibility for the management of the project. This involved monitoring a specified number of cases handled using the complaints form through to the closure of the case and preparing a file for each form. It also involved encouraging consumers to use the form and showing them how to use it correctly. The co-contractors also attempted to use the form as much as possible to deal with complaints passed on by consumers, making every effort to obtain a response from professionals who did not automatically react to the complaints form in an attempt to reach an agreement (Commission: “Evaluation of the Pilot Project on the Use
of the European Consumer Complaints Form for Consumer Disputes":
The results passed on to the Commission showed a mixed outcome, particularly with
regard to the frequently poor supply-side response to the consumers' requests. A
breakdown of the responses obtained demonstrated that 46% of suppliers did not reply at
all to the complaints form, 9% rejected the complaint outright and 7% referred the
complaint to a non-judicial body. Therefore, it can be calculated that in 62% of the cases
monitored, the consumer either encountered a negative or at best an uncertain outcome.
Of the remaining 38%, the complaint was accepted outright by just 26% of professionals,
the complaint was partially accepted by 7% and 5% of professionals made some kind of
commercial gesture toward the consumer. It is, however, interesting to compare the
mixed outcome of the form's success with the interpretation of the evidence according to
the Commission's evaluation form. By focusing exclusively on those companies that did
reply, the Commission is able to paint a rosier picture than the whole body of evidence
would justify. The Commission's evaluation claims that:

According to the results, over half the professionals (54%) replied to the consumer
using the form. The replies can be seen as positive in that professionals quite often
accepted the consumer's request in full or in part (33%) and rarely rejected it (9%).
Referral of the dispute to an extra-judicial body was also not infrequent 7% and
there was significant showing of commercial gestures (discounts, rebates) (5%)"
(Commission: "Evaluation of the Pilot Project on the Use of the European
Consumer Complaints Form for Consumer Disputes: 7:

Nevertheless, during the course of an interview with an official of the Bureau Européen
de l'Union des Consommateurs (BEUC – 19/6/2003), the view was expressed that the
European Complaints form represented a potentially useful tool for the resolution of
cross-border disputes but that its existence was not widely known and that the initiative
had been insufficiently publicised. Indeed, the Commission evaluation report, itself
claims that according to the results of Eurobarometer survey 52.1, only 7% of consumers
participating in the survey had either heard or seen the form (Commission: “Evaluation of the Pilot Project on the Use of the European Consumer Complaints Form for Consumer Disputes”: 12: http://europa.eu.int/comm/consumers/redress/compl/accejust_en.pdf). Lack of public awareness was also a problem common to the EEJ-NET, as the evidence below suggests – the position of both of these initiatives with regards to publicity contrasts with the apparent success of the Internal Market DG's initiative – the SOLVIT network. SOLVIT was created by the internal market DG as a result of a Commission communication in 2001 (COM(2001)0702(02)) in order to serve both citizens and business in the event of a cross-border problem concerning the states' administrations. Contact points were set up in each member state in order to facilitate the exchange of information and the co-ordination of solutions to problems between the member states. In practice though, the main beneficiaries of this network have been businesses who are generally better informed of the existence of such facilities in contrast to individual citizens. According to the BEUC official, information about the SOLVIT network was more widely disseminated; it was suggested that the explanation for this lies partly with the fact that the Internal Market DG is older and more powerful than DG SANCO, and enjoys greater resources. This analysis strongly supports findings regarding the low status of the Consumer DG in Chapter Two. It is again symptomatic of the supply-side bias inherent in the EU's approach to market integration that initiatives to help consumers should be disadvantaged because of an in-built institutional imbalance.

EEJ-Net Initiative

Inception
As with the European Complaints Form, the origins of the EEJ-Net initiative may be traced back to the adoption by the Commission of the "Communication on the Out-of Court Settlement of Consumer Disputes" (EC: 1998a). This communication was designed to promote the use of easily accessible and relatively inexpensive forms of consumer dispute resolution (such as alternative dispute resolution bodies - ADRs which make greater use of arbitration methods) to assist consumers caught in cross-border disputes. It was recognised that cross-border consumer disputes in particular merited this
type of aid because of the costs and complexity of pursuing a cross-border consumer legal case relative to the usually small sums of money at stake in the dispute. The Communication also included the Recommendation on the Principles Applicable to Out-of-court Procedures for the Settlement of Consumer Dispute (98/257/EC OJ L 115 17.04.98 p1-34), which set out broad guidelines for the quality criteria of acceptable ADR bodies. Member states were requested to send lists of appropriate national ADR bodies (based on the Commission's quality criteria) to the Commission, where they would be made publicly accessible in order to improve the transparency of the ADR system for EU consumers. Subsequent to this development, as mentioned earlier, a European Summit meeting in Tampere (15th-16th October 1999), concentrating on improving access to justice, mutual recognition of judicial decisions and increasing convergence in procedural law, provided an added impetus to the Commission's general policy direction on ADR by calling on the member states to create alternative extra-judicial procedures. As a result of this, the Commission published a Working Paper on the establishment of a European Extra Judicial Network (EC: 2000a) which acted as the blueprint for the future EEJ-Net. The proposal was approved by a Resolution of the Council of the European Union in May 2000 (Council: 2000) and put into action during a conference on the EEJ-Net in Lisbon May 2000, organised by the Commission in partnership with the Portuguese presidency, and attended by policy actors from national authorities, out of court bodies, consumer organisations and Commission officials.

**Modus Operandi**

The European Extra-judicial Network was set up in order to improve the information, knowledge and access of consumers to ADR mechanisms, particularly in cross-border situations, where ADR is often faster and cheaper than ordinary legal procedures. The network is a consumer support and information structure consisting of seventeen national contact points (or clearing houses) located in each member state, plus Iceland and Norway. The pilot phase was launched on 16th October 2002 with eight member states participating (Austria, Belgium, Denmark, Finland, Luxembourg, Portugal, Sweden, and the UK) as well as Norway and Iceland; the other seven EU states were integrated during 2002 (France, Germany, Greece, Italy, Ireland, Netherlands, and Spain). Because the
work of the European Consumer Centres and the Clearing Houses are closely connected, nine of the countries have in fact lodged the facilities in a shared locality (Austria, Belgium, France, Ireland, Italy, Luxembourg, Portugal, Sweden, and the UK) (EC: 2003: 4 - Conference Papers) The Clearing Houses are co-funded by the Commission and the relevant member state in which the clearing-house is located; each party provides 50% of the funding.

Before examining the effectiveness of the clearing-houses, it is first important to have a clear understanding of how they are intended to work. The clearing houses exist to assist consumers who experience problems as a result of having made a transaction with a business across borders in the EU and who, after initial attempts to obtain redress from the business itself, either individually or through an intermediary, such as a consumer organisation or a European Consumer Centre, have been unsuccessful. The clearing houses assist consumers by acting as intermediaries – offering advice, and trying to resolve the problem by contacting the supplier. Usually a consumer faced with a cross-border problem that they cannot resolve would contact their national clearing house which would try to resolve the dispute by offering advice and contacting the supplier on the consumer's behalf. If these avenues are insufficient to resolve the dispute, the next stage is for the national clearing house to contact its counter-part in the state where the problem occurred and to ask its assistance in raising the problem with the business. If this fails, they can then forward the complaint to a relevant ADR body. They also help the consumer to overcome initial problems posed by the language barrier – some clearing houses offer translation services to help with the translation of relevant documents. The clearing houses further have a role in monitoring and recording the progress of a consumer complaint through the ADR process and may provide assistance should the consumer experience difficulties with the ADR body.

**Evaluation of EEJ-Net: General**

The preliminary evaluation report on the functioning of EEJ-Net suggested that, as it became more widely known, the system was delivering increasingly promising results in terms of receiving and handling increasing numbers of complaints and also in terms of resolving cross-border consumer disputes. For example, an interim report (EC:2003:4 -
Conference Papers) evaluating the activity of the clearing houses prepared by the Commission in 2002 revealed that 1,100 complaints had been dealt with. By the end of March 2003 that number had risen by 100% to 2,182. Furthermore, the clearing houses appear to have been relatively successful in procuring successful outcomes for consumers. Although the statistics reveal that only 7% of cases were resolved by using ADR mechanisms, 44% were resolved without having to recourse to ADR, which suggests that businesses become more amenable to reaching a solution once the consumer has pursued their complaint as far as the clearing house. Thus over 50% of cases were successfully resolved.

The EEJ-Net system is a new phenomenon and as such it is difficult to offer a comprehensive assessment of its successes and weaknesses. As policy actors have pointed out repeatedly during the course of interviews conducted for this research, 'teething problems' are symptomatic of any new venture, and a degree of tolerance ought to be exercised. Nevertheless, it is possible, from examination of the evidence so far, to provide an indication of the problem areas that are already undermining the venture and that are likely to continue to do so unless they are tackled.

_Evaluation of EEJ-Net: Publicity Problems_

One complaint that the BEUC put forward was that one of the problems with evaluating the success of both the EEJ-Net and the FIN-Net initiatives was the general lack of awareness on the part of consumers as to their existence. The BEUC (2002:3) concluded that this clearly demonstrates that "the Commission and the member states should invest more means into the marketing and promotion of the network. This will be the only way to increase consumers' awareness of the existence of these initiatives."

Lack of publicity and lack of public awareness as to the existence of the schemes was one of the principal findings of the EEJ-Net conference (Brussels, 10-11th June 2003) and is an issue that was emphasised by several key actors at the conference (for example, Diana Wallis UK MEP: 2003 - (spokes-person from the Legal Affairs and Internal Market Committee, European Parliament) during her speech at the conference: Carina Tornblom: 2003 – DG SANCO, Jim Murray: 2003 – director of the BEUC). In order to highlight the need for greater publicity, Diana Wallis in her speech mentioned an anecdote in
which the question 'has anyone heard of the EEJ-NET?' was posed at a meeting in the UK of the Council of bar lawyers – no-one present had heard of the initiative. In her opening speech, Carina Tornblom suggested that member states were reluctant to publicise the EEJ-NET in its pilot phase because they were concerned that the system might not be able to live up to consumers' expectations where those expectations had been raised by, for example, a high-profile publicity campaign. Tornblom explains:

There is a clear need to promote the network via publicity. Members of the network, especially those who did not already have an ECC, were reluctant to publicise the EEJ-Net when the pilot phase was first started. Now that the pilot phase is well under way, it is important for member-states to promote actively the network through publicity to raise its public profile and raise consumer awareness of ADR. It is up to each state to see how this can best be done.

(Tornblom: 2003)

Certainly, this attitude towards publicising the national clearing-houses was confirmed during an interview with two officials of the UK Department of Trade and Industry (interview 16/6/2003 – see p.254) who had been anxious not to over-publicise the UK clearing-house for fear of a backlash from disappointed citizens. The attitude of officials at the DTI also demonstrated that they did not favour a high-profile approach to publicising the initiative. They took the view that consumers only needed to be aware of the initiative when they experience a cross-border problem; informing them of the initiative in advance might be a waste of resources, since consumers would be unlikely to retain this information. The problem with this attitude is, as an official of the BEUC (interview 19/6/2003 – see p.254) pointed out, that consumers need a residual knowledge of these initiatives in advance, so that they can have recourse to the initiative as soon as a problem is experienced.

The problem posed by the variations in the member states' commitment to publicising the EEJ-Net was also highlighted in the evaluation report on the functioning of the initiative (Commission: 2003: 3 – Conference Papers). This report, which was partly based on a questionnaire sent to the clearing-houses, stated that: "The questionnaire shows that
some Clearing Houses have conducted wide-scale national publicity campaigns whilst others have used more modest publicity. More publicity by some Clearing Houses would probably have increased consumer awareness and consequently increased the number of complaints."

The question 'whose role is it to publicise the initiatives?' also raises pertinent issues. Although the Commission emphasised the importance of publicity at the conference, it became evident during the course of interviews with officials of DG SANCO (interview 25/6/2003 see p.254) that they did not view the task of publicising the initiatives as a function that should be carried out by the Commission. The prevailing view was that the Commission was not a PR company and publicising the initiative at Commission level was, in any case, not a priority owing to scant resources. The officials expressed the view that they felt that publicity would be more effective if undertaken at a more local level, closer to the citizen. They also explained that as the clearing houses and European Consumer Centres were co-funded by the Commission and the member states, it was the clearing houses themselves that should assume the task of publicising the initiative. This view was clearly supported by officials in the DTI (interview: 16/6/2003 – see p.254) who appeared unperturbed by the call for increased publicity, certainly at the national level. Their strategy revealed a reluctance to publicise at national level – although, in the light of the conference's findings, they suggested that UK ministers might henceforth be permitted to begin to refer to the EEJ-Net during public speeches. Nevertheless, the devolution of action to the lowest level, in line with the principle of subsidiarity, needs to be closely monitored if it is to function properly, as the example below demonstrates.

**Evaluation of EEJ-Net: Monitoring**

Although the Commission does undertake monitoring exercises of the functioning of the EEJ-Net, there is a certain question as to the effectiveness of its capacity adequately to enforce at ground level the directions it issues from above. Ultimately, the only weapon that the Commission can wield at an ECC or a clearing house that fails to comply with Commission requests is to withdraw funding. However, as interviews with DG SANCO officials revealed, such action is viewed as undesirable and only to be undertaken as a last resort. Their view was that systems such as the EEJ-Net work on the basis of the good
will and co-operation of the participants - threatening to withdraw funding upsets relations between the Commission and the relevant member state and creates a bad atmosphere. However, the case of the UK ECC-EEJ-Net clearing house, provides an example of the limitations to this approach.

The principal mechanism open for citizens to access the ECCs or EEJ-Net clearing house facilities is via the internet. Investigation has revealed that the existence of ECCs and EEJ-Net clearing houses in other member states is clearly indicated on their web-sites (for example, Austria, Belgium and Finland), which on the whole provide clear hyper-links to the relevant sections. The UK, however, has a rather unique set-up in that the ECC and EEJ-Net clearing house has been located within the existing network of the Citizens Advice Bureau, as outlined earlier. To a large extent it is entirely logical for these facilities to be integrated into a citizen's information system which is already well known and broadly based throughout the UK. However, the Citizens Advice web-site provides no information of these facilities and no hyper-link to the centres - in short, as far as the uninformed consumer is concerned, the facilities might as well not exist at all.

There is a separate web-site for the UK EEJ-Net where citizens can obtain information about how the system operates. However, the citizen would already have to know the name of the initiative in order to produce effective results during an internet search - and as the EEJ-Net conference clearly revealed, the vast majority of EU citizens are blissfully unaware of the existence of this system.

Other avenues for reaching the web-sites, including information provided by the Commission on its own web-site (and this strategy, of course, depends on the citizen having the knowledge, the initiative and the material resources to access the Europa web-site) simply point the citizen back in the direction of the Citizens Advice Bureau. This forces consumers round in circles, effectively locked into a closed loop.

An interview with the DTI officials (16/6/2003) revealed that they were unaware of this problem. A further interview with officials at DG SANCO (25/6/2003) revealed that the Commission was aware of the problem and had tried to resolve it by numerous phone calls and letters to the UK centre. However, the officials admitted that enforcing Commission requests could be problematic - and in view of the fact that the situation in the UK has existed for months and continues to date (July 2003), this approach appears to
have been singularly ineffective. It seems surprising that Commission officials should be aware of the lack of direct interface between the citizen and the UK ECC and EEJ-Net centre via the CAB network when officials at the DTI were not. This fact might be interpreted as evidence of a break in the communication and monitoring systems between the different levels of governance that are supposedly delivering effective policy solutions to problems experienced by consumers at the ground level.

One fundamental conclusion that may be drawn from the above examples is that, whilst it may be understandable for a new initiative to experience teething problems – making policy actors reluctant to invest too much time and energy in publicising it or in ensuring the existence of adequate monitoring and enforcement arrangements by not putting these arrangements in place adequately at the outset - the success of the venture is likely to be undermined.

As the example above demonstrates, the success of the EEJ-Net system relies to a significant degree on the good will of those responsible for implementing it. However, further evidence of tardy implementation by particular member states or ineffective management on the part of some of the ECCs and clearing houses, indicates that, to a certain extent, the system may be developing unevenly. Once again, this example highlights the problems of the EU's delegated system of implementation and enforcement explored in Chapter Three.

There even seems to have been confusion about the date of the launch of the initiative. According to the Commission Green Paper on ADR, the EEJ-Net was officially launched on 16 October 2001. The Paper predicted that it would run as a one-year pilot project on which the Commission would write an evaluation report in the autumn of 2002 (Commission:2002f:17). However, in writing its response to the Commission's Green Paper on ADR, the BEUC expressed the following opinion:

... more than two years after the formal launching of the EEJ-Net in May 2000, it still is impossible to evaluate whether this initiative can live up to its promises or not. This is mainly due to the fact that, on the one hand, there are as yet not very many consumers contracting cross-border, and, on the other hand, to the fact that
member-states took a long time to set up their national clearing houses and only very recently could the last country be added to the EEJ-Net. (BEUC:2002:2-3)

In fact the last clearing houses were only added in 2003 (Greece and Italy). The Italian clearing house had in fact opened earlier and had closed because of management difficulties. Originally the Italian clearing house had been managed by a board of interested parties including a number of Italian consumer organisations; however, due to problems created by the lack of agreement amongst the parties, the centre did not operate effectively. It appears that the nature of the disagreements was general – according to an official in DG SANCO (interview 25/6/2003 – see p.254) the interested parties could not agree on anything. This is not to suggest that the Italian experience was replicated elsewhere, nevertheless, the lack of urgency with which the centres have been set up might be taken as an indication of the level of priority accorded to this project by the member states.

**Evaluation of EEJ-Net: Variations in Effectiveness**

Further evidence of the variation in the effective operation of the houses came to light during the EEJ-Net conference ("Review of the European Extra-Judicial Network and Future Perspectives for Improved EU Consumer Assistance" Brussels 10-11/6/2003). At one point, an employee of the Spanish EEJ-Net clearing house complained about the variation in the level of work undertaken by certain clearing-houses and specifically named the Italian clearing-house in this context. This comment was immediately followed by a response from an employee of the Greek clearing-house who complained about the lack of action taken by the Spanish clearing house in relation to a request for help by its Greek counterpart. During the course of an interview an official of the BEUC (Brussels 19/6/2003) also suggested that, in her opinion, the problem of variations in work commitment across the network was likely to be a problem.

Examined clearing house by clearing house, statistics in the preliminary evaluation report reveal that the number of complaints received varies enormously, although it is difficult to interpret the variations accurately since they may be explained by many factors other than the diligence of those operating the centres. For example, the number of complaints
received partly depends on the length of time for which the clearing house has been operational. It may also depend on factors such as population, geographical locality (for instance, whether the country has many border regions), the number of ADR bodies available to deal with the problems, and even the manner in which the complaints were compiled. For example, some houses included all of the complaints that they received, others only included those which led to a dispute which had to be referred to an ADR. Nevertheless, the discrepancies are worth mentioning, as they may at least give some indication as to variations in the level of effectiveness of these centres.

Other factors affecting the success of the EEJ-Net relate specifically to the coverage, quality and working comparability of the ADR bodies upon which the EEJ-Net system is fundamentally based. There are approximately 400 ADR bodies which the member states have put forward as meeting the qualitative criteria set out in the Commission's two recommendations on principles applicable to bodies responsible for out-of-court settlement of consumer disputes: Commission Recommendation 1998/257 and Commission Recommendation 2001/31. However, the issue of patchy coverage of ADR has been raised as a significant issue by a number of different sources. For example, in its report on the functioning of ADR systems across the EU, the Nordic Council of Ministers (2002) confirms patchy coverage as a particular problem for the successful functioning of the system both in terms of unevenness of coverage across market sectors and across countries and regions. Their findings were also commensurate with those of the Commission's preliminary evaluation report on the functioning of the EEJ-Net.

Based partly on the Nordic report, the conclusions of Giles Buckenham, the rapporteur of the EEJ-NET conference second workshop on ADR, (11/6/2003) identified a number of sectors where the coverage of ADR bodies is significantly incomplete across the network. For example, the workshop report concluded that in the timeshare sector, 11 out of 17 countries in the EEJ-NET do not have ADR bodies dealing with time-share problems. In the travel sector only 13 countries out of 17 have ADR bodies. The vehicle sector was described as "very incoherent as even where schemes exist [they] only deal

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5 First wave of Clearing Houses (2001): Sweden (37), Finland (39), Portugal (223), UK (529), Austria (28), Belgium (108), Denmark (31), Luxembourg (122), Iceland (8), Norway (119). Second wave of clearing houses (2002): Ireland (48), Germany (841), France (89), Italy (20), Spain (206), Netherlands (61), Greece (14).
with some but not all possible complaints arising from this sector" (Buckenham :2003:1). In the e-commerce sector, only 10 out of 17 countries had ADR bodies and in the expensive goods sector only 8 out of 17 countries had ADR bodies. These findings were further confirmed by David Byrne (Commissioner for Health and Consumer Affairs) and Carina Tornblom in their opening speeches (Brussels 10-11/6/2003). There is already evidence that the lack of ADR bodies in these sectors is generating difficulties for the clearing houses. For example, a number of countries, including specifically Sweden, experienced problems relating to time-shares in Spain; however there are insufficient numbers of ADR bodies in Spain to deal with these problems which, in fact, account for 29% of all the complaints received by the EEJ-Net (Tornblom: 2003).

The number of ADRs also varies widely across the member states; for example, there are relatively few ADR schemes in France, Austria, Luxembourg and the Nordic countries and over 200 in Germany (Buckenham: 2003, Nordic Council of Ministers:2002).

The adequate vetting of the ADR bodies has also been raised as an issue likely to affect the functioning of the EEJ-Net system as a whole. Further reservations expressed by the BEUC came as a result of comments from their members (the national consumer organisations). They complained that in some countries, consumer organisations had not been sufficiently integrated into the setting up of the clearing houses. Other members expressed concerns about the fact that, in their countries, the ADR bodies notified to the Commission for inclusion in the EEJ-Net did not meet the qualitative criteria set out in the Commission's recommendations concerning ADR bodies. This problem stems from the fact that a recommendation is simply that, a recommendation, i.e. it is not legally binding. The Commission has neither the powers nor the resources to monitor the vetting of the ADR bodies recommended to it by the member states. Moreover, it became clear during the course of an interview with two officials from DG SANCO (25/6/2003) that the Commission does not view this task as a major part of its role. The officials referred to the importance of trusting the member states to implement the Commission's requests properly. Furthermore, they indicated that they viewed their role in terms of inventors of the EEJ-Net system – once created, the operation of the system should be devolved down
to the member states to manage and the Commission should only be lightly involved in its regulation. During the EEJ-Net conference in Brussels (10-11/6/2003), Jim Murray (Director of the BEUC) expressed further concerns about the reliability of the ADR bodies recommended to the Commission. In particular, he commented on the doubtful reliability of national measures for assessing the bodies and he claimed that, in some instances, national consumer organisations had not even heard of some of the national bodies posted on the Commission's web-site list; this assertion was also reiterated during the course of an interview with a BEUC official (19/6/2003).

Another conclusion that was reached by the Nordic Council of Ministers in its report on the functioning of ADR bodies in Europe, confirming earlier findings regarding the ECCs and the European Complaints Form, was the lack of public awareness of ADR schemes. The report claims that this is a problem in Germany where "a wide range of ADR schemes exist on paper, but ... are never used in practice" (Nordic Council of Ministers: 2002:49). The problem of lack of public awareness was particularly noted in states that ran a system of less centralised ADR systems such as the UK, Austria or Germany, where there is a more individual and unregulated approach. The Council of Ministers concluded that in those states, the result was an "incoherent, ADR system" (Nordic Council of Ministers: 2002:50).

The Commission's non-legislative measures have been complemented by a series of legislative initiatives designed to have a cross-border impact. In general these are broader in their effect and some may be described as framework directives in that they establish a legal model within which specific measures may be located.

**Directive on Injunctions for the protection of consumers interests (98/27/EC)**

The Injunctions Directive finds its origins in the discussions that took place following the 1993 Commission Green Paper on Access to Justice (EC: 1993a) and the 1996 follow-up Communication "Action Plan on Consumer Access to Justice" (EC: 1996a). Both of these documents emphasised the need for legal tools that were capable of dealing with the legal and jurisdictional barriers caused by state frontiers - the 1993 paper in particular explored the merits of using injunctions for the protection of consumers' collective interests.
The Commission's proposal for the directive was issued in 1998. The purpose of an injunctions action is to put an end to illegal behaviour on the part of a trader, which affects consumers adversely. The directive provides for member states to put forward national bodies that are designated as capable of pursuing an injunctive action on behalf of the collective interests of consumers. The directive also allows for actions to be pursued across borders against traders located in other EU member states — thus, under limited circumstances (elaborated below) the barriers to effective enforcement caused by the different legal jurisdictions in the EU can now be broken down. However, the Injunctions Directive is not a universal tool and is restricted in its application to particular EU directives. Nevertheless, as the list demonstrates, many of the directives included deal with problems that have a logical potential for creating cross-border disputes. In addition to these, the injunctions directive was amended in 2003 and significantly extended.

To date (July 2003) the UK enforcement authorities would appear to provide the best example in terms of their proactivity in using the injunctions directive. By their own assertion they are regarded by both the Commission and other member states as the 'leading light' on this particular directive — a situation which contrasts with their attitude towards the EEJ-Net (interview, OFT Officials, 3/7/2003). Moreover, as an official of DG SANCO admitted (interview 25/6/2003), on the basis of the restricted feedback he had received so far, experience of the directive appeared to be limited. Other than the OFT, the only authority to his knowledge that was using the directive was Tests Achats in Belgium who were pursuing a case (June 2003).

The OFT was the first enforcement body to pursue an injunctions case — against a Dutch company called 'Royal Consulting' who were sending unsolicited first aid kits to

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7 Directive 97/7/EC (Protection of Consumers in Respect of Distance Contracts)
Directive 1999/44/EC (Sale of Consumer Goods and Associated Guarantees)
Directive 2000/31/EC (Electronic Commerce)
Directive 2001/83/EC (Community Code Relating to Medicinal Products for Human Use) and
Directive 2002/65/EC (Distance Marketing of Consumer Financial Services)
consumers in Britain and requesting payment for them. The request for payment of unsolicited goods is illegal under Regulation 24 of the Distance Selling Regulations. The OFT co-operated with Consumentenbond (the Dutch Consumers Association) in order to bring the practice to a close. Further monitoring of the situation is being undertaken by the OFT, which will react to evidence of future complaints and which is empowered to take further court action against the trader. In such a case, court action would be undertaken and would be enforced by a Dutch court. This is the only case that the OFT has brought using the directive where there has been a visible outcome. However, it is in the process of taking a number of injunctions cases (details of the cases were not available for discussion) and has used the directive on numerous occasions as a deterrent against traders engaging in dubious practices - reputedly to some effect. As an official of the OFT explained (OFT interview: 3/7/03):

...if you look at the bare statistics, the "Stop Now" actions that we've taken, doesn't look very many. There's only been a couple of orders, one contempt hearing. But in the scheme of things, the number of undertakings we've obtained, then you actually see that it's working; it's mostly the threat of an injunction case that works rather than going through the injunctions...

Most of the issues that the OFT has investigated with regard to the Injunctions Directive have related to misleading advertising, misleading mail and to holiday clubs (which have apparently set up certain practices designed to circumvent the requirements of the Time-Share Directive). The Injunctions Directive, therefore, appears to be particularly useful in these respects. The general consensus within the OFT was that the Injunctions Directive had proven to be a useful tool. The Injunctions Directive appears to have the potential to be a useful legal instrument in helping to prevent rogue traders from taking advantage of consumers across borders. However, there are a number of factors that may affect the success of the directive, particularly in the first few years of its operation. The first factor is the length of time that some countries have taken to make the directive operational in national law. The transposition period was supposed to have been
completed by 2001 and yet, by June 2003, Luxembourg for example still had not notified the Commission of its transposition arrangements. Another factor delaying the use of the directive stemmed from the fact that enforcement bodies could not begin to use the directive until the Commission had published, in the Official Journal on 2 February 2002, a list of 'qualified entities' (i.e. bodies that the states had put forward as qualified to take actions).

Much of the success of the Injunctions Directive relies on the pro-activity of those bodies empowered to carry out actions as well as their capacity to co-operate with their counterparts across borders. There appeared to be some evidence (during the course of the OFT interview), that the enforcers were not always as pro-active as they might be in pursuing potential cases using the directive. For example, the OFT officials stated many times over that their capacity actively to monitor sections of the market was limited by available time and resources. They admitted that they were a complaints-driven organisation — and reacted to evidence of actual consumer detriment, rather than potential (and even probable) detriment based on, for example, dubious contract clauses. Using the injunctions directive across borders is not always straightforward as the bodies empowered to take action across borders are not always comparable enforcement entities — thus procedures for pursuing a case vary from country to country. (This was the situation faced by the OFT in the Royal Consulting case (2002)). The enforcement agencies themselves are in the position of having to develop co-operation mechanisms 'on the job', which gives the system a slightly ad-hoc appearance (interview with an official of DG SANCO: 25/6/2003). Nevertheless, as an interview with OFT officials (3/7/2003) revealed, this does not present an insurmountable barrier and ways and means are found to cope with administrative differences.

An official of DG SANCO (interview: 25/6/2003) further confirmed that there were other teething problems with the directive. For example, in some countries the notion of an injunctions instrument is completely new to their legal cultures (e.g. Spain). There are, predictably, also problems to be tackled at the level of the language barrier and familiarisation with the law.

Although in the UK the system of pursuing an injunctions case across borders is centralised, other countries, such as Germany and France, have many entities that are
capable of pursuing injunctions cases. Not all of these are empowered to take action on the basis of the entire range of directives and may be limited in their scope of action; such is the case in Germany. Within and across the EU there are no centralised systems for collecting data on cases pursued between the enforcement agencies across borders. There is no obligation for one qualified entity to contact or operate with the co-operation of their counterpart in a state where an action is being pursued (OFT interview 3/7/2003). Thus for the purposes of monitoring the effectiveness of the directive, the lack of co-ordination would seem to present certain drawbacks.

There is no routine obligation on the member states to inform the Commission of progress (successes or failures) with regard to the utilisation of the directive (Commission Official DG SANCO: interview: 25/6/2003), although the directive itself states that the Commission shall write a report on its application and present it to the European Parliament by 21st July 2003 at the latest. In fact, the report was in the process of being written at the time of the interview. From then on, the Commission is mandated with the task of writing a report on the directive every three years.

The monitoring arrangements at national level also vary from country to country; for example, OFT officials (interview: 3/7/2003) claimed that it does not have to report to the DTI on the application of the directive. The monitoring arrangements for the directive therefore do not appear to be either particularly uniform or particularly stringent. In any case, the Commission has no power to oblige the national enforcement authorities to adopt a more pro-active line in their use of the directive – that is a matter for the proper monitoring of the member states. The only powers that the Commission currently possesses are in respect of obliging the states to comply with the requirements of transposing the directive into national law. Ultimately, if a state refuses or drags its feet beyond the set time limit, the Commission may ask the European Court of Justice to begin infringement proceedings.


A brief passage on this directive is included here because a popular misconception regarding the use of this directive to facilitate cross-border trade is that it provides EU
consumers with a cross-border EU guarantee. That is to say that it would lead the citizen to believe that, when they buy goods in a member state other than their own, they would be covered by the guarantee pertaining to the product in their member-state. This is not the case. The directive enables the supplier to limit the application of the guarantee, not only in terms of the time limit but also in terms of its territorial scope. Article 6.2. of the directive states:

The guarantee shall...set out in plain language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

This misconception is certainly fuelled by the rhetoric preceding the scope and definitions of the directive, which focuses heavily on facilitating cross-border trade. For example:

...whereas consumers who are keen to benefit from the large market by purchasing goods in member states other than their state of residence play a fundamental role in the completion of the internal market; whereas the artificial reconstruction of frontiers and the compartmentalisation of markets should be prevented; whereas the opportunities available to consumers have been greatly broadened by new communication technologies which allow ready access to distribution systems in other member states or in third countries; whereas in the absence of minimum harmonisation of the rules governing the sale of consumer goods, the development of the sale of goods through the medium of new distance communication technologies risks being impeded...(EP & Council: 1999b)

The purpose of the guarantee, therefore, is to create a base legal framework of minimum quality characteristics to which all EU guarantees will conform – thus making the format of EU guarantees at least predictable to EU consumers as they shop across borders. How useful this might be in obtaining cross-border redress is difficult to imagine.
In 2003, however, the Commission published two complementary proposals – the Unfair Commercial Practices Directive (COM (2003) 536 Final) and the Regulation on Consumer Protection Co-operation (COM (2003) 443 Final). In many respects both the directive and the regulation, discussed below, may be viewed as extensions of the process begun by the Injunctions Directive, that is, to provide a surer and more comprehensive approach to providing consumer protection for citizen-consumers across borders, particularly with respect to enforcement provisions. The proposals adopt a framework rather than sectoral approach to the problem of cross-border enforcement; this represents a significant break with strategies adopted by the Commission until this moment (2003).

The proposal for an Unfair Commercial Practices Directive came into existence as a result of an extended consultation process initiated by the Commission in the 2001 Green Paper on Consumer Protection (EC: 2001b). The main thrust of the Green Paper was the need to reform EU consumer protection legislation in order to address barriers to consumers' access to goods and services across borders.

Apart from 'natural' barriers to consumer access to goods and services (e.g. language or distance) the proposal identified a range of unfair commercial practices likely to deter consumers significantly from making cross-border purchases (Commission: 2003d: 4). These practices were viewed as penalising not only consumers but also legitimate business interests who would pay the price for the loss of consumer confidence (Commission: 2003d: 4). The ex-ante impact assessment (GFA: 2002) compiled as a corollary to the Green Paper (EC: 2001b) concluded that the best approach to dealing with these practices was to create a “framework directive setting out general principles supplemented by specific sectoral legislation” (Commission:2003d: 6). The proposal for the directive sets out to explain and describe the commercial conditions deemed by the Commission to be unfair and includes a short black-list of definitive malpractices in the annex. Thus the principal objective of the directive is to harmonise EU requirements relating to unfair business to consumer commercial practices across the internal market. This approach is intended to produce a number of benefits: first, it establishes a common approach to this aspect of consumer protection thus extending protection to EU
consumers outside of their national jurisdictions; second, it simplifies existing legal arrangements; and third, it helps to dismantle barriers to trade caused by divergent national provisions on unfair commercial practices.


The proposed Regulation on Consumer Protection Co-operation was devised as a result of the Green Paper on Consumer Protection (EC: 2001b), and was in fact intended to complement the Unfair Commercial Practices Directive by providing a framework of cooperation between national enforcement bodies for the practical realisation of that directive. Support for the proposed regulation also came as a result of the Commission's Internal Market Strategy 2003-2006 which argued in favour of improved enforcement mechanisms in order to ensure consumer confidence in the Single Market and marked the regulation as a particular priority. Once again the rationale for prioritising this directive makes the connection between the effective enforcement of consumer protection laws and citizen-consumer support for the internal market.

The proposal notes that, in their current state, the member states' systems of domestic enforcement are inadequate to deal with the demands of the internal market, particularly with respect to cross-border infringements. Although some mechanisms have already been developed to promote cross-border enforcement, for example the Injunctions Directive, some bilateral mutual assistance agreements between the member states as well as informal biannual meetings of enforcement authorities within the framework of the International Marketing Supervision Network (IMSN, described in Chapter Two) and their EU sub-group, the proposed regulation deemed these arrangements to be "insufficient" (EC: 2003f: 5).

The enforcement framework is only intended to apply to intra-Community cross-border infringements thus member states' domestic enforcement arrangements remain unaffected. The regulation aims to create a framework for cross-border co-operation
between the national enforcement authorities based on reciprocal mutual assistance rights and obligations and is designed to work in the following way:

The proposal puts in place a system of exchange on request... If the information exchanged confirms the existence of an intra-Community infringement, the proposal requires that competent authorities act to bring about cessation of the infringement without delay. The requested authority is free to determine the most effective and efficient way to achieve this. (EC: 2003f: 9)

Thus, the regulation aims to circumvent a number of practical problems posed by the existing system. Examples of these practical problems would include jurisdictional limitations to national enforcement authorities' scope for action (based on powers or resources), the lack of an adequate rationale to act on behalf of foreign consumers, the absence in some member states (notably Germany, the Netherlands, and Luxembourg) of comparable enforcement authorities and the absence, in some instances, of bilateral arrangements between countries (EC: 2003f: 6).

Conclusions
The primary concern of the Commission in creating and pursuing its strategy of initiatives to help consumers to access their economic rights across borders has been to improve consumer confidence in the internal market. The emphasis placed on practical co-operation and administrative partnership to achieve improvements for consumers in the enforcement of their rights, heavily emphasised by the 1992 Sutherland Report, has begun to be translated by the policy actors into concrete mechanisms, as analysis of the Commission's initiatives demonstrates (Weatherill: 1999: 717).

The Commission has adopted a mixed approach towards consumer protection in cross-border situations. Some initiatives are based on legal instruments – such as the Injunctions Directive or the Cross-border Directive on Guarantees. Other initiatives, however, are mainly based on information and advice with some attempt to bolster and co-ordinate the use of ADR mechanisms across the member-states. As Chapter Three on enforcement has already revealed, the Commission is in a peculiar position with regard to
the enforcement, implementation and monitoring of its policy initiatives. Whilst it is the Commission's task to propose, develop and devise policy ideas and strategies, it is the member states who are very largely responsible for realising these plans at ground level. Indeed, the Commission's competencies are restricted and defined by the treaties themselves and also by the principle of subsidiarity. This principle helps to maintain the fragmentation of the EU governance system by giving the member states justification for restricting the Commission's role in the policy process. This benefits the member states by allowing them to safeguard their sovereignty to a greater degree. On the other hand, it also helps to maintain a disjointed pattern in respect of the policy cycle; the dangers inherent in this approach are that it provides for sub-optimal monitoring, evaluation and co-ordination between the EU level and that of the member states. The examples drawn from examination of the selected initiatives have strongly suggested that this is the case. The Consumer DG has suffered from the lack of powers to monitor, co-ordinate or enforce its strategies at national level, furthermore, it suffers from a lack of both human and financial resources with which to carry out its work. Unable to create a super-structure of civil and commercial redress mechanisms at EU level and in the absence of regular co-ordination and feedback systems for the proper monitoring of the translation of EU policies at national level, the Commission's strategy has been to use the member states as trusted implementation agents, whilst engaging in some limited monitoring activities of its own. The co-financing of the European Consumer Centres and EEJ-Net initiative, for example, has given the Commission some justification for more direct intervention.
CHAPTER 6

CASE STUDY ON THE EU MARKET IN CARS

Introduction
This chapter examines the particular case of car distribution in the light of European Commission initiatives to help consumers to access the best deals across borders in the Single Market. A principal aim underpinning the empirical aspect of the research design was to examine ways in which the Commission has attempted to compensate for the institutional constraints imposed upon its capacity to supervise proper enforcement at member state level in the domain of consumers' economic rights and to assess the success of these strategies. The intention was to do this by taking two contrasting case-studies, one a product, the other a service; both containing a cross-border dimension and examining their specific peculiarities in the light of the Commission's approach to consumer protection in these market sectors. A further dimension to the research design was to seek indications of the successful application of Commission initiatives examined in Chapter Five, where appropriate, relative to the case study chapters. In simple terms, the plan was to form a preliminary assessment of whether these initiatives were actually helping consumers assert their economic rights in these cases. Given the recent appearance of many of these initiatives and the incompleteness of their implementation, it seemed premature to attempt a more detailed assessment. This strategy is in line with the design of a plausibility probe, suggested by Eckstein (2000). The case of car distribution suggested itself because of the obvious and well-publicised problems surrounding the car industry’s penchant for discriminatory pricing across the member states and for attempting to prevent parallel imports. The case thus involved a clear cross-border dimension.

This chapter is organised into a number of sections. The first, 'Description of the Case-study Field', aims to describe the principal regulatory mechanism governing the structure of car distribution in the EU (the block exemption regulation). The second section, 'Effects of the Block Exemption', gives an account of its operation and significance. The third section, 'Reform of the Block Exemption – Rationale', explores the political context,
which led to the decision of the European Commission to finally alter the block exemption in 2002. The fourth section, 'The Reform Process', explains how the block exemption was reformed, including an account of the responses of the European Parliament to the Commission's reform proposals and an account of the Commission's final decision. Finally, the last section draws inferences from the case in the light of the research questions contained in Chapter One.

Description of the Case-study Field
Any examination of the problems that face consumers in attempting to exercise and enforce their rights when buying motor vehicles in the Single Market must take into account the particular impact of the distribution system for the sale of new cars. The structure of the motor vehicle market is pre-determined by the distribution system and consumers are inevitably obliged to work within the artificial boundaries created by this system. The system is characterised by a series of agreements between manufacturers and dealers and is sanctioned by the EU in spite of its potentially anti-competitive nature. The system itself creates certain artificial patterns of advantages and disadvantages for consumers and dealers as well as advantages for manufacturers. An appraisal of the basic situation in which consumers have to operate is a prerequisite to an understanding of the particular problems that they may experience when attempting to exercise their economic rights to access the best deals in the field.

The ensuing passages aim to describe how the distribution system works and why it has been organised in this way. It includes a description of the putative advantages that have been used to justify the maintenance of the present system and an appraisal of its disadvantages and special problems.

Structure of Car Distribution
Dealer networks are the principal mechanism used in the motor industry for the distribution of motor vehicles to the public. These networks are governed by a combination of exclusive and selective agreements. The rationale for adopting this method of distribution for motor vehicles lies in the nature of the product itself. The sale of motor vehicles has a number of characteristics which, although not unique, are specific
to the industry. For example, motor vehicles have certain technical requirements; they require that certain standards in after-care services should be met, and that certain levels of safety should be ensured as well as protecting the brand image of the manufacturer in the sales-room. Exclusive and selective agreements between manufacturers and dealers are intended to ensure that these conditions are met. Selectivity means that manufacturers can set certain criteria when selecting dealers. The criteria used can be both of a qualitative and quantitative nature. Qualitative criteria might typically include an obligation on the dealer to train and employ specialists or to meet certain standards in the provision of after-care services, to design the car show-room according to particular specifications or to comply with specific stock requirements or standards for advertising. Dealers belonging to the network are not allowed to sell cars on to other resellers outside of the network. Selective distribution systems exclude enterprises not meeting the set requirements. On the other hand, manufacturers are obliged to incorporate into their network all dealers meeting these requirements. Consequently, manufacturers limit their number through a further process of quantitative selection. Quantitative selection might, for example, seek to limit the number of dealers operating in the same territory or it might set quantitative sales targets on the dealer. Dealers are not permitted to open outlets or appoint sub-dealers outside of the contract territory. However, manufacturers do not have the right to prevent, by agreement, the entry of other vehicle manufacturers into their exclusive sales territories; i.e., they may not partition the market and assign sales territories within that market exclusively to their dealers.

**Structure of Car Distribution in the EU**

*What is the block exemption?*

The block exemption on motor vehicle distribution and servicing agreements is the principal competition mechanism constraining the structuring of the car industry's arrangement for getting cars from the manufacturer to the dealer and on to the final consumer and has been described as the car industry's own "highway code" (Monti: 2000). Although the EC treaty provision Article 81 (1) prohibits restrictive agreements and concerted practices in the field of vertical restrictions, EU competition policy Article 81 (3) in effect provides for a derogation from this arrangement. However, such an
exemption may only be obtained where the overall economic benefits (for all interested parties, including consumers) outweigh the disadvantages for competition. According to the Commission's Report on the evaluation of Regulation (EC) No 1475/95, an exemption "under Article 81(3) is possible if an agreement contains only indispensable restrictions, does not eliminate competition and promotes production, distribution or technical improvements, while granting a fair share of the gains to consumers." (EC: 2000d: 8)

The block exemption on selective and quantitative distribution had its origins in the block exemption regulation 67/67 of 22nd March 1967 (governing the application of article 85 (3) of the Treaty of Rome to certain categories of exclusive dealing agreements amended by regulation EEC 259/72 (8 December 1972) and EEC Regulation 3577/82 (23 December 1982)). However, exemption 67/67 was a general regulation and did not specifically cover agreements in the field of motor vehicle distribution. The first exemption decision in this sector was taken by the Commission in 1974 and involved BMW. The "BMW" case was intended to serve as a landmark decision and the Commission hoped that manufacturers would use it as a guide and adjust their distribution systems in accordance with the principles agreed in the decision. However, manufacturers continued to notify their agreements to the Commission in order to obtain individual exemptions. In order to deal with the problem of mass individual notifications, the Commission in 1985 adopted the first block exemption in the motor vehicle distribution sector along the lines of the BMW case: Regulation 123/85. The Regulation was in effect a form of administrative rationalisation. Regulation 123/85 ran for a period of ten years and covered both selective and exclusive distribution and servicing agreements. Amongst the obligations imposed on dealers, manufacturers were allowed to control to whom their dealers sold contract goods – for example, dealers could not sell to independent resellers. Manufacturers could restrict dealers to selling only to end-users and to dealers within the manufacturer's distribution system. Manufacturers could prevent dealers from selling spare parts to independent resellers who might need the parts for maintenance and repairs – thus restricting competition in both sales and after-sales services, although wholesalers of spare parts
were exempted from this. In addition, manufacturers could oblige dealers to offer after-sales services, thus tying together two types of commercial activity. At the time the Commission felt that tying together the sale of new cars and the obligation to offer after-sales services would be more efficient and beneficial to consumers because of the technical complexity of motor vehicles and the need for close co-operation between manufacturers and dealers on technical matters with regard to maintenance and servicing. For the same reasons, the Commission approved of manufacturers limiting the number of dealers and repairers to their networks. Further restrictions were placed on dealers to concentrate on particular sales territories. Dealers were not allowed to maintain branches or depots or even to advertise actively outside their own territories. The rationale behind these obligations resided in the notion that they would encourage dealers to engage in more intensive distribution and servicing efforts, enable them to gain a more in-depth knowledge of the local market and that this would lead to a more demand-oriented supply. (EC: 2000d:16-17) Dealers were, however, allowed to sell to customers who came from anywhere outside of their territory and dealers had the right to order 'corresponding vehicles', i.e. vehicles with slightly different technical specifications (e.g. RH drive), from the manufacturers. Manufacturers were allowed to prevent their dealers from selling other makes of new vehicles, from selling spare parts which did not match the quality of spare parts of the product range, or from selling vehicles made by the same manufacturer but which were outside of the dealer's product range. Again the Commission's rationale for allowing these practices was so that dealers would concentrate on the products supplied by the manufacturer thus ensuring better distribution and servicing for the consumer.

In 1995, Regulation 123/85 expired and was replaced by another block exemption EC Regulation 1475/95, which allowed for the continuation of both qualitative and quantitative distribution agreements between motor vehicle manufacturers and dealers. Although the basic principles of regulation 123/85 remained the same, the rules under the renewed block exemption were modified in order to stimulate competition and improve the functioning of the Single Market with a view to re-balancing the interests of manufacturers, dealers and consumers (UK Competition Commission: 2001). For example, the new regulation allowed dealers to distribute other vehicle makes providing
that they did so in separate premises under separate management. It was also made clear that dealers' remuneration should not depend on the final destination of a vehicle – this was an attempt to protect both the rights of the consumer to buy and of the dealer to sell cars from his/her establishment to consumers from anywhere in the EU. The rules governing the dealer's right to advertise outside of his/her territory were also relaxed. There were other changes aimed at providing dealers with greater economic certainty with regard to the manufacturers.

This revised block exemption was due to expire on 30th September 2002, and as the regulation provides that the Commission should at regular intervals evaluate its effectiveness, the Commission undertook to write such a report by the end of December 2000. The report aimed to equip EU policy-makers with the necessary information in order to make a judgement as to whether the regulation should be renewed in its present form, modified, or allowed to become obsolete.

Effects of the Block Exemption

Before turning to an examination of the reform process itself, a necessary pre-requisite to an understanding of its significance is the appreciation of the effects of regulation 1475/95. The following section thus aims to provide a summary of the practical effects of the block exemption on the distribution structure, on the market structure, and on consumers.

On the Distribution Structure of the Industry:

The block exemption has in fact legitimised and ossified the system of vertical restrictions - selective and exclusive distribution agreements, which have characterised the car industry. The system has considerable advantages for manufacturers. It has enabled them to tailor the system for distributing and servicing their vehicles to their own specifications. They have also been able to ensure a certain level of geographical representation for their vehicles and servicing throughout the EU and have been able to control the density of the distribution system.
This method of distribution has also allowed manufacturers largely to avoid the economic costs and financial risks of distribution, whilst affording them considerable control over the performance of their dealers. The latest EU evaluation report argues: "manufacturers have a right to closely monitor their distributions activities and performance through sales targets for e.g. the sale of new vehicles and spare parts, or as regards requirements on stocks of contract goods." (EC: 2000d:1. Annex II). For the dealers themselves, the block exemption offers a mixed balance sheet. There are certain benefits. By allocating dealers an exclusive territory within which to operate, the system provides dealers with a certain amount of protection from intra-brand competition. This enables the dealers (largely SMEs) to earn a reasonable return on their investment more securely.

The dealer contract is itself intended as a form of protection in so far as the dealer's investment is guaranteed for a certain period of time. Either contracts have to be concluded for five years or, if the time period set is unlimited, manufacturers have to give the dealer two years notice before ending the contract without a reason or one year's notice in case of network reorganisation. In addition to these benefits, manufacturers guarantee dealers with a supply of contract goods and offer a range of support services. However, dealers have argued that the power ratio in the distribution structure under both Regulation 123/85 and 1475/95 has been weighted firmly in favour of the manufacturer. Certain dealers (for example, Pendragon, Nottingham, UK) have complained that allowing manufacturers the freedom to give only one or two year's notice, severely curtails the dealer's independence to engage in pro-competitive practices (Pendragon Letter 2002). This assessment is supported by the Consumers in Europe Group (CEG) who, at the time of the review of Regulation 123/85, commented:

The proposal, if adopted in its current form will continue to impose a straight-jacket on dealers which will stifle their ability to respond to changing consumer needs over the next decade. The draft proposal does not go far enough to bring about a single market or to develop a flexible and efficient distribution system for cars and spare parts. CEG emphasises that even the limited benefits of the draft proposal will not be achieved without a vigorous programme of monitoring, review and
enforcement by the Commission. One of the fundamental weaknesses of the current Regulation has been, on the one hand, the ability of manufacturers openly to flout the conditions on which the block exemption was granted, and on the other, the unwillingness of the European Commission to apply any sort of sanctions (CEG: 1994:2).

**On Market Structures in the EU**

As for its impact on the single market, the block exemptions have served to restrict the number and type of sales outlets selling new cars. For example, the regulation enables manufacturers to close their sales networks by restricting sales of new vehicles to independent retailers operating outside of the regulation. Also, to a large extent, the regulation has excluded the creation of multi-brand sales outlets by tying dealers to supplying cars from one manufacturer. The evaluation report observes: "selling a make produced by a different manufacturer is only permissible where the seller is a separate legal entity run by separate management and where the sale is made in separate premises." (EC: 2000d:10)

The block exemptions (Regulations 123/85 and 1475/95) have also allowed manufacturers to divide the market into exclusive sales territories. On the other hand, it has been claimed that this model of distribution ensures the effective geographical distribution of new vehicles and enables manufacturers to tailor the supply of vehicles to local demand. However, the effect of the agreements significantly distorts the structure of the market by preventing the elimination of high-cost distribution outlets. Because dealers operate under similar conditions across the EU, their out-going costs tend to be broadly comparable and, consequently, the price of their vehicles also bears significant similarities within a given country, particularly with regard to intra-brand trade. However, the picture alters significantly when intra-brand car prices are compared across national boundaries, where comparisons demonstrate significant price differentials (See annex1 table of car prices). These differentials appear to show an artificial geographical basis and do not seem related to largely economic considerations, such as transport costs. For example, Finland and Greece are two of the markets the furthest away from
manufacturing centres, but enjoy some of the lowest prices across a wide range of brands in the EU. Moreover regulation 1475/95 actually obliges manufacturers to require their dealers to provide after-sales service thus, in the majority of cases, tying the sale of new cars to car servicing. This practice has had the effect of reducing competition both in the car servicing and repairs industry.

The activities of manufacturers have actually led to the reduction of parallel imports - for example, by reducing the discount available to consumers wanting to import cars from abroad. They have done this in a number of legitimate ways: for instance, by raising, in the case of parallel imports, the pre-tax price charged for new cars in countries with high taxation regimes to the same as that charged in countries with low taxation regimes. They have charged consumers a supplement for supplying right-hand drive cars. The block regulation allows for this because right-hand drive cars have to be manufactured to particular specifications and the demand for such cars on the continent is low. As the EU evaluation report explains:

... the text of the notice clearly specifies that this supplement is a "further" supplement...this text can be understood as meaning that the supplier can charge this supplement only if he is already entitled to charge another supplement for the relevant car, such as the so-called "corresponding car". If this interpretation were correct, and some car manufacturers take the view that it is, this clause would permit considerable price discrimination in cross-border sales of right-hand -drive cars as against purchases of left-hand-drive cars. Such an interpretation is clearly in contradiction with the basic principles of the Regulation, i.e. to give all European consumers the right to take full advantage of the single market and to purchase a car wherever prices are most advantageous. (EC: 2000d:102)

According to this scenario, the manufacturer (or the manufacturer's importer) might claim the right to charge twice. The first charge would be for the special supplement (e.g. for a right-hand drive vehicle) and the second for exporting cars from high tax regimes (i.e. where vehicles have a lower pre-tax price) to countries with low tax regimes. Thus, manufacturers are regaining the pre-tax price of vehicles when moving them from a high
tax country to a low tax country. This regulation allows price supplements only where vehicle modification (e.g., right hand drive) already imposes an initial price supplement. Thus right hand drive consumers are open to discrimination not suffered by other EU consumers. In its report, the Commission concludes that this practice is discriminatory. The report states:

High car taxes have a clear impact on car prices and contribute to increased price differentials within the single market. Under the notice on Regulation 123/85, a further supplement may be charged in countries where car taxes are above 100%. This would be discriminatory: it would allow manufacturers to make an additional surcharge for exports of - in practice - right-hand-drive cars which are purchased in these countries. With this surcharge manufacturers could increase prices for such cars to the price level in the cheapest country where car taxes are below 100% of the net car price. The maintenance of such a provision which allows price increases in view of the tax regime in a certain member state for export sales of - in practice - right-hand-drive cars does not appear to be justified. (EC: 2000d: 103, my emphasis)

Furthermore, parallel trade has been reduced specifically in the UK due to the fact that car manufacturers have failed to pass on to UK consumers the financial benefits of the cheaper production costs of cars manufactured in continental Europe. Manufacturers have also imposed strict sales quotas on their dealers and have tailored the supply of cars to dealers on the basis of local demand. Consequently, dealers have tended to favour consumers from their own member state and have adversely discriminated against foreign buyers. For example, dealers have discouraged foreign buyers by quoting long periods for delivery of a vehicle or by refusing to supply. Even though refusal to supply is classed as an abuse of the regulation, experts from consumer organisations have suggested that many foreign consumers do not know their rights well enough to question the veracity of the dealers' explanations and therefore do not pursue the matter. Moreover, even in such circumstances where consumers do know their rights, it does not
follow that they are able to exercise them. When faced with an entrenched institutional abuse, individual consumers rarely have the will or resources to challenge that abuse.
The question of price differentiation across borders is confused by both tax and currency issues. Manufacturers and suppliers have consistently argued that differences in car prices across borders are the result of tax differences and currency fluctuation. The evaluation report recognises this:

Car taxation is a factor which is outside the control of the motor vehicle industry. The Commission recognises this and in its notice on Regulation 123/85 stated that it will not investigate price differentials if they can be attributed to taxes, charges or fees amounting in total to more than 100% of the net price of a car, as is the case in Denmark, Finland and Greece. (EC: 2000d: 96)

However, it is perhaps worth pointing out that the Commission's explanations are ambiguous and open to misinterpretation by the uninitiated reader. It is true, for example, that car taxation is outside the control of the motor vehicle industry, and prices can be attributed to tax differentials. However, the wording of the passage would lead the reader to draw the conclusion that the higher prices were in no way attributable to the pricing policy of the manufacturers. In fact, the manufacturers are responsible for differentials in the pre-tax pricing policy of vehicles across the member states, and in countries with very high tax regimes, such as Denmark, manufacturers choose to lower the pre-tax price of vehicles to make them more affordable.
The manufacturers' practice of reducing net prices to high tax countries (such as Finland and Denmark) means that they have operated a systematic pattern of cross-border price subsidies to the detriment of consumers in low-tax countries. The purpose of the parallel import supplement is to prevent arbitrage.
Regulations 123/85 and 1475/95 state that the Commission can suspend the block exemption in cases where there is evidence of significant price differentials. In practice, it has, however, never used this power. Moreover the effects of such drastic action might be so extensive and complex as to make this sanction unusable. For instance, one official in the Competition DG (interview: 27/6/2002) has compared it to the nuclear deterrent.
The Commission provided its own interpretation of the regulation. According to its interpretation, the Commission recommended that retail prices in general should not exceed 12% of the lowest price for any specific model of car within the Single Market, i.e. price differentials across the EU should not exceed 12%.

However, the report continues to explain that even if Denmark, Finland and Greece (countries with the highest tax regimes) are not taken into account, the price differentials amongst the remaining twelve states still exceeded 12% for the period of November 1996 to November 1998. Technically, therefore, the Commission could have opened investigations (EC: 2000d: 96). The reason the report gives for the Commission's inaction, is that the level of price differentials is affected by countries with special tax regimes. However, the diagram clearly demonstrates that countries with special car tax regimes were not even included in the main part of the survey. Their statistics were only included in the diagram from May 1999 onwards. Consequently, the level of price differentials cannot be attributed to high tax regimes.

Currency fluctuations were also identified by car manufacturers and the Commission as being a major contributor to price differentials. In its report, the Commission claimed that prices in the UK had been particularly high because of exchange rate fluctuations. They based the proof of this assertion on a chart (see Diagram 18, EC: 2000d:103) which showed how UK car prices rose closely in line with the rise in the exchange rate between the pound and the Euro. As Mario Monti (Competition Commissioner) commented:

A recent test case for the functioning of the internal market is the case of the United Kingdom. Prices for domestic buyers are, as you know, very high in this Member State if converted into Euros, compared to other markets with similar car taxes. Reasons for the price differential between UK prices and prices on the continent include, on the one hand, the appreciation of the pound sterling against the Euro and on the other, the fact that right-hand drive vehicles are more expensive because the numbers of such cars are smaller than the numbers of similar left-hand drive cars. (Monti: 2000)
However, this argument is illogical. The effect of an appreciation of the £ against the Euro should be to reduce the price within the UK of cars imported from countries in the eurozone.

Both Monti and the EU report criticised UK car prices on these grounds, attributing the high prices to insufficient amounts of parallel trade. The report explained:

...one would also have expected another element [the strength of the £ sterling] to play a role in promoting downward pressure on prices in the United Kingdom... despite the strength of the pound, car prices in the United Kingdom have, since 1997, generally not decreased. Assuming that trade should become lucrative if price differentials are above 12% significant trade should indeed take place and should have exerted a downward pressure on car prices. The fact that producers can obviously ignore the impact of parallel imports on prices in the United Kingdom implies that trade is very limited and that competition does not fully play its role. (EC: 2000d:104)

At this point, it appears that the authors of the report recognise that an appreciation of sterling should lead directly to a reduction in the price of cars imported into the UK. Nonetheless, the report concluded with a worrying confusion about the impact of rises in the value of sterling:

The car price differentials calculated in ECU/euro within the 8 countries with low taxes on cars show that the rise in value of the pound sterling after 1996 has automatically increased the magnitude of differentials between these countries: UK car prices increased nearly in parallel with the rise in value of the pound. However, the rise in value of the pound cannot, on its own, completely justify the level of prices in the UK since other factors (increase in parallel trade, action on car manufacturers producing in the euro zone) should have exerted downward pressure on prices. These factors, which are to be expected in a market on which there is competition did not materialise. (EC: 2000d: 99) (My emphasis.)
However, this logic only applies to vehicles manufactured and sold in the UK. In the case where vehicles are manufactured on the continent and sold in the UK, precisely the opposite applies. The effect of a rise in the value of the pound sterling should be to reduce car prices expressed in pounds in the UK. This reversal of the logic of exchange rate fluctuations frequently appears in debates on this topic. It is particularly disturbing to find it in an EU evaluation report.

Mario Monti concurred with the report's analysis and explained that the paucity of parallel trade could also be attributed, in part, to the pressure exerted by the manufacturers on dealers. According to Monti, manufacturers have been in the habit of using the regulation to justify allocating new vehicles in a rigid way, such that dealers' stocks have been focussed on local demand in their territories (Monti: 2000).

**On Consumer Choice:**
Price differentials for cars across the member states are important because, as the Commission report evaluating the block exemption explains, price differentials can be an indication of market partitioning. In view of the fact that one of the objectives of the single market is to promote market integration, evidence of market partitioning should, according to the Commission, be carefully monitored (EC: 2000d: 92).

For the consumer, the block exemption means that there are few real alternatives to buying a new car other than going through the dealer networks (EC: 2000d:11). The dealer networks restrict the sale of new cars to independent resellers, which restricts the entry of new players into the market for selling new cars. This restricts competition in the car distribution sector, which might otherwise put downward pressure on the price of cars. Intra-brand competition is therefore restricted, consequently prices are not as low as they might be were other would-be entrants to the market allowed to compete effectively. The activities of manufacturers (largely legitimised by the block exemption) have also created considerable obstacles for consumers who attempt to purchase cars across borders. For example, the Regulation effectively legitimises the practice of charging higher prices for cars in lower tax regimes to those in higher tax regimes. Thus, the
benefit of discounts that might have been expected to accrue to consumers prepared to shop around in the Single Market are less than might be expected.

Reform of the Block Exemption: Rationale

Why was the block exemption retained for so long without significant alteration?

In view of the above assessment, the first question that naturally arises is why was the block exemption retained in a similar form for so long? Apart from the arguments offered by the Commission at the time to the effect that this system offered the best and most efficient method of distribution (assertions which have been strongly contested, as the above critique has demonstrated), the reason for the retention of the 1985 and 1995 block exemptions focus around one central theme - the corporate influence of manufacturers on politicians, on political parties, on member state governments and on the EU. McLaughlin (1993) and Holmes and McGowan (1997) all note the importance of the car industry to the member states' manufacturing and employment policies. For example, Holmes and McGowan comment:

The car industry in Europe is politically visible and sensitive. It is estimated that value added in the automobile and component industry itself is just under 2 per cent of EU... (GNP). EU car producers employed around 1.13 million workers in 1990, with another 900,000 in the components industry. If all indirect suppliers are added in, it is estimated that about 4.5 million workers, or 15 per cent of industrial employment is involved in the industry. (Holmes & McGowan: 1997:160)

The importance of the car sector to the member states' industrial policy has in the past led some member states to adopt protective strategies towards the car manufacturers. McLaughlin comments:

The car industry has, in the past, been plagued by crises and a poor industrial relations record. Moreover, because of its pivotal role in the manufacturing sector, its under-performance has led to repeated government intervention. The European
industry is therefore dominated by national champions which have come to rely heavily on domestic sales. (McLaughlin: 1993: 196)

Holmes and McGowan further note that the industry was badly hit during the early 1990s due to the recession and that member states were also anxious to protect both domestic and EU car manufacturers from the impact of Japanese imports. They describe the protective strategies adopted by certain member states towards car manufacturers. Taking the UK, France and Italy as examples, Holmes and McGowan explain the economic impact of these strategies on the EU car market:

The UK government, believing the industry to be viable but in need of radical overhaul, encouraged inward investment. It allowed manufacturers to collude to restrict Japanese imports and to set prices high in the UK market, such that the UK consumer would in effect subsidise domestic and foreign producers alike. The French government with Renault...chose to subsidise local producers directly, while keeping prices lower, restricting imports by direct administrative controls that had no legal base and discouraging inward investment. From the 1960's, the Italian government maintained more or less legal and very restrictive import quotas (not contested by the Commission) leaving prices high and allowing no inward investment to compete with Fiat. (Holmes & McGowan: 1997: 161/162)

The strength of the car industry's lobbying powers is acknowledged by a range of sources. McLaughlin describes the industry's 'multi-level' strategies at some length, noting the presence of the car manufacturers at national and EU level. According to McLaughlin, manufacturers have used a variety of lobbying tactics; lobbying directly at both national and EU level, setting up their own offices in Brussels, lobbying via national and European interest associations as well as employing professional lobbyists. This assessment has also been confirmed by members of the Consumer's Association (CA) (3/7/2002), by MEPs (25/5/2002) and the Competition DG (27/6/2002) during the course of interviewing. For example, a principal policy adviser from the CA commented: "The reason why the block exemption remained for so long is it is there for the car industry."
The industry has incredible power—huge economic power." (Interview: 3/7/2002). Eric Van Ginderachter, head of the competition DG's unit on car distribution and other forms of transport offered the following comments regarding the first regulation 123/85:

At the time, the exemption [regulation 123/85] was based on the specific characters of the motor vehicle industry advanced by the manufacturers in order to permit this system of distribution which is, it is to be underlined, the most restrictive one can imagine from the competition point of view. (Van Ginderachter: 2000)

The continuation of the system in 1995 with only minor adjustments may be attributed to the power of the manufacturer's corporate lobbying and their importance to the industrial policies of the member states, as Holmes and McGowan indicate:

The producers succeeded in persuading the Commission to renew with only a few minor modifications the Block exemption on motor vehicle distribution in 1995, despite opposition from BEUC and the new member states. (Holmes & McGowan: 1997:168)

As Holmes and McGowan comment above, it is interesting to note the lack of action taken by the Commission to correct the collusive practices of the manufacturers at this time. In view of the fact that these practices were largely condoned by the member-states themselves, the Commission's politically sensitive task of pursuing corporate miscreants cannot have been easy. Nevertheless, the first infringement of competition rules taken by the Commission against any car manufacturer documented below came as late as 1998.

**Why Did the Commission Decide to Redefine the Block Exemption?**

In view of the fact that the Commission changed only marginally the substance of Regulation 123/85 in 1995, one question that suggests itself is: why did the Commission suggest such a radical overhaul of the block exemption regulation by 2002? One part of the answer lies in the fact that Regulation 1475/95 was due to expire on 30th September
2002 anyway and contained a clause committing the Commission to publishing an evaluation of its effectiveness by the end of 2000 (Article 11.3 Regulation 1475/95). In the event, the evaluation was highly critical of the effectiveness of the exemption. The proposed new draft was based on the findings of the report as well as on information gathered through a variety of consultations with interested parties, questionnaires and commissioned studies. The importance of the evaluation as an instrument for change is clearly stated in Annex 1 of the new draft exemption, which also contains a summary of the key reasons prompting this. The annex states:

A renewal of the existing motor vehicle block exemption Regulation (EC) No 1475/95 is not a real option... The evaluation report adopted by the Commission on 15 November 2000 concluded that Regulation (EC) No 1475/95 did not achieve certain of its principal aims. (EC: 2002d: annex 1)

The key failures of regulation 1475/95 were identified as follows:

1. The regulation had a 'straight-jacket' effect, since all motor vehicles were distributed in a similar way.

2. Parallel trade between member states remained marginal as demonstrated by the Commission's six monthly car price surveys. The amount of parallel trade was not significant enough to put downward pressure on manufacturer's prices. Studies commissioned by the Competition DG showed that price differentials were not simply due to taxation or to currency fluctuations but could be attributed to the pricing strategies adopted by the manufacturers.

3. Regulation 1475/95 made it difficult for new market entrants such as internet suppliers or multi-brand dealers to establish themselves.
4. The report concluded that the link between the sale of new cars and after sales services was not 'natural', that it did not pose safety problems and that it constituted a restriction of competition.

5. Although approximately 80% of spare parts are not made by the manufacturers, the dealers were encouraged by the manufacturers to source the majority of their spare parts via the vehicle manufacturers instead of via the original producers.

6. Dealer independence had not been significantly strengthened by Regulation 1475/95 in spite of the changes made in 1995. Moreover, the annex contained the following assessment:

   Although regulation (EC) No 1475/95 is very generous to the automobile industry, car manufacturers have often not respected its terms, obliging the Commission to adopt four decisions involving the imposition of fines. On 28 January 1998, Volkswagen was fined EUR 102 million for impeding parallel trade in Italy (reduced by the CFI to EUR 90 million). On 20 September 2000 the Commission fined Opel Nederland EUR 43 million for restricting parallel trade in the Netherlands. On 30 May 2001, Volkswagen was fined a second time for price fixing in Germany, this time involving the VW Passat (fine EUR 30,96 million) and on 10 October 2001 DaimlerChrysler was fined EUR 71,825 million for impeding parallel trade in Germany, restricting sales to leasing companies and engaging in price fixing in Belgium. (EC: 2002d:Annex)

During the course of this research, members of the Competition DG (interview 27/6/2002) and the European Parliament (25/5/2002) have explained that the successes that the Competition DG had in prosecuting the car manufacturers lent further weight to the case for redefining the car block exemption. These were by no means the only instances of infringement. In a speech delivered to at the European Competition Day during the panel on car distribution (Lisbon 9/6/2000), Eric Van Ginderachter (head of
the Competition DG's unit on Motor vehicles and other means of transport) commented that apart from the first case involving VW:

Other possible cases of similar infringements made by other manufactures, which are still being examined reveal that, as soon as parallel imports reach a figure of about 3% of sales in a state, a percentage which represents all in all a low figure, restrictive measures aiming to block them are taken. In one of these cases, the restrictions observed concern the parallel trade between Spain and Portugal. The prices were higher in Portugal than in Spain for certain models of that manufacturer and parallel trade was taking place. The car manufacturer apparently decided then to reduce the vehicle allocation in respect of those Spanish dealers who had been selling cars to Portugal and cars awaiting distribution to dealers were not delivered. Other measures to halt the export of cars to Portugal were also taken. The result was a steep decline of sales to Portugal compared with the previous years. (Van Ginderachter: 2000)

Jim Murray, director of the BEUC (Bureau Européene de l'Union des Consommateurs - European Consumer's Group) also confirmed the recalcitrance of the manufacturers' to comply with the regulation during the Commission's hearing on 13/14th February 2001 on Regulation 1475/95 (Murray: 2001).

In addition to the EU evaluation report, two member-states - Denmark and the UK - also produced reports on the block exemption. The UK report – April 2000, (UK Competition Commission 2000) - appeared in advance of the EU report and seems to have had some influence on it (Monti: 2000). The report recommended the abolition of the system of exclusive territories and suggested that manufacturers should be forbidden to refuse to supply new cars to any retailer. It also recommended that tying the sale of new cars to after sales servicing should be abandoned and that dealers should not be obliged to offer the full range of the manufacturer's models. In brief, the report recommended that the regulation should not be renewed. In the spring of 2001, the Danish competition authority also published a report 'Agreements and prices in the car sector' in which it found that regulation 1475/95 was responsible for the absence of competition between
members of the same network for new cars and spare parts. It recommended that any future regulation should not be based on quantitative or exclusive criteria but on certain qualitative criteria.

Further pressure to change the block exemption came from the sheer number of consumer complaints that the Commission received as a result of regulation 1475/95. The level of complaints intensified both prior to and during the consultation process for the new draft exemption. The significance of consumer lobbying is noted in the annex of the new draft regulation (Commission: 2000d). In his speech 'Who will be in the driver's seat?' Mario Monti, the Competition Commissioner, specifically commented on the importance of the UK consumer lobby in this respect (Monti: 2000).

The importance of the consumer lobbying was also cited during interviews with members of the Competition DG (27/6/2002), the EP (25/5/2002) and the CA (3/7/2002). Other consumer organisations also brought pressure to bear on the Commission, for example at the Competition DG's hearing on 13/14th February 2001, Jim Murray, director of the European Consumer's group, offered the following assessment:

"We do not say there is no competition in the car market. We say there is not enough, and that the block exemption is a major factor in facilitating unreasonable unjustified and unnecessary restrictions on competition." (Murray: 2001)

The Competition DG's bi-annual price surveys which demonstrated continued market segmentation in the sale of new cars also supported the Commission's decision to overhaul regulation 1475/95.

Impetus for change also came from the car manufacturers themselves, who, after having sought to obtain cost savings from the suppliers of car components, began to seek further economies by rationalising their distribution systems. This trend was confirmed by Mario Monti who cited the changes as an additional reason for carefully evaluating the operational effectiveness of regulation 1475/95 in an altered environment (Monti : 2000).

The dedication of Mario Monti, himself a professor of economics, to the reform of the exemption, also gave support to the process. Moreover, it is clear from an examination of Prodi's speeches that, since becoming EU Commission President, he has been very
concerned to improve the relationship between the EU citizen and the EU institutions.
The circumstances under which Prodi became Commission President, shortly after the
resignation of the disgraced Santer Commission, had an obvious impact on his priorities.
His speeches show a high level of concern regarding the disillusionment of EU citizens
with the EU institutions and with the integration process. He repeatedly refers to a
greater commitment to issues of concern to citizens, such as social, environmental, health
and consumer issues, as Chapter Four demonstrated.
Reforming the governance process, democratising and improving the functioning of both
the decision-making process and the implementation and enforcement of policies are also
The phrase he used is 'making Europe work better'; it is possible to draw links between
the context provided by these general priorities – a context which is generally more
sympathetic to issues of concern both to citizens and to citizens as consumers and the
reform of the block exemption regulation. A principal policy adviser at the UK
Consumers' Association also suggested that the Commission was worried about the way
in which citizens viewed the EU. He commented:

The EU is bloody worried about how citizens view the EU – they're worried about
bad publicity due to corruption and how citizens view the EU institutions in the
light of this corruption. They're worried about their legitimacy – they're aware of
low turn-out figures for EU elections, of the rise of the right wing, EU scandals.
They want to prove that they are worthy because without legitimacy you have no
power. (Interview: 3/7/2002)

Finally, members of the Competition DG, themselves aware of the perceived failure of
the Commission to bring about adequate changes to the block exemption in 1995 or
adequately to ensure the proper functioning of the market for the sale of new cars, were
anxious to redeem the image of the Competition DG in the eyes of the citizens. An
official of the Competition DG admitted that the evaluation report, which showed
evidence of a marked change in attitude to the block exemption, effectively represented
an admission that the competition DG had made a mistake in not reforming the regulation

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governing the distribution system earlier in 1995 (Interview: 27/6/2002). A principal policy adviser in the CA also confirmed this:

The Competition DG decided that it had not done the job properly last time and they decided to do the job properly this time. They also got fed up of the car industry throwing its weight around and basically treating them with contempt. They wanted to move away from the image of corruption that had grown up during the Santer Commission - there was a desire to put things right. The new president of the EU Prodi had a clear vision - he wanted to make EU policy closer to the citizen and Monti was the same. (Interview: 3/7/2002)

**The Reform Process**

In the wake of the conclusions of the evaluation report, the Commission began a period of informal consultation. A range of interested actors were consulted and invited to comment or submit evidence to support their opinions during a number of hearings and debates organised by the Commission, the EP and the Economic and Social Committee (ECOSOC). These hearings were complemented by a series of studies commissioned by the Competition DG ('The sales service link' by Autopolis (2000), 'Price Differentials in the EU: an Economic Analysis' by Prof Verboven and Degryse (2000), 'Customer Preferences for Existing and Potential Sales and Servicing Alternatives in Automotive Distribution by Dr. Ladermann & Partner (2001)).

As a result of this, the Commission decided that it would not renew regulation 1475/95 in a similar form, but would significantly alter its substance and form. The Competition DG consequently composed a new draft regulation, which it presented on 5th February 2002. It was considerably stricter on the manufacturers than the previous regulations and was intended to increase competition in the sale of new cars and after sales services and strengthen the position of the dealers in respect of the manufacturers. The draft contained a number of innovations. For example, it did not prescribe a single kind of distribution system as previously but allowed manufacturers the choice between running a selective or exclusive system. (An exclusive system is where each dealer approved by the manufacturer is given a sales territory but may sell to other resellers outside of the

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manufacturer's network. In a selective system manufacturers again choose their dealers according to qualitative criteria but do not allocate specific sales territories and are not allowed to sell to other retailers operating outside of the manufacturer's network). The link between the sale of new cars and after-sales servicing was loosened; the new draft gives dealers the choice as to whether to carry out after sales services themselves or to sub-contract them. In addition, the practice of allocating dealers an exclusive territory and obliging them not to engage in active sales outside of their territory – the 'location' clause - was to be prohibited and dealers were to be allowed to establish themselves in other member states. In the draft, additional restrictions were removed from dealers wishing to sell multi-brand vehicles. Dealers would be allowed to sell multiple car brands without being obliged by the manufacturer to display the full range of motor vehicles if this constituted an unreasonable restriction on the dealers' financial ability to multi-brand, and dealers were to be allowed to service competing makes of car. However, manufacturers were to be allowed to insist that their cars should be displayed under certain specific showroom conditions.

In addition to these changes, the draft exemption contained an extended list of 'black practices' which was also intended specifically to remedy the failures of the previous regulations. As well as the conditions outlined above, the black list contained clauses referring to the prohibition of manufacturers to set re-sale prices for distributors, although recommended prices would be permitted. In addition, manufacturers would be prohibited from restricting dealers' territories or access to customers, except under very specific conditions compatible with the regulation. Many of the clauses were intended to prevent manufacturers from restricting the sale of spare parts to independent repairers, or from preventing dealers access to the cheapest spare parts. Other clauses referred to the ability of the Commission to withdraw the benefits of the block exemption where "prices or conditions of supply for contract goods or for corresponding goods differ substantially between geographic markets; or ...where discriminatory prices or sales conditions are applied within a geographic market." These conditions were specifically aimed at reducing the problems of parallel imports.

The prospect of reform met with considerable opposition from both the car manufacturers and from key national politicians. For example, Gerhardt Schroder (German Chancellor)
has been accused of bullying member of the Commission in defence of the German car manufacturers; a principal policy adviser at the CA offered the following comments about the German chancellor:

Gerhardt Schroder is on the VW car industry advisory board, every German and French MEP backed the car industry, they are lobbied endlessly, the industry camps out at their door. Schroder threw his weight around at the competition DG endlessly and shamelessly. (Interview: 3/7/2002)

*The Response of the European Parliament.*
The draft exemption was sent out for comment to the member states and also to the other institutions of the EU – the European Parliament and ECOSOC. Both the Parliament and ECOSOC drew up their own reports on the Commission's draft exemption. Although the Parliament had recourse to neither the co-operation nor the co-decision procedures, its opinion nonetheless was significant for the success of the Commission's draft proposal. Although the Parliament 'welcomed' the Commission's efforts to increase competition in the car sector, it offered a number of alterations, which were clearly intended to weaken the liberal effect of the new draft. It is interesting to note, for example, that in the initial justification for the proposed changes, none of the explanations refer to the position of the consumer, but address the position of the dealers, distributors and other SMEs. The most damaging changes concerned the elevation of the percentage level of the manufacturer's market share before investigation by the Commission and the delay on the ban of the location clause. The Parliament proposed raising the market share level at which manufacturer's vertical agreements should be investigated from '30% or up to 40% in case of quantitative selective distribution for the sale of new motor vehicles', as proposed by the Commission, to a flat 40% for all vertical agreements. The Commission's suggestion was already enormously generous and amounted to permission to maintain oligopolistic practices. The Parliament also suggested delaying the abandonment of the 'location clause', the ability of distributors to set up showrooms and repair/maintenance workshops anywhere in the EU. Under the Commission's draft proposal, enterprises benefiting from the
current regulation on 30th September 2002 were to be allowed a year to adjust before the new rules should apply. The Parliament suggested that the introduction of this clause should be delayed until 2005, when a review of the operation of the exemption should be undertaken, with a view to establishing whether or not it would really be necessary to adopt this practice in order to meet the criteria set out in Article 81(3). The review itself would take a number of months to complete, thus delaying even further the freedom of distributors to establish themselves anywhere in the EU. At the end of the review, the possibility still remained that the location clause would not be abandoned thus, in the meantime, prolonging regulatory uncertainty for all concerned. The importance of the clause to the Commission's success in liberalising the car sector was underlined by Commissioner Monti in his submission to the EP's plenary debate. Monti comments:

One of the most important elements of our new system is the prohibition of use of the location clause. This is the linchpin of the system and it is necessary for the other measures to be effective too. The abolition of this clause applying to vehicle sales, which will allow dealers to open secondary sales and delivery outlets in other areas, including in other member states, is essential to facilitate consumer access to vehicles sold by dealers from other Member States at lower prices. This will increase competition between dealers selling the same brand of car and encourage market integration, making multi-brand sales possible too. (Monti : 2002 a)

The EP's position is difficult to reconcile with the evaluation reports. In spite of technical advice or the weight of consumer dissatisfaction, the EP sought to block reform, suggesting that MEPs were subject to powerful lobbying by the manufacturers. This was subsequently confirmed both as a result of a debate that took place in the Parliament on 29th May 2002 and also as a result of a vote that the EP took on whether to adopt the proposed parliamentary amendments. It was also confirmed individually by an MEP (interview: 25/5/2002), by members of the UK Consumer's Association (3/7/2002) and by a senior official in the Commission's Competition DG during the course of interview (27/6/2002).
The debate involved submissions by seventeen MEPs on the subject of the Commission's proposed draft block exemption. The crux of the submissions centred on the question of the location clause: whether to accept the Commission's ban or whether to extend the transition period for the clauses with a review in 2005. The submissions were clearly divided in opinion along national lines and reflected the importance of national lobbying from home industries. It must be remembered that the German and French manufacturers are particularly important to their respective governments' economies and that, for both countries, the redrafting of the block exemption occurred during an election year. Lobbying of national and European politicians was therefore intense. Seven MEPs favoured extending the location clause with a review in 2005, three of these were German, two French, one Spanish, and one Italian. One Spanish and one Portuguese MEP favoured an extension of the transition phase with no review and four MEPs favoured banning the location clauses altogether; three were British and one was Danish. The Danish MEP (Riis-Jorgensen) offered the following comments on the impact of the car manufacturers' lobbying tactics on a variety of the MEPs during the period of the draft exemption review. She states:

...the car manufacturers' view of what is in their own best interests does not coincide with what is beneficial for consumers. We have clearly seen this in the form of the massive lobbying that has gone on everywhere in recent weeks and months in order to prevent a genuine internal market for car sales being established... (Riis-Jorgensen: 2002)

On 30th May 2002, the Parliament voted overwhelmingly in favour of adopting the European Parliament's amendments, extending the inclusion of the location clause until 2005 with a subsequent review.

**The Commission's Decision**

On 17th July 2002, after taking into account the opinion of the European Parliament, the Commission published its final version of the new block exemption. The new regulation took into account fully or partly 18 of the 29 modifications suggested by the EP. Its
commitment to offering manufacturers a choice between a selective or exclusive network remained unchanged. Dealers belonging to selective systems will be able to engage in active sales techniques, i.e. they may actively advertise anywhere in the EU. Dealers belonging to exclusive systems will be able to sell actively to independent resellers within the exclusive territory. This practice is banned by the current regulation. The clause on availability - i.e. the right of buyers wishing to purchase corresponding vehicles and the right of dealers to supply those vehicles - was also reconfirmed. However, the decision on banning the location clause was delayed until 2005. This represents a partial success on the part of the EP (and particularly on the part of the manufacturers) in gaining two more years of protection from the full force of competition. However, contrary to the EP’s proposal, the working of the block exemption will not be re-evaluated but will definitely be banned as of the 1st October 2005. The effects of the clauses on multi-branding, as described in the draft exemption, remain the same. Existing restrictions on operators acting on behalf of consumers are to be removed, in the future, so called 'intermediaries' will only need to show a mandate from the consumer; thus making cross-border purchases theoretically easier. The link between the sale of new cars and after sales service is to be loosened, as the draft exemption intended. Dealers are to be allowed to choose whether to carry out service operations or subcontract them to an authorised repairer in the manufacturer’s network. The new regulation also provides that as long as they meet the correct quality standards, car dealers and independent repairers can become part of a manufacturer’s network without being obliged to sell new cars. The manufacturer may not limit the number of repairers, and repairers can service a variety of car makes.

Conclusions
This chapter set out, in the context of the EU market for cars, to examine ways in which the Commission has attempted to compensate for the institutional constraints imposed upon its capacity to supervise proper enforcement at member-state level in the domain of consumers’ economic rights and to assess the success of these strategies. In many respects, the case-study amply demonstrates the limitations of the Commission’s approach towards consumer protection. The approach adopted by the Commission in this
field substantially rested on attempts to amend the block exemption on cars, so as to increase consumers' capacities to exercise their economic rights. The case has revealed that a significant characteristic of this market sector is that many of the problems experienced by consumers occur prior to purchase – for instance, refusal to supply, restriction of supply, application of multiple price supplements for parallel imports. Problems of this type cannot be addressed by means of redress mechanisms. However, many of the direct consumer protection measures currently in force are designed to provide for consumer redress as Chapter Five demonstrated - as such they may be considered to have been largely inappropriate and inadequate. In these circumstances, the Commission has turned to competition policy and, in particular, the revision of the block exemption as a means to achieve its policy goals. However, its attempts to strengthen the consumer's hand by altering the balance of power of the regulatory framework in their favour met with profound opposition from politicians and manufacturers, whose interests were often closely interrelated. Consequently the reforms did not go as far as consumer interest groups had hoped or expected. It is particularly interesting to note that the institution responsible for weakening the Commission's bid to reinforce consumer power was the European Parliament, the supposed protector of citizens' interests. In this way, the case-study clearly demonstrates the dilemma posed by Tallberg's P-S-A model – that as principals, the member states agreed to the creation of a common regulatory structure which they delegated to the Commission to supervise and enforce. However, when faced with the application of economic pressure by the car manufacturers, many politicians worried about the adverse economic and political fallout that might result from the reaction of the manufacturers to the revised regulatory structure, themselves pressurised the Commission to water down the effects of some of the more liberal clauses. Although the analogy with this model is not exact – in competition policy, the states delegate both the task of supervisor and agent to the Commission – member states' politicians are still in the position of reacting to the application of the rules. Cut out of the loop, as they are in the application of competition policy rules, member states' politicians used political pressure, both directly on the Competition DG and through the European Parliament, to oppose regulations which they perceived to be damaging to their party political interests. The success of the
manufacturers and politicians in watering down the revised block exemption also clearly demonstrated the limitations on the Commission’s attempts to promote citizen-consumer support for the Single Market by increasing their ability to access its full economic benefits.

Nonetheless, the new block exemption would seem to represent some progress on the old regulations. As the above analysis has demonstrated, the Commission has worked hard to increase competition in the car sector and to curb the power of the manufacturers. The extension on keeping the location clause represents a not insignificant victory for the manufacturers, although, ultimately, the Commission's desire for reform has prevailed. Nevertheless, it remains to be seen whether the new regulation will succeed in making a practical difference to the car market. Recent EU car price surveys (22/7/2002) show that substantial price differences persist across the member states. The Commission will still be responsible for the supervision and enforcement of the regulation. Its ability to do so effectively will still be hampered by a lack of resources and by the limited political will of some of the member states. Its ultimate weapon, the withdrawal of the block exemption remains, to all intents and purposes, unusable. The Commission can continue to fine car manufacturers, but the fines appear to have only a limited impact; manufacturers continue to engage in 'black practices', even after substantial fines, as the VW case clearly demonstrates. However, by attacking the root of the problem, rather than by aiming to redress the after-effects, and in this way, circumventing the difficulties posed by the enforcement loop, the Commission may in the long term have taken a step towards putting the consumer back in the driver's seat.

Prior to the publication of the Commission's evaluation report of regulation 1475/95, Commissioner Monti made a speech on the future of the car distribution system at the end of which he summarised his view of the then prevailing system:

The manufacturer is in the back seat of the car and gives instructions to his chauffeur, the dealer, on how to drive down the distribution highway to the consumer, who buys the car. The manufacturer finally manages to bring the car to the consumer, who buys the car, but not always, it seems in the fastest, most economic and smoothest way possible: moreover, all too often the manufacturer
appears to instruct the dealer, who should really be the one responsible for driving
the car, to do things which are outside the "highway code". In addition, according
to consumers' expectations, the European "highway code" seems not in all respects
the best possible solution to bring the car to the consumer. (Monti: 2000)

A year after the adoption of the new block exemption the changes to the regulatory
framework appear to have had only a modest impact on the car sector. The car market
2003 annual EU Car Price Report (1.5.2003) indicates a modest overall reduction in car
price differences of 2%, although price differentials between the cheapest and dearest
member-states remain substantial. The report reveals that prices of popular models have
remained unjustifiably divergent. The largest differential found in the survey, applied to
the Fiat Seicento which cost 45.5% more in Austria than in Spain. Indeed pricing of the
most popular models shows no marked improvement on previous years and the prices of
some Peugeot and VW Group models show marked increases compared with 2002.
Germany remains the most expensive state where a total of 35 models are sold at the
highest prices in the EU. Prices in Denmark remain the lowest in the Union.
Commissioner Monti expressed disappointment at the rate of progress (Commission

This report shows slight though insufficient progress towards a truly single market
for car distribution...A consumer who buys a car at a lower price in another member
state should not face any anti-competitive obstacles.
CHAPTER 7

CASE-STUDY: CROSS-BORDER PASSENGER TRANSPORT

Introduction

This chapter examines the case of cross-border transport with particular reference to cross-Channel passenger transport, principally between the UK and its nearest Continental neighbours – France and Belgium. It explores the recent experience of consumers in terms of sea and rail transport along a limited number of popular routes, in the light of the market strategies adopted by the principal operators.

In terms of sea-crossings, the case will be mainly restricted to the short cross-Channel routes. Some reference will be made to western routes and to the longer North Sea routes. In terms of rail travel, the case will be confined to Eurostar routes from London to Paris, Lille or Brussels, and to the Eurotunnel shuttle services for motorists from Folkestone to La Cocquelles.

The case is intended to fulfil a number of functions. It will place cross-border transport in the wider context of EU policy objectives, especially those relating to the economic development of border regions. It will provide, by examining primary data relating to travel reservations, evidence to illustrate the increasing limitations on consumer choice and will specify the structures and strategies which have brought this about. It will explore a variety of forms of discrimination experienced by consumers including cross-border discrimination, and it will examine these experiences with reference to selected EU policy measures designed to protect the economic interests of consumers. In this way it will address one of the research questions central to this study, namely: given the institutional constraints imposed upon the Commission's capacity to supervise proper enforcement at member state level, how has the Commission attempted to compensate for these constraints in the domain of consumer economic rights and to what extent has it been successful?
From this case of cross-border travel and from the study of the European car market, it is intended to draw inferences regarding the impact of measures 'on the ground' to inform key issues raised by the study. This case complements the study of the European car market by focussing on a service, which is quintessentially cross-border in its nature. Moreover, like the cars case, cross-Channel travel has represented an area in which interest has been shown by policy actors at both member-state and European Commission levels since the mid-1980s.

The chapter first examines the significance of cross-border travel, outlining the structure of the cross-channel market and reviews attempts by European Commission and member-state actors to shape market structure; it then examines the present market position and explores the effects of market practices on consumers. The final sections deal with Commission responses to cross-border consumer problems, and examine these in the light of cross-channel passenger transport.

The Significance of Cross Border Travel

Inevitably, the EU inherited the economic history and the economic structures of its constituent member states. These structures reflected and, to some extent, still reflect the shapes etched by the economic and commercial flows of the independent national economies which pre-dated the EEC. Apart from the fact that national frontiers were themselves frequently defined by geographical barriers, the very political entity of the nation-state tended to marginalise these frontier areas by committing resources and infrastructure to serve areas more centrally placed. This feature of the economic geography of the EU was addressed in the early-1990s by the support of projects designed to strengthen cross-border links via the progressive construction of a Trans-European Transport Network. In an analysis of the development of the fourteen initial Trans-European Network (TEN) projects, van Exel et al stress the importance of this policy as a necessary supplement to normal market forces (van Exel et al: 2002:299).

The TEN projects are recognised by the European Commission as having an important role to play in the process of launching a more dynamic, sustainable and job-creating economic growth; in particular by improving the competitiveness
of European countries to match or exceed that of other developed or developing regions in the world. This should be done by providing peripheral regions – often being border regions - of the community with better access to economic centres, by improving economic and social cohesion throughout Europe and by enhancing the environmental conditions of transport activities.

In fact, in 1998, the Commission itself specified the main objectives for the TEN initiatives. These included the need to improve strategic mobility, to contribute to strategic economic improvement, and the implementation of the Single Market. Interestingly, it was also intended to enhance the social dimension, with particular reference to equity, working conditions and a 'Citizens' Network' (van Exel et al: 2002).

Apart from its economic role in what was once frontier territory, the case of cross-border travel is unusual, perhaps unique, in a number of respects and it is these peculiarities which make it especially relevant to this study. First, a journey, be it by train, ferry or plane, is not simply a similar experience for consumers, but one actually shared by those consumers who happen to have booked the same departure. Moreover, since the experience is shared, it may be taken as axiomatic that the operator's unit costs will be much the same, irrespective of when or where the booking was made, though clearly, different levels of service (First Class), for instance, may involve additional costs and accordingly higher prices per unit. A second peculiarity of this case is that it is normal for bookings for the same departure to be made by consumers operating from a number of different states, speaking different languages and often paying in different currencies. A third peculiarity of this case is that the service itself, by necessity, involves delivery in two or more states, before the service may be said to be complete; it is, by its very nature, international. Only other means of communication, post, freight, telecommunications, for instance, seem comparable. A fourth feature is that, owing to the exceptionally wide geographical distribution of potential consumers and the differences between them in language and culture, it is difficult for consumers themselves to make effective price comparisons, even regarding the same supplier, offering an identical service but to different consumers in different member-states. These geographical and cultural
differences make it possible for suppliers of cross-border travel services to engage in discriminatory policies.

**Description of Case-study Field: The Market Structure**

The sea crossings to the near continent operate from ports along the English south coast, principally, Dover, Newhaven, Portsmouth, Poole, Plymouth, and Weymouth, to ports along the French and Belgian coasts – Ostend, Calais, Dieppe, Le Havre, Cherbourg, St Malo and Roscoff. In 2003 the major operators offering regular services on these routes were P & O, Brittany Ferries, Seafrance, Hoverspeed and Norfolk Line. Condor Ferries were also operating on the Western Channel routes. P & O, Stena and Northsea Ferries merged operations in the Channel in October 2002, although Stena Line retains an independent service from Harwich to the Hook of Holland. Following the merger, the Dover-Zeebrugge route was abandoned by this operator.

In terms of rail crossings, two main passenger services are available. Eurostar offers high speed direct cross channel journeys from termini in London, Brussels, Paris and Lille. These connect with other high speed and conventional services across Western Europe.

Eurotunnel offers a vehicle plus passengers service from Folkestone to La Cocqueulles. No provision is made for passengers without vehicles other than via Eurostar. In many respects, these services represent a unique case in that the tunnel was not simply a commercial venture, but a project enjoying the political and economic support of the French and British governments. The immense investment involved in the construction of the tunnel and, the financing problems it has engendered, place those operators using it in a position which is not strictly commercial and which is not shared by other cross-Channel operators (see Appendix 2). The significance of these market structures for the EU's indirect approach to securing the benefits of single market for the citizen-consumer is explored below.

**Indirect Intervention: The Shaping of the Market Structure**

One arm of the EU's policy to secure for consumers the benefits of the Single Market has been to monitor market structure with a view to reducing the incidence of 'market failure'.
A key element of the EU approach has been to rely on the 'normal' forces of a
competitive market to achieve effectiveness and efficiency on the supply side, whilst
delivering the benefits of these economic virtues to the demand side of the market.
Evidence set out in Chapter Four (The Citizen Consumer) suggests that it was only in the
1990s that consumer dissatisfaction and voter indifference alerted policy actors at
national and EU levels to the need for a supplementary range of policies more directly
targeted towards support for consumer interests. Nonetheless, the market in cross-
Channel travel provides an instructive example of the workings of indirect intervention,
focussing on the competitive environment of the industry. This particular policy
approach gave rise to a series of investigations into proposed mergers of cross-channel
short-sea operators and goes some way towards explaining the present market structure.
In fact, the structure of this market has been the subject of several enquiries in recent
years, amongst the more significant of which are the Monopolies and Mergers

The 1986 Report

In 1986, the Monopolies and Mergers Commission reported on a 'merger situation'
between P & O and European Ferries. The investigation covered not only operations on
the short sea routes to the Continent, but also on the routes from Hull to Zeebrugge and
Rotterdam, as well as routes to Ireland. The 'situation' arose, not from a complete merger
or even a merger proposal, but from the acquisition by P & O of 20.8% of the ordinary
and convertible preference shares in European Ferries (including Townsend Car Ferries
Ltd and Thoreson Car Ferries Ltd).

In their deliberations, the MMC considered, apart from the views of the principal
companies involved, the views of a range of interested parties. Apart from the
Automobile Association, perhaps, none of the parties consulted could be said to speak for
passenger interests. No explicit reference was made to the most popular UK holiday
crossing, short sea routes to France. No public body concerned with travel or tourism in
England or on the near continent was consulted and no body explicitly represented the
end consumer.
Although the report was directed at the overall impact of the merger situation, including passenger business, analysis largely concentrated on freight and concluded that the freight operators were strong enough to drive hard bargains involving heavy discounting. Unsurprisingly, given the emphasis on company to company bargaining and a virtual neglect of the individual consumer, the report concluded: "We have not found evidence therefore that the present merger situation has of itself brought about changes detrimental to the public interest or that it may be expected to do so". (MMC: 1986: 50)

The 1989 Report

Three years later, the Director of Fair Trading asked the Monopolies and Mergers Commission to investigate cross-channel car ferry services between Dover, Folkestone and Ramsgate on the English side and Boulogne, Calais and Dunkirk on the French. The MMC considered a proposal for P & O and Sealink to provide a joint service which would involve co-ordination of sailings, interchangeable tickets, agreement on fares and the pooling of revenue. The service would include Société National des Chemins de Fer Francais (SNCF), which was already Sealink's partner in an existing joint service agreement. On this occasion the list of interested parties invited to submit evidence included a number which might be said to represent consumers directly, namely the Consumer Association, the National Consumer Council, the Caravan Club, the Caravanning and Camping Club, the AA and the Royal Automobile Club (RAC). Unlike the earlier report, the 1989 enquiry included some pertinent comparisons on price and service. The strategies adopted by the main operators was summarised as follows (Monopoly and Mergers Commission: 1990: 27):

Generally the operators aim to set fares according to what the market will bear. Sealink and P & O told us that they needed to be competitive with each other and had responded to each other's prices. Sally and Hoverspeed charge different prices, possibly reflecting their different market positions. A number of discounts are available and, we were told, the operators had difficulty increasing their average fares in line with inflation...
P & O EF [P & O European Ferries] and Sealink have a similar structure of prices. These tariffs are applied to differentiate by season, by day and by time of day. Broadly the application of tariff bands reflects the expected pressures on capacity and attempts to use pricing signals to match demand to capacity.

This pattern, at that time, was common across the industry and gave consumers clear information on tariffs and services.

The report contained a price comparison between P & O and Sealink on the Dover-Calais Route covering the period from 1979 to 1990. This indicated not only the existence of an identical tariff structure – definition of car-length, identical combined packages (car up to 4m + 2 adults and 2 children), but also a very high level of identity between prices. In all, the table shows 60 direct price comparisons between 1979 and 1989. Of these, 22 showed no difference at all; i.e. in 36.6% of comparisons, prices were identical. In a further 20 instances, the difference was £2 or less, i.e. 33% of all comparisons. Thus in 69.6% of all comparisons, the difference between P &O and Sealink prices was £2 or less. In the report, the companies explained this in terms of their reciprocal responses to each other's competitive position. It could equally easily be described as price collusion based on a tacit duopoly. The MMC chose to take a benign view of this phenomenon:

At first sight, similarity of brochure prices might suggest that competition is weak. This would be misleading. Because each competitor watches each other's prices closely, reprinting its own brochures if necessary, the existence of competition has had a real moderating effect on price levels. (MMC: 1990: 79)

The report concluded:

...that the proposal to operate a joint or co-ordinated service may be expected to have the effects adverse to the public interest of reducing competition and choice in the period until the tunnel opens, with further adverse effects on price and standards of service...We do not believe that there would be offsetting benefits to competitions after the tunnel opens to offset the substantial and
irremediable detriment to competition in the interim. (MMC: 1990: 83.) (my emphasis)

The 1997 Report
Eight years later the question of a proposed merger between P & O and, on this occasion, Stena Line, was again the subject of a Monopolies and Mergers Commission investigation (MMC 1997). The MMC considered both freight and passenger business and examined the structure of the market, including Eurotunnel services. P & O and Stena claimed that the inception of the shuttle service had placed pressure on their operations and that a merger was a necessary step to preserve an effective ferry-based alternative to the tunnel. The Commission obtained a detailed comparison of costs between the major operators and this led the Commission to anticipate that Eurotunnel's cost structure was unlikely to give rise to a significant downward pressure on prices (see Appendix 2). They concluded that, if the merger were permitted, an effective duopoly over short sea routes would come to prevail and that this market structure would give rise to parallel pricing at a level higher than necessary to maintain a sustainable alternative to the tunnel (MMC: 1997).

Whilst accepting that some benefits would accrue, particularly in the creation of a durable competitor to Eurotunnel, the report went on to reject the proposed joint venture in the clearest terms:

We believe, however, that the most important benefit, namely the potential cost savings, would not flow through to the benefit of the public unless the joint venture were operating in a competitive market with other ferry operators. We do not consider that this will be the case and we conclude that the likely service benefits of the joint venture do not outweigh the detriments to the public interest, in the form of higher prices, which it would bring about...We have therefore concluded that the joint venture would operate against the public interest. (MMC: 1997: 5) (my emphasis)
Given the unequivocal nature of this assessment it is therefore surprising to find that the MMC nonetheless recommended that the joint venture should be allowed to proceed, subject to certain limited conditions. The report recommended as follows:

We take the view, however, that adjustments of cross-Channel capacity are necessary as a result of the opening of the Tunnel and that the joint venture could bring other benefits to the public interest given a sufficiently competitive environment. The majority of us believe that conditions could be secured under which effective competition from ferry companies to the joint venture would be preserved. (MMC: 1997: 5)

The MMC considered what action could be taken to remedy any adverse effects, which were expected to flow from the joint venture. These potential remedies covered three aspects of the situation: those designed to encourage the development of competitors with smaller market shares, those to prevent action to eliminate competitors, and remedies designed to limit the joint venture's marketing power. The MMC therefore recommended that P & O and Stena should give undertakings before implementing the joint venture. These conditions are listed below:

1. An undertaking not to introduce fast-craft services on any short sea route, except Newhaven-Dieppe where it already existed;

2. A commitment to introduce interlining arrangements for full fare tickets on the Dover-Calais route, where requested to do so by other ferry operators;

3. A commitment to provide the Director General of Fair Trading with financial and other data to enable the OFT to monitor the competitive situation in the market;

4. A commitment not to negotiate joint arrangements with travel agents or aggregate incomes for the purpose of calculating commissions, nor would it enter into any exclusive arrangements with travel agents;
5. "P & O and Stena would not advertise the joint venture's services in promotional publications, brochures or advertisements which they had produced or commissioned" (MMC: 1997: 6)

6. P & O and Stena would give up rights to some ticketing facilities at Dover.

Interestingly, one of the report's authors, Professor Cave, dissented from the majority view and concluded that these proposed remedies would not be sufficient to preserve effective competition. He argued that the merger should not be permitted (MMC: 1997). In themselves, these conditions offered little by way of a barrier to merger, even though the report had concluded in clear terms that such a merger would operate against the public interest. Nor did they introduce any significant conditions designed to protect consumers from uncompetitive pricing, the main fear expressed in the report by Cave. The belief that parallel behaviour would emerge in the future is also interesting, since the previous MMC report had already concluded that such parallel pricing could be clearly detected in the 1979-89 period.

Parallel behaviour is not, however limited to pricing policies. The market power which a duopoly or oligopoly situation affords suppliers means that they are able to engage in a variety of market practices designed to segment the market and to profit from effective discrimination. These practices were already beginning to emerge before the 1997 MMC report and, as the analysis below shows, these practices have progressed unchecked since that time. In the event, the joint venture was set up in time to advertise joint operations for the beginning of the 1998 season. The following section explores, with detailed examples, some of the practices relating to prices and conditions of service on the short-sea channel routes and investigates their impact on passengers.

The Present Position: Market Practices & their Effects on Consumers

In the case of cross-border transport between the UK, France and Belgium, observation of routine market practices during the period of this study suggests that a number of restrictive practices were commonly in operation. These strategies took a variety of
forms; the most common examples may be located in one of four categories: Information Limitation; Characteristic or Status of the Consumer; Constraints on Freedom to Travel; and Mode of Reservation or Payment. These four categories are examined below, with recent illustrations of the impact of each strategy.

**Information Limitation**

The first category, market manipulation based on information limitation, refers to supplier control of key information which would otherwise allow consumers to optimise their choices. Typical strategies would include supply of incomplete information, such as imprecise pricing ('Prices from...'); pricing based on criteria concealed from the general consumer - e.g. failure to publish timetables linked to tariffs and failure to supply information about deals offered by the same operator in other countries where the distribution of brochures is restricted by language or 'country of origin'.

Examples of such information limitation are not hard to find; P & O /Stena adopted imprecise pricing in their 1999 publicity and since then, this practice has become general. In the 2003 season, P & O, Seafrance and Brittany Ferries, adopted the practice of imprecise base tariffs ('Prices from...') with no indication, in most instances, as to where and when these minimal tariffs apply.

For the 2000 season, Brittany Ferries published a brochure completely omitting price information. This prompted some protest from regular users, particularly the Brittany Ferries Property Owners Club. In a letter, dated January 2000, the company wrote justifying the omission:

> Our reasons for omitting prices were ostensibly to avoid any confusion whereby brochures, published up to a year in advance, were overtaken by events such as changes in fuel prices or general market conditions. Whilst we are able to quote a guaranteed price for any departure at any time we cannot, with certainty, say how much the quotation for the same departure would be six months hence, for example. (Brittany Ferries Letter, January 2000, to members of the Brittany Ferries Property Owners Travel Club)
The use of the word 'ostensibly' is intriguing, since it implies that other real reasons were at work. This policy has since been abandoned. For the 2003 season, Brittany Ferries published a standard brochure, though with limited and imprecise price data.

For many years operators published in their brochures a comprehensive calendar setting out tariffs in four or five price bands, attempting to use price signals to match capacity to seasonal or weekly patterns of demand, as reported in the 1986 MMC investigation. This policy was widely abandoned in the late 1990s, following the 1997 MMC Report. Thus, the 2002/3 brochures for P & O and SeaFrance gave no indications as to which sailings attract the lowest fare. The Brittany Ferries brochure has indicated the availability of the lowest fare, and this, in itself, is most instructive. In the high season, July and August, it amounted to 1 sailing (1 out of 20) per week on the Portsmouth routes to Caen and Cherbourg, 1 per month (1/31) between Portsmouth and St. Malo and 2 per month (2/52) on the Plymouth – Roscoff route. The distribution of return sailings at the lowest tariff was similarly sparse. The prices on more than 95% of these sailings, were therefore omitted from their published tariff. However, two of the smaller operators, Hoverspeed and Condor Ferries continued to publish definitive prices clearly banded according to popularity of sailings. This practice gives consumers clear data on which to plan their travel, trading off cost against convenience.

Rail operators have adopted similar strategies. Eurotunnel published no standard brochure for the 2003 season. Where prices have been indicated - (in their users' magazine 'A Vous', for instance) - they are listed in terms of a base tariff only ('Prices from....'). Again, there is no indication as to which seasons, days or times attract these base tariffs. Moreover, consumers attempting to plan ahead for optimum deals are faced with the following disclaimer: "Prices from' are correct at the time of printing (January 2002) and are subject to date restriction and alterations at any time." ("A Vous": Spring 2002:16.). Eurostar does not distribute standard brochures on prices and timetables.

Travel information is obtainable by telephone, or via the internet. However, it does publish package holiday brochures. Since no standard 'traditional' brochures are now published by either of these providers, it is the case that the only source of open tariff and timetable information is the internet. Each web enquiry demands a particular proposed journey date and time; therefore, where
journey dates and times are potentially flexible, a straightforward comparison of best prices is extremely time-consuming and difficult.

**Status of Consumer**

A second category of discrimination might be defined as market manipulation based on definition of the client. Discrimination in this category is usually based on some personal characteristic of the consumer. Examples include restrictions based on nationality and place of residence. Evidence of manipulation based on a characteristic or status of the consumer is to be found in all market sectors, as the following examples demonstrate. Some operators include specific exclusions in their promotional literature, based on residential status (which applies in fact, largely as a restriction based on nationality). An explicit example is to be found in P & O's 2003 material: "Fares (i) All fares offered by P & O Ferries are available only to residents of the country in which they are issued." (P & O Ferries Brochure: 2003 Edition 1 'Terms of Business', para. 3.) Although there is no explicit reference to residential status in the main brochure, the SeaFrance Early Booking Offer, 2003, also contains the following condition: "These Early Booking Fares are only available to UK residents whose journey commences in Dover and they are not available at the port on the day of departure." (Seafrance: 2002c) This condition seems designed to prevent EU nationals and others from exploiting the special fares, even if they happen to be in, but not resident in, the UK.

**Constraints on Freedom to Travel**

The third category of market manipulation is based on constraints on freedom to travel. Restrictions in this category include contractual terms, imposed by the supplier, limiting the traveller's freedom to travel as a condition of supply. Examples would include restrictions based on duration of stay along with the introduction of unusual contractual terms, in particular so-called 'Ticket Abuse'. Evidence of constraints on freedom to travel may seen in a variety of strategies adopted by both sea and rail operators, as is clear in the following examples. Between them, operators in 2003 discriminated between 1-day, 3-day, 5-day, 8-day and 10-day tickets. Only recently have the prices of short-stay tickets been discounted at less than half the
long-stay ticket. For example, in 2003, Seafrance offered 5-day tickets up to 14th July at £49 return, compared with a standard return of £115. ("The Times", T2: 2nd June 2003: 6). P & O have enforced these terms by introducing the concept of 'Ticket Abuse'.

All tickets of restricted duration are only valid where the outward and return journeys are completed within the specified time, with the same vehicle and passengers and using the same operator...If you fail to travel on one part of your booking we may charge you a supplement. That supplement will be the difference between the amount you have paid and the price of the standard single fare appropriate to the sailing used. This payment will be collected using the credit card details provided when paying for the original booking. (P & O 'New Horizons' Brochure: Feb. 2003.)

Similar, though less draconian, conditions have been introduced by tunnel operators. So far their policy has been that only the day-trip ticket is less than half the standard return. (Eurotunnel and "A Vous" Brochures 1998-2003.) Eurotunnel brochures and telephone messages contain no reference to 'ticket abuse'; however, its Terms and Conditions contain the following attempt to curb travel options:

Failure to complete both your outward and return journey invalidates both outward and return tickets. If you fail to complete one of the journeys you will be liable to pay for the journey you do complete, the difference between the price paid for your ticket and the standard single fare applicable at the time of travel. (Eurotunnel: "A Vous" Summer 2002: 16.)

**Mode of Reservation or Payment**

The fourth category of market manipulation is based on point of reservation or mode of payment. Examples in this category would include price-discrimination based on point of departure, restricted access to reservations, means of payment and choice of reservation medium (e.g. agent, telephone, via internet).
Evidence of this type of manipulation is well illustrated in the internet booking samples set out in Appendix 1. The examples in Appendix 1 are based on an internet search in which identical search criteria were used. The Seafrance example showed that, for identical return services, but in the converse direction, travellers from France would pay 20.5% less than the sum payable by travellers from the UK. Eurostar routinely charged different prices for journeys booked at the alternative terminus; that is to say, a journey, which is identical in every respect except that the outward leg for reservations at one terminus represents the return leg for reservations made at the other. These sample bookings simply provide an exemplification of the problem; but it seems clear that they represent the operators' general strategy.

It is interesting that in both the Seafrance and Eurostar sample reservations, a saving of approximately 20% is available to travellers beginning their journey on the European mainland. These examples strongly suggest that both rail/tunnel and ferry operators are effectively segmenting the market so as to generate and sustain a price differential of about 20% at the expense of travellers based in the UK.

The price differences of about 20% noted in the exemplars above might be partially explained in terms of currency shifts. However, using the conversion rates of December 31st, 2002 and 28th March 2003, the maximum difference which could be explained in those terms would be in the order of 8.7%, even if all Seafrance costs were sourced in Euros and all their revenues were in Pound Sterling, which is clearly not the case. The Eurostar price differences, since they are all expressed in Sterling, cannot be explained in this way.  

Price-discrimination based on means of payment may also be found in operation on some routes, irrespective of point of departure. Some operators use the means of payment, including choice of currency, as a further hidden form of discrimination. This is revealed in the sample internet reservation from Hull to Rotterdam. Here, the only difference is the currency, not the point of departure. A search dated 28th March 2003, conducted on the P & O Ferries Rotterdam-Hull route, showed the following discrimination based on the choice of currency and locus of credit card. Although this example is outside the
particular focus of the case – the short cross-channel routes – it is significant because it relates to a pricing strategy of a company, which is also a major channel operator:

Rotterdam – Hull Out 1st Sept./ Return 2nd Sept

Price in Pound Sterling = £279
Price in Euros = 427 Euros.⁹

Conversion of the Sterling price of £279 at the rate for the day = 390 Euros.

In this instance, the purchase in Euros costs 37 Euros more than the purchase in Pound Sterling. This cannot be explained by currency fluctuations since the price was set after the currency movements in the preceding period had led to a fall in the value of the Pound. Therefore, on a narrow calculation of currency movements, one would have expected the balance of advantage to rest with purchases in Euros rather than Pound Sterling (see Appendix 3).

Price-discrimination may also be based on choice of reservation medium (e.g. agent, telephone, via the internet). All Eurotunnel special offers must be booked at least 14 days in advance and are not available at the termini. As with prices at the port, travellers without advance bookings pay a heavy premium for the convenience. This practice is quite unrelated to surplus capacity and is simply a means of applying price penalties to consumers with short planning horizons. In other words, it is the precise antithesis of the free movement envisaged by the authors of the Single Market and the public promoters of the Eurotunnel venture. The freedom of movement promised by the opening of the tunnel and featured in its early publicity – a 'turn up and go' system – has been replaced by reservation restrictions similar to the ferry operators.

⁹ On the search date the rate of exchange was 1.4 Euros to the Pound. Source: http://www.moneyworld.co.uk/rates/currency/converter (Consulted 28.3.2003) Conversion of the Sterling price of £279 at the rate for the day = 390 Euros.
Controlling the Consumer: The Interlocking and Interdependent Nature of Market Manipulation

Some cross-channel operators have gone to considerable lengths to establish control over the behaviour of consumers by devising a series of interdependent strategies locking the consumer into the supplier's definition of the *modus operandi*. Some forms of price discrimination are based on well-understood economic principles, which, by and large, do not provoke consumer resentment. These would include discounts for early booking, low-season and travel at un-social hours along with higher prices for high or long vehicles. Each of these has a clear economic rationale obvious to the consumer. Other practices are less easy to defend on straightforward economic grounds.

**Price Discrimination Based on Duration of Stay**

An almost universal practice is to make special offers for short-duration stays – day return offers. These are well understood and widely accepted in the travel industry. However some ferry operators have adopted a tariff structure which is exceptionally biased towards day-trippers. For instance, both Eurotunnel and P & O offer three categories of ticket based on duration of stay:

<table>
<thead>
<tr>
<th></th>
<th>P &amp; O*</th>
<th>Eurotunnel**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day trip for car + up to 5 passengers</td>
<td>£25</td>
<td>£47</td>
</tr>
<tr>
<td>5-day Flexible Return car + 2 passengers</td>
<td>£152</td>
<td>£179</td>
</tr>
<tr>
<td>Flexible Return car + 2 passengers</td>
<td>£290</td>
<td>£309</td>
</tr>
</tbody>
</table>

(Sources: *P & O Ferries Brochure, 2003, Edition 1  

This strategy has recently been given a further twist by the adoption of even more detailed differentiation; one by SeaFrance in a new promotion in "The Times" 2nd June,
2003 and the other by P & O in a promotion advertised in "The Observer", 29th June 2003. SeaFrance offers two price bands – a low season (A) and a high season (B) band (all prices relate to Dover-Calais):

<table>
<thead>
<tr>
<th>Five Day Return</th>
<th>Eight Day Return</th>
<th>Ten Day Return</th>
<th>Standard Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>From:</td>
<td>From:</td>
<td>From:</td>
<td>From:</td>
</tr>
<tr>
<td>A £49 : B £119</td>
<td>A £79 : B N/A</td>
<td>A £99 : B N/A</td>
<td>A £115 : B £219</td>
</tr>
</tbody>
</table>

The P & O offer is strictly proportionate to the time spent abroad:

<table>
<thead>
<tr>
<th>Day Return</th>
<th>3-Day Return</th>
<th>6-Day Return</th>
<th>7-Day Return</th>
<th>10-Day Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>£10</td>
<td>£30</td>
<td>£50</td>
<td>£70</td>
<td>£100</td>
</tr>
</tbody>
</table>

The significant innovation is the introduction of sharp price difference based on very slight differences in the duration of stay on the Continent. This tactic discriminates severely against passengers who plan to spend even a little extra time abroad since the prices set for 1 and 3-day stays are, as data from Appendix 2 demonstrates, clearly below average costs. The longer-stay passenger is effectively cross-subsidising the short-stay voyages. The 'product' is shipping space, but its pricing structure is that of a package holiday; clearly, the duration of stay involves transport operators in no additional costs. The above strategy sets prices to vary by as much as 134% on raw calculation (95% averaging upward and downward price comparisons). Although the tariff in itself is not a cross-border issue, the discrimination against longer-stay passengers may be seen as a cross-border issue since the pricing structure again impedes and distorts free movement across the border. Logically, there is no reason to suppose that short-stay travellers are more likely to generate increased cross-border economic activity than longer-stay passengers. In terms of both work and consumer roles, reason suggests that the reverse is likely to be true. If the general aim of EU policy and the specific intention of the TEN projects, in particular, is to foster greater cross-border activity, this pricing strategy seems
to militate directly against this end. If consumers stay longer they are likely to consume more; if workers stay longer they are likely to contribute more to the trans-national economy. This seems to be a case where unfair terms of contract, such as those referred to in the Council Directive 93/13/EEC 5th April 1993 OJ of the EC no. L95, 21 April 1993 might apply. This is examined below in relation to “Ticket Abuse”.

The control exercised by some operators over the options open to consumers is best understood by examining the interdependencies between the different condition of service introduced in recent years. The significance of the restrictions set out in the previous section becomes clearer as their cumulative effect is revealed.

_Price Discrimination Based on Mode of Reservation/Payment_

For instance, in an apparently unrelated shift of strategy, noted above, in recent years P & O and other operators began to impose higher charges on tickets purchased at the port of departure than those purchased by telephone or over the internet. This practice has discouraged purchases at the port and encouraged distance selling of reservations. A feature of telephone and internet purchases is that they are paid for by credit cards. Such purchases necessarily reveal the identity of the national base of a credit card and the banking base of each customer. These categories of price differentiation have been facilitated by the abandonment of the practice of publishing specific price commitments, thus enabling the operator to reduce the visibility of the premiums imposed at the port.

_Choice of Terms of Contract: Introduction of 'Ticket Abuse'_

As the previous section showed, in 2003 P & O explicitly introduced the use of the term 'Ticket Abuse' into their Terms and Conditions. 'Ticket abuse' is not a well-defined term. Indeed, it seems to be one which has been specifically invented by the travel industry in order to enhance operator control over consumers. This condition demands our attention for the exceptional level of control it seeks to exert. The P & O website 'virtual booking form' contains a condition, to which potential customers are required to assent before booking, giving P & O the right to make additional charges against the credit card used for the booking should the traveller fail to undertake the return journey before the expiration of the ticket. Telephone bookings involve no such explicit consent.
Thus the practice of charging prices for short trips at less than half the standard fare is supported by penalties which the operator is able to enforce as a result of having introduced a whole series of inter-dependent practices. That is to say, price discrimination depends on the form of reservation, the form of payment and the collection of data about each and every passenger, down to their individual identity and travel history. Under these terms, a new 'offence', namely "ticket abuse", is created and the operator becomes legislator, prosecutor, judge, jury and bailiff in these cases. The regulation relating to the return journeys being completed within the specified time, offers a spurious sense of rationality to the fares structure. However, in the majority of other transport contexts, the short-stay trip amounts to a special offer, which is itself of limited duration. Its rationale is usually a pattern of surplus capacity, sometimes on a seasonal basis, taken up by the unusual offer of a cut-price fare for a limited period. The ferry operators provide unusually low short-stay fares throughout the year. The offer itself is not of limited duration. It cannot be seen simply as a reasonable commercial device to take up surplus capacity during the 'low-season'. Indeed, the 2003 offers described above coincided with the onset of the high season.

**Restricting Market Information**

Underpinning all of these practices are strategies to limit the amount of market information available to the consumer. In particular, the refusal to indicate in clear terms which sailings attract the lowest prices and which prices apply to those sailings which do not attract the lowest tariff - leaves the rational consumer devoid of comparative price and service data on which to based choices. The difficulty in accessing brochures in other languages, designed for citizens in other member-states of the Union, adds to this information shortfall. In effect, a cultural difference, namely language, has been used by some operators to obscure price-comparisons and to facilitate market segmentation. This practice has more general implications which are explored in the concluding section to this chapter. Having explored some of the salient features of the strategies adopted by operators to control the consumer's behaviour, it is now appropriate to examine the European Commission's position on these issues.
EU Position on Restrictive and Discriminatory Practices in the Market

Evidence of the Commission's perspective on the cross-channel market is mainly to be found in their market assessments accompanying its responses to P & O Stena requests for exemption in respect of their merger proposals.


In December 1996, SeaFrance complained to the Commission in respect of the effects of the joint venture on its business. In June 1999, having considered the case under Article 85 of the Treaty, the Commission published its decision. The Commission admitted: "...restriction of competition is appreciable. The parties have a high combined market share (even if their combined market share on the Short Sea declined following the market entry of Eurotunnel.)" (European Commission: 1999b: para 40). Nevertheless, it concluded

The creation of the joint venture will bring about benefits, notably in the improved frequency to be offered by the joint venture, continuous loading, and estimated cost savings of GBP... million. The overall positive benefits will arise even were the joint venture to stop operating on the Newhaven/Dieppe route.

7.2. Allowing Consumers a fair share of the resulting benefit

Customers can be expected to benefit from the improved frequency and continuous loading. Customers can be expected to benefit from the cost savings to the extent that the joint venture will be faced by effective competition. (EC: 1999b: paras 62 and 63)

The Commission's Decision continued in optimistic vein: "Firms faced with excess capacity will normally have an incentive to cut prices to fill that excess capacity ...Where prices are transparent, any price cuts will provoke rapid retaliation." (EC: 1999b: para 89)
The Commission's decision shows a remarkable lack of awareness of market events. By the time of its publication in 1999, the Newhaven/Dieppe route had long been abandoned and P & O/Stena had already dropped any pretence of price transparency in their brochures, as the evidence in the following sections demonstrates.

The Commission's optimism carried over into its assessment of the risk of a duopoly between the joint venture and Eurotunnel: "The Commission considers that the characteristics of the market are such that the joint venture and Eurotunnel can be expected to compete with each other rather than to act in parallel to raise prices." (EC: 1999b: para 127)

Paragraph 63 carefully qualifies the condition under which benefits will pass to consumers - "to the extent that the joint venture will be faced by effective competition."

Given that, on its own assessment, (EC: 1999b: Table 9) P & O, Stena and Eurotunnel already accounted in 1996 for over 85% of the market and the next largest competitor, SeaFrance, under 7%, it is difficult to know where this competition was supposed to come from.

In 2001, P & O Stena asked for an extension to the exemption for a further twenty years. The Commission granted the joint venture a further six-year exemption from the EU's competition rules (EC: 2001c). It concluded that the price increases evident since 1998 were not the result of the inception of the joint venture but were due to 'normal market conditions'.

Particularly relevant to this case was the explanation in the Press Release: "...another factor which also partly explains the price increases on the cross-Channel services is the introduction by P & O Stena Line of a yield management system, whereby the ticket price is set according to demand, as is done in the airline sector. According to such a system, prices change daily and customers travelling in peak periods with little flexibility usually pay more."

This is interesting if only for its naivety. The Commission's own data on cross Channel capacity, contained in its decision of January 1999 (EC: 1999b: Table 10 and paras. 89-98), revealed that apart from a few weekends in July and August services rarely approached capacity, the average utilisation level being below 50%. In such
circumstances, claims to be pricing up as capacity tightens amount to little more than a planned piece of commercial deception based on sustaining consumer ignorance.


In July 2002, the Commission was notified that P & O proposed to acquire full control over the joint venture, buying out Stena. In a letter, dated 7th August 2002 (European Commission 2002:5-6), the Commission indicated non-opposition to the merger. The question considered by the Commission was a narrow one: "The issue to be investigated is...whether the sole control of P & O SL will give P & O the incentive and ability to engage in predatory behaviour with a view to eliminating competition on the Western Channel and/or the North Sea." It concluded, "...this concern does not seem to be justified", since the number and strength of competitors made this strategy non-viable. Despite its own data (European Commission 2002: Table 1) showing that, on the short sea routes, P & O and Eurotunnel would control about 80% of the passenger market (figures were left imprecise for reasons of commercial confidentiality), the Commission concluded that there would be no collective dominance of the market between P & O and Eurotunnel. It assured consumers that duopolistic behaviour would be constrained in practice by actual or potential competitors and concluded: "The fact that, after the merger, P & O will control the business of P & O & SL alone will not alter this situation" (Ibid: para 29). These conclusions suggest that the Commission was unaware of, or chose to ignore, the charges of existing duopolistic behaviour already raised by the Consumer Association.

Application of Competition Policy: the UK Position

Competition policy applies to this case at EU and national levels. For the UK, the OFT has produced a series of guidelines regarding the issue of price discrimination as it interprets its duties under the Competition Act of 1998. The guidance defines price discrimination as follows:

An undertaking can be said to be discriminating when it applies dissimilar conditions to equivalent transactions with other trading parties. The most direct
way is through the prices charged to different sets of customers. It can take two basic forms:

- an undertaking might charge different prices to different customers, or categories of customers, for the same product – where the differences in price do not reflect any differences in relative cost, quantity, quality or any other characteristic of the products supplied;

- an undertaking might charge different customers or categories of customers, the same price even though the costs of supplying the product are in fact very different. A policy of uniform delivered prices throughout the country, for example, could be discriminatory if differences in transport costs were significant. (OFT: 1999c: 7-8).

The guidance also spells out the key conditions necessary for price discrimination to operate (OFT: 1999c: 8): "For price discrimination to be feasible, an undertaking not only has to be able to segment the market in some way, but also has to be able to enforce the segmentation... The term price discrimination ... refers to situations where differences in prices cannot be justified by differences in costs." (my emphasis)

The OFT guidance confirms that price discrimination may be regarded as an abuse under the 1998 Competition Act. However, since its powers are derived from a piece of legislation designed not directly to protect the consumer, but to strengthen competition, whether discrimination is regarded as an abuse under the Act depends, not on its effects on consumers, but on its effect on market structure. The guidance (OFT: 1999c: 7) explains: "The Director General considers price discrimination to be an abuse only where there is evidence that prices were also excessive or that discrimination was used to reduce competition significantly..." The application of the legislation, focussing on market structure, seems to be in conflict with the principles implied in the definition of price discrimination above.
The Problem of the Director General of Fair Trading's Position vis à vis Consumer Policy

The problem arising from action under the Competition Act is that it seeks to improve the consumer's position 'at one remove' by seeking to remove imperfections in the structure of the market. Once the imperfections are removed, classic economic theory would dictate that discrimination will prove impracticable and normal market forces will ensure that consumers are able to optimise their economic choices. However, as the MMC reports have indicated, in the case of cross channel travel, the market is far from perfect, with a mere handful of competitors, two of which (P & O and Eurotunnel) currently dominate the short sea crossing market. Moreover, the OFT approach centres on cost comparisons, involving apparently precise calculations of average and marginal costs, but which exclude critical components, such as debt repayments on the building of the Tunnel.

In view of the DGFT's commitment to take action only where price discrimination is accompanied by excessive prices (verified by evidence of excessive profits) and/or by a reduction in competition, the examples of price discrimination in the short sea cross-channel market set out above, would seem to fall outside the scope of action he has defined for the OFT under the 1998 Competition Act. The position at present (2003) seems to be that parallel patterns of market segmentation and price discrimination will attract no action so long as the market structure is deemed to be 'competitive'. The weakness of the competitive context, although acknowledged in successive MMC reports, has not, so far, prompted OFT action on discrimination in this field. This assessment is confirmed by the interviews undertaken with OFT officers in June 2003. (Interview 03/07/2003)

This inaction by enforcement bodies leaves the operators free to engage in a series of practices, because the impact of these practices on market structure is not sufficiently serious to reduce competition even further. It is interesting that the OFT's own guidance acknowledges that, in a series of judgements going back to 1978, the European Court of
Justice has regarded price discrimination to be an abuse in itself under Article 82 (quoted in OFT: 1999 c).¹⁰

This approach was questioned on 16th September 2002 in the European Parliament by Michael Cashman MEP, who asked:

"When air fares are being booked within the EU (to EU and non-EU destinations), the price for the same flight(s) using the same booking facilities, often varies according to the country in which the payee is domiciled or in where the booking is made. When booking with a ferry company in the EU, customers are asked if they are resident in the country in which they are making the booking and are sometimes asked for an address. Could the Commission state whether this practice contravenes EU policy and could be classed as a barrier to competition? Could the Commission outline what steps are being taken to investigate the legality of this practice, how widespread it is within the travel sector and what is being done to put an end to it?" (Cashman: Letter 24th September 2002)

The response of Monti, (P-2205/02EN) on behalf of the Commission is instructive:

"The pricing practices described by the Honourable Member might, in certain specific circumstances, constitute an infringement of European competition rules. If a company limited some of its fare offers purely on the basis of a payee's country or residence, it would effectively be charging different prices for identical services. In certain circumstances, this might be incompatible with European Competition rules. This would be the case if the company had a dominant position on the route in question, if transport companies had agreed between themselves to apply a pricing policy of this type or if a transport company prevented its distributors from

¹⁰ Note: ECJ Judgements on Price Discrimination:
selling a certain category of ticket outside of the member state in which they were based."

(Cashman: Letter: 24th September 2002)

The practice of relying on competition rules to regulate this type of discrimination means that unless specific conditions apply, such as a dominant market position, the supplier is free to discriminate. This represents a situation in which the consumer is neither protected by the competitive market nor by consumer protection regulations. This situation illustrates the limitations of an approach to consumer protection based on a policy designed to influence the structure of the market.

**Evidence of the Connection Between Market Structure and Market Practices**

The MMC, whilst finding the proposal against the public interest, gave conditional assent to the proposed joint venture between P & O and Stena in its 1997 Report. Accordingly, the following year P & O and Stena announced a joint operation on the short sea routes between Dover-Calais and Newhaven-Dieppe. The impact of the merger on market practices was immediate. In the 1998 brochures, a number of the restrictions noted above made their first appearance, namely:

1. Abandonment of specific price commitments ("Prices from...")

2. More detailed price bands based on duration of stay. The 1998 New Horizons Brochure (P & O Stena Line May 1998) introduced the following restricted bands:
   - Days out from £10; 3-Day Return from £48; 6-day Return from £99; 15-day Return from £155.

3. These bands introduced for the first time, short-stay prices, which were less than half the long-stay prices, thus making double bookings profitable for consumers.

4. The Autumn 1998 New Horizons Brochure (P & O Stena Autumn 1998), introduced the condition: "These travel offers are open to UK residents only."
5. In an attempt to deter the purchase of double day-tickets in lieu of a standard return, the 1999 P & O Stena Brochure added a new restriction to the existing condition: "Day trip tickets are valid only when outward and return travel take place on the same calendar day." To this was added: "Only one item of hand luggage is permitted on day trips."

Since these tickets were designed for cars with passengers, it is difficult to see how, without the right of vehicle search, the operators could enforce this unusual restriction.

6. A further mechanism to strengthen the operator's ability to monitor and manipulate consumer behaviour occurred in 2000 as a by-product of changes in health and safety requirements and in immigration procedures. The terms and conditions in the P & O Stena 2000 Dover-Calais Brochure spell this out:

We are required by law to record the names, age-group and gender of all passengers, together with (for purposes of an emergency) details of any special care or assistance needs. Failure to provide this information will result in permission to board being refused.

(P & O Stena : 2000:10.)

These innovations were accompanied by a reduction of travel options for travellers on the short-sea crossings. In 1998, on the Newhaven-Dieppe Route, P & O Stena operated five sailings per day (some by fast craft), in 1999, two sailings per day with no fast craft, and by 2000, the Newhaven-Dieppe operation had been dropped altogether.

Moreover, credibility of the MMC and European Commission beliefs that a duopoly would not emerge was soon put to the test. In December 1998, both P & O and Eurotunnel announced increases in peak summer fares of 25% for the 1999 season. The Editor of 'Holiday Which' commented in a press release: "There appears to be a cosy-duopoly shared by P & O Stena Line and Eurotunnel, which is carving up the cross-channel travel market...Consumer Association predictions about price hikes have come true." (Consumer Association:1998:1)
A complementary strategy to competition policy is direct measures, with specific targets, designed to ensure that 'rogue traders' do not persist in practices which discriminate unfairly against consumers and which may well have the effect of undermining the effective operation of the Single Market and confidence in it. As Chapter Five demonstrated, EU policy has moved in this direction.

**Direct Intervention: Consumer Protection Initiatives in Relation to this Case**


In a Directive of 16th February, 1998 (Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers), the EU published a general directive aimed at exactly the kind of pricing strategies adopted by the major Cross-Channel operators. This Directive was due to be transposed into the law of the Member States by March 2000. The Directive seems to be absolutely clear both in its intention and its definition of the required practice

... transparent operation of the market and correct information is of benefit to consumer protection and healthy competition between enterprises and products... consumers must be guaranteed a high level of protection; whereas the Community should contribute thereto by specific action which supports and supplements the policy pursued by the Member States regarding precise, transparent and unambiguous information for consumers on the prices of the products offered to them... (European Parliament and Council: 1998: 1) (my emphasis

The Directive is very clear. Articles 1 and 2 state:

Article 1. The purpose of this directive is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices.
Article 2. For the purposes of this Directive:

(a) *selling price* shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes;

(b) *unit price* shall mean the final price, including VAT and all other taxes for one kilogramme, one litre, on metre, one square metre, or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned in the marketing of specific products;

(e) *consumer* shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity.

It should be noted that the term "product" as defined in some other EU documents refers to both goods and services. For instance, the recent ‘Proposal for a Directive on Unfair Business to Consumer Commercial Practices’ makes this clear (Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directive 84/450/EEC,97/7/EC and (98/27/EC (the Unfair Commercial Practices Directive, (page 3 Para 6)) states: "The cross-border movement of goods and services ("products") gives consumers access to a broader range of products, including innovative products which may not be available in their own country. It also provides the pressure for a more efficient and competitively-priced supply." (my emphasis.) The EU Letter (European Commission: 2002:3), extending the exemption on the P & O Stena joint venture, actually refers to the ferry services in question as "the relevant product".

Both of these documents make their purpose crystal clear; it is to make the Single Market more effective by ensuring that consumers have open access to essential price information. The scope of the Directive on price transparency seems to be general; it contains no explicit limitation to physical products in its application, though it does not define the term 'product'. However, there are a number of derogations associated with this Directive.

The DTI Consultation Paper on this Directive (DTI: 1999:12) states: "This Directive applies to products; it does not apply to services." In view of the importance attached to
clear and unambiguous pricing and its importance in promoting informed consumer choice, stressed in the Directive's preamble, it seems extraordinary that such a wide exception as the whole of the service sector should be permitted. It is even more surprising in view of the fact that the legal base for the Prices Directive is Article 129a of the Treaty of Rome, which deals with consumer protection compared with similar earlier Directives, which were based in Article 100a, dealing with the removal of trade barriers. When one reviews the pricing policy of the principal operators in this case, it is difficult to square their publicity with the broad intentions of the 1998 Directive. Nonetheless it appears not to apply to services based in the UK. However, another EU initiative, the Directive on Unfair Contracts, examined below, certainly does apply and has underpinned numerous OFT actions in the UK.

**EU Contracts (Unfair Terms) Directive**

In April 1993, the Council of the European Communities promulgated a directive describing unfair contractual terms, including lists of illustrative, but not exhaustive examples. One of the principal objectives of this directive was that "acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular, against one-sided contracts and the unfair exclusion of essential rights in contracts".(Council: 1993)

There are aspects of the conditions imposed by cross-channel operators which may merit attention under this directive as the analysis below suggests. One of these is the monitoring of so-called 'ticket abuse'. Amongst the examples of unfair contractual terms set out in the Council Directive 93/13/eeec of April 1993, one is particularly relevant to this case:

a condition giving him (the supplier) the exclusive right to interpret any term in the contract.

The condition on 'ticket abuse' may amount to such a term, since, although it is a term standard in P & O contracts, it is of recent origin and does not yet appear to have been tested in the courts. In the course of interviews with the OFT Consumer Protection Team, it became clear that 'Ticket Abuse' is a term that might legitimately be investigated within the framework of the Unfair Contract Terms Directive, but that so far
no action had been taken, since the OFT relies on evidence of consumer detriment to justify action. (Interviews OFT 03/07/2003)

The introduction of computerised reservation systems and the increased demand, for security reasons, for accurate information on cross-border travellers, have combined to produce a situation in which cross-channel operators carry much more detailed and precise information about every reservation and every traveller. Insofar as this information is used for legitimate business and security purposes, consumers would have little cause for complaint. However, the combination of technical innovations and contractual terms is, in this case, principally directed at giving the supplier greater freedom to manage the market, by asserting more and more control over the options open to the travelling public.

The main purpose of this restriction seems designed to defend a pricing policy, one in which reservations for longer stays cost more than twice the price of a short-stay. It is intended to frustrate the normal market workings of arbitrage, which serves to reduce price differences in different segments of the market. Since the price differences themselves are unrelated to the cost of supplying the product, it is difficult to see why they have not been challenged under Chapter II of the 1998 Competition Act.

For price discrimination to be feasible, an undertaking not only has to be able to segment the market in some way, but also has to be able to enforce the segmentation...The term price discrimination ...refers to situations where differences in prices cannot be justified by differences in costs. (OFT: 1999c: 8)

Judging from the OFT reports on cases to June 2002 (OFT 2002), the practice of ticket monitoring might well constitute "excessive discretion" on the part of the operator and the threat to debit further payments against a credit card, might be regarded as an example of "onerous right of enforcement". These legal issues have yet to be tested. However a proposal for a complementary directive in this area has been suggested by the Commission.
Another example of direct EU action to protect consumers and a recent response to the Green Paper on EU Consumer Protection, discussed in Chapter Five, is the Commission's proposal for a directive on unfair business to consumer practices (European Commission: 2003d).

This proposal seeks to establish a general framework for the protection of consumers against unfair, in particular misleading and aggressive, commercial practices. It includes an interesting section, Article 7, Misleading Omissions, paragraph 3, which is particularly relevant to this case:

For commercial practices before a commercial transaction a misleading omission may occur only if a trader makes an invitation to purchase. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(a) ...the main characteristics of the product;...

(c) ...the price inclusive of taxes, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that additional charges may be payable...(European Commission: 2003d: 25)

This would reinforce the 1998 Directive on Price Transparency. Annex 1 to the proposed Directive also contains an useful list of commercial practices which are in all circumstances considered unfair, including one on "bait advertising", which is defined as:

Making an invitation to purchase products at a specified price if there are reasonable grounds for believing that the trader will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that
price for a period that is, and in quantities that are reasonable having regard to the product and price offered. (European Commission: 2003d: 32)

This proposal is pertinent to this case, since:

a. it might be argued that some operators fail to outline the main characteristics of the product by failing to publish in a transparent manner, the date and timing of the crossings to which particular prices refer;

b. it might, similarly be argued that Brittany Ferries, by advertising only one return crossing per month at the published tariff, are guilty of a combination of bait advertising and failure to publish the price of over 95% of their sailings.

**Injunctions Directive**

As Chapter Five has indicated, this initiative is one which might prove useful to consumers in this case. However, the consumers in question would have to be citizens of other EU member states. The evidence presented above indicates that the bulk of the weight of discrimination, with the exception of the Hull-Rotterdam example, operates to the disadvantage of reservations made in the UK, it seems unlikely that this facility will produce a significant volume of cross-border complaint.

**Conclusions**

**General principles**

As earlier chapters have indicated, EU policy over the last ten years has largely focussed on the economic benefits expected to accrue from a single market and a single currency. That analysis has shown that some commissioners have openly recognised that, for the European enterprise to retain its impetus, the benefits of eradicating market boundaries must be seen to flow through to consumers. But, price discrimination depends on effective market segmentation, which is the very antithesis of a Single Market. As long as segmentation practices are tolerated, a truly single market will not emerge and its potential benefits will not impact on the citizen-consumer. One way in which the workings of the Single Market can be enhanced is by safeguarding freedom of movement for consumers as well as suppliers and by taking action to
eliminate market behaviour designed to impede it. The discriminatory practices adopted by cross-channel operators involve such huge cost discrepancies for different categories of passengers that it can hardly be doubted that there is cross-subsidisation of some passengers by others. The pattern of price differences shows both intra- and trans-national levels of cross-subsidy, both of which, in different ways, will have the effect of distorting the distribution of cross-border travel and thus distorting and very probably reducing the general level of cross-border activity.

It is also difficult to justify differential prices based on different points of departure on the same crossing for similar reasons. If a key economic stimulus is to be derived from the movement of workers across frontiers, it is unreasonable to suppose that the transport costs of a flow of workers in one direction should be subsidised by the flow of workers in the other. EU harmonisation policies have frequently been designed to move towards a 'level playing field'; differential travel costs for the same journey starting in different member states generate different costs of cross-border labour mobility, thus increasing, rather than reducing, the incline of the playing-field.

**Limitations of a Structural Approach**

The limitations of a 'supply side' approach to the support of consumers, the monitoring of market structure so as to prevent 'market failure', is well exemplified in this case. The fact that the 1997 MMC investigation into the proposed P & O/Stena joint-venture clearly judged it to be against the public interest, but gave approval, subject to a set a series of scarcely disobliging conditions, indicates the sympathy with which the supply-side of the market has been treated. Moreover, the weak definition of what counts as a competitive market, implied by the MMC report, provides a poor basis on which to build consumer confidence. The large number of successful OFT actions against companies seeking to impose unfair contractual terms indicates clearly that attempts to disadvantage consumers do not necessarily flow from an abuse of a dominant market position. It is anomalous that price discrimination should be treated as a characteristic of a flawed market structure, thereby placing it in the realm of competition policy. (OFT 2002)
The 2001 Report of the Competition DG does not offer much comfort that the structural approach is generating a system of adequate monitoring of detailed market behaviour on the ground. The Report concluded in respect of the P & O/Stena joint venture:

...the characteristics of the market are still such that the joint venture and Eurotunnel, the main operators on the market, could be expected to continue to compete with each other, rather than to act in parallel to raise prices. (European Commission: 2001f: 194)

It will be noted that the inference of this statement was that the two main operators had a history of unquestioned competition. This is the exact antithesis of the conclusions of earlier MMC reports and of the view of Cave, one of the authors of the 1997 report. The evidence of duopolistic behaviour published by the Consumers Association, noted above, also weakens confidence in the efficacy of the Commission's judgement. Nonetheless, when the three-year exemption of the P & O Stena joint venture, granted under Article 81(3) of the EC Treaty, came up for renewal at the end of 2000, the Commission raised no serious doubts and renewed it until 2007.

There are many different forms of commercial practices which have the effect of restricting consumer access to optimum travel deals. As the MMC reports indicate, some of these arise from artificial limits to competition; others arise from less formal collusion between suppliers and yet others may arise simply from the attempts by individual suppliers to impose unfair terms on the consumer. Those which arise from cartels and mergers are, of course, dealt with in the EU by the Competition DG, but many forms of restriction and discrimination fall outside its scope. Some market strategies do not require explicit, or even tacit agreements, being the result merely of shared market practices; yet these are, nonetheless, capable of distorting the market to the detriment of consumers. Where these are operated in a poor competitive climate they are, of course, likely to be all the more effective.

A central feature of this case has been the ability of operators in a monopolistic position to combine technical, informational, financial and legal constraints so as to introduce
entirely new curbs on market information and limits on consumer behaviour, thus facilitating market segmentation and discrimination.

The introduction of individualised ticketing and price-quotation on a personal basis ("Tell me what time you want to travel and I will quote a price") changes the purchase of a ticket to travel from a standard to an individualised purchase, allegedly exclusively fitted to the customers specifications or needs. Ironically, the DTI Consultation Paper on the Price Indications Directive (DTI:1999: 10) boasts: "UK legislation currently requires that products must be price marked before a consumer asks to see them – i.e. the price not merely written down when the consumer asks what it is." Unfortunately, the same document makes it clear that, in this context, services do not count as 'products'.

The advantage to the supplier of this approach to pricing is that, first, it makes price comparisons time-consuming and inconvenient and, second, unlimited discrimination is possible, since each sale is priced individually. In this model of market behaviour, price information is not public, but private. It enables the supplier to raise prices as the market clears. In normal market transactions, supply prices are advertised; these prices constitute an offer and therefore suppliers are unable to raise the prices of their few remaining loaves of bread or baskets of strawberries. As matters stand, cross-channel operators appear to have unfettered scope for price individualisation. In a highly competitive market this may not prove problematic. In a quasi-monopoly situation where there are no close alternatives and where distant alternatives impose severe penalties, the consumer is only able to escape the power of the supplier by withdrawal from the market.

A number of EU initiatives, including those considered in Chapter Five, are designed to improve consumer access to market information. The strategies adopted by cross-channel operators are working in entirely the contrary direction.

The situation exemplified by this case again represents one in which the balance of market power is weighted against the consumer. Whilst businesses retain unfettered cross-border access to consumers, they are simultaneously able to segment the market by constructing conditions of their own choosing in order to channel consumer access to market information and to the services themselves. In this field, the Single Market has helped dismantle market barriers for suppliers, but not for consumers. This danger is explicitly recognised in some of the EU Directives, for example Directive 1999/44/EC of
the European Parliament and of the Council of 25th May 1999 on "Certain Aspects of the
Sale of Consumer Goods and Associated Guarantees", which observes in the preamble:

...whereas consumers who are keen to benefit from the large market by purchasing
goods in member states other than their state of residence play a fundamental role
in the completion of the internal market; whereas the artificial reconstruction of
frontiers and the compartmentalisation of markets should be prevented...(my
emphasis).

The market imbalance, evident in earlier periods of the development of the EU, is still
powerfully evident in this case.

Having established in this case that the problems facing consumers engaged in cross-
border travel incorporate both structural and non-structural market characteristics, it is
reasonable to conclude, therefore, that consumers should be expected to benefit from a
variety of approaches to market surveillance - surveillance not only aimed at monitoring
the effects of cartels, mergers and explicit or implicit collusion between suppliers, but
also at monitoring the detailed workings of specific market practices, whether these are
the product of market structures or not. The EU Press Release to accompany the renewal
of the P & O Stena joint venture promised: "In any case and irrespective of the
exemption, the Commission will continue to follow developments in cross-Channel
transport in close contact with consumer organisations and national authorities."
(European Commission 2001c) This monitoring does seem to be active. On 3rd
September 2003, officers from both the Competition DG and the OFT raided the offices
of P & O and Eurotunnel in London, Dover and Folkestone, seeking, according to the
Commission spokesperson, evidence of 'suspected cartel agreements and related illegal
practices concerning fixing of prices' (The Times: 04/09/2003: 1) in relation to both
passenger and freight businesses. The Commission was seeking to establish whether
there was any evidence of market-share agreements between the rival operators. A
Eurotunnel representative commented: "We operate in a fiercely competitive market".
The attitude of the business commentators to this type of action is well illustrated by the
observations of The Times' business editor:
Holidaymakers and haulage companies may whine about the cost of getting across the Channel but it is hard to see how any operator is profiteering. There is no evidence of that in recent profit numbers published by P & O... It may not just be the lack of a profitable incentive that leads companies away from offering services for which there is a public need. The reputational damage caused by investigations of this type could be enough. There is a risk that in attempting to ensure that every principle is met and every rule is obeyed, the EU creates more damage than it manages to prevent. Which would the Eurocrats prefer to see: an industry that exists, but is allowed to bend a few rules or a situation where no cross-Channel service can be sustained?

This kind of response is interesting, since it implies that respectable observers and companies should have no qualms about 'bending' the competition rules designed to protect consumers. This is despite evidence, some contained in The Times's own initial report, that cross-Channel crossings are, mile for mile, much more expensive than other similar services (The Times: 04/09/2003: 1. The Caravan Club: 2000: 80). Whilst this news is re-assuring in the sense that it does suggest that the Commission is keeping its promise to continue to monitor the situation, it is less assuring in the sense that it undermines confidence in the Commission's judgements that this market represents a competitive environment, sufficiently robust to tolerate further merger activity and further exemptions.

Narrow Scope of Legal Instruments
The 1998 Directive on Price Indication and the 2003 Proposed Directive on Unfair Commercial Practices indicate, in their preambles, that the EU sees transparency as an essential condition for the effective working of the Single Market. The data produced in this chapter shows that, in cross-channel passenger transport, this essential condition is notably absent. Five years after the 1998 Price Directive's publication, the whole field of service provision has been excluded from its scope in the UK.
This illustrates, in graphic form, a core issue of this study: the impact on consumers of
the narrow scope of direct EU policy instruments for their protection and the wide degree
of discretion afforded to member states in transposition and implementation. This case
also illuminates the dilemma set out in Chapter Five and originally identified in the 1993
Green Paper on Consumers' Access to Justice, which states:

In a Single Market, where goods and services circulate freely, the principle of 'free
movement' should also apply to legal instruments designed to ensure the
discontinuation of unlawful practices... (Commission :1993a)

The dilemma in the case of cross channel travel is, however, even more perplexing than
the examples outlined in the Green Paper, which focussed on examples of consumers of
one nationality suffering at the hands of suppliers of another. Where travel prices vary
widely from point of departure to point of departure, and where price changes can be
difficult to detect owing to an absence of clear pricing information, different parties may
be subject to different patterns of discrimination; some may advantage UK consumers,
others may advantage non-UK purchasers. All that is certain is that consumers are not
paying the comparable prices for what is essentially a comparable service.

 Proposed Legislation

The proposed Directive concerning Unfair Business-to-Consumer Commercial Practices
in the Internal Market (COM (2003) 356 Final) would seem to offer cross-border
consumers a stronger legal framework, focusing on their economic interest.
However, the weakness of a regulatory approach, without provision for systematic cross-
border monitoring, is that it appears to depend largely on the vigilance and pertinacity of
the individual consumer. For instance, if a practice is to be judged unfair, the legal tests
the plaintiff would need to satisfy are three-fold: first, "the practice must be contrary to
the requirements of professional diligence"; second "the benchmark consumer to be
considered in assessing the impact of the practice is the 'average' consumer established by
the ECJ"; and third, "the practice must materially distort or be likely to materially distort
consumers' economic behaviour."

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The concept of professional diligence represents "a measure of care and skill exercised by a good businessman, in accordance with generally recognised standards of business practice in his particular sector of activity." (EC: 2003d: 12) It remains to be seen whether this legal approach to consumer protection makes much impact on the welfare of the individual consumer in the absence of mechanisms of institutional support. The existing limitations of that support have been set out in Chapter Five.

**Analogy with Domestic Markets**

The anomalous situation in which cross-channel travellers find themselves becomes much clearer if some of the strategies used by Channel operators are applied to a purely domestic travel toll. Take the case of differential charging for different points of departure. Let us suppose that the Humber Bridge or the Birmingham Relief Road chose to charge North-South travellers a higher price than the South-North traveller. To all intents and purposes, this would be seen as a privately levied surcharge on travel to the south of the country. Whilst such a strategy might conceivably be in the interests of the profitability of the operator, it might well be seen as contrary to regional or national economic interests in general. Similarly, if either of these undertakings varied their charges according to the duration of time before the traveller made a return journey, this would undoubtedly be seen as an intolerable interference with freedom of movement. Perhaps one reason why such strategies seem to be divorced from economic reality in the domestic setting, whilst they are apparently normal in the international setting, is that the domestic economy really does constitute a mature Single Market, whereas the European setting is that of a Single Market yet to be fully realised.

If a principal purpose of the TEN initiatives was to weaken the impact of historic borders and to strengthen the prospects of economic growth in border regions, it seems unfortunate that the private enterprises left to operate these services, should adopt strategies which effectively restore some of the gate-keeping effects of the former frontiers, essentially, for private business motives.

This case has focussed directly on the Commission’s capacity to supervise proper enforcement at member-state level and its attempts to compensate for these constraints in the domain of consumer economic rights. In terms of the success of this policy, the case
has provided a significant critique of the limitations of the present dual approach adopted by the Commission.
CHAPTER 8

CONCLUSIONS

Introduction
The study set out to examine consumer protection in the European Union, with particular reference to the ability of citizen-consumers to access their economic rights across borders. It specifically addressed issues relating to European Commission strategies on enforcement and redress, exploring the relationship between policy outputs and policy outcomes in this area. The study also focussed on the motivations of the Commission in raising the profile of consumer protection policy and especially its use of the rhetoric of the 'citizen-consumer'. This chapter first reviews the methodology and conceptual frameworks adopted in this study in order to evaluate their validity in the light of our analysis before summarising the main findings in relation to each of the key research questions. The implications of these findings are then set out and the chapter concludes with an outline of options for future research directions.

Review of Methodology
In the EU, consumer protection policies emerged relatively late in the development of the Union. As previous chapters have sought to explain, in the early stages of the development of the EU, consumer protection simply did not exist as a policy area in its own right. Strategies to protect consumers depended largely on competition policy; consumers were viewed as the ultimate beneficiaries of effective market structures. In researching this area, it is therefore difficult to ignore competition policy. There remains a degree of overlap and ambiguity between the domains of competition and consumer protection policies. This overlap complicates research and represents part of the difficulty of defining research problems in this field.

Researching a Moving Target
The task of researching fields dealing with contemporary policy issues is beset by a number of practical and methodological problems. These stem from an attempt to study
phenomena which are taking shape in a moving policy environment and which are themselves developing and changing during the period of the study. For example, several key regulatory initiatives, supporting the general findings of the study, were published very late in the actual research process and certainly too late to have influenced either the research foci or the chosen methodology. One aspect of this problem is associated with the time-horizons set for the study. At the outset, it was envisaged that the empirical study would be completed by September, 2002. However, during 2002 it became clear that the pace of progress in the EU policy-making process was affecting the progress of the study. Therefore the period of study was extended into 2003, in order to give greater weight to the most recent and emerging developments in EU initiatives in this area.

**Merits of methodology and models used**

**Search and Review of Secondary Literature**

The search and review of secondary literature, although routine methodology, made a particularly useful contribution to the shaping and content of this study. First, it revealed how research into this policy area had been neglected. The review also demonstrated that other researchers had already identified some of the anomalies which prompted the initial formulation of the principal research questions addressed in this study, (for example, Tallberg 1999, 2000a, 2000b, Previdi 1997, Mendrinou 1996). More importantly, the secondary literature suggested one or two pertinent conceptual models, particularly the Principal-Supervisor-Agent model and the concept of the citizen-consumer, which have helped shape the foregoing analysis. The secondary literature also fulfilled an important role in providing an interpretative backdrop against which to examine and evaluate the primary evidence.

**Review and Analysis of Primary Literature**

The review and analysis of the primary literature provided not only a wealth of evidence, but also offered critical insight into the stated rationale underpinning the perspectives, positions and strategies of relevant institutions and policy actors. The official documentation provided a rich source of data in relation to both the contextual/conceptual and empirical aspects of the study. However, one of the problems encountered in using
Commission documentation was that it was not infrequently poorly referenced and consequently sometimes difficult to obtain. This was particularly true of documents retrieved from the internet; some of the older documents were removed from easy public access and placed in the EU archives. However, it was possible to gain access to some of these documents through contact with officials in DG SANCO.

Interviews

The interviews took place over a fifteen month period and were designed to throw particular light on the specific initiatives explored in Chapter Five and on the two sectoral-specific case-studies in Chapters Six and Seven. The earlier batch of interviews (May-July 2002) concentrated on the cars case (Chapter Six), since the amendment and renewal of the block exemption in 2002 made this focus particularly salient at this time. The second series of interviews (June-July 2003) concentrated on the selected initiatives reviewed in Chapter Five and, to a lesser extent, on the cross-Channel travel case. The interviews were characterised by a common purpose based on the search for evidence in relation to the third and fourth research questions which are examined in detail below. The structure of each set of interviews was driven by a set of common criteria and common objectives; however, the emphasis of each interview depended on the particular subject target under review and on the nature of the constituency from which interviewees were drawn. The interviews were particularly valuable in a variety of ways. First, they provided useful guidance, eliciting unpublished and expert evidence, privileged insights and access to further information networks. They also provided evidence of the differing perspectives of policy actors representing different constituencies, and offered invaluable insights into the processes of policy implementation and enforcement. One aspect of the interview process that did pose certain difficulties was the problem of fitting the interviews into the busy work schedules of officials in the Commission. This problem made it necessary to visit Brussels twice in June 2003 which proved time-consuming and costly. In retrospect, it would have been preferable to have conducted the interviews at an earlier stage. However, the timing of the reform of the block exemption for the car sector in 2002 and the time taken for the
Commission initiatives to sufficiently mature by 2003 meant that earlier interviews, in all likelihood, would have proved less profitable.

**Case-studies**

One problem at the outset of the study was to choose case areas which were likely to prove fruitful. In the event, the cases chosen proved particularly valuable in demonstrating the limitations of the indirect approach to consumer protection by means of competition policy. They were also useful in that they represented different sectors of the Single Market illustrating the need for a 'direct approach' using specific initiatives, particularly targeting practices impeding the exercise of consumers' cross-border economic rights. As vehicles for demonstrating and evaluating the efficacy of direct initiatives, the case studies were less illuminating. This was largely due to the fact that most of the relevant initiatives were in the early stages of, often belated, implementation during the study. Thus in the case-study chapters it was only possible to offer a preliminary assessment of their likely impact.

The method involved what Eckstein (2000) described as a 'disciplined-configurative', a 'heuristic' and a 'plausibility-probe' approach to case-material. The P-S-A model and the construct of the 'citizen-consumer' acted both as lenses through which to interpret evidence and formative models helping to underpin the structure of the study. In the outcome, the study did involve a heuristic element in that it prompted the development of the two principal conceptual frameworks by exploring connections between them, as is shown below. The plausibility-probe element is to be found in the attempt to relate policy outputs in particular market areas to policy outcomes 'on the ground' and as a way of assessing the consequences of the balance of policy choices (in this case between competition and consumer policy).

**Review of Conceptual Models Used**

The two main configurative frameworks used to structure the study were the concept of the citizen-consumer and the P-S-A Model of the relationship between supranational institutions and member-states (Tallberg: 1999).
Citizen-Consumer

In spite of the conceptual and definitional ambiguities surrounding the term, the concept of the 'citizen-consumer' has proved useful in several ways. It provided a construct through which the Commission's actions in raising the profile of consumer policy could be understood. The concept helped not only to facilitate the establishment of connections between the issues of enforcement, legitimacy and citizenship, but also contributed to an understanding of the political strategies adopted by the Commission.

The concept of the citizen-consumer also shed light on the broader implications of the developing notions of EU citizenship. Because the EU is not an established state, but a developing political entity providing governance, EU "citizenship" is itself an incomplete concept. The academic literature has suggested different approaches to understanding and interpreting citizenship and this body of debate broadly falls into two camps: the first focuses on creating emotional or psychological attachments to the EU, the second focuses on a more pragmatic interpretation of citizenship based on the accessibility of rights. The concept of the citizen-consumer, itself falling into the second category, provided a useful vehicle for exploring the relevance of these two approaches.

P-S-A Model

The P-S-A model provided a generic framework of delegation within which to locate the different roles played by the principal actors in the EU system of governance. Its particular value was that it did, as Tallberg (1999) claimed, expose the complexities and ambiguities inherent in the EU system. The evidence compiled in the empirical chapters fits well with this model of the system, encapsulating as it does a definition of one of the key problems EU policy actors face, namely the constraints imposed upon the Commission's ability to directly supervise and monitor EU policy outputs at ground level in the member states. The study has attempted to establish relationships between the citizen-consumer and the P-S-A model in the field of consumer protection and to use them in collaboration to elucidate the processes at work there. These processes are illustrated in the diagram below.
Diagram:
Prevention and Redress in the EU Approaches to Consumer Protection

The above model illustrates two different approaches to enforcement – prevention and redress. The redress loop refers to those areas of policy where citizens are protected by the provision of access to legal remedies for detriment suffered. This represents post hoc protection. The prevention loop, in the EU context, refers to regulations and directives across the policy areas which are intended to anticipate detriment and to prevent it. However, prevention at EU level does not simply consist of creating legal constraints and frameworks but involves the effective monitoring and policing of these. At the EU level, the 'prevention loop' also extends to a limited number of policy areas (competition, agriculture, fisheries) where member-states have delegated power to the Commission to undertake supervisory/monitoring activities directly across national borders. Much of the work of the Competition DG, for example, consists of policing and monitoring the activities of market actors to ensure that they do not flout existing regulations. The
Competition DG does not, however, provide redress in its own right; it can only stop malpractices by threat of court action or by reference to the ECJ. In spite of the fact that the Competition DG is able to engage in direct supervision of market activity in the member-states, its scope for action in this respect is circumscribed by the criteria which must be satisfied in order to undertake either preventive action, or referral to the ECJ. The criteria are namely the anti-competitive practices outlined in the Rome Treaty involving abuse of dominant position, cartelisation or anti-competitive mergers.

In the field of consumer policy, on the other hand, the Commission is very constrained in its capacity to supervise and monitor policy at ground level and is therefore obliged to work through the agency of the member-states. In principle, where market abuses are intra-state, national enforcement agencies are free to adopt both prevention and redress strategies. Where cross-border abuses occur, there is no international agency within the EU charged with prevention. Cross border redress is possible through private legal and mediatory mechanisms and now, at the institutional level, through co-operation between member states, by means of the Injunctions Directive. However, evidence arising from the interviews undertaken at the OFT and the DTI suggests that preventive action seems to be hampered by a need to allocate limited resources to addressing consumer complaints. Officials confirm that the enforcement process is complaints driven and readily confess that they are 'not looking for work'. In the future, the proposed Directive on Unfair Commercial Practices and the Regulation on Consumer Protection Enforcement should strengthen the administrative framework for cross-border consumer protection enforcement.

Whereas on the redress side the P-S-A/Citizen-consumer model indicates limited support for consumers seeking to address problems in exercising their economic rights, on the prevention side, no such trans-national system of monitoring or support has been put in place. On this side of the model, preventive monitoring and enforcement depend on inter-state action. The success of such an approach therefore relies on the individual enforcement agencies in each member-state taking a pro-active stance. The evidence in this study suggests that this may be an over-optimistic expectation.
Summary of Main Findings

Review of Research Questions

The key research questions were constructed in the course of the initial exploration of the field and since that time have consistently steered the direction of study. They proved particularly useful in directing attention towards the motivation of the Commission in this policy area, in structuring an examination of Commission strategies, and in promoting an assessment of the efficacy of policy outcomes. Whilst the original research proposal had set out these intentions in broad terms, the research questions were particularly useful in sharpening the focus of the research effort. The inter-dependencies between the research questions helped to promote the perceptions and development of connections between the difference aspects and phases of the research process.

The findings in relation to each of the research questions are examined below.

1. First, the study asked whether the Commission's increased attention to the ability of citizen-consumers in the EU to exercise their economic rights across borders in the Single Market was used as a means of legitimising the Single Market in the eyes of the citizen.

The study shows that during the 1990s the Commission, in its policy documents and in the statements of policy actors, began increasingly to associate improvement in citizen perception of the EU with evidence of increasingly benificent economic outcomes for consumers, arising from the inception of the Single Market. The creation of a culture of citizenship and citizens' rights was used strategically to develop the relationship between the citizen and the Union, by widening and deepening the effectiveness of rights and by targeting areas of specific interest to citizens, particularly social, environmental and consumer policy-areas. The study shows that the Commission consciously adopted this strategy in response to evidence of citizen alienation and apathy towards the Single Market and towards EU integration generally. The documentary evidence demonstrates that EU policy actors feared that lack of citizen support for the Single Market, a key stage of the integration process, would undermine the legitimacy of EU integration. This change of focus was specifically detected in a greater emphasis on the need to protect the citizen as consumer. The shift in the status of consumer protection policy,
evidenced in its explicit Treaty status (TEU 1992), its elevated institutional status as a DG in its own right and in the marked increase in policy initiatives and outputs, represents a facet of a more general policy. The two main features of this process – improved health and safety and improved ability to exercise economic rights – largely proceeded in tandem. However, the timing and co-incidence of a series of major food scandals in the mid-1990s prompted a shift of emphasis towards health and safety issues. Nevertheless, as evidence from policy outputs and policy documents showed, strategies to enhance consumers' ability to exercise their economic rights continued and accelerated towards the end of the decade. The full participation of citizen-consumers was also seen as essential to the proper functioning of the Single Market, because if citizen-consumers were not able to maximise their market benefits, then neither would the supply-side. It was thought that loss of consumer confidence would have a negative effect on business, leading to a sub-optimal level of economic growth.

2. Second, the study analysed the extent to which, as part of this strategy, the Commission used the rhetoric of the 'citizen consumer' as a device to court citizen support for the single market project.

The secondary literature on the legitimacy bases for the EU strongly points to the notion that its legitimacy is best predicated on policy performance, identity and democracy both being relatively weak at this level. The Commission's rhetoric in speeches and policy documents (for example, Action Plans, Green and White Papers) demonstrates a particular understanding of this dilemma with regard to citizen perceptions of the Single Market. The documents clearly and repeatedly refer to the need to equip citizens with accessible rights. The policy documents related this argument specifically to the experience of consumers in the Single Market. It is clear from official documents and speeches that the Commission consciously set out to raise the profile of consumer policy within the wider context of a general objective to close the gap between the citizen and the EU, concentrating on deepening consumers' economic rights across borders and focussing on enforcement and access to redress. The analyses in Chapters Four and Five show that many of the documents use the notion of the citizen-consumer to justify these policy strategies. The documents repeatedly cite the need to enhance consumer
confidence by improving the effectiveness of cross-border enforcement and redress mechanisms. Although intended as the ultimate beneficiaries of this policy, citizens themselves may not have been intended as the primary recipients of the rhetoric. How many ordinary citizens read EU policy documents? On the basis of the available evidence, it is reasonable to suggest that the member states were the primary targets, as part of a strategy to encourage them to support this policy line. As Principals they were central to the decisional stage and as Agents they were crucial policy actors in the implementation and enforcement stages.

3a. Third, given the institutional constraints imposed upon the Commission's capacity to supervise proper enforcement at member state level, how has the Commission attempted to compensate for these constraints in the domain of consumers' economic rights?

The Commission has suffered from several institutional constraints in the field of consumer policy. There is a general constraint on direct enforcement or supervision of enforcement at ground level, which may be said to be true of most EU policy areas excluding competition, agriculture and fisheries. The constraint is based on restrictions in the treaty provisions, on the principle of subsidiarity, and also on the lack of resources available to the Commission. The Consumer DG in particular has suffered from low institutional status and a lack of financial resources as is evidenced over the years by poor budgetary allocations. The Commission's scope for action in the early days was also constrained by the lack of explicit reference to consumer protection in the treaty provisions which effectively limited the available policy approach to one based primarily on competition policy and the management of market structures.

The development of EU consumer protection has involved a developing interaction and overlap between the two different approaches of competition policy on the one hand and consumer protection policy on the other. There exists a fundamental philosophical difference between these two approaches. Competition policy is predicated on the notion that consumers are best protected by safeguarding the competitive structure of the market, which will, when operating normally, automatically accord them optimum choice and value. Consumer protection policy on the other hand is predicated on the
assumptions that markets are never perfect and frequently significantly flawed; in these circumstances, consumers require specific legislative and administrative support in order to optimise their market position. In the early stages, the EU depended largely on competition policy to shape the market so that the consumer would reap the economic benefits of the Union. The 1980s and 1990s witnessed a growing recognition that the market revealed an in-built bias in favour of the supply side. Competition policy, by itself, was insufficient to guarantee appropriate economic benefits to consumers; therefore, this policy came to be increasingly supplemented by more direct intervention in the market place to support consumers by means of specific consumer protection measures. The study has therefore included some analysis of the overlap between competition policy and consumer protection policy in the case-studies.

However, with particular reference to consumer protection policy, there are also specific problems that restrict the capacity of the Commission to supervise enforcement in the field of consumers' economic rights, particularly across borders. Numerous Commission studies and reports have commented on the absence of an effective legal framework for the pursuit of these rights and the lack of portability of legal instruments. The survey of this material in this research project has also shown that consumers have, in particular, suffered from practical barriers to legal processes because of the cost, time and complexity of accessing redress across borders through the national court systems. Moreover, these findings have been clearly confirmed in the secondary literature, much of it by legal specialists.

One way in which the EU has developed strategies for dealing with the general problem is by decentralising EC rights to EU citizens. For example, as Chapter Four illustrated, the ECJ during the 1980s and 1990s, began to devolve EC rights to EU citizens that they could directly enforce before their national law courts through a number of important case rulings. This strategy of decentralising enforceable rights to citizens was further developed by the Commission during the 1990s, as Chapter Five demonstrates, when it began to develop a number of initiatives aimed at helping citizens to access their rights in the Single Market. Until the late 1990s initiatives designed specifically to assist consumers (e.g. the European Consumer Centres) were largely non-legislative. They focused on providing consumers with advice and information pertaining to their rights,
although they also provided consumers with low level legal advice and assistance. The Commission also attempted to promote the development of low-cost small claims procedures within the domestic settings of the member states. Towards the late 1990s and into the 21st century, official documents clearly demonstrated that the Commission adopted a more proactive stance and began to develop low-cost procedures which consumers could use to gain redress across borders. Some of these procedures were non-legislative, such as the EEJ-Net and the European Complaints Form, although increasingly the output of initiatives demonstrates that the Commission has come to rely on legislative measures such as the Injunctions Directive (1998), the proposed Unfair Commercial Practices Directive (2003), and the proposed Regulation on Consumer Protection Enforcement (2003). Whilst the non-legislative initiatives largely relied on the ability of the individual consumer to self-protect, the legislative initiatives attempted to develop legal instruments and administrative frameworks to promote co-operation and co-ordination between national enforcement agencies, thus lightening the burden of enforcement on the ordinary citizen.

3b. To what extent has it been successful?

The case-studies in Chapters Six and Seven have emphasised a number of the limitations of competition policy as a vehicle for delivering consumer protection. First, they have demonstrated the ability of companies to exercise political pressure at the highest level in order to mitigate changes in the regulatory framework, as the campaign to modify the revised block exemption for cars has shown. They highlight the weakness of the criteria applied in the assessment of market structures, for instance the looseness of concepts such as 'dominant market position' or 'public interest'. Third, they raise questions regarding the public accountability of agencies for the advice they offer and the judgements they routinely exercise in the performance of their duties; for instance, in their choices of priorities or in their interpretation of policy guidelines (setting conditions, which circumvent the 'public interest' test). They have revealed the inconsistent and low-level surveillance of the market even by agencies charged with such duties and their dependence on a complaints-driven approach.
Probably the most serious weaknesses in the use of competition policy to deliver consumer protection is that it does not deal with manifest abuses unless they stem from a flawed market structure. Firms remain outside its purview so long as the market in which they operate is deemed to be 'competitive', no matter how unsatisfactory the criteria of competition may be.

Whilst evidence from the Commission's indirect competition policy approach to consumer protection presents, at best, a mixed picture, the Commission's direct approach based on decentralising measures also shows significant limitations. Evidence gathered from interviews, Commission evaluations, progress reports, and conferences demonstrate that the non-legislative approach has suffered from a number of general and specific problems. For example, as the analysis in Chapter Five showed, many of the initiatives (ECCs, EEJ-Net and European Complaints Form) suffered from poor publicity – the public were largely unaware of their existence. There was also some evidence that some initiatives suffered from weak management, ineffective monitoring and poor coordination. Evidence from interviews and reports indicated that, in part, this failure appeared to be the result of a lack of commitment to the initiatives on the part of certain member states. The inconsistent and sometimes disappointing performance was attributable to the dislocation in the management of the initiatives between the different levels of governance (local, national and EU) and to the low priority given to the task of monitoring by the Commission. Moreover, the Commission was hampered in its ability to oblige those directly responsible for managing the initiatives to comply with Commission requests because of the lack of sanctions at its disposal. Interviews with Commission officials revealed that the only real sanction available to the Commission was the withdrawal of funding from the projects. Officials were reluctant to take this step for fear of souring relations with the member- states in question. Specific problems that related to the EEJ-Net centred on the incompleteness of the ADR network across the market sectors of the participating member states. In the context of the case studies, it is interesting that the car sector was noted as being particularly poorly served. Other problems were associated with the difficulty of monitoring the quality of recommended ADR bodies. These findings were unanimously supported during interviews with DTI officials, with an official of the BEUC and from verbal and documentary evidence given

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during a conference on the EEJ-NET 10th-11th June 2003 ("Review of the European Extra-Judicial Network and Future Perspectives for Improved EU Consumer Assistance"). Although the above criticisms demonstrate the limitations of these initiatives, some of the measures have not been operational for very long and in principle they do have the potential to be useful in the long term providing that some of the teething problems are ironed out.

The success of some of the legislative initiatives also presents a mixed picture. For example, the Directive on the Sale of Consumer Goods and Associated Guarantees (1999) does not create a pan-European Guarantee, as the notes attached to the directive would appear to suggest. Similarly, as the case study on cross-channel travel has shown, the Directive on the Indication of Prices (1998) has so many possible derogations attached to it that it can be watered down to the extent that whole categories of products may be exempted as well as the entire service sector. Moreover, it is perfectly possible for different states to pick and choose from the available exemptions – thus making the practical application of this directive quite uneven. The Injunctions Directive (1998) has the potential to provide a useful instrument for the pursuit of unscrupulous traders operating across borders, although the evidence so far (2003) suggests that, in general (the UK aside), member-states' enforcement agencies have not been sufficiently proactive in applying it. The Directive on Unfair Commercial Practices and the Regulation on Consumer Protection Enforcement Cooperation are as yet only proposals; it is therefore not possible accurately to predict their likely impact. However, the Injunctions Directive, the Unfair Commercial Practices Directive and the Regulation represent a marked break with previous Commission strategies in that they attempt to create an institutionalised framework for the enforcement of consumers' economic rights across-borders. The success of these frameworks will depend, to a large extent, on the pro-activeness of the agencies operating them. Once again, in the absence of direct monitoring/supervisory capacities the Commission will have to rely upon the willingness of the member states acting as agents to comply with the legislation.
4. The final question invited an exploration of the argument that, in this context, the issues of enforcement, citizenship and legitimacy are interdependent and have been consciously interwoven by EU policy actors, seeking to re-invigorate citizen support for the process of EU integration.

The logic underpinning the Commission's broad policy strategy can be summarised in simple terms. Enforcement facilitates good policy performance. Good policy performance improves citizen perceptions of the EU. Improved perception translates into citizen support. Improved support creates a climate of positive participation. Positive participation promotes political legitimacy. The secondary literature generally support the assumptions underlying this logic. The evidence in this study demonstrates that the Commission has consciously emphasised improved enforcement of consumers' economic rights, so that, by improved policy outcomes in this field, the benefits of the Single Market may become more evident to consumers and improve consumer confidence.

Since the Single Market represents a critical stage in the integration process, consumer confidence, based on access to the economic benefits of the market, is seen as a direct route to the enhancement of more general citizen confidence. Confidence is an important factor in both economic and political climates. If enforcement improves policy outcomes, it may be argued that these have the capacity for positive effects in both political and economic contexts. These two contexts are interdependent. EU policy seems to be predicated on the belief that improvements in economic performance promote a 'feel-good' factor, which enhances satisfaction, not just with a particular party or government, but with the whole system of governance.

**Implications of the Findings**

The benefits of the Single Market are intended to flow through to citizen-consumers in a variety of ways, including improved goods and services at increasingly competitive prices. The progressive dismantling of inter-state boundaries has been the means to this goal. However, although the effect of EU governance has been to weaken the inter-state boundaries, it has nonetheless left elements of boundary control in place. Some of these elements might be considered 'natural', such as linguistic or cultural differences, others
however, are the result of remaining institutional barriers, in particular legal and enforcement frameworks. With regard to the protection of consumers' economic interests across borders these remaining barriers have generated particular problems at both the market level and at the institutional level.

With regard to the Single Market, the barriers have created conditions enabling the supply-side to segment the market. Market segmentation, i.e. the capacity of a supplier to discriminate in terms of the price and conditions of service offered to different consumers, depends on the presence in the market environment of several related factors. First, there must be a basis for market segmentation, for example, legal, technical or cultural differences which provide a platform for discriminatory practices. Second, suppliers must be able to maintain the boundaries between the segments and have the power to enforce differential prices and conditions. Third, they need a motive for doing so, in this case, the existence of market conditions which will support greater profitability, greater control over consumer choice and/or a greater market share. It is possible for the supply-side to maintain segmentation because of the difficulties caused by cross-border legal differences that both national enforcement agencies and individual consumers experience when attempting to operate across borders in order to police the market or to gain redress. In many respects, this illustrates the problem of a continued dependence on an intergovernmental model in order to create a cross-border framework for monitoring and enforcement in EU consumer protection policy.

There seems to be a structural problem at the heart of the enforcement of policy in general and of consumer policy in particular. It may be summarised as follows. In the existing political climate, there is insufficient political support or political will to transfer additional power and resources to the centre in order to create institutions or agencies at the European level which could monitor and enforce consumer policy in the trans-national domain. Therefore, to a large extent, the EU depends on market forces to discipline producer behaviour. Where this fails, the monitoring and enforcement of EU regulations depend largely on non-governmental mechanisms to monitor and address non-competitive behaviour — consumer complaints, publicity, cases brought forward for alternative dispute resolution, and private legal actions. The problem with this strategy is that the balance of resources, between the supply and demand side of the market, are
weighted heavily in favour of the supply side. Thus, the context in which the market operates may be characterised, from the outset, as an uneven field.

In other words, not only is the market an uneven playing field, but the regulatory context, which has been created in an attempt to iron out the unevenness, is itself markedly uneven and for much the same reasons as the market itself is biased. That is to say, although the economic and financial resources on the demand and the supply side of the market are, in aggregate, similar, on the demand side they are thinly distributed and on the supply side they are clustered. Resources on the supply side are in the hands of the few, thus they are able to concentrate them in order to defend their specific interests, whereas on the demand side, they are so widely distributed that their force is dissipated. Thus, both in terms of bargaining-power inside the market framework and outside of it (say in the legal or political arenas), consumers and the consumer-lobby are always operating at a severe disadvantage in comparison with producers and the producer-lobby.

This distribution of resources is reinforced by the close commercial-political nexus, which a command of large resources helps to create.

The paucity of direct action to support consumer economic interests in trans-national matters at EU level may be explained by two phenomena. First, in a situation where the resources delegated by member states to the centre are inadequate to support a large independent operation, politicians and the officials at EU level are heavily dependent on business co-operation and generosity in the supply of expert technical support for policy formulation and implementation. The second phenomenon is the dependence of politicians on business support, both in seeking power and in exercising it.

The P-S-A model throws direct light on the structural problems outlined above and illustrates the difficulties encountered by the Commission in three senses. First, the enforcement problem stems partly from an inability to enforce regulations by means of existing institutional channels. This may be partly due to late or incomplete transposition, slow or reluctant implementation and weak enforcement by the Agents. Second, in the case in particular of cross-border transactions, the problem stems less from a failure to use existing channels, as a failure to create an effective framework of enforcement at EU level in the first place. Third, because it focuses on unwillingness of member-states to delegate, it also explains the inability of the Commission, itself to
create central mechanisms for the effective enforcement of consumer economic rights across borders.

The overlap between competition policy and consumer protection policy reveals a peculiar regulatory anomaly. Many of the direct initiatives are designed to deal with matters which require redress, arising after purchase, as a result of terms of contracts, failure to deliver, faulty products, unsatisfactory after-sales service, inadequate guarantees or fraud, whereas many consumer problems, as the case studies showed, stemmed from problems arising prior to purchase. These included, refusal to supply, unclear price information, unclear product data, refusal to supply after-sales services, pricing based on irrelevant reference-points, and restrictions on access to deals on the basis of nationality, residence, point of departure, point or means of payment. In principle, competition policy is intended to deal with the pre-sales environment in which the consumer is obliged to operate. However, this policy approach is severely limited by the narrow definitions of market failure, which bound the scope of its application. The two specific case-studies have shown that, on the one hand, competition policy provides for intervention at a level too remote to afford consumers protection from many specific problems experienced in the field, and on the other hand, the scope of consumer protection policy has so far been too narrow. Thus the picture of EU consumer protection policy that has emerged in this study suggests a policy area which is incomplete in its own right, yet not sufficiently compensated for by either EU competition policy or domestic consumer protection regimes.

**Implications for Future Research**

This study has suggested a number of possibilities for research directions in the future. One of the limitations deliberately imposed on this study at the outset was to limit its remit to the EU. However, it might be profitable to build on this initial study by adding a trans-Atlantic comparative dimension, comparing the situation regarding the enforcement of consumers' economic rights across state borders in the EU with the situation in the USA. Here, the main interest would be to compare the application of consumer protection policies across state borders in a fully federated political system with a system such as the EU, which is part supranational, part intergovernmental. Another line of
enquiry might be to explore more deeply the connections between policy outputs and policy outcomes in this field as the initiatives examined in Chapter Five develop and as the Commission's consumer protection strategies mature. A strategy similar to the one adopted in this study might also be applied to other policy fields such as environmental or social policy in order to construct a broader picture of the problems posed by breaks in the EU regulatory framework.

The Study's Contribution to the Further Understanding of the Subject Field

By focussing specifically on consumer economic interests across borders, the study highlights the uneasy relationship between the direct and indirect approach to consumer protection inherent in the policy approaches adopted by the Competition DG and the DG for Health and Consumer Protection. Although some material in this field already recognises this dual approach, the use of case-studies to illuminate the tension inherent in these two approaches suggests some distinctive insights into the limitations of the EU's approach to consumer protection.

Another innovative element in this study is the explicit linking of policy outcomes to outputs by tracing implementation and enforcement measures at 'ground level' in this fields and attempting to assess their effectiveness by reference to these specific case-studies. The approach also sheds some new light on the effectiveness of a 'soft-law' approach to policy-making in this field. Whilst previous consumer studies have examined the output of such initiatives, this study provides some assessment of their practical impact for consumers. Because the study checks outputs against outcomes it also provides useful insights by comparing the rhetoric emanating from key policymakers with the reality experiences by the target audience - the citizen-consumer - at ground level. In the realm of theoretical modelling, the study opens up a number of possibilities for combining the P-S-A model with the concept of the citizen-consumer. The study also seeks to further understanding of the concepts of legitimacy and citizenship and the factors underpinning them with particular reference to the role of citizen as consumer – thus building on conceptual frameworks already established in the field.
APPENDIX 1

PRICE DISCRIMINATION BASED ON POINT OF DEPARTURE: SAMPLE INTERNET BOOKINGS

Example 1.

SeaFrance reservations on the Dover-Calais route reveal a clear pattern of price differentiation based on point of departure/location of reservation. Two sample bookings, one made in English, the other in French, for a standard saloon car + two adults September 2003, one made for a point of departure in Dover, the other for a point of departure in Calais reveals the discrimination:


| Dover – Calais Dep.1st Sept. 09.00 hrs | Calais – Dover Dep.7th Sept. 14.30 hrs | Super Apex Standard Fare: £254.00 |
| Calais – Douvres Dep. 1 Sept. 0.900 hrs | Std. Apex: 295 Euros |
| Douvres – Calais Dep. 7. Sept. 14.00 hrs | |

Source: https://reservation.seafrance.net/cgi-bin/booking.cgi?cl=sfr (consulted 28.3.2003)

The appropriate currency converter for the £:Euro on that day was £1 = 1.40000 Euro.
Source: http://www.moneyworld.co.uk/rates/currency/converter (consulted 28.3.2003)

Therefore £254 = 355.6 Euros.
This represents a difference of 60.6 Euros (£43.28).
Travellers from France would pay 20.5% less than the sum payable by travellers from the UK.

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Example 2

Eurostar

This example provides data relating to a number of potential journeys in each direction.

Search dated 27.03.2003 for travel on 29.03.2003.
Search based on lowest available fare for each journey:

<table>
<thead>
<tr>
<th>Paris (Gare du Nord) – London (Waterloo)</th>
<th>Depart</th>
<th>Return</th>
<th>Lowest Price</th>
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</thead>
<tbody>
<tr>
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<td>29.03.2003.</td>
<td>30.03.2003</td>
<td></td>
</tr>
<tr>
<td>Option 1</td>
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<td>17.40</td>
<td>50.00 £GBP</td>
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<td>Option 2</td>
<td>07.16</td>
<td>18.10</td>
<td>50.00 £GBP</td>
</tr>
<tr>
<td>Option 3</td>
<td>08.13</td>
<td>19.10</td>
<td>50.00 £GBP</td>
</tr>
<tr>
<td>Option 4</td>
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<td>50.00 £GBP</td>
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<tr>
<td>Option 5</td>
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<table>
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<th>Return</th>
<th>Lowest Price</th>
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<td>30.03.2003</td>
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<tr>
<td>Option 1</td>
<td>06.40</td>
<td>17.43</td>
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<td>Option 3</td>
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<td>Option 4</td>
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<td>59.50 £GBP</td>
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Search dated 28.03.2003 for travel on 29.03.2003.
Search based on lowest available fare for each journey:
### Brussels (Midi) – London (Waterloo)

<table>
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<tr>
<th>Journey</th>
<th>Depart</th>
<th>Return</th>
<th>Lowest Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
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<td>30.03.2003</td>
<td>£50.00 GBP</td>
</tr>
<tr>
<td></td>
<td>07.01</td>
<td>16.14</td>
<td></td>
</tr>
<tr>
<td>Option 2</td>
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<td>18.14</td>
<td>£50.00 GBP</td>
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<tr>
<td>Option 3</td>
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### London (Waterloo) – Brussels (Midi)

<table>
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<th>Journey</th>
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<th>Return</th>
<th>Lowest Price</th>
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<tbody>
<tr>
<td>Option 1</td>
<td>29.03.2003</td>
<td>30.03.2003</td>
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</tr>
<tr>
<td></td>
<td>06.00</td>
<td>17.01</td>
<td></td>
</tr>
<tr>
<td>Option 2</td>
<td>08.14</td>
<td>17.56</td>
<td>£59.50 GBP</td>
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<td>Option 3</td>
<td>10.14</td>
<td>19.57</td>
<td>£59.50 GBP</td>
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</table>

In each of these potential journey bookings, the difference between an outward journey from Paris and from London and from Brussels and from London amounts to 19%.
APPENDIX 2

In their evidence to the 1997 Monopolies and Mergers Commission investigation into their proposed joint venture on Short Sea Channel crossings, P & O and Stena European Ferries were at pains to point out the unique position of rail services via the tunnel (Monopoly and Mergers Commission: 1997: 161-2).

"The parties commented that Eurotunnel's competitive strength in the Short French Sea passenger market was based upon a unique mix of economic and commercial factors that also established a fundamental asymmetry between Eurotunnel and its competitors. First, Eurotunnel operated from a radically different platform in terms of capital employed (£12 billion compared with £410 million in the case of the joint venture). Secondly, it was removed from ordinary commercial and financial constraints. Applying normal commercial standards, it was an insolvent business. However, the exceptional size of the Eurotunnel debt and the exposure of lenders to such debt had produced a unique situation where lenders were unwilling to, and arguably incapable of, abandoning the project......but the date when, if ever, dividends would begin to be paid remained entirely uncertain. Eurotunnel's aggregate losses dwarfed any further loss that it might need to incur in order to gain further market share from the ferries; the parties feared that the normal commercial considerations that would otherwise constrain Eurotunnel's behaviour would, therefore be negated."

Despite this claim by P & O and Stena, the Commission found that their operating costs per unit were in fact lower than that of the Tunnel. The comparative costs are reproduced below.
### 1996 operating costs per unit of capacity, assuming 50% capacity utilisation (in £'s)

<table>
<thead>
<tr>
<th></th>
<th>P &amp; O</th>
<th>Stena</th>
<th>Le Shuttle</th>
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<tr>
<td><strong>Variable costs</strong>*</td>
<td>9.10</td>
<td>11.20</td>
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<tr>
<td>Semi-variable</td>
<td>14.05</td>
<td>16.61</td>
<td>22.77</td>
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<tr>
<td>costs**</td>
<td>23.15</td>
<td>27.81</td>
<td>23.90</td>
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<tr>
<td><strong>Overheads</strong>*</td>
<td>8.86</td>
<td>9.31</td>
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<td></td>
<td>32.01</td>
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<tr>
<td><strong>Depreciation</strong>**</td>
<td>2.58</td>
<td>2.62</td>
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<tr>
<td></td>
<td>34.59</td>
<td>39.74</td>
<td>46.74</td>
</tr>
</tbody>
</table>

*Variable costs consist of travel agents' commission and, in the case of P & O and Stena, port transit costs.

**Semi-variable costs include payroll costs, fuel and maintenance in all cases. In addition Stena's figures include charter hire and Le Shuttle's figures include a share of the Tunnel operating costs.

***Overheads include administration and marketing costs.

****Le Shuttle depreciation relates only to rolling stock and does not include a depreciation charge for the tunnel.

(MMC: 1997: 21, Table 2.4)
APPENDIX 3
NOTE ON EXCHANGE RATE CALCULATIONS
The Effect of a Currency Devaluation

As this chapter has indicated, between December 2002 and March 2003, the Pound Sterling suffered a fall against the Euro of about 9%. The effect of this on an operator may be summarised by a simple illustration.

If an operator had all of its costs in Euros and all of its revenue in Pounds, then the full effect of the devaluation would fall on the operator, since it would need to exchange all the revenue (all in Pounds) into Euros in order pay out necessary expenditures (all in Euros). With about 9% fewer Euros to the Pound, the operator would find, in effect that costs had risen by exactly that degree.

Thus, the greater an operator's cost commitment in Euros and the greater the dependence on revenue in Sterling, the greater the impact of a devaluation in the value of the Pound against the Euro. The converse is, of course, also true.

The effect on an operator based on the continent, such as SeaFrance, might be greater than that on an operator based in the UK. However, it must also be remembered that, prior to 2003, the Pound Sterling experienced a period of appreciation against the Euro since the inception of the single currency. Therefore, between 2001 and 2003, the balance of advantage moved in the converse direction.

For price differentiation to be explained in terms of currency movements, the pattern of differentiation would need to be consistently in favour of one currency. In this case, in the circumstances of 2003, the prices expressed on Pound sterling would be expected to be consistently higher than in Euros. However, at the time when Eurostar and Seafrance were offering lower prices in Euros for similar reservations, P & O Ferries were discriminating in the other direction on the Rotterdam-Hull route. In other words, the differential prices shown in the examples in this chapter cannot be explained away in terms of currency movements. The operation of market segmentation is a more convincing explanation of the differences.
LIST OF INTERVIEWS

Members of the European Parliament

Phillip Whitehead MEP (25/5/2002)

European Commission:


Bureau Européene de l'Union des Consommateurs
Victoria Villamar Bouza – Legal Officer (19/6/2003)

Consumers Association
Phil Evans – Principal Policy Advisor (3/7/2002)

Department of Trade and Industry

Martin Bond – Assistant Director - Consumer and Competition Policy (16/6/2003)
Linda Stevens – (16/6/2003)

Office of Fair Trading

Richard Cook – Consumer Enforcement Division (3/7/2003)
Clare Hughes – Consumer Enforcement Division (3/7/2003)
Harriet Henry-Rapoz – Consumer Enforcement Division (3/7/2003)
Vicky Parr – Consumer Protection Division (3/7/2003)
Gerry Reagan – Competition Enforcement (3/7/2003)
Jay Thakar – Competition Enforcement (3/7/2003)

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List of Acronyms

AA- Automobile Association
ADR – Alternative Dispute Resolution
BEUC – Bureau Européene de l’Union des Consommateurs
CA – Consumer’s Association
CAB – Citizen’s Advice Bureau
CC – Consumer Committee
CC – Competition Commission (UK)
CCC - Consumer’s Consultative Committee
DGFT – Director General of Fair Trading
DG – Directorate General
DTI – Department of Trade and Industry (UK)
EC – European Community
EEC – European Economic Community
ECJ – European Court of Justice
ECLG – European Consumer Law Group
ECSC – Committee for Economic and Social affairs (EU Commission)
EEJ-Net – European Extra Judicial Network
EP – European Parliament
EU – European Union
IMSN – International Marketing Supervision Network
MMC – Monopolies and Mergers Commission (UK)
PA – Principal Agent
PSA – Principal Supervisor Agent
OFT – Office of Fair Trading (UK)
RAC – Royal Automobile Club
SNCF – Société National des Chemins de Fer Français
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