

Empowering consumers through law?

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EMPOWERING CONSUMERS THROUGH LAW?

Rethinking the Concept of EU Consumer Empowerment



Kate O'Reilly

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Kate Elizabeth O'Reilly

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Empowering Consumers Through Law?

Rethinking the Concept of EU Consumer Empowerment

DISSERTATION

to obtain the degree of Doctor

at Maastricht University,

on the authority of the Rector Magnificus,

Prof.dr. Pamela Habibović,

in accordance with the decision of the Board of Deans,

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by

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To Keith, Teagan and Saoirse

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Kate O'Reilly
January 2023

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Chapter 1

Introduction

1. Background

This study offers a rethinking of the concept of EU consumer empowerment by bringing empowerment theory into dialogue with the European Commission's use of secondary legislation as a tool to enact the agenda of consumer empowerment that is developed in consumer policy. Following the reform of the internal market in 2007, the Commission's narrative shifted to focusing on the needs of the consumer in the market as the basis for harmonization and in tandem began to develop a consumer empowerment agenda in consumer policy. This integration of consumer empowerment into several key policy areas and as a strategic approach to connecting consumers to the Green Transition in the European Union (EU) raises several questions about what it means to empower EU consumers through law and what the role of the empowered consumer is in the internal market. The following discussion in this section sets the background that brings these questions to the fore and lays out the puzzle of the concept of EU consumer empowerment.

During her candidacy for president of the Commission, Ursula von der Leyen presented several potential political guidelines for the Commission's term during 2019–2024.¹ The European Green Deal, as the first of these six headline ambitions, is now the Commission's current response to the pressing climate and environmental crises that the EU and the global community are presently facing. Following the appointment of von der Leyen as Commission President, the Commission published a Roadmap and Communication on the European Green Deal in late 2019 that outlines the ambitious aim to transform the EU into the world's first sustainable and carbon neutral economy.² The environmental goals of this communication set out a framework that will not simply decouple environmental degradation from economic growth but will profoundly transform the development path of the EU's economic model.³ The impact of the European Green Deal on consumer policy became apparent in the new approach adopted by the Commission in the 2020 New Consumer Agenda, which casts aside the traditional silo approach in key policy areas by integrating environmental concerns into

¹ Ursula von der Leyen, 'Political Guidelines: A Union that Strives for More: My Agenda for Europe' <https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf> accessed 22 July 2022.

² Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

³ Sarah Wolf, Jonas Teitge, Jähel Mielke, Franziska Schütze & Carlo Jaeger, 'The European Green Deal – More Than Climate Neutrality' (2021) 56 *Intereconomics* 99, 105.

the blueprint of strategic consumer policy.⁴ Contemporary consumer policy and energy policy now emphasize that consumers have an integral role to play in this transformation of the EU economy. To enable consumers to participate in the Green Transition, the Commission has integrated a consumer empowerment agenda in several policy areas that is subsequently enacted through various legislative instruments in the regulatory framework. In 2022, the Unfair Commercial Practices Directive (UCPD),⁵ the Consumer Rights Directive (CRD),⁶ and the Sale of Goods Directive (SGD)⁷ were undergoing legislative amendments with the aim of empowering consumers for the Green Transition.⁸ In the energy market, over the last four years the Electricity Directive (ED),⁹ the Renewable Energy Directive (RED),¹⁰ and the Energy Efficiency Directive (EED)¹¹ have each been recast as part of the Commission's endeavour to reform the architecture of the energy industry and to empower consumers to participate in the clean transition to a decarbonized economy.¹²

Consumer empowerment was first introduced by the Commission in 2007 in the communication titled 'Empowering Consumers, Enhancing their Welfare and Effectively Protecting Them' and so it is not a new strategic approach adopted by the Commission to achieve the goals in horizontal and sectoral policies with a consumer interest.¹³ Rather than waning in the face of the Green Transition, the consumer empowerment agenda has instead become one of the Commission's primary approaches for addressing this important transformation by targeting EU citizens in their role as

⁴ Commission, 'New Consumer Agenda' COM(2020) 696 final; On the shift from 'silo thinking' see Evelyne Terryn, 'The New Consumer Agenda: A Further Step Toward Sustainable Consumption?' (2021) 10 *Journal of European Consumer and Market* 1, 3.

⁵ Directive 2005/29/EU of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

⁶ Directive 2011/83/EU of 25 October 2011 on Consumer Rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/260 (Consumer Rights Directive).

⁷ Directive 2019/771/EU of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (Sale of Goods Directive).

⁸ Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information' COM (2022) 143 final.

⁹ Council Directive (EU) 2019/944 on Common Rules for the Internal Market for Electricity and amending Directive 2012/27/EU (recast) [2019] OJ L 158/125 (Recast Electricity Directive),

¹⁰ Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the Promotion of Energy from Renewable Sources, and Repealing Council Directive (EU) 2015/652' COM (2021) 557 final.

¹¹ Directive (EU) 2018/2002 of 11 December 2018 on Energy Efficiency amending Directive 2012/27/EU on Energy Efficiency [2018] OJ L328/10 (Energy Efficiency Directive).

¹² Commission, 'A Policy Framework for Climate and Energy in the Period from 2020 to 2030' COM (2014) 15 final.

¹³ Commission, 'EU Consumer Policy Strategy 2007-2013' COM (2007) 99 final.

consumers in the evolving marketplace. As the blueprint of key consumer policy areas becomes altered to accommodate the goals of the Green Transition, several established understandings of consumer empowerment, of consumer law and of the consumer can be challenged.¹⁴ In a sustainable economy that is both circular and carbon neutral, it is not readily apparent that the purpose and approach of consumer law and of consumer protection will remain the same.¹⁵ Put differently, if consumption patterns and attitudes towards how we should consume are changing, what do these changes mean for the role of the consumer in the internal market. If consumer empowerment is the strategic approach in secondary legislation for creating an environment where consumers can help drive the Green Transition, is it appropriate to continue to define consumer empowerment through the theoretical concepts of autonomy, consumer choice, perfect rationality, and the narrow view of power as agency that the consumer law debate has used to ascribed meaning to the concept of empowerment and of EU consumer empowerment.¹⁶ From a legislative perspective, as the Commission repurposes existing secondary law for consumer empowerment aims, this challenges whether we should continue to frame consumer empowerment as a strategic agenda that is pursued primarily through information duties.

It is the underlying view in this study that the established definitions of empowerment and of EU consumer empowerment in the scholarship on consumer law are too narrow for considering the breadth of the changing role of the consumer in the internal market and what is at stake when consumers are to be empowered for the Green Transition through secondary legislation. The opening discussion in the following sections sets the background for this study by establishing the practical significance of the consumer empowerment agenda in EU consumer and energy policy and that the concept of empowerment (and more specifically of EU consumer empowerment) is

¹⁴ Commission, 'A New Circular Economy Action Plan for a Cleaner and More Competitive Europe' COM (2020) 98 final.

¹⁵ See for instance, Hans Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) 8 *Journal of European Consumer and Market Law* 229.

¹⁶ This point will be addressed in detail in Chapter 3 Section 5; See for example, Vanessa Mak, 'The Consumer in European Regulatory Private Law' in Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2018); Andrzej Nalecz, 'Empowering the 'Unempowerable'. Behavioural Insights into Informing Consumers about Internet Access Services in the European Union under Regulation 2015/2120' (2018) 11 *Yearbook of Antitrust and Regulatory Studies* 13; Niamh Moloney, *How to Protect Investors. Lessons from the EC and the UK* (Cambridge University Press 2010) 53; Catherine Porras & Willem van Boom, 'Information Disclosure in the EU Consumer Credit Directive in Consumer Credit, Debt And Investment In Europe' in James Devenny & Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012); Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 254, 256; Cătălin Gabriel Stănescu, 'The Responsible Consumer in the Digital Age: On the Conceptual Shift from 'Average' to 'Responsible' Consumer and the Inadequacy of the 'Information Paradigm' in Consumer Financial Protection' (2019) 24 *Tilburg Law Review* 49, 51; Saskia Lavrijssen, 'Power to the Energy Consumers' (2017) *European Energy and Environmental Law Review* 172, 180; Maria Ioannidou, 'Effective Paths for Consumer Empowerment and Protection in Retail Energy Markets' (2018) 41 *Journal of Consumer Policy* 136; Patrizia Gazzola, Gianluca Colombo, Roberta Pezzetti & Luminița Nicolescu 'Consumer Empowerment in the Digital Economy: Availing Sustainable Purchasing Decisions' (2017) 9 *Sustainability* 693–694.

more than an empty buzzword or political promise. Rather, it will be established that empowerment has the potential to be framed as a complex and multidimensional concept.

1.1 EU consumer empowerment, consumer law and the role of the empowered consumer in the internal market

A reconsideration of the established understandings of the concept of EU consumer empowerment is prompted by the transformations that are taking place in both horizontal and vertical EU consumer policies that are part of the strategic approach for transitioning to a circular and carbon neutral economy and the repurposing of existing and new legislation towards these ends. To contextualise these recent changes to the blueprint of consumer policy and the relevance of these changes to the concept of consumer empowerment requires a consideration of what the conceptual blueprint in policy is transforming from.¹⁷ To be clear, the claim will not be made that there has been a radical transformation in the consumer rights and protections that are part of the current legal framework. Instead, these recent policy changes in both consumer and energy policy are considered to be conceptual and indicate that there is a need for rethinking what the legal framework is for. This perspective adopts, pragmatically, an instrumental view of secondary legislation as a tool that the Commission uses in practice to solve the problems in the internal market that it has identified in its policy communications and to complete the internal market.¹⁸ Based on this, there are many perspectives from which the blueprint of consumer policy can be constructed; however, as consumer empowerment is targeted towards the consumer, the following discussion will consider the policy blueprint in the context of the role of the consumer in the internal market and what the act of consumption means in a market that is based on a linear economic model.

In Western society, the consumer has become one of the most significant concepts in political, cultural, social, economic and legal theory and is an integral actor in the European Union's liberalized internal market. While there is an established debate on the normative consumer profiles in EU consumer policy and law, it is generally agreed that the role of the instrumentalized consumer in the development of the internal market has been to drive competition and economic growth through rising rates of mass consumption.¹⁹ The blueprint set by early consumer policy from 1975 onwards matches

¹⁷ Consumer policy is broadly construed here to include sectoral policy, including energy policy that has a consumer element.

¹⁸ On this point see for example Hans Micklitz, 'European Consumer Law' in Erik Jones (ed), *The Oxford Handbook of the European Union* (Oxford University Press 2013) 526–528.

¹⁹ On the instrumentalization of the consumer see for instance Kati Cseres, 'The Active Energy Consumer in EU Law' (2018) 9 *European Journal of Risk Regulation* 227, 228–231.

the economic and social ideologies of consumerism and consumer society in a post-World War II Europe. These ideologies have firmly cemented the act of consumption into a lauded and necessary social behaviour that drives the modern capitalistic machine by stimulating economic growth and innovation. Modalities of consumption have now become the spirit of our age in the Western world where we no longer consume to live but live to consume.

In recent years, the Western world has become increasingly aware – almost to the point of normalization – that the Western industrial revolution, the rise of late capitalist economies, and the overconsumption of natural resources have come at a price: broadening inequality, climate change, untenable resource depletion, and environmental degradation.²⁰ The global community and the EU find themselves at a crossroads where the signposts are increasingly pointing towards the tipping point of irreversible global warming, rising overconsumption of natural resources, and a planet that will be uninhabitable for future generations.²¹ Increasingly, social attitudes in Europe towards excessive consumption and even the meaning of consumption itself are slowly circling back towards pre-17th century understandings.

Historically, consumption was once defined as the using up or ‘physical exhaustion’ of matter.²² For instance, tuberculosis, or the ‘wasting disease’, was also more colloquially known as ‘consumption’ because it slowly consumes the totality of the flesh of the infected individual.²³ It is these older understandings of consumption that underpin the model of a circular economy that prioritizes both sustainable consumption patterns and methods of production that ensure that a product is wholly consumed, or more colloquially ‘used up’. The dominant ideologies of consumerism and mass consumption of the 20th century and the corresponding linear economic model of take-make-dispose are slowly falling out of sync with the new direction in consumer and energy policy. This is evidenced by the conceptual move in EU policy towards a post-consumerist society and the ideal of an economic system where growth is decoupled from environmental degradation.²⁴ With this shift, the role of the consumer is also

²⁰ On climate change and inequality see for example, Ulrich Beck, ‘Remapping Social Inequalities in an Age of Climate Change: For a Cosmopolitan Renewal of Sociology’ (2010) 10 *Global Networks* 165; see also Timmens Roberts, ‘Global Inequality and Climate Change: Society and Natural Resources’ in Steve Vanderheiden (ed), *Environmental Justice* (Routledge 2001).

²¹ Climate tipping points are critical thresholds that once surpassed will lead to irreversible changes in the climate system. Currently these are man-made but there is a geological record of such tipping points occurring naturally in the past. On the pending threat of climate tipping points see Timothy Lenton, ‘Early Warning of Climate Tipping Points’ (2011) 1 *Nature Climate Change* 201; see also, Timothy Lenton, ‘Arctic Tipping Points’ (2012) 41 *Ambio* 10; on the Amazon forest tipping point, see Mairon Bastos, Lima Niklas, Haringb Sverke Jagers, Åsa Löfgren, Martin Persson, Martin Sjöstedt, Bengt Brülde, David Langlet, Will Steffeng & Francisco Alpizarh, ‘Large-Scale Collective Action to Avoid an Amazon Tipping Point - Key Actors and Interventions’ (2021) 3 *Current Research in Environmental Sustainability* 1.

²² Frank Trentman, *Empire of Things* (Penguin Books 2017) 2.

²³ *ibid.*

²⁴ See for the example, Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Next Steps for a Sustainable European Future European Action for Sustainability’ (Communication) COM (2016) 739 final;

affected. If the purpose of the consumer as a social actor was to drive economic growth by acquiring goods and services in ever-increasing amounts, what then is the role of the consumer in a market where such unchecked consumption is no longer appropriate? It goes too far to make the claim that the act of consumption will – at least in the near future – return full circle to being conceived of as a morally repugnant and socially unacceptable behaviour.²⁵ Nevertheless, the move toward a sustainable economic model in the EU does have implications for the role of the consumer in the market. While the consumer will continue to drive economic growth, their role has expanded to also become a driver of the transformation to this new economic model through changing mindsets towards the meaning of consumption and the ways in which we ought to consume. In this sense, there is a shift to understanding consumption holistically. This shift entails focusing regulation not only on the products and services that are purchased but also on how goods and services are treated by the consumer post-acquisition, to how natural resources such as energy are consumed and to the self-generation by consumers of natural resources. While it is true that placing the burden of the Green Transition on consumers without addressing production is a flawed strategy, it cannot be ignored that the consumer has an integral role to play in the transition to this new economic model. If the role of the consumer is changing and the meaning of consumption is evolving in strategic policy, then the ends that consumers are being empowered for are also shifting. In other words, empowering consumers to participate in the transition to a circular and net-zero economy takes on a new meaning and becomes more nuanced than empowering consumers in the growth model of a linear economy.

Following this, the legislative measures that now aim to drive the Green Transition forward have ramifications for several of the established understandings in the debate on the yardstick consumer profiles in strategic policy, on the role of the consumer in the internal market, and more broadly still on the purpose of consumer law and consumer protection. To enable and facilitate consumers to participate in these profound social, technological and economic transformations, the Commission has developed the consumer empowerment agenda in strategic policy that uses secondary legislation as a tool for regulating power imbalances by amending market structures to create an environment that is conducive to empowered consumer behaviours. This draws the concept of empowerment to the fore and consequently it becomes increasingly relevant to consider what perspectives are adopted to define the concept of empowerment and more specifically EU consumer empowerment.

see also Commission, ‘A new Circular Economy Action Plan For a Cleaner and More Competitive Europe’ (Communication) COM (2020) 98 final; For a debate see Esther Sanyé-Mengual, Michela Secchi, Sara Corrado, Antoine Beylot & Serenella Sala, ‘Assessing The Decoupling of Economic Growth from Environmental Impacts in the European Union: A Consumption-Based Approach’ (2019) 236 *Journal of Cleaner Production* 1.

²⁵ Trentman (n 22) 2.

1.2 The puzzle of the concept of empowerment

Even a brief reading of the vast literature on empowerment across several disciplines reveals that empowerment is not a monolithic concept. It is even a term that is difficult to define in everyday usage. Linguistically, empowerment garners meaning as both a verb and a noun. The verb ‘to empower’ is transitive. This means that it requires an object to receive the action. For example, the Commission empowers *consumers* to participate in the transition to a circular economy. There must therefore be a person, a group or an entity that is being empowered and can be qualified as being the recipient of an empowering action. The more difficult question that follows is: what is meant by ‘empowerment’ as a noun? A quick search for the definition of empowerment in several dictionaries will immediately reveal that there are many different formulations that describe empowerment as the giving of freedom, control, power, capacity, confidence, responsibility or authority to a social actor.²⁶ Already the problem becomes apparent when empowerment is defined by recourse to other essentially contested terms such as freedom and power. This is the first indicator of the difficulties that can be expected when one wants to define the concept of empowerment.²⁷ To further complicate matters, the term empowerment has become increasingly familiar and popularized. Without a doubt, having read the title of this book, the reader will already have an established understanding of what empowerment means that is contoured by the increasing use of the term in our everyday lives.

In the last few decades, the term ‘empowerment’ has been co-opted as a buzzword in marketing campaigns and other domains of social life.²⁸ Not only are we flooded with the message that we should empower ourselves, but so too should we be empowered by our employers, healthcare providers, politicians and the businesses that we choose to transact with. This rise in usage of ‘empowerment’ is unsurprising because we tend to subconsciously attach positive connotations to the term. Put differently, it seems difficult to argue that there is something morally wrong about a powerful corporation that is ceding its power to consumers or an NGO that is fighting against the power structures in society that cause inequality. To the contrary, these empowerment agendas are generally considered to be something positive because the

²⁶ See for instance The Oxford Learners Dictionary’s definition of empowerment using terms such as control and authority, The Oxford Learners Dictionary, ‘Definition of Empowerment (noun)’ <<https://www.oxfordlearnersdictionaries.com/definition/english/empowerment?q=empowerment>> accessed 29 July 2022. This can be contrasted with the Cambridge Dictionary that uses terminology such as power, freedom and control, see Cambridge Dictionary, ‘Definition of Empowerment’ <<https://dictionary.cambridge.org/dictionary/english/empowerment>> accessed 29 July 2022.

²⁷ On essentially contested concepts, see Walter Gallie, ‘Essentially Contested Concepts’ [1955] *Proceedings of the Aristotelian Society* 167; on freedom as an essentially contested concept see Patrick Day, ‘Is the Concept of Freedom Essentially Contestable?’ (1986) 61 *Philosophy* 116; on the essentially contested nature of the concept of power, see Steven Lukes, *Power: A Radical View* (1st edn, London 1974) 9.

²⁸ See for example, Srilatha Batliwala, ‘Taking the Power out of Empowerment – an Experiential Account’ (2007) 17 *Development in Practice* 557.

powerful – the haves – relinquish power or control to the less powerful actors – the have nots – in society. On face value this positive understanding of empowerment as freedom from the control of others meshes well with the narratives that we have as autonomous individuals in modern society as heirs of the Enlightenment. In the context of the consumer law debate, however, the Commission's development of an empowerment agenda has been met with resistance and criticism because it has come to be defined as a neoliberal political agenda and as an empty buzzword that serves to deepen the existing neglect of the protective dimension of EU consumer law.²⁹

While in recent decades empowerment has become popularized and over-used as an empty buzzword, it is also a rich, complex and multifaceted concept that has developed nuanced meanings across several fields such as psychology, social work, education, healthcare and gender studies. In the 1970s, the Brazilian educator and philosopher Freire was one of the first scholars to advance a theory of empowerment. Freire developed a participatory educational approach that would be the catalyst for the marginalized and the poor in society to become empowered and drive radical social transformation.³⁰ In the decades that followed, several different accounts of empowerment have emerged where the meaning of the concept has become contoured by the morals, norms and values of any given field and discipline. In light of this plurality, it can be said that there is no singular authoritative or 'right' definition of empowerment. Instead, empowerment can be framed as both a value orientation and a theoretical model that can be used to understand both the processes and consequences of an empowerment agenda.³¹ Framing the concept of empowerment in this way is significant because it acknowledges that as a concept it is normatively value laden and derives different meanings depending on the context and field within which it is used. Moreover, empowerment does not appear to be a self-contained concept. Understandings of empowerment are instead dependant on and invariably entangled with what are often implicit and assumed understandings of what is meant by power. In turn, the failure to consider the concept of power, of power structures, and of power relations when defining the concept of empowerment or when enacting an empowerment agenda in practice can result in what the scholarship on empowerment has come to term as an 'empowerment paradox'.³² This paradox ensues when an empowerment agenda reproduces the existing power structures that were the very target of the empowerment agenda. As a result, the empowerment agenda and its practical strategies (unintentionally) perpetuate the disempowerment it sought to remedy. It then becomes

²⁹ This point will be elaborated on in detail in Chapter 3, Section 2.

³⁰ Paulo Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos (trn), Herder and Herder 1970).

³¹ Marc Zimmerman, 'Empowerment Theory' in Julian Rappaport & Edward Seidman (eds), *Handbook of Community Psychology* (Springer Science 2000)

³² Linda Weidenstedt, 'Empowerment Gone Bad: Communicative Consequences of Power Transfers' (2016) 2 *Sociological Research for a Dynamic World* 2; Ching Man Lam & Wai Man Kwong, 'The "Paradox of Empowerment" in Parent Education: A Reflexive Examination of Parents' (2012) 61 *Family Relations* 65; Sylvia Bawa, 'Paradoxes of (dis)empowerment in the Postcolony: Women, Culture and Social Capital in Ghana' (2016) 37 *Third World Quarterly* 1.

important to take seriously what is meant by power, disempowerment, and how these theoretical understandings of concepts of power and disempowerment become manifest in practice.

Following this, answering the question of how we can conceive of power is a difficult task. The vast body of literature on power in political and social theory³³ reveals that it is at the least an essentially contested concept³⁴ and, to take this a step further, a truly plural and family resemblance concept: that is a cluster of concepts with overlapping characteristics but no singular point of commonality.³⁵ The consumer law debate has tended to theoretically define the concept of power in consumer empowerment by using the economic concepts of agency and consumer choice. This narrow perspective on what counts as power is problematic and comes under pressure when the Commission, as the empowering entity, uses secondary legislation to empower consumers. Power can also be conceived of much more broadly than agency to include an understanding of power as manifest in the structures in society that affect social behaviours. Through the Commission's recent expansion of a consumer empowerment rationale into pre-existing and new secondary legislation, it is not readily apparent that the power in the empowerment agenda can or should be defined from the perspective of power as agency. The reform of the architecture in the energy services industry – for instance from a centralized to decentralized system – with the rationale of empowering consumers is an example of how law is used to change the structure and fabric of this market. Moreover, departing further from an understanding of power as agency, power can also be framed as becoming manifest in the tacit systems of knowledge that guide the behaviours of individuals as socialized actors as well as the individual's sense of self (identity) and ontological security. These dimensions of power that exist beyond agency are not separate nor shielded from the legislation that structures the internal market.³⁶

With the discussion so far in this section in mind, the starting point can then be adopted that the concept of empowerment and the context-specific concept of EU consumer empowerment is more than a hollow buzzword. To fully engage in an examination of the EU consumer empowerment agenda that uses law as a tool to empower consumers, it becomes necessary to develop a broader theoretical framework than currently exists in the scholarship on EU consumer empowerment as a starting point that is capable of exploring several of the dimensions of the evolving concept and practice of EU consumer empowerment.

³³ See for example, Mark Haugaard, *Power: a Reader* (Manchester University Press 2002).

³⁴ Lukes, *Power* (n 27) 9.

³⁵ Mark Haugaard, 'Power: 'A 'Family Resemblance' Concept' (2010) 13 *European Journal of Cultural Studies* 419.

³⁶ Mark Haugaard, *The Four Dimensions of Power: Understanding Domination, Empowerment and Democracy* (Manchester University Press 2020).

1.3 Two understandings of EU consumer empowerment

What is meant by empowerment and, more narrowly, EU consumer empowerment can be validly approached from several different theoretical perspectives and starting points. A central claim that will be made in this study is that the theoretical lenses adopted within scholarship on EU consumer law offer a limited understanding of the concept of empowerment. Politically, consumer empowerment is classified as a (neo)liberal agenda that protects the negative liberty of consumers to the detriment of consumer protection. The empowerment agenda is considered as reinforcing the primacy of the information model in secondary legislation and is by extension diametrically opposed to other forms of consumer protection. The empowered consumer is the average consumer who is strong, active and unboundedly rational. The ‘power’ allocated to the consumer through the empowerment agenda is the power of the consumer, as an under-socialized agent, to exercise free choice and the collective capacity of consumers to affect production. Yet, the concept of empowerment and what it means to empower consumers through law is rarely itself the object of analysis.³⁷ A question that is rarely asked or considered in depth is ‘what do we mean when we use the term empowerment?’ Instead, the meaning of (consumer) empowerment is often assumed and derived from pre-existing value-laden concepts stemming from legal, political and economic theory that circulate in the consumer law scholarship. Following this, the liberal vocabulary of freedom, autonomy, and consumer sovereignty have been used to normatively ascribe meaning to the EU consumer empowerment agenda as a (neo)liberal model that opposes and potentially erodes the protective dimension of EU consumer law. These normative language games in the consumer law debate have then constructed a particular and narrow understanding or context-specific definition of the concept of EU consumer empowerment. What counts as empowerment is then often reflexively assumed with the result that the concept of empowerment itself is rarely the object of study.

From another perspective, the definition of EU consumer empowerment that has evolved within consumer law scholarship is in no way definitive. An interesting commonality that connects the various disciplinary approaches to the concept of empowerment is that it tends to be framed on the one hand normatively as a value orientation and on the other hand as theoretical model that explains the practice of empowerment as a process and an outcome. To understand the specific content of the concept of EU consumer empowerment as a practical agenda, it then follows that we must also consider what consumer empowerment means to the Commission as the empowering entity. Focusing on the Commission’s meaning of consumer empowerment is highly relevant because it is the EU institution that decides what processes and

³⁷ For an exception, see Stefan Wahlen & Kaisa Huttunen, ‘Consumer Policy and Consumer Empowerment: Comparing the Historic Development in Finland and Germany’ (2012) 36 *International Journal of Consumer Studies* 2; Ioannidou (n 16); Natalie Helberger, Jef Ausloos, Joanna Strycharz, ‘Data Protection or Data Frustration? Individual Perceptions and Attitudes Towards the GDPR’ (2020) 6 *European Data Protection Law Review* 407.

strategies will be adopted to empower consumers and what outcomes can be qualified as empowerment outcomes. From an empirical perspective, the Commission's output on consumer empowerment in strategic policy documents and proposals for secondary legislation offer the primary source of materials that the context-specific meaning of EU consumer empowerment can be constructed from. The dynamic nature of policy (and to a lesser extent legislative proposals) means that the Commission's understanding of empowerment can quickly change and be at odds with debates that do seek to make the concept of (consumer) empowerment the object of study.

Consumer policy, energy policy, and secondary legislation are a dynamic response to problems that arise in the internal market. In comparison to consumer policy during the latter half of the 20th century, the challenges and issues that the Commission has laid out in the most recent New Consumer Agenda, adopted in late 2020, are profoundly different from the challenges set out by the Commission even ten years ago. The changing content of these market problems impacts how we can define EU consumer empowerment from the perspective of the Commission. Looking back on the evolution of Western societies in the latter half of the 20th century, it has become a truism to say that we are living during a period of rapid social and technological transformation. Despite this, as we emerge from the global COVID-19 pandemic and continue to teeter on the brink of a global environmental and climate crisis, there are several supranational changes taking place in the EU that are redrawing the vision of the internal market, challenging the appropriateness of unchecked consumerism and of the 'take-make-dispose' linear model. As has been discussed earlier, the recent changes in consumer policy and secondary legislation that are aimed at a net-zero EU by 2050 and the transition from a linear to a circular economy require a rethinking of the function of consumer law and of the role of the consumer in the internal market.³⁸ The Commission's roadmap for achieving the Green Transition in part relies on a consumer empowerment agenda that utilizes secondary legislation as a tool for creating structural conditions in the market that are conducive to empowered consumer behaviours.

In light of the contest nature of the concept of empowerment, there are then two highly relevant perspectives that must be taken seriously by any study that aims to rethink the meanings ascribed to the concept of EU consumer empowerment. The first perspective on EU consumer empowerment can be found in the scholarship on EU consumer empowerment and what empowerment has come to mean to the consumer law debate. In other words, what language games in this body of scholarship have played a role in contouring the current established and accepted understandings of EU consumer empowerment. The second perspective can be found by looking to the definitions of empowerment that the Commission is providing in its policy narratives and to the text of the secondary legislation that has become reoriented by the Commission towards achieving the empowerment aims set out in policy.

³⁸ Micklitz, *Squaring the Circle* (n 15).

2. Research questions and aims

The discussion so far has sought to establish the practical significance of the consumer empowerment agenda in EU consumer and energy policy and to establish that the concept of empowerment and EU consumer empowerment is more than an empty buzzword or political promise. As a value orientation contoured by underlying assumptions of power and disempowerment and as a practice aimed towards achieving the goals of the Green Transition, the Commission's development of the consumer empowerment agenda in policy transforms the purpose of the regulatory framework. When secondary legislation is used as a tool to empower consumers then from a practical perspective, the empowerment agenda is also concretely affecting both the structures in the market and the relationship between businesses and consumers. The recent changes in consumer and energy policy and the goal to transition the internal market into a circular and carbon neutral economy challenge the established definitions of consumer empowerment that can be identified in the consumer law debate. If we are to take the Green Transition seriously and acknowledge that the consumer empowerment agenda is an integral part of achieving this transition, it is necessary to engage in a deeper examination of what EU consumer empowerment is and the complex process involved in using secondary legislation as a tool for empowering consumers.

The central question that will be answered in this study is: *How can the concept of EU consumer empowerment in consumer policy and secondary legislation be rethought through the lens of empowerment theory?* To answer this central question, five sub-research questions will guide the analysis throughout this study:

- How can the abstract concept of empowerment be defined?
- What theories have been used to ascribe meaning to the concept of consumer empowerment by the consumer law debate?
- What does the concept of consumer empowerment mean to the Commission as the entity that has developed the consumer empowerment agenda in strategic consumer policy and in energy policy?
- By bringing the findings from sub-question 1 into dialogue with the findings of sub-questions 2 and 3, what discipline specific theory of EU consumer empowerment can be developed?
- What are the implications of rethinking the concept of EU consumer empowerment?

The aims of this study are therefore twofold. First, the broadest aim of this study is to offer more conceptual depth to the complex concept of EU consumer empowerment than currently exists in the consumer law debate. If the EU consumer empowerment agenda is to be the subject of a critical and normative debate, how the concept of EU consumer empowerment is first defined is important. Simply put, a discussion of the

normative ‘ought’ of EU consumer empowerment is made redundant if the starting point of the empirical ‘is’ has adopted a narrow and outdated definition of empowerment. The primary goal of this study is then to develop a more nuanced understanding of what EU consumer empowerment is. Second, this study aims to contribute to the broader debates on the role of the empowered consumer in the transition to a circular and net-zero economy where the consumer empowerment agenda has evolved to become the dominant strategic approach for these new policy goals. If it is acknowledged that consumer empowerment is one of the dominant strategic approaches for these transitions and that the role of the consumer is evolving, then there is more at stake for defining consumer empowerment that goes beyond the theoretical exercise of debating the nuances of what the concept of consumer empowerment does or should mean. The goals of this study are then to examine the existing understandings of consumer empowerment in the debate and the soundness of the normative premises that support these understandings of empowerment in light of the changing blueprint in consumer policy and the recent amendments to the legislative framework in horizontal consumer law and in energy legislation.

3. Research design

The central question and five sub-research questions of this study require adopting several different research methods and techniques. The following discussion in this section first sets out the ontological and epistemological viewpoints and assumptions that affect the methods chosen for answering these questions. Second, the specific methods used in each chapter are outlined.

3.1 Ontological and epistemological viewpoints

This study adopts a constructivism research paradigm in the social sciences tradition.³⁹ Ontologically, the starting point that is taken is not that there is a singular unitary truth but instead there are multiple realities. This means that from an epistemological perspective, reality must be interpreted and not measured in order to draw out underlying meaning / knowledge. The constructivist paradigm acknowledges that whilst a physical world exists around us, our understanding of this reality is subjective and socially constructed. This is an epistemological claim that knowledge and reality are constructed by the ‘knower’.⁴⁰ As von Glasersfeld put it: “Knowledge is the result of an

³⁹ For a discussion and critique of the constructivist paradigm, see Michael Matthews, ‘Constructivism and Science Education: Some Epistemological Problems’ (1993) 2 *Journal of Science Education and Technology* 359.

⁴⁰ Roger Holmes, ‘The Knower and the Known’ (1986) 1 *Sociological Forum* 610; Robin Miller and Rosalind Driver, ‘Beyond Processes’ (1987) 14 *Studies in Science Education* 33.

individual subject's constructive activity, not a commodity that somehow resides outside the knower and can be conveyed or instilled by diligent perception or linguistic communication."⁴¹ Knowledge is then not absolute but a construct or a framework that we use to make sense of the world around us knowledge is therefore made rather than discovered.⁴² As Wheatly proposes:

The theory of constructivism rests on two main principles [...]. Principle one states that knowledge is not passively received, but is actively built up by the cognizing subject . [...] Principle two states that the function of cognition is adaptive and serves the organization of the experiential world, not the discovery of ontological reality . . . Thus we do not find truth but construct viable explanations of our experiences.⁴³

The constructivist paradigm entails three basic assumptions that have an effect on the methods that will be used to answer the five sub-research questions in this study. The first fundamental assumption is that the self and the world are constructed through individuals. These constructions and reproductions of reality can be identified through acts of speech and other forms of communication, which will be defined hereinafter as narratives. Second, the relationship between agents and social structures that are viewed as being dependent and co-constitutive. Third, when multiple versions of the world are considered to be legitimate, then language and text are open to multiple different readings. The constructivist approach is then highly relevant for research questions that seek to understand the different meanings that exist regarding a phenomenon, such as the concept of consumer empowerment and the meanings that we can ascribe to this concept based on a reading of policy and secondary legislation.

3.2 Methodology

With the assumptions laid out in the previous section in mind, to answer the central research question and the five sub-research questions, several methodological approaches are necessary and are explained in detail in the following discussion on each chapter of this study.

Chapter 2 begins by answering the first sub-research question: how can the abstract concept of empowerment be defined? The overarching aim of this chapter is to

⁴¹ Ernst Von Glasserfeld, 'Environment and Communication' in Leslie Steffe & Terry Wood (eds), *Transforming Children's Mathematics Education: International Perspectives* (Hillsdale 1990) 37.

⁴² Ernst von Glasserveld, 'An Introduction to Radical Constructivism' in Paul Watzlawick (ed), *The Invented Reality: How Do We Know What We Believe We Know? (Contributions to Constructivism)* (Norton 1980); Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999).

⁴³ Grayson Wheatley, 'Constructivist Perspectives on Science and Mathematics Learning' (1991) 75 *Science Education* 9, 10.

construct a theory on what will count as the concept of empowerment for this study by drawing on social scientific theories of empowerment. In the social sciences, a theory is defined as: “a systematic explanation for the observed facts and laws that relate to a specific aspect of life.”⁴⁴ There are two approaches that can then be taken for choosing a theory on empowerment. The first is deductive and entails the selection of existing theory on empowerment that is appropriate for guiding the subsequent analysis on EU consumer empowerment, can easily be applied, and has sufficient explanatory power. The second approach is inductive and entails the construction a new theory of empowerment that can fulfil these criteria. A review of the literature on empowerment theory across several disciplines revealed that empowerment is not a monolithic concept. Instead, it is a plural concept that gains meaning depending on the context and field that it used within. With this in mind, following the literature review it also became apparent that the existing selection of theories and analytical models on empowerment were too narrow for rethinking the concept of EU consumer empowerment and the consumer empowerment agenda. For instance, if this study were to draw on the theory of empowerment as a subjective phenomenon from the field of community psychology, this would have resulted in the exclusion of the theory that empowerment is an objective phenomenon that is achieved by making (often structural) changes to the disempowered actor’s environment. Another issue arises when it is acknowledged that empowerment is not a self-contained concept and that the plural concept of power in its many forms influences both practical and theoretical understandings of what is meant by empowerment. To answer the first sub-research question, it was then necessary to inductively develop a new theoretical framework on empowerment that drew on several existing theories and analytical models of power and empowerment.

The purpose of the theoretical framework on empowerment developed in Chapter 2 is to guide, frame, and give context to the subsequent analysis on EU consumer empowerment in Chapters 3, 4, 5, 6 and 7. In this way, the theoretical framework has an analytical function. The goal is to create a framework that acts as a lens for exploring the complexity of EU consumer empowerment. This comes with the acknowledgement that, while the creation of a theoretical framework is an inherently normative exercise because choices are made on what the theories of empowerment should be included, the application of this framework does not share this normativity. The purpose of the theoretical framework developed in Chapter 2 is then threefold. First, by drawing on findings on empowerment theory from several disciplines, this study becomes embedded in the state of the art of the broader debates on empowerment that goes beyond the boundaries of the scholarly debate on consumer law. Second, this framework specifically embeds this study on EU consumer empowerment in the theoretical debates on power and empowerment and through this sets out the theoretical starting point for analysis. Third, the theoretical framework in this chapter creates a set

⁴⁴ Earl Babbie, *The Basics of Social Research* (5th edn, Wadsworth 1989) 46.

of conceptual categories that will be used to guide the subsequent discussion throughout this study.⁴⁵

In Chapter 3, a second theoretical framework on empowerment is developed that, in contrast to Chapter 2, is more narrowly embedded within the scholarly traditions in the debates on consumer law. Chapter 3 answers the second sub-research question of what theories have been used to ascribe meaning to the concept of consumer empowerment by the consumer law debate. The purpose of Chapter 3 is not to create a second analytical framework. Instead, the primary aim of the chapter is to trace and construct the theory of EU consumer empowerment that dominates in the consumer law debate by tracing the key theoretical concepts that have been used within the consumer law debate to ascribe meaning to the concept of EU consumer empowerment. The conceptual categories developed in Chapter 2 will be applied as a structure for the analysis where the second aim of Chapter 3 is then: (a) to reveal the dimensions of empowerment that are considered by the consumer law debate, and (b) to expose the dimensions of empowerment that are neglected by these debates.

Having then established the meaning that has been ascribed to the concept of consumer empowerment by the consumer law debate, Chapters 4 and 5 analyse the Commission's narratives on EU consumer empowerment in horizontal strategic consumer policy before conducting an analysis that qualifies several horizontal consumer law directives as having an empowerment aim. Chapter 5 adopts a similar approach but in the context of energy policy and several legislative instruments in the energy sector that have a consumer element. Combined, these chapters answer the third sub-research question of what the concept of consumer empowerment means to the Commission as the empowering entity. This question examines what the Commission is saying about consumer empowerment and what concrete actions it has / is taking to empower consumers. To answer this question, the methodological approach in these chapters will engage in a narrative analysis.⁴⁶ Following the most basic assumptions of the constructivist paradigm, the fundamental importance of discourse and narratives becomes apparent for studying the social construction of reality. From a practical perspective, narratives are a way in which individuals make sense of their sense of self (identity), of the world around them, and of events that occur. Narratives are also fundamental for how organizations and institutions make sense of the world. Policy documents consist of narratives that explain to the reader how they should understand a dimension of social life such as the economy or healthcare, what is right or wrong with this dimension of society, and what should be done about it. Narratives are then much more than stories we tell ourselves and are often embroiled in structures of power. Put

⁴⁵ On the three functions of a theoretical framework, see Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' [2018] *Law and Method* 1, 4–5.

⁴⁶ On this see for instance Emery Roe, *Narrative Policy Analysis Theory and Practice* (Duke University Press 1994); on the importance of narratives and the connection between law, narrative and the normative world within which law gains meaning, see Robert Cover, 'Nomos and Narrative' (1994) 97 *Harvard Law Review* 4–5.

differently, narratives have an effect on the world around us. Take for instance the question of who gets to tell the narrative about a historical event. The well-known saying “history is written by the victors” encompasses the idea that our histories are not simply objective facts but also narratives reconstructed through a particular perspective.

From a narrative perspective, the Commission is a powerful actor who gets to decide and tell the world what the narrative is of the internal market, of consumer law, and of consumer empowerment. The Commission’s narratives in policy have a profound effect on society because they are ideas and understandings of, for instance, the internal market, the consumer, of consumer protection, and of consumer empowerment upon which secondary EU legislation is created. With this understanding of the important function of narratives, it then becomes clear why a narrative analysis approach is necessary for examining EU consumer empowerment and for answering the sub-research question what does empowerment mean to the Commission as the empowering entity? In the social sciences, since there are several different approaches that can be used for narrative analysis and for narrative policy analysis, the question then becomes what the most relevant approach is that fits with the research question. First, narrative analysis is qualitative. It entails focusing on a form of communication, to collect data from this communication, to analyse this data, and to present findings. Therefore, whether the form of communication is at the micro, meso or macro level of analysis is important.⁴⁷ The micro level focuses on the level of the individual actor. The meso level focuses on groups and organizations. The macro level is institutional. Chapters 4 and 5 examine the Commission’s policy communications, proposals for legislative amendments, and the final text of adopted secondary legislation. The form of communication that is examined is written text and the locus of the study is at the macro level because the focus is on the policy narratives of the Commission as a supranational institution.⁴⁸

The discussion in Chapter 6 answers the fourth sub-research question of how the concept of EU consumer empowerment can be rethought by applying the theoretical framework on empowerment that was developed in Chapter 2 to the discussion in Chapters 4 and 5 that examine what consumer empowerment means to the Commission as the empowering entity. The implications of the rethinking of the concept of EU consumer empowerment in Chapter 6 are considered in Chapter 7.

⁴⁷ Elizabeth Shanahana, Michael Jones & Mark McBeth, ‘How to Conduct a Narrative Policy Framework Study’ (2018) 55 *The Social Science Journal* 1–3.

⁴⁸ The focus is not macro because this instead relates to a broader meta understanding of narrative as a shared narrative of the collective of society. This can be for example narratives around historical events such as war, see for example Tim Büthe, ‘Taking temporality seriously: Modeling history and the use of narratives as evidence’ (2002) 96 *The American Political Science Review* 481.

4. Assumptions

In this study there are two primary assumptions that will be adopted and that will remain unchallenged. The first assumption concerns how the function of EU secondary legislation (and of consumer law more specifically) will be conceptualized. From the outset, consumer law has played an instrumental role as a tool for deepening market integration. That is not to preclude the persuasive argument that EU consumer law (or more narrowly European private law) has its own form of normativity.⁴⁹ Instead, the point I intend to draw here is that consumer law can be framed as an instrument of strategic policy that the Commission has, in practice, used pragmatically as a tool for solving the problems that it considers as having arisen in the internal market. These problems can be economic and tied to the internal market rationale of pursuing more growth by exponentially increasing consumption. However, more recently the problems in the internal market have taken on a decidedly social dimension. The current proposal for the Directive on Empowering Consumers for the Green Transition⁵⁰ and the (pending) publication of the proposal for amending the SGD⁵¹ – with the potential for a new directive on a right of repair – are illustrative of how secondary legislation is now being used as a tool for achieving the Green Transition and is therefore part of the intended solution for combatting the global environmental and climate crises. The first assumption – and a starting point of this study – is the understanding that consumer law is used by the Commission instrumentally and that law is used as a tool to bring about policy aims. Adopting this perspective on the use of secondary legislation as a tool for policy ends allows for an exploration of how the Commission intends to bring about the empowerment aims in strategic policy through the consumer law framework as secondary legislation which then becomes reoriented towards empowerment outcomes. Put differently, it allows for a consideration of how law is used by the Commission as a tool to empower consumers.

The second fundamental assumption and starting point of this study concerns how the nature of the Commission's policy documents, the preparatory documents for secondary legislation, and the final text of adopted legislative instruments will be conceptualized. The majority of the Commission's policy documents that will be dealt with throughout this study are the Commission's communications on horizontal consumer policy and communications on energy policy.⁵² These communications set

⁴⁹ Vanessa Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020).

⁵⁰ Commission, 'Proposal for a Directive of the European Parliament and of the Council 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information' COM (2022) 143 final.

⁵¹ The proposal was expected by the end of 2022, see the Commission, 'Sustainable Consumption of Goods – Promoting Repair and Reuse' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 27 July 2022.

⁵² In contrast to other types of Commission policy documents, including green papers, white papers and staff working documents.

out the Commission's intended strategies, roadmaps and promises for future action. The obligations the Commission sets out for itself in these documents are not binding. Aside from conceiving of these policy documents as a host of (political) promises and future action points, the second of the assumptions in this study assumes that these documents are also the voice of the Commission, as the EU institution that has the power to propose legislation on its own initiative. The assumption is also adopted that the preparatory documents for secondary legislation and the final text of the adopted legal instruments are therefore also sites where we can find the Commission's voice. If these documents are the voice of the Commission, then the written text within these documents can be framed as the narratives of the Commission. Therefore, these documents take on a value that goes beyond simply being viewed as mere political statements. This assumption offers a rethinking of how policy, the preparatory documents for secondary legislation, and the final text of the legislation itself can be rethought of as sources that tell us the version of reality that is being constructed by the Commission. This is a necessary step for answering sub-question three: what the concept of EU consumer empowerment means to the Commission as the empowering entity, because these documents are the source of where we can find and construct the Commission's definition of consumer empowerment.

5. Limitations

The Commission's policy on consumer protection, the Commission's policy communications with a consumer element, and the growing consumer law *acquis* offer too broad a starting point for examining the EU consumer empowerment agenda. It was therefore not possible to trace the development of the consumer empowerment agenda in every policy document of the Commission and in all legislative instruments with a consumer element. The choice was then made to focus on two key policy areas. The first policy area is the Commission's overarching strategic, horizontal consumer policy plans adopted every three to five years. The second is the Commission's strategic policy for the energy market. Other key policy areas that have adopted a consumer empowerment agenda but that fall outside of the scope of this study include policy on food safety, the digital internal market, and financial services.

The choice to focus on horizontal consumer policy and energy policy was twofold. First, the several changes that have taken place in horizontal consumer policy, as discussed earlier, have implications for how EU consumer empowerment can be understood and how this agenda is to be pursued through the consumer law *acquis* that is currently undergoing legislative amendment. The same can be said of vertical consumer legislation in the energy market. Second, the consumer empowerment agenda has become increasingly targeted towards achieving the goals of transforming the internal market into a circular and decarbonized economic model where consumers have

an integral role to play as drivers of these transitions. Moreover, the pending 2022 legislative amendments to several horizontal consumer instruments and the recast of several directives in the energy sector in the last several years are examples of how increasingly existing and new legislation are becoming targeted towards achieving the Commission's new vision of the internal market. A related limitation is that the consumer empowerment agenda in the context of the digital transition will not be explored. This is because the scope of this study focuses on consumer empowerment and the Green Transition and more specifically on the Commission's construction of the consumer empowerment agenda in horizontal consumer policy. In this strategic policy the Commission has yet to holistically move beyond 'silo thinking' and draw more synergies between the Green Transition and digitalization. For this reason, consumer empowerment and the digital transition was not considered but it is acknowledged that this also a highly relevant and important line of enquiry, especially in light of the recent adoption of the Digital Services Act and Digital Markets Act.⁵³

A second limitation of the analysis in this study is the broad strokes that are used to conceptualize society in the theoretical framework that is developed in Chapter 2 and consequently adopted throughout this study. In Chapter 2 it was necessary to define what concept of power will be adopted as the basis for developing an analytical model of empowerment that would guide the discussion through this study. The choice was made to adopt Haugaard's four-dimensional model that conceives of power as a plural and family resemblance concept. In developing this model, Haugaard synthesizes several theories of power from both social and political theory. Invariably, Haugaard makes several broad and empirical assumptions about what society is and what social life looks like. By applying Haugaard's model of power in Chapter 6, what follows is that an equally broad understanding of power, society and social action is adopted in rethinking the concept of EU consumer empowerment. This is not a shortcoming that impacts the ability of the analysis to answer the central research question, but rather limits the audience to which this study can appeal. Put differently, this study is contributing to the consumer law debate on consumer empowerment rather than the social and critical debates on EU consumer law. On the other hand, the final findings of this study will – as a side effect – raise several relevant questions that can be further explored by such debates.

The third limitation of this study is that the focus of analysis is on the Commission's use of secondary legislation as a tool for empowering consumers. The Commission has also engaged in other methods of empowering consumers, such as information and education campaigns. The choice was made to focus on secondary legislation for two reasons. The first was because legislation represents the primary

⁵³ Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final; Commission, Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) COM/2020/842 final.

method used by the Commission as a strategy for empowering consumers. Second, due to space and time constraints it was not possible to fully explore the context-specific strategies adopted in information and education campaigns.

6. Outline

The chapters of this study are structured as follows. Chapter 2 answers the first sub-research question of how the abstract concept of empowerment can be defined. The underlying assumption of developing this framework was that empowerment is more than a buzzword and that the frameworks used to define the concept of empowerment in the consumer law debate were too narrow. This analytical framework consists of two parts. The first approaches empowerment as a value orientation and integrates a holistic model of power as a four-dimensional cluster of concepts that forms the theoretical foundation of the concept of empowerment. The second part focuses on the theory of empowerment as a practice and consists of a set of conceptual categories that build on the concept of power and that can be used to explore the meanings and implications of empowerment as a practice. These are subjective and objective disempowerment, empowerment as a subjective and objective process and empowerment as an outcome.

Chapter 3 answers the second research question of the language games in the consumer law debate that have contoured the scholarly understanding of the concept of EU consumer empowerment. This discussion reveals not only the theories used within consumer scholarship to ascribe meaning to the concept of empowerment but also, using the framework developed in Chapter 2, the dimensions of consumer empowerment that remain underexplored.

Chapters 4 and 5 answer the third sub-research question of what the concept of consumer empowerment means to the Commission as the empowering entity. The structure in both of these chapters is the same. First, several of the Commission's narratives in consumer policy and energy policy are identified and interpreted. The second part of each chapter further explores the Commission's narratives on consumer empowerment in the text of secondary legislation that is qualified as having an empowerment aim.

Having interpreted in detail in Chapters 4 and 5 what the concept of consumer empowerment means to the EU Commission as the empowering entity, the discussion in Chapter 6 answers the fourth sub-research question of how the concept of EU consumer empowerment can be rethought through the theoretical framework on empowerment that was developed in Chapter 2. The analyses in Chapters 4 and 5 will reveal both the Commission's narratives on empowerment and the concrete strategies that the Commission has adopted to achieve the empowerment goals set out in consumer and energy policy. The purpose of Chapter 6 is then to offer a discipline-specific theory of the concept of EU consumer empowerment both through the

theoretical lens of power and through the conceptual categories of subjective and objective disempowerment, subjective and objective empowerment as a process, and empowerment as an outcome.

The discussion in Chapter 7 will consider the final sub-research question of the implications that arise from the rethinking of the concept of EU consumer empowerment throughout this study and more specifically the discussion in Chapter 6.

Chapter 8 will conclude by summarising the approaches and main findings from each chapter before considering the answer to the main research question that has guided the analysis throughout this study.

Chapter 2

Conceptualizing Empowerment – A Theoretical Framework

1. Introduction

The central question that will be answered in this study is how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. If the concept of EU consumer empowerment is to be reconceptualized, it is then necessary to begin by developing a theoretical framework that will provide the set of conceptual categories that can guide the analysis throughout this study. In light of this, the first sub-research question asks how the abstract concept of empowerment can be defined. In my view there were no pre-existing theoretical frameworks on empowerment that were suitable for this task for two reasons. First, a review of the literature on empowerment in several different fields reveals that there is no universal and unitary definition – or agreement on a definition – that captures the essence of the concept of empowerment. Instead, empowerment, like the concept of power, gains its meaning and normative content from the language games in any one particular field. Put differently, the concept of empowerment enjoys several meanings that vary and depend on the meaning that makes the most sense in any given discipline. Empowerment is, for instance, often ascribed meaning through other concepts such as freedom and power, which can both be qualified as essentially contested concepts.¹ The analysis in Chapter 3 will show that if we choose to define consumer empowerment by recourse to the language games that dominate in the scholarship on consumer law, then invariably the meanings that are ascribed to the concept of empowerment will be contoured by the concepts of consumer sovereignty, consumer choice, autonomy, the rationality study, and (neo)liberalism. These conceptual categories are just set one starting point and lenses that can be adopted for defining the concept of EU consumer empowerment and, as will subsequently be shown in Chapter 3, have resulted in a narrow definition of the underlying concept of empowerment.

Second, from a practical perspective what it means, for example, to empower a student and the strategies for student empowerment that prevail in pedagogical theory and practice will be different from what it means to empower EU consumers and from the Commission's strategies of empowering consumers through law. There is then a distinction to be drawn between the concept of empowerment as both a complex value orientation based on an underlying conception of what counts as power and as a corresponding theoretical construct that can be used to explain the practice of empowerment.

¹ Steven Lukes, *Power: A Radical View* (1st edn, London 1974) 9

With these two points in mind, this chapter develops a theoretical framework on empowerment and a set of conceptual categories that will function as a backdrop against which to explore and rethink the theoretical complexity of the concept of EU consumer empowerment and to rethink the practice of empowering consumers through secondary legislation. Section 2 opens the discussion on the concept of empowerment by considering the various uses and understandings of the concept of empowerment in several fields and illustrates that empowerment is more than a vague and empty buzzword where there is no real intent on the behalf of the (supposed) empowering entity to empower. Instead, it is established that empowerment is a complex and multidimensional concept that entails the regulation of several forms of power which in turn entails making real changes to the environment of the disempowered actor.

Following this brief overview of the empowerment literature, Section 3 lays out the significance of the concept of power and what counts as relative disempowerment for defining empowerment. Also, the argument will be made that empowerment is not a self-contained concept. As a value orientation, the meaning of empowerment is unavoidably moulded by what understanding of the concept of power is used. For instance, what is considered as counting as power provides the benchmark against which an actor subsequently becomes qualified as disempowered. This section highlights that the scholarship on empowerment has tended to neglect both a discussion of what counts as power and a discussion of the binary oppositional relationship between power and (relative) disempowerment. These two interrelated concepts of power and disempowerment will then serve as the underlying conceptual foundations that in my view have a significant role to play in informing the context-specific understandings of what counts as empowerment in several disciplines. Following this view, any empowerment agenda that is to be implemented in practice is unavoidably and often implicitly informed by what the empowering entity considers as counting as power. The same can be said for the practical steps that are taken by this entity to empower the disempowered actor. The discussion in this section reveals that if this study has as its aim a more robust examination of the concept of EU consumer empowerment, it is then necessary to adopt a broader understanding of what counts as power that goes beyond defining power as agency and as a result consumer power as consumer choice.

With the conclusions of Section 3 in mind, Section 4 adopts Haugaard's four-dimensional model of power as the definition of power that will underpin the subsequent discussion throughout this study. Haugaard's model was chosen for several reasons. As mentioned in the introduction to this study, power is at the very least essentially contested and can even be characterized as a truly plural – or family resemblance – concept.² This means that there is no singular account of power that is the most truthful or the most correct. Instead, when we talk about power, we are talking about several different but related sets of concepts. The consumer law debate on

² On this point see Chapter 1, Section 1.2.

consumer empowerment has tended to frame EU consumer empowerment as an agenda that protects the autonomy and free will of both consumers and businesses. This understanding is implicitly built on a definition of power as agency that becomes manifest in the zero-sum (unequal) power relations between two actors. This view understands the individual as the under-socialized creator of social structures whose behaviour is subsequently unaffected by such structures. Conversely, power can also be defined as becoming manifest through these social structures that guide and dictate the behaviours of individuals as social actors. This perspective often adopts an over-socialized perspective on individual behaviour. Neither perspective on what counts as power is the most correct and both have several drawbacks. The opposing view of power as agency or power as structure is just one example of the many approaches to the concept of power that exist in both the social and political literature on the concept. Haugaard's model of power conceives of power as operating along four dimensions: agency, structure, systems of knowledge, and identity. It is possible to focus on one dimension of power, but this does not preclude the presence or operation of each of the other three. This model then offers a broad definition of what counts as the concept of power that is in actuality a cluster of concepts. From an analytical perspective, this model offers a theoretical reorientation that allows for the rethinking of the dimensions of power at play when the dimension of the EU consumer empowerment agenda in practice uses secondary legislation as a tool to empower consumers.

Having established a theoretical model of the concept of power that will form the basis of the concept of empowerment as a value orientation, Section 5 bridges the conceptualizing of empowerment as a value orientation and empowerment as a practice. To briefly restate the discussion on the concept of empowerment in the introduction of this study, the verb to empower is transitive, meaning that there is always an entity that is responsible for the act of empowering another entity, which is the object of the verb. This general description of empowerment can be used to describe any empowerment agenda, but it is too vague to be of analytical significance. Instead, a theoretical framework is necessary for examining the practice of empowerment. Drawing on the empowerment literature from several disciplines, it becomes evident that the practice of empowerment entails the qualification of a social actor or group that exists in a disempowered state, which for the EU consumer empowerment agenda is the consumer. The question then becomes not only why this consumer is disempowered, which depends on what the underlying understanding of power is based on the Commission's value orientation, but also what in practice constitutes and is causing this disempowered state. There is an agreement in much of the empowerment literature that disempowerment is both a subjective and an objective phenomenon. The objective dimension of disempowerment consists of concrete external causes of disempowerment. This could be, for example, situations where a business abuses the weaker position of the consumer by refusing to repair or replace a faulty good. Disempowerment can also be subjective and internal and is generally considered to be

psychological disempowerment. This subjective dimension may be less concrete and more difficult to identify and define than objective disempowerment, but it is no less relevant. If an actor has an internalized disempowering narrative – such as the consumer believes that nothing will happen if they challenge the unlawful behaviour of a rogue trader – then an empowerment outcome will not ensue even if changes have been made to their environment that visibly and objectively caused the objective disempowerment. Section 5 therefore defines how empowerment can be understood as both objective and subjective phenomena, which are in turn informed by an underlying conceptualization of power.

If disempowerment is both subjective and objective, an empowerment agenda must take tangible and concrete steps to remedy both elements of this disempowered status. This moves the discussion firmly on to the question of how empowerment as a practice can be conceptualized. A further distinction can be made between empowerment as a process and empowerment as an outcome. Section 6 considers how empowerment can be defined as a process that is triggered or set in motion through context-specific empowerment strategies. What an empowerment strategy looks like then depends on the entity that is setting out to empower another actor or group of actors. The EU Commission is a supranational institution that has the capacity to introduce policy and legislative proposals of its own volition. The primary tool at the Commission's disposal for both objectively and subjectively empowering EU consumers is secondary legislation. Rights, remedies, and obligations are then the context-specific strategies that the Commission adopts to make changes to the consumer's environment – the market – and constitute the process of empowering consumers.

It is then necessary to distinguish between the process and strategies of empowerment as a practice and empowerment as an outcome. The question in Section 7 then becomes how empowerment can be operationalized as an outcome. Put differently, what does objective and subjective empowerment look like in practice. The discussion in this section will then offer a definition of the practice of empowerment as an outcome from two perspectives. The first is the normative operationalization of what empowerment should look like according to the empowering entity. The second is empowerment as an outcome from the perspective of the actor that is the recipient of the empowerment process.

2. Empowerment: an empty buzzword or complex concept

The concept of empowerment is often dismissed as an empty buzzword adopted in management speak, marketing narratives, and even in public communications of NGOs that work with marginalized communities and persons. Although consumer empowerment is a relatively new strategic agenda in EU consumer and energy policy and a goal of secondary legislation, several disciplines have an established body of

conceptual and empirical literature that has examined the concept of empowerment. Not unlike EU consumer empowerment, these research agendas on empowerment have in common that they are concerned with the personal and interpersonal empowerment of social actors that are classified as disempowered because of objective and subjective obstacles in their social environment that prohibit empowered behaviours. These disciplinary context-specific theories of empowerment as a value orientation and the operationalization of empowerment as a practice have given rise to several nuanced frameworks upon which empowerment agendas are developed with the aim of changing the behaviours of certain groups of actors by adjusting their objective and subjective social realities. To exemplify the point, the following overview will provide a brief description of several disciplines where the concept of empowerment has been the subject of intense scholarly debate, the focus of empirical analysis, and which has been deployed as a method and strategy in diverse practical settings.

From the 1960s onwards, several disciplines, such as social work, education and feminism, turned toward developing the concept of empowerment and the practice of empowerment through empowerment agendas. Empowerment represented a new approach to addressing power imbalances and social inequalities that was triggered by concerns arising in a variety of fields where scholars and practitioners alike were disturbed by the disempowerment and marginalization of individuals and groups within society. Freire in his 1967 publication *Pedagogy of the Oppressed*, contended that disempowered people in society must take control over their own learning alongside developing an awareness of one's own position in their community through participation and engagement.³ This was what Freire termed as critical consciousness, where education and his proposed active teaching method did not simply aim to give the student knowledge (as a blank slate)⁴ but to facilitate the student to “transform the world that surrounds him.”⁵

Freire's scholarship on empowerment through education remains seminal not only in the field of education but has also impacted several other disciplines concerned with disadvantaged actors in society.⁶ Solomon, in her work on marginalized black communities in the US, proposed a new model of empowerment in 1976 in the field of social work. This model, built on the critical consciousness theory developed by Freire, proposed that disempowered and marginalized actors in society have the personal strength to engage with and transform their social reality.⁷ From this point on, social

³ Paulo Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos (trn), Herder and Herder 1970).

⁴ Freire rejected the dominant view in education at that time known as ‘banking’, where students were simply a blank slate to be filled with knowledge, see *ibid*.

⁵ Freire, *Pedagogy of the Oppressed* (n 3) 9.

⁶ See for instance Marvin Fine & Anne Gardner, ‘Counselling and Education Services for Families: An Empowerment Perspective’ (1991) 26 *Elementary School Guidance & Counselling* 33; Kevin McGrew & Cheri Gilman, ‘Measuring the Perceived Degree of Parent Empowerment in Home-School Relationships through a Home-School Survey’ (1991) 9 *Journal of Psychoeducational Assessment* 353.

⁷ Barbara Bryant Solomon, *Black Empowerment: Social Work in Oppressed Communities* (Columbia University Press 1976)

work has been considered an empowerment profession where social workers are responsible for helping their disadvantaged clients to mediate their relationship with their social environment.⁸ Social work practitioners that use an empowerment model in their everyday work aim to both facilitate knowledge building and empower their clients to take control of their affairs by developing their critical consciousness, their skills, and their problem-solving abilities.⁹ Empowerment theory in social work acknowledges that an individual can feel helpless and out of control in their personal situation.¹⁰ This helplessness stems from what the social work discipline has termed direct and indirect power blocks.¹¹ Direct power blocks are created by social conditions that prevent a person from achieving their goals. These are the structural conditions that pose obstacles for individuals, such as difficulty in accessing education because of discrimination and marginalization. Indirect power blocks are the internalized thought processes that lead to psychological feelings of helplessness. This understanding of the practice of empowerment acknowledges that conceptually empowerment is a duality comprised of the personal (subjective) empowerment and objective empowerment of an individual who has, according to the basic understanding of power in this discipline, been categorized as ‘disempowered’.

In the field of psychology in the 1980s, Rappaport’s work was instrumental for advancing empowerment as a practical approach and for the development of a theory of empowerment as a psychological process.¹² In his influential work, Rappaport developed empowerment as a practice that focuses on the strengths of a person as opposed to their weaknesses. This contrasts with the deficit-based approach that was

⁸ Social workers in training can now even specialize in empowerment practice by enrolling in university level degree programmes that focus on the empowerment method, for example the degree of master’s in social work with a specific focus on the empowerment method. See St. Ambrose University <<https://www.sau.edu/master-of-social-work/empowerment-method>> accessed 4 July 2022.

⁹ Lorraine Gutierrez, ‘Working with Women of Color: An empowerment perspective’ (1990) 35 *Social Work* 149; Judith Lee, *The Empowerment Approach to Social Work Practice* (2nd edn, Columbia, University Press 2001); Maurice Moreau, ‘Empowerment through Advocacy and Consciousness Raising’ (1990) 17 *Journal of Sociology and Social Welfare* 53; Ruth Parsons, ‘Empowerment: Purpose and Practice Principle in Social Work’ (2008) 14 *Social Work with Groups* 7; Ping Kwong Kam, ‘Strengthening the Empowerment Approach in Social Work Practice: An EPS Model’ (2020) 21 *Journal of Social Work* 329; Graydon Andrus & Susan Ruhlin ‘Empowerment Practice with Homeless People/Families’ in Lorraine Gutierrez, Ruth Parsons, & Enid Cox (eds), *Empowerment in Social Work and Practice: A Sourcebook* (Brooks/Cole Publishing 1998); Richard Beaulaurier & Samuel Taylor, ‘Self-determination and consumer control: Guiding principles in the Empowerment Model as Utilized by the Disability Rights Movement’ in Wes Shera & Lillian Wells (eds), *Empowerment Practice in Social Work: Developing Richer Conceptual Foundations* (Canadian Scholars’ Press 1999).

¹⁰ For a debate on how consumers and practitioners conceptualize empowerment see Amnon Boehm & Lee Staples, ‘The Functions of the Social Worker in Empowering: The Voices of Consumers and Professionals’ (2002) 4 *Social Work* 449.

¹¹ On direct and indirect power blocks see, Barbara Bryant Solomon, ‘Empowerment: Social Work in Oppressed Communities’ (1987) 2 *Journal of Social Work Practice* 79.

¹² Julian Rappaport, ‘Studies in Empowerment: Introduction to the Issue’ (1984) 3 *Prevention in Human Services* 1; Julian Rappaport, ‘Terms of Empowerment/Exemplars of Prevention: Toward a Theory for Community Psychology’ (1987) 15 *American Journal of Community Psychology* 121; Although the theoretical development of empowerment in the field of psychology can be traced as far back as the 1970s with the works of David McClelland, *Power: The Inner Experience* (Irvington Publishers 1975).

dominant in the field of psychology during the 1980s. By focusing on strengths, Rappaport's development of the psychological (subjective) dimension of empowerment aimed to facilitate a social actor to gain more mastery and control over their own affairs.¹³ As Rappaport defines it, "Empowerment is viewed as a process: the mechanism by which people, organisations and communities gain mastery over their lives."¹⁴ In the 1990s, Zimmerman continued to advance empowerment as a theory in social and community psychology as well as providing a significant empirical contribution by testing empowerment in a variety of contexts and at several levels of analysis.¹⁵ For Zimmerman, empowerment is both a value orientation for working in the community as well as a theoretical model for understanding the practical process and the consequences of the practice of empowerment.¹⁶ As a value orientation, Zimmerman defines empowerment as the normative values from the community psychology discipline that underpin an empowerment approach for social change. This is distinguished from empowerment theory that consists of a set of conceptual categories (a framework) that help the researcher to explore the empirical phenomenon of empowerment at multiple levels of analysis.¹⁷ For Zimmerman these categories are empowerment as a process and as an outcome.¹⁸

Throughout the 1990s, empowerment theory and the adoption of empowerment approaches/strategies proliferated in management studies and borrowed heavily from the empowerment literature within the field of psychology.¹⁹ Differing from psychology, the space under scrutiny in management studies is limited in context to the work environment and the setting is primarily organizational. The most basic assumption of workplace empowerment is that by making employees *feel* in control will enhance employee satisfaction, employee commitment and by extension enhance

¹³ On the development of psychological empowerment see Charles Kieffer, 'Citizen Empowerment: A Developmental Perspective' (1984) 3 *Prevention in Human Services* 9; Building on the work of Kieffer, see Marc Zimmerman & Julien Rappaport, 'Citizen Participation, Perceived Control, and Psychological Empowerment' (1988) 16 *American Journal of Community Psychology* 725.

¹⁴ Rappaport, 'Studies in Empowerment' (n 12)

¹⁵ Marc Zimmerman, 'Empowerment: Forging New Perspectives in Mental Health' in Julian Rappaport & Edward Seidman (eds) *Handbook of Community Psychology* (Plenum Press 1990); Marc Zimmerman, 'Toward A Theory Of Learned Hopefulness: A Structural Model Analysis Of Participation and Empowerment' (1990) 24 *Journal of Research in Personality* 71; Marc Zimmerman, Barbara Israel, Amy Schulz & Barry Checkoway, 'Further Explorations in Empowerment Theory: An Empirical Analysis of Psychological Empowerment' (1992) 20 *American Journal of Community Psychology* 7; Marc Zimmerman, 'Psychological Empowerment: Issues and Illustrations' (1995) 23 *American Journal of Community Psychology* 581; Marc Zimmerman, 'Empowerment Theory' in Julian Rappaport & Edward Seidman (eds), *Handbook of Community Psychology* (Springer Science 2000).

¹⁶ Douglas Perkins & Marc Zimmerman, 'Empowerment Theory, Research and Application. An Introduction to a Special Issue' (1995) 23 *American Journal of Community Psychology* 569; Marc Zimmerman & Julien Rappaport, 'Citizen Participation, Perceived Control, and Psychological Empowerment' (n 13).

¹⁷ Zimmerman, 'Empowerment Theory' (n 15).

¹⁸ *ibid.*, 45 – 46.

¹⁹ For instance, currently a search of "empowerment in the workplace" on Google Scholar yields roughly 10,500 results, accessed 4 July 2022.

productivity.²⁰ Similar to the field of psychology, the management studies approach to empowerment involves subjective empowerment while also making concrete, structural (organizational) changes to the actors (employees) workplace conditions that concretely facilitate the process of empowerment. The aim of an empowerment strategy in an organizational setting is to maintain the organizational status quo because empowerment is operationalized as enhanced employee productivity.²¹ In other words, the aim is not transformation or emancipation but to empower an actor to succeed (in a pre-defined way) within the existing power structures of an organization by mediating power imbalances.

In feminism and gender studies, the aim of an empowerment agenda differs radically from management studies.²² Empowerment in feminist theory is comparable to the concepts of empowerment that were developed in social work and education. In this field, empowerment is an approach that developed with the objective of triggering social transformation. The function of the empowerment agenda is therefore to disrupt the status quo in society and to reform social structures from the bottom up.²³ Empowerment strategies in this field therefore aim to emancipate a disempowered actor, in this case women, from the social structures that perpetuate disempowerment.²⁴

Empowerment is also a prominent concept and agenda in a variety of other disciplines and fields, including consumer studies,²⁵ marketing,²⁶ legal empowerment,²⁷

²⁰ See for example, Gretchen Spreitzer, Mark Kizilos & Stephen Nason, 'A Dimensional Analysis of the Relationship between Psychological Empowerment and Effectiveness Satisfaction, and Strain' 1997 (23) *Journal of Management* 679.

²¹ Ihsan Hammuda & Mohammed Dulaimi, 'The Theory and Application of Empowerment in Construction: A Comparative Study of the Different Approaches to Empowerment in Construction, Service and Manufacturing Industries' (1997) 15 *International Journal of Project Management* 289.

²² For an historical overview of the development of empowerment in feminism and radical discourse see Anne-Emmanuèle Calvès, 'Empowerment: The History of a Key Concept in Contemporary Development Discourse' (2009) 200 *Revue Tiers Monde* 735.

²³ *ibid.*

²⁴ Gita Sen & Caren Grown, *Development, Crises and Alternative Visions: Third World Women's Perspectives* (Monthly Review Press 1987); Haleh Afshar, *Islam and Feminisms an Iranian Case-Study* (Macmillan 1998); Jo Rowlands, *Questioning Empowerment: Working with Women in Honduras* (Oxfam 1997); Naila Kabeer, *Reversed Realities: Gender Hierarchies in Development Thought* (Verso 1994); Srilatha Batliwala, *Women's Empowerment in South Asia: Concepts and Practices* (Asian-South Pacific Bureau of Adult Education 1994)

²⁵ Paul Freund, 'Professional Role(s) in the Empowerment Process: "Working with" Mental Health Consumers' (1993) 16 *Psychosocial Rehabilitation Journal* 65; Tim Gilley, *Empowering Poor People: A Consumer View of the Family Centre Project* (Brotherhood of St Laurence 1990).

²⁶ See for instance the several contributions to the special issue on consumer empowerment in the European Journal of Marketing, 'Consumer Empowerment Special Issue' <https://www.emerald.com/insight/content/doi/10.1108/ejm.2006.00740iaa.001/full/html?utm_source=TrendMD&utm_medium=cpc&utm_campaign=European_Journal_Of_Marketing_TrendMD_0&WT.mc_id=Emerald_TrendMD_0> accessed 9 July 2022.

²⁷ Laura Goodwin & Vivek Maru, 'What Do We Know about Legal Empowerment? Mapping the Evidence'(2017) 9 *Hague Journal on the Rule of Law* 157.

medicine,²⁸ nursing,²⁹ anthropology,³⁰ and community empowerment for sustainable transformation.³¹ Despite the differences in the aims and the substantive content of the concept of empowerment outlined here, it can be said that empowerment is a distinctly social concept that is concerned with individuals (or groups of individuals), their behaviours, their relationships, and the (social) structures that govern their environment. Moreover, the argument can be made that empowerment is a plural concept because scholars from several disciplines utilize different material starting points to examine the relationships between individuals in a variety of social contexts.³² Despite the heterogeneity of empowerment, there do appear to be several commonalities that transcend disciplinary boundaries. First, empowerment is an agenda or strategy that can be adopted by a wide variety of entities attempting to empower an individual or group. This entity can be a national government, a court, an NGO, an organization/ movement by a group of actors, or even an individual. Second, empowerment is concerned with a (perceived) power imbalance that has led to undesirable results such as marginalization, discrimination, an unproductive work environment, inadequate access to justice, or ineffective legal rights. What constitutes ‘power’ and the relative ‘disempowerment’ of an actor/actors is predicated on discipline-specific understandings of the concepts of power and disempowerment. Third, empowerment is both an internal and an external process. Fourth, empowerment is an outcome.

²⁸ Carla Bann, Fuschia Sirois & Edith Walsh, ‘Provider Support in Complementary and Alternative Medicine: Exploring the Role of Patient Empowerment’ (2010) 16 *The Journal of Alternative and Complementary Medicine* 745; Freund, ‘Professional Role(s) in the Empowerment Process’ (n 25).

²⁹ Mary Louanne Friend & Christina Sieloff, ‘Empowerment in Nursing Literature: An Update and Look to the Future’ (2018) 31 *Nursing Science Quarterly* 335.

³⁰ For minority groups see Solomon, *Black Empowerment* (n 7); Sharon Williams & Dolores Wright, ‘Empowerment’ The Strength of Black Families’ (1992) 2 *Journal of Multicultural Social Work* 23.

³¹ Coy *et al.* for instance conducted a wide-scale review of the literature on community empowerment for the energy transition to decarbonized economies and worked with 38 articles (out of a yield of 1,231) where empowerment was central to the study, was defined by the study, were about people and was about sustainable consumption, see Dominique Coy, Shirin Malekpour, Alexander Saeri & Roger Dargaville, ‘Rethinking Community Empowerment in the Energy Transformation: A Critical Review of the Definitions, Drivers and Outcomes’ (2021) 72 *Energy Research & Social Science* 1.

³²On management studies, see Jay Conger & Rabindra Kanungo, ‘The Empowerment Process: Integrating Theory and Practice’ (1988) 13(3) *The Academy of Management Review* 471; On education, see Freire, *Pedagogy of the Oppressed* (n 3); More recently on education see, Jim Cummins, *Negotiating Identities: Education for Empowerment in a Diverse Society* (2nd edn, California Assn for Bilingual 2001); See also Ira Shor, *Empowering Education: Critical Teaching for Social Change* (University of Chicago Press 1992); On leadership, see Paul Speer, Courtney Jackson & Andrew Peterson, ‘The Relationship Between Social Cohesion And Empowerment: Support and New Implications for Theory’ (2001) 28 *Health Education & Behavior* 716; On psychology, see the following: Douglas Perkins & Marc Zimmerman, ‘Empowerment Theory, Research and Application’ (1995) 23 *Community Psychology* 569; Julien Rappaport, ‘Empowerment Meets Narrative: Listening to Stories and Creating Settings’ (1995) 23 *American Journal of Community Psychology* 795; On renewable energy communities, see Dominique Coy, Shirin Malekpour, Alexander K. Saeri A & Roger Dargaville, ‘Rethinking Community Empowerment in the Energy Transformation: A Critical Review of the Definitions, Drivers and Outcomes’ (2021) 72 *Energy Research & Social Science* 1

3. Empowerment and the oppositional binary of power/relative disempowerment

Empowerment is not a self-contained concept. The ordinary usage of empowerment as a verb indicates that empowerment entails the giving of power to an actor who is, for whatever reason, powerless. What then constitutes 'power' and the relative 'disempowerment' of an actor is highly context-specific because at the very least power is an essentially contested concept.³³ Moving even further to a plural view of power and disempowerment, these concepts will have different meanings depending on the normative language games of the debate within which they find themselves. For instance, the consumer law debate, the marketing debate, and even the debate on patients as consumers of healthcare services will adopt different empirical and normative understandings of what power/disempowerment are and what the content of these concepts ought to be.

Nevertheless, at an abstract level the concept of empowerment is predicated on the oppositional binary concepts of power and relative disempowerment. It was already indicated in the opening of this chapter that the concept of empowerment has been employed in both academic discourse and empirical fieldwork in disciplines that study situations where an actor or group of actors has become disempowered *vis-à-vis* a disempowering relationship with another social actor and/or because of structural conditions that disempower. When an actor is qualified as being in a position of relative powerlessness (and normatively this is deemed to be problematic) then empowerment agendas are seen as necessary for remedying this disempowered state. When empirically qualifying what has disempowered an actor or group of actors, a power imbalance being at play cannot be avoided. Noting here that what will be qualified as a power imbalance depends on the situation, context, and the values/norms of the discipline at hand. What will be qualified as a power imbalance to the detriment of consumers that requires intervention in the internal market according to neoliberal theory will be different than what qualifies as a power imbalance for scholars that advocate for more intrusive interventions in the market to protect consumers.

What constitutes power, how it is defined, and how it becomes expressed is therefore relevant for both the theory of empowerment and the practice (implementation) of empowerment agendas. The context-specific approaches to empowerment as a process and the concrete empowerment strategies that are adopted are then reliant on a predetermined and often assumed/invisible conceptualization of power. Freire, for instance, was influenced by Marxist theory, which entails an understanding of power as domination and a zero-sum commodity that is possessed by the elite ruling class to the detriment of the masses.³⁴ Freire's Marxist orientation

³³ Walter Gallic, 'Essentially Contested Concepts' [1955] *Proceedings of the Aristotelian Society* 167; Lukes, *Power* (n 1) 9.

³⁴ Freire (n 3).

impacted his understanding of what constitutes power and therefore the content of his proposed empowerment agenda/strategy. This becomes apparent in his contention that the Brazilian poor could be empowered through education because of the Marxian view of utopian communism where education plays a pivotal role in developing socialized individuals that can create a harmonious society.³⁵ Freire's development of a critical pedagogy then adopts education as a strategy to empower the oppressed and exploited individuals in Brazilian society because it is predicated on the rationale that education can produce autonomous, revolutionary subjects capable of their own emancipation.³⁶ As the findings from Chapter 3 will show, the debate on EU consumer empowerment has defined the 'power' in consumer empowerment through the neoclassical economic theories of consumer choice and consumer sovereignty. The relative powerlessness of consumers then arises in situations where externalities impact consumers exercising rational choice. Moreover, it will also be contended that this narrow view of consumer power is conceptually impoverished and incapable of explaining the power in consumer empowerment in the context of, for instance, energy poverty and vulnerable energy consumers.

The concept of power, the relativity of disempowerment, and what is considered to constitute these concepts can therefore be viewed as representing the most fundamental unit of any empowerment agenda. In other words, how power is defined, who or what is considered to possess or not possess power, how this power can be obtained by a social actor, or even whether power is something that any one actor can possess are fundamental but often invisible assumptions that support any empowerment agenda. In turn, it is the concept of power that determines what is the cause of disempowerment of an actor, what the process of empowerment is, what empowerment strategies can be adopted as part of this process, and how empowerment is subsequently operationalized and studied as an outcome. The concepts of power/disempowerment are most overtly evident when empowerment is described as an outcome. This is because an empowerment outcome is usually qualified based on whether the goals/objectives of empowerment have been achieved because the obstacles to empowerment have been removed. Take, for instance, that the goal of a community empowerment agenda is the social transformation to a decarbonized economy. The empowerment goal/objective is broadly qualified as the clean energy transition. This can be more specifically operationalized as an outcome where citizens/consumers behave in an empowered way when they produce and consume renewable energy. The power/disempowerment of consumers can be identified in the structural conditions that stand in the way of this action. These conditions could stem from the (inadequacies) of the regulatory framework, from disempowering social

³⁵ Karl Marx Critique of the Gotha Programme (First published 1875, Progress Publishers 1970).

³⁶ Freire, *Pedagogy of the Oppressed* (n 3).

conditions such as poverty, and even the subjective narratives and attitudes of consumers towards the consumption of renewable energy.³⁷

The development of the theoretical framework of empowerment in this chapter therefore takes as its starting point the binary opposition of the concepts of power and disempowerment. I use these terms as binary oppositions to demonstrate that while power and disempowerment are opposite in meaning, they are also strictly defined and differentiated relative to and against each other. We cannot understand what counts as empowerment unless we understand the relation and difference between power and disempowerment. Like the concept of empowerment, however, there is no unitary theory of power.³⁸ Over the latter half of the twentieth century, the concept of power became the focal point of systemic analysis and the subject of intense theoretical debate in social and political theory.³⁹ It is not possible in this section to provide a complete overview of the totality of work that comprises the subject of power and the many frameworks that make power a plural concept.⁴⁰ It is possible to provide a brief overview of the reasons why power became subjected to such scrutiny and ascribed much importance. Moreover, because the concept of power constitutes the normative foundations of any empowerment agenda, it is necessary to develop a theoretical framework that can be subsequently used to identify the visible and invisible concepts of power that support the EU-specific concept of consumer empowerment and the practice of consumer empowerment through law.

3.1 The absence of a discussion on power in the empowerment discourse

Despite the central significance of the underlying conceptualization of power for any empowerment agenda, the conceptual definition of power in such agendas is often implicitly assumed. A critical discussion on what counts as power has therefore become largely absent in the discourse on empowerment. There are, however, some instances in the literature where the concept of power that supports an empowerment agenda is explicitly defined. In the early literature on empowerment when power was openly addressed, it was often equated with the concept of control⁴¹ and its manifestations were

³⁷On the concepts of power and disempowerment in sustainable transitions, see Flor Avelino, 'Power in Sustainability Transitions: Analysing Power and (Dis)empowerment in Transformative Change Towards Sustainability: Power in Sustainability Transitions' (2017) 27 *Environmental Policy and Governance* 505.eread

³⁸ On this point, see Mark Haugaard, *Power: a Reader* (Manchester University Press 2002).

³⁹ For an overview of several influential theories of power, see *ibid.*

⁴⁰ Several books provide an introduction to the concept of power or treatise of several prominent theories of power. For example, see Haugaard, *Power: a Reader* (n 38); Stewart Clegg & Mark Haugaard (eds), *The Sage Handbook on Power* (Sage Publishing 2009); For a discussion on social power, see John Scott, *Power* (Polity 2001); Moreover, there is a journal dedicated to discussion of political power, see *The Journal of Political Power* <<https://www.tandfonline.com/journals/rpow21>> accessed 4 July 2022.

⁴¹ Rappaport, *Terms of Empowerment/Exemplars of Prevention* (n 12).

economic or political power.⁴² In this vein, some authors understood disempowerment through the Marxist conception of power as resources that were distributed zero-sum. Power is elite, oppressive and class-orientated where only a small number of social actors wield vast amounts of economic and political power while many other social actors possess little to none.⁴³ Subsequent literature on empowerment has typically neglected to directly address and evaluate their underlying assumptions of what counts as power. Instead, as empowerment agendas in several disciplines became more practice-orientated, power became defined using the cluster of concepts: power to, power over, and power with.⁴⁴ The failure to acknowledge the underlying theories of power within the empowerment discourse has become a point of contention that has been raised by various authors within several fields.⁴⁵

The problem that stems from neglecting what counts as the foundational concept of power in empowerment is both theoretical and practical. From a practical perspective, empowerment agendas that fail to identify and evaluate their assumed conceptualization of power and powerlessness have resulted in an empowerment paradox. This paradox entails the empowerment agenda continuing or deepening the disempowered status of the disempowered actor(s) it has sought to empower.⁴⁶ It is claimed that this empowerment paradox is caused by a failure on several fronts, including the failure to identify the power structures and relations that disempower and therefore these structures are reproduced and perpetuated.⁴⁷ Moreover, ignoring the intersectional nature of power as well as an overemphasis on the individual dimension of power to the neglect of the collective dimension has also led to the identification of an empowerment paradox in scholarship on empowerment in the disciplines of legal

⁴² George Albee, 'Power, Politics, Prevention and Social Change. Prevention Through Political Action and Social Change' (1981) 5 *Primary Prevention of Psychopathology* 5.

⁴³ Freire (n 3); Allan Moscovitch & Glen Drover (eds), *Inequality: Essays on the political economy of social welfare* (University of Toronto Press, 1981)

⁴⁴ These cluster of concepts can be first traced to Amy Allen, 'Rethinking Power' (1999) 13 *Hypatia* 21.

⁴⁵ Empowerment has been termed a 'leftist buzzword'. See Elizabeth Ellsworth, 'Why Doesn't This Feel Empowering? Working through the Repressive Myths of Critical Pedagogy' (1989) 59 *Harvard Educational Review* 297; Jennifer Gore 'What We Can Do for You! What Can "We" Do for "You"? Struggling over Empowerment in Critical and Feminist Pedagogy' in Carmen Luke & Jennifer Gore (eds), *Feminisms and Critical Pedagogy* (Routledge 1992); on how the empowerment paradox in education policy perpetuates existing power structures by allowing an actor to act successfully within pre-existing power structures instead of critically assessing and challenging these structures of power, see Tom Inglis, 'Empowerment and Emancipation' (1997) 48 *Adult Education Quarterly* 3, 4; see also Barry Troyna, 'Critical Social Research and Education Policy' (2010) 42 *British Journal of Education Studies* 70; on the disempowering effects of empowerment agendas in development studies, see Calvès (n 22).

⁴⁶ Linda Weidenstedt, 'Empowerment Gone Bad: Communicative Consequences of Power Transfers' (2016) 2 *Sociological Research for a Dynamic World* 2; Ching Man Lam & Wai Man Kwong, 'The "Paradox of Empowerment" in Parent Education: A Reflexive Examination of Parents' (2012) 61 *Family Relations* 65; Sylvia Bawa, 'Paradoxes of (dis)empowerment in the Postcolony: Women, Culture and Social Capital in Ghana' (2016) 37 *Third World Quarterly* 1.

⁴⁷ Thomas Archibald, 'Rethinking Empowerment: Theories of Power and the Potential for Emancipatory Praxis, Adult Education Research Conference (2011)' <https://newprairiepress.org/aerc/2011/papers/3> accessed 4 July 2022, 25.

development and feminism.⁴⁸ It is important to note here again that the concepts of empowerment/disempowerment are not universal but relative. What counts as empowerment and disempowerment in education may overlap with female empowerment or with workplace empowerment but there is no unitary essence that connects these distinct understandings of empowerment/disempowerment together. Instead, it is my view that empowerment, like power, is best conceptualized as a plural and family resemblance concept, a point that will be returned to and addressed in more detail subsequently in Section 3.3. In short, the point to be drawn from this discussion is that the content of an empowerment paradox is dependent upon the localized and disciplinary understandings of what counts as power/disempowerment.

From a theoretical perspective, the heuristic simplifications that are adopted in empowerment research agendas and a reliance on mid-level theories to substantiate what counts as power, such as the economic theory of consumer power as consumer choice, obfuscates the deeper intellectual traditions and meta-narratives of power upon which empowerment agendas are unavoidably built.⁴⁹ For instance, underneath the economic theory of consumer power as consumer choice lies a Dahlian notion of power, with Hobbes as the common ancestor.⁵⁰ Following the thread of the economic theory on consumer power, consumer choice is predicated on the rationality study that is both crucial and axiomatic for modern economics.⁵¹ Yet this house of cards collapses when we pull these ‘unquestionable’ foundations of the economic theory apart and by extension of consumer power in the marketplace. In my view it is inadequate that this economic theory on power should be the primary lens that dominates in the discussion on EU consumer empowerment and that is used to frame our understanding of the concept of consumer power and of empowerment. As the discussion in the subsequent sections will show, this agency-orientated perspective on power is just one of several ways to frame what counts as power, and is a rather narrow one at that.

The task of defining what constitutes power is a difficult task because as a concept its meaning is highly context-specific. Following Haugaard’s extensive work on the concept of power, a persuasive argument is offered as to why there is no single and most truthful essence of power that can be uncovered.⁵² For Haugaard, there is no unitary, overarching theory of power capable of homogeneously and implicitly informing all empirical inquiry into the operation of power. Instead, power is at the very least an

⁴⁸ Marella Bodur & Susan Franceschet, ‘Movements, States and Empowerment: Women’s Mobilization in Chile and Turkey’ in Jane Parpart, Shirin Rai & Kathleen Staudt (eds), *Rethinking Empowerment: Gender and Development in a Global/Local World* (Routledge 2002); Sánchez Néstor, ‘Community Development and the Role of NGOs: A New Perspective for Latin America in the 1990’s’ (1995) 29 *Community Development Journal* 307.

⁴⁹ Janice Denegri-Knott, Detlev Zwick & Jonathan Schroeder, ‘Mapping Consumer Power: An Integrative Framework for Marketing and Consumer Research’ (2006) 40 *European Journal of Marketing* 950.

⁵⁰ *ibid.*

⁵¹ This point on the economic theory of consumer power as consumer choice is addressed in more depth subsequently in this study; see Chapter 3, Section 5.1.

⁵² This point will be addressed in more detail in Section 4 of this chapter.

essentially contested concept.⁵³ Despite this, for many decades, the intellectual traditions occupied with defining power were engaged in a conflict over providing an account of power that most closely encompasses its essence. Ignoring the increasingly theoretical plurality of the concept of power becomes problematic when debates on both power and empowerment rely on heuristics and mid-level theory and accordingly fail to identify and evaluate the deeper meta-theoretical origins upon which their implicit notions of power in their discipline are based. This results in disparate and (perhaps even more troubling) irreconcilable perspectives and approaches to defining empowerment within debates that are rendered incapable of recognizing *why* such disparate approaches exist and why (in practice) empowerment strategies disempower.⁵⁴

3.2 The stages of the conceptual analysis of power

While the literature on power can be traced back many centuries to the works of ancient philosophers such as Plato and Aristotle, it was not until the 17th century that philosophers began to focus on the analysis of power as a theoretical concept.⁵⁵ Ledyayev proposes that the modern conceptual analysis of power can be divided into three distinct stages.⁵⁶ The first stage is considered to begin with Hobbes's *Leviathan* in 1651 until theorists such as Weber,⁵⁷ Russell,⁵⁸ Jouvenel⁵⁹ and Merriam⁶⁰ in the early to mid-20th century. In this first wave of literature, power was defined but the development of power as an analytical concept and its subsequent analysis was absent.⁶¹

The second stage represents a turn to the conceptual analysis of power. This stage is characterized by a shift away from ambiguous and intuitive treatments of power to the systematic analysis of power as a concept in several separate dimensions of political and social theory. Ledyayev proposes this stage begins from the mid-20th century onwards with Lasswell and Kaplan's seminal text *Power and Society* from 1950.⁶² In this work, a general framework for political analysis was developed, with a particular emphasis on developing an analytical concept of power. This wave of the conceptual analysis of power is characterized by an intense debate between theorists that sought to identify the true essence of power. These authors include theorists such as Dahl,⁶³

⁵³ Lukes, *Power* (n 1) 45.

⁵⁴ Denegri-Knott *et al.* (n 49).

⁵⁵ On this see point, see Valeri Ledyayev, *Power: A Conceptual Analysis* (Nova Science Publishers 1998) 2.

⁵⁶ Valeri Ledyayev, 'Conceptual Analysis of Power: Basic Trends' (2021) 14 *Journal of Political Power*, 72.

⁵⁷ Max Weber, *The Theory of Social and Economic Organization* (Oxford University Press 1947)

⁵⁸ Bertrand Russell, *Power a New Social Analysis* (Allen and Unwin 1938).

⁵⁹ Bertrand Jouvenel, *Power the Natural History of its Growth* (London Hutchinson 1948).

⁶⁰ Charles Merriam, *Political Power: its Composition and Incidence* (McGraw-Hill 1934).

⁶¹ David Baldwin, *Paradoxes of Power* (Blackwell 1989) 129.

⁶² Harold Lasswell & Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (Yale University Press 1950); see also Baldwin, *Paradoxes of Power* (n 61) 129.

⁶³ Robert Dahl, 'The Concept of Power' (1957) 2 *Journal of Society and General Systems Research* 201.

Parsons,⁶⁴ Arendt,⁶⁵ Lukes,⁶⁶ Giddens⁶⁷ and to some extent Foucault.⁶⁸ Moreover, this stage can be characterized as consisting of two distinct approaches to the conceptualization of power. The mainstream approach was developed by thinkers who followed in the works of Hobbes, such as Weber, Lasswell, Dahl and Lukes, where power was defined as power over, power as domination, and power as a zero-sum relation between social actors, known as the conflictual tradition. The alternative to this approach was established by Spinoza and includes theorists such as Parsons and Arendt, known as the consensual or positive-sum tradition. This alternative approach has turned to considering the manifestation of power as ‘power to’. According to the alternative approach, power is not necessarily negative, it can be productive, and it belongs to a social structure rather than being a zero-sum possession that can be held by an individual. Foucault’s work on power belongs to this alternative category insofar as he theorizes power as having the capacity to be a productive force in society.⁶⁹ Noting that the term ‘productive’ is not value laden; instead, ‘productive’ is an empirical statement that power is not only repression and domination but that the power/knowledge binary is productive because it produces discourse and shapes subjects.⁷⁰

The third wave, termed the ‘modern stage’ begins at the end of the 20th century. It consists of the literature where the question has turned from attempting to find the ‘essence’ of power predicated on the understanding that there is a unitary definition of power. This shift, in the work of Haugaard for example, entails a move from attempting to unmask the truth of power to acknowledging the pluralistic nature of power as a concept and the analysis of the different forms and dimensions that power can take.⁷¹

3.3 Power: an ‘essentially contested’ or ‘family resemblance’ concept

In light of the differentiated definitions of what counts as power, Lukes has claimed, inspired by Gallie, that power is an ‘essentially contested concept’ where “reasonable

⁶⁴ Talcott Parsons, ‘On the Concept of Political Power’ (1963) 107 *Proceedings of the American Philosophical Society* 232.

⁶⁵ Hannah Arendt, ‘On Power’ (1996) 10 *The Journal of Speculative Philosophy New Series* 210.

⁶⁶ Lukes, *Power* (n 1).

⁶⁷ Anthony Giddens, *A Contemporary Critique of Historical Materialism. Vol. 2. The Nation State and Violence* (Polity 1985)

⁶⁸ Although Foucault robustly denied that his work on power was an attempt to create a (grand) theory of power. See Michel Foucault, *Discipline and Punish* (Alan Sheridan (trn), Pantheon Books 1977); Michel Foucault, ‘The Subject and Power’ (1982) 8 *Critical Inquiry* 777. See also the debate surrounding the concept of power as a response to Foucault in works of Peter Digeser, ‘The Fourth Face of Power’ (1992) 54 *The Journal of Politics* 977; Barry Hindess, *Discourses of Power: From Hobbes to Foucault* (Wiley-Blackwell 1996).

⁶⁹ For a discussion on the productive dimension of Foucault’s conceptualization of power, see Cris Mayo, ‘The Use of Foucault’ (2000) 50 *Educational Theory* 103.

⁷⁰ For a discussion on the power/knowledge binary and productive nature of power, see Ellen Derder, ‘Power/Knowledge’ in Dianna Taylor (ed), *Michel Foucault: Key Concepts* (Routledge 2011)

⁷¹ Mark Haugaard, *The Four Dimensions of Power: Understanding Domination, Empowerment and Democracy* (Manchester University Press 2020).

people, who disagree morally and politically, may agree about the facts but disagree about where power lies.”⁷² Haugaard contends that the ‘essentially contested’ aspect of the contested nature of power is a normative issue rather than an empirical one.⁷³ The contentions surrounding the definition of the concept of power stem from the normativity of the moral and political orientations of the theorist as opposed to the contentions arising from explanatory, empirical observations of what power is.⁷⁴ In other words, the concept of power is essentially contested because it is value laden and not because the concept of power itself is inherently normative. Haugaard proposes that while Lukes’ claim moves the debate away from essentialist claims of a single, true definition of power, he does not go far enough because he stops short of arguing for a plural view of power.⁷⁵ Moreover, when Lukes classifies power as an essentially contested concept, he also creates an inherent tension between his proposition that there are several usages of the concept of power but contradictorily that his (one) usage was ‘better’ than the rest.⁷⁶

Drawing on Wittgenstein, Haugaard then proposes that power is instead a family resemblance concept where there is no unitary thread that ties the concepts together but instead overlapping characteristics that constitute the family.⁷⁷ Haugaard, drawing on Wittgenstein’s example of language games, uses the following example that clearly exemplifies the point:

[...] the power of the President; the power which individual A exercises over individual B, the power of love; the power of truth; the power of ideology; and electric power; all have elements in common but there is no single common essence which runs through all of these which can be extended to cover all usages of the concepts of power.⁷⁸

This then entails that there is no one ‘best’ definition of the concept of power but rather that when a theorist engages with the concept of power, they are instead engaging with a cluster of conceptualisations of power (power to, power with and power over)⁷⁹ that are part of different language games.⁸⁰

⁷² Gallie (n 33); Lukes, *Power* (n 1) 62–63.

⁷³ Mark Haugaard, ‘Power: A ‘Family Resemblance’ Concept’ (2010) 13 *European Journal of Cultural Studies* 419, 421–422; *ibid* 4– 5.

⁷⁴ Haugaard, ‘Power: A ‘Family Resemblance’ Concept’ (n 73) 422.

⁷⁵ *ibid*; Haugaard, *The Four Dimensions of Power* (n 36) 6.

⁷⁶ Haugaard, ‘Power. A ‘Family Resemblance’ Concept’ (n 73) 420.

⁷⁷ Haugaard, *The Constitution of Power* (Manchester University Press 1997) 2.

⁷⁸ *ibid*.

⁷⁹ This perspective on power was first introduced by Allen, see Amy Allen, *The Power of Feminist Theory: Domination, Resistance, Solidarity* (Westview Press 1999); The idea is drawn upon by Haugaard throughout much of his work, see for example Haugaard, *The Four Dimensions of Power* (n 71) 19.

⁸⁰ Haugaard, *Power* (n 35) 420.

The idea of *language games* and words as *conceptual tools* are pivotal for Haugaard's treatment of power as a family resemblance concept.⁸¹ For Haugaard, theories of power are different not just because the theorist of power began with a particular 'member of the power family' but because the model/theoretical framework of power itself "produces its own local language game where certain members of the power family receive a prominence where others are ignored."⁸² The debates on power are then 'micro-languages' or 'language games' because: "Within each game there are local uses which are shaped by the nature of the local language game as a whole."⁸³ Relying on a de Saussurian structuralist theory of language, Haugaard's approach is that of *meaning holism*.⁸⁴ This entails that words such as cat or power (signifier) do not derive their meaning from the fact that they stand for something external to the language, which in the case of 'cat' is the "creature that mews and drinks milk" (the signified).⁸⁵ Instead, the meaning of the words 'cat' or 'power' derive meaning not from the external thing it refers to but instead by the relationship of the word to other words in the language system. Using the example of chess, Haugaard proposes:

Imagine the pieces in a game of chess as symbols or words. Each piece has its specific meaning. Then picture yourself trying to explain to someone who knows nothing about the chess what a single piece – the queen, for instance – means. What is manifest in this thought experiment is that understanding what the queen means is incomprehensible without explaining the game as a whole.⁸⁶

Chess is then an example of a "self-contained language game in which each piece refers to the other and to the rules of the game."⁸⁷ Applying this line of thought to an academic discipline leads Haugaard to conclude that with any paradigm or theory there is a corresponding conceptual vocabulary. Academic disciplines and the corresponding context-specific language games determine whether a definition is good/bad or right/wrong not because of an external "holy grail of the essence of things-in-themselves."⁸⁸ Rather, local definitions of power, for instance, are given meaning according to their *effectiveness* within a localized language game.

⁸¹ See for instance the following, Haugaard, *The Constitution of Power* (n 77) 2; Haugaard, *Power: a Reader* (n 38) 6-7, 274; Haugaard, *The Four Dimensions of Power* (n 71) 6 - 7

⁸² Haugaard, *The Constitution of Power* (n 77) 2.

⁸³ Haugaard, *Power: a Reader* (n 38) 274.

⁸⁴ Although he uses this label to describe Foucault he also adopts such a stance in his treatment of power as language games, see *ibid.*, 274; Haugaard, *The Constitution of Power* (n 130) 2; Haugaard, *The Four Dimensions of Power* (n 71) 6 - 7.

⁸⁵ Haugaard uses this explanation in his description of De Sausurre's theory when setting up how it is that we ought to understand Foucault's archaeology project, see Haugaard, *The Constitution of Power* (n 77) 48.

⁸⁶ Haugaard, *Power: a Reader* (n 38) 183.

⁸⁷ Haugaard, *The Four Dimensions of Power* (n 71) 8.

⁸⁸ *ibid.*, 9

This line of reasoning has an important implication for how we can understand power as a family resemblance concept that gains meaning within a local language game and operates as a conceptual tool. Haugaard proposes that the *empirical* and *normative* language games are the most significant language games that we can find in the broad literature of power. Moreover, they have been the cause of the most confusion. To simplify the matter, empirical language games involve a statement of what power *is* while the normative language games discern what ought to constitute power. Haugaard uses the example of mainstream political theory where the localized normative language games have tended to qualify power negatively. Pettit, paradigmatically, defines freedom through the antonym of power as domination: “There is a strong and traditional association between being free and not being dominated or subjugated by anyone: not being under the yoke of another’s power, not being defencelessly susceptible to interference by another.”⁸⁹ Conversely, by defining power as domination it is then qualified as malign and ‘bad’ because it opposes the liberal ethical ideals of liberty and freedom as ‘non-interference’ and ‘antipower’.⁹⁰ Freedom *from* interference and freedom *as* non-interference are considered to be the commonality under right- and left-wing ideals of liberty.⁹¹ Freedom as ‘anti-power’ is not another form of power as domination if: “Institutions get rid of certain forms of domination without putting new forms of domination in their place – any new ways in which some have power over others – then we may say that they promote antipower.”⁹² Pettit, in the conclusion of his article, concedes that his definition of power as domination is value laden, that power when qualified as domination is presented negatively, and that the structures that are identified negatively as domination are only so because of his beliefs. Moreover, Pettit concedes that what he qualifies as domination are social facts that “not everyone may find them arresting, let alone objectionable [...] the important point, so I allege is that everyone must still recognise their reality.”⁹³ Pettit’s concession confirms Haugaard’s observations that local normative language games offer definitions of power that obfuscate a broader empirical analysis of what power is. The neglecting of the range of possibilities as to what can constitute the empirical ‘is’ of power undermines the arguments of what one might think power ought to be. Haugaard challenges Pettit’s view and by extension the belief in political theory that power should be defined negatively as domination by pointing to Arendt’s claim that “power is the capacity to act in concert” and by pointing out that freedom can be more than non-interference.⁹⁴ For Haugaard, the concept of freedom can be more than Robinson Crusoe’s freedom before Friday’s arrival: If freedom entails not just the right to do something but also the capacity to do it, then

⁸⁹ Phillip Pettit, ‘Freedom as Antipower’ (1996) 106 *Ethics* 57, 576, 578–588.

⁹⁰ *ibid* at 588–595; See also Isaiah Berlin, ‘Two Concepts of Liberty’ in Isaiah Berlin and Henry Hardy (eds), *Liberty* (Oxford University Press 2002).

⁹¹ Pettit (n 89) 59–596.

⁹² *ibid* 587.

⁹³ *ibid* 604.

⁹⁴ Haugaard, *The Four Dimensions of Power* (n 71) 3.

power is a condition of possibility for freedom.”⁹⁵ Political theory, according to Haugaard, could therefore benefit from considering what “normatively desirable power would look like rather than wishing it away.”⁹⁶

4. A four-dimensional model of power

It was established in the previous sections that providing a context-specific definition of what empowerment means in its localized setting cannot be achieved without recourse to what counts as power for that empowerment agenda or empowerment movement. The theoretical framework in this chapter takes the position that power is a context-specific, family resemblance concept and so it is not the aim in this section to make the claim that one theory of power is the unitary essence of power that can later be used to explain EU consumer empowerment. For instance, it is possible to take the starting point that the only form of power that EU consumer legislation (with an empowerment aim) regulates is the ability of consumers to dictate production because consumer legislation facilitates freedom of choice. As the subsequent analysis will show, this understanding of power as agency is conceptually limiting and there is no satisfactory reason as to why other understandings of power should not be explored.

Following this, power will be understood as a family resemblance concept that gains meaning from local language games and functions as a conceptual tool within a local system. Drawing on this starting point, we can now tackle the question of how to empirically assess what the ‘power’ in EU consumer empowerment is. This is an abstract and generalized question that considers how power can be conceptualized. This does not negate the implicit normativity that occurs when making a choice about what existing theory of power ought to be adopted as an explanatory tool because choices have been made to define it in this way. The analysis in the following chapters is instead best viewed as a bracketing exercise between the existing empirical and normative understandings of power that exist in the social and political literature on power. The following discussion makes use of Haugaard’s four-dimensional model of power as an explanatory tool. Noting here that this bracketing exercise does not imply that there can be absolutely distinctive empirical and normative claims regarding power and empowerment. Instead, as Haugaard puts it, this distinction represents a scale that distinguishes between the empirical workings of a concept we term ‘power’ and the norms that a discipline dictates as to what should constitute the meaning of power.⁹⁷ The purpose of integrating Haugaard’s model on power into this framework on empowerment is then in the following chapters used as a lens for generating an

⁹⁵ *ibid* 3.

⁹⁶ *ibid*.

⁹⁷ *ibid* 12–13.

alternative perspective on the empirical question of what dimensions of power are at play in the EU consumer empowerment agenda when it is enacted through legislation.

The four dimensions of power in Haugaard's model are ideal types. While presented as distinct levels of power, the reality is that the boundaries of these dimensions are fluid. Power intersects and is comprised of all dimensions. As Haugaard puts it, using the analogy of a plan of a house:

[...] the plan does not mean that the other dimensions have vanished into thin air. The plan gives us specific information about the house, which the other dimensions do not. Yet we really do not understand the house just from focusing on the plan. While we look at each aspect singly, full understanding comes from first separating and then combining all four aspects or dimensions.⁹⁸

Considering that power is a family resemblance concept, and that consequently empowerment has a similar character, the conceptual framework that is chosen for an analysis of power should have a broad explanatory function. Put differently, it should avoid the reflexive assumption that power is normatively malign because such a view of power is conceptually limiting. In the existing literature on power, Haugaard's four-dimensional theory of power then presents a holistic and comprehensive account of power as a pluralistic concept as neither good nor bad. It provides a broad and multi-dimensional lens for examining a range of concepts that have been connected to the concept of power, which at times have been and can be rendered irreconcilable due to localized normative language games as to what power should be. These include agency and structural questions surrounding the exercise of power, of power as a capacity, of power as domination, of power conflicts operating within a legitimized structure of a social system and outside of the legitimized structure, and of how power patterns are legitimized. From a tacit perspective on power, this model allows an examination of how it is that actors subconsciously replicate power structures in a way that is disconnected from the normative issues that arise through the concepts of false consciousness and ideology. From an identity perspective, it allows us to examine how power plays a role through the ontological identity creation that results in power manifesting as self-disciplinary behaviours that reproduce power.

4.1 The four dimensions of power: an overview

For Haugaard the four dimensions of the model focus on the following aspects of power: agency, structure, systems of thought, and social ontology/identity. These four

⁹⁸ *ibid* 15.

dimensions are introduced using the following example that Haugaard drew from Dahl's 1957 article titled "The Concept of Power":

Suppose a policeman is standing in the middle of an intersection at which most traffic ordinarily moves ahead: he orders all traffic to turn right or left: the traffic moves as he orders it to do. Then it accords with what I conceive to be the bedrock idea of power.⁹⁹

In this example, Haugaard presents each of the four dimensions of power. One dimensional power (1-D) is the agent-centred causal relationship between two actors, the police officer and the driver.¹⁰⁰ Power becomes manifest at the moment of the exercise of power. This is the moment that the driver turns right or left, thus the police officer has made the driver do something he or she would not otherwise have done. Two-dimensional power (2-D) is the dispositional capacity (power) of the actor who is made into a police officer by social structures. These social structures are reproduced every time a driver complies by driving right or left. A driver can choose not to comply with this social structure by attempting to drive straight ahead. Haugaard terms this act of agency a form of 2-D structural conflict, which can be contrasted with routinized and structured 1-D conflict. Three-dimensional power (3-D) focuses on systems of thought, understood as the tacit social knowledge that is shared by the police officer and the driver. The police officer wearing certain clothing, such as a uniform, results in the driver imposing the concept of policeman on the other actor. Through this act of practical consciousness, the driver considers it reasonable to comply. The effect of fourth-dimensional (4-D) power on social ontology is the internalized self-discipline of drivers that they need to routinely obey traffic law. This self-discipline entails obeying the traffic police officer's demand even when drivers do not wish to do so.

4.2 Dimension one: agency and the exercise of power

In the previous section 1-D power was identified through the exact moment of the exercise of power, where the police officer made the driver act in a way that he or she otherwise would not have done. This first dimension relies on Dahl's seminal work on the development of the 'power to' conceptualization of power; however, Haugaard corrects some limitations of Dahl's work using the work of Morris, Pansardi and Arendt. The first dimension then conceptualizes of power as agency that can be positive (legitimate) and negative (domination). The 1-D dimension of power also provides a theoretical foundation for defining what is meant when power is defined as power over,

⁹⁹ *ibid* 14.

¹⁰⁰ *ibid* 14.

power to and power with, as has become common in the literature but from which conceptual ambiguity has arisen. Moreover, as will be explained in this section, defining 1-D power as agency makes possible an examination of the routine structured conflicts that occur at the level of 1-D power and the social structures that set out the parameters within which a social actor has agency.¹⁰¹ This is not an over-deterministic view of structural power because, as will be seen at the level of 2-D power, it is always possible for an actor to contest social structures. It is simply that this form of agency as *structural* conflict does not have a 2-D structuring effect.

4.2.1 Dahl and ‘power over’

In 1957, Dahl published his seminal article where he synthesized a formal, analytical definition of power and a methodological approach for power analysis.¹⁰² In this article, Dahl developed a narrow and specific view of power that aimed to understand the power relations between two actors by analysing how one actor can prevail over another.¹⁰³ Dahl defines this relational, behavioural and decisional account of power using the following statement: A has power over B to the extent that A can get B to do something that B would not otherwise do.¹⁰⁴ Power is then identified through an observable moment that arises when one actor exercises their influence and so prevails over the other. Through this, Dahl argues that there is a difference between *exercising* power and *holding* power by empathically making a distinction between power and power resources.¹⁰⁵ For Dahl, as a response to Mills, power resources are not to be conflated with power. Instead, power resources are potential and latent power that has not yet been actualized through A exercising their influence over B. For Dahl power resources can be virtually anything, including wealth, authority, objects or opportunities. The essential point is that power resources do not become power until they are used in an identifiable moment where control is exercised over the behaviour of others.¹⁰⁶ The distinction between ‘power’ and ‘power resources’ was significant for Dahl because part of his project was to contest the theoretical thinness of Mills’ critique of American democracy. Mills had proposed that power itself was unevenly distributed in a pyramidal shape, where economic, political and military bureaucracies set the agenda of political power.¹⁰⁷ Using his conceptualization of power, Dahl argued that critics of American

¹⁰¹ *ibid* 37.

¹⁰² Dahl, *The Concept of Power* (n 63); Dahl, *Who Governs?* (n 48).

¹⁰³ On this point, see Haugaard, *Power: a Reader* (n 38) 5–7; Noting also that an actor needs not necessarily be an individual but can also be an entity such as an organization or the legislature.

¹⁰⁴ Dahl uses the letters C and R in place of A and B, see Dahl, *The Concept of Power* (n 63) 203.

¹⁰⁵ *ibid*.

¹⁰⁶ Dahl developed the distinction between power as actuation and power resources in his encyclopaedia article on power, see Robert Dahl, ‘Power’ in David Shills (ed), *International Encyclopaedia of Social Sciences* (Vol 12, Macmillan 1968) 405–415.

¹⁰⁷ Charles Wright Mills, *The Power Elite* (Oxford University Press 1956)

democracy had rather shown that it was power resources that were unevenly distributed rather than power itself because democracy is about the *actual* exercise of power. Power resources do not necessarily always translate into power. Following Dahl's concept of power entails that power resources can be unevenly distributed but this does not automatically lead to the uneven distribution of actuated power.¹⁰⁸

An important element of Dahl's theory of power rests on the idea that power and power resources are not general but specialized and are limited by scope. This can be explained through the analytic that Dahl developed for analysing power using the variables of magnitude, distribution, scope, and domain. As Haugaard puts it:

Some of the characteristics of a political system that analysts seek to explain are the *magnitude* of the power of the C's with respect to the R's, how this power is *distributed* in the system, and the *scope*, and *domain*, of control that different individuals or actors have, exercise or are subject to.¹⁰⁹

Dahl argues that power resources, when exercised, are relative and specialized rather than global/general. This means that A will only have influence over B in specific aspects (scope) of B's behaviour.¹¹⁰ The same can be said of domain: an actor can possess power in specific domain(s) but not in all domains. The domain refers to the number of subaltern actors B within the principal A's influence. To explain the implications of distinguishing power from power resources that are further limited by the variables of relational power Haugaard provides the following example:

To explain what Dahl means by this, let us compare the power resources of Dahl as a university professor at Yale and the local traffic police officer in New Haven (i.e. the town where Yale is situated). Both Dahl and the police have power over the students in the Yale Politics Department. Dahl's power derives from his authoritative power resources as university professor, while police officers have authoritative resources deriving from their position as defined by the law. As a consequence of his resources, Dahl has power over student study patterns, whereas police have power over where they park their cars. However, because of the *nature* of their resources, neither Dahl nor the police are in a position to exercise power in the same areas. Neither are the power resources of Dahl or the police general, they are of a specific scope.¹¹¹

Drawing on this overview of Dahl's theory of power, several conceptual features can be teased out. Power is relational. The exercise of power can be identified in the

¹⁰⁸ Haugaard, *The Constitution of Power* (n 77) 12.

¹⁰⁹ Haugaard, *Power: a Reader* (n 38) 12.

¹¹⁰ *ibid.*

¹¹¹ Haugaard, *The Constitution of Power* (n 77) 12.

moment of ‘conflict’ when A makes B do something that B would not otherwise have done. This is to be distinguished from power resources, which are the potential to be drawn upon by A to exercise power over B. Power resources are not general and absolute but are instead specific and limited by scope and domain.

For Haugaard power resources can be further structured into the following categories: coercion,¹¹² several forms of authority,¹¹³ and economic resources.¹¹⁴ Coercion as a resource is a threat that brings about the exercise of power. Haugaard proposes as scale, where violence is one end of the extreme (following Arendt), coercion is in the middle and authority is the other extreme. Authority as a resource can be the authority of the professor in New Haven to determine the reading materials of his or her class. Economic resources differ from the variations of authority. Economic resources can be used as violence or coercion by the threat of depriving or depriving the less powerful of these resources. The symbolic nature of economic resources, such as money, can have 3-D implications, which will be discussed subsequently in Section 4.4.

4.2.2 ‘Power to’, ‘power over’, ‘power with’

Dahl went to great lengths to distinguish the exercise of power (power over) from the capacity for power (power to), which he classified as power resources. While Dahl was persuasive that power resources are what allow an actor to exercise power over, there are some issues that arise in his dismissal that power can also be the capacity to bring about an effect, known as power to. Morris and Pansardi have pointed to this shortcoming by showing that power is also dispositional (power to) and that the identification of power is not restricted to the actual exercise of power.¹¹⁵ Instead, the police officer’s power over the driver can be understood as arising from the broader capacity of the actor for action (power to). This is the underlying dispositional capacity of the police officer’s power to bring about an *effect* – the driver does turn left or turn right. In contrast, power over is the power to *affect* the behaviour of another actor.¹¹⁶ Following this logic, the power to of the policeman is then a dispositional condition (capacity) that is necessary for the policeman to then have the ability to exercise the power over that *affects* the driver’s behaviour.¹¹⁷ Drawing on Clegg and Wong, Haugaard

¹¹² *ibid* 24.

¹¹³ *ibid* 26; This also includes everyday authority, authority as a performative action, authority as variable sum, and simulacrum authority, see *ibid* 31.

¹¹⁴ *ibid* 35.

¹¹⁵ Peter Morriss, *Power: A Philosophical Analysis* (2nd edn, Manchester University Press 2002); Pamela Pansardi, ‘Power to and Power Over: Two Distinct Concepts of Power?’ (2012) 5 *Journal of Political Power* 73.

¹¹⁶ A point emphatically made by Morriss and that is implicit in Haugaard’s model, see Haugaard, *The Four Dimensions of Power* (n 71) 19-20.

¹¹⁷ Haugaard, *The Four Dimensions of Power* (n 71).

also acknowledges that power can be either dispositional or episodic. Episodic power is momentary while dispositional power arises because of the capacities of an actor.¹¹⁸ In an election, the winning candidate has momentary/episodic power while the police officer has dispositional power.

The 'power over' and 'power to' aspects of 1-D power are a duality. When a driver accepts the: "power-over of the traffic police and follows the highway code [this] enables them to drive in an ordered manner, which gives them capacity for action".¹¹⁹ The 'power to' is the driver's capacity for action other than driving straight ahead. Haugaard proposes that for the successful exercise of the police officer's power over in a social system, the driver also needs to have the capacity for action to follow A's command. There is a duality between A's exercise of power over that occurs with B's power to. This is what Haugaard considers to be legitimate power: it is a feedback of A's exercise of power over B. This feedback of power then empowers B to act with power to. The police officer's *power over* the driver feeds back to (empower) the driver who consequently has the *power to* drive in the ordered system of traffic.

In addition to power over and power to, Haugaard, drawing on Allen, defines power with as a collective of actors who aim to collectively enhance their power to.¹²⁰ An example of this are organizations consisting of minorities and marginalized persons who have joined together under a collective aim, such as minority ethnic women. These women may be marginalized because of gender, skin colour, and/or ethnicity. The combination of the collective power while classified as power with can generate a collective dispositional power as power to for the organization or by individuals in the organization.¹²¹

The cluster of power concepts discussed here are ideal types. As Haugaard explains, a move from these ideal types to reality can reveal instances where a power with organization has abused its collective power over. It can also be the case that organizations that set out to create power with end up disempowering by using this power against their members in a way that does not serve the interests of the less powerful. This is a concern that has been raised in the empowerment literature. It has been argued in the field of women's empowerment that organizations which aim to empower in a top-down approach are criticized as either disempowering, further marginalizing the disempowered groups of women and/or simply empowering those women in society who least need it.¹²² This indicates the importance of 2-D and of 3-D power. If an empowering entity or organization wishes to generate power over, then existing 2-D structures that cause disempowerment must be identified. The same can be said for 3-D tacit systems of knowledge where a disempowering narrative can be found

¹¹⁸ *ibid* 23; Stewart Clegg, *Frameworks of Power* (Sage 1989); Dennis Wrong, *Power: Its Forms, Bases and Uses* (Transactions Publishers 2009).

¹¹⁹ Haugaard, *The Four Dimensions of Power* (n 71) 20.

¹²⁰ *ibid* 19; Allen, *The Power of Feminist Theory* (n 79).

¹²¹ Haugaard, *The Four Dimensions of Power* (n 71) 19.

¹²² For a comprehensive overview, see Anne-Emmanuèle Calvès, *Empowerment* (n 22).

in the horizons of interpretation that are taken for granted and that enable actors to successfully function in a social system. An example of this, which will be addressed in detail in the section on 3-D power, is the performance of female gender in a social system where the 2-D structural biases are masculine.

4.2.3 Legitimate power and power as domination

Haugaard has defined the duality of power to and power over as legitimate power, where legitimate is to be understood as a neutral term that describes the power duality between the police officer's power over that enables the power to of the driver. In this way, legitimate power is a reproduction of the social structures found at the level of 2D structuration bias. The term bias should also be understood neutrally here as a social fact, which will be addressed subsequently in the section on 2-D power. Moreover, the concepts of legitimate power and power as domination are Weberian ideal types and the reality of these forms of power is that they co-exist in society. Distinguishing these concepts in this section is then an: "abstraction that constitutes the essence of a social phenomenon but rarely exists in its pure form."¹²³

Haugaard notes that 'power over' is not always legitimate. It can be coercive and therefore classified as domination. For instance, A holds a gun to B's head and demands that B hand over all his or her money. There is little reason for B to comply and so the act amounts to domination and coercion. A exercises power over B in a way that is only of benefit to A and does not feed back as a power to for B to do anything. B is not empowered because B cannot derive capacity for action (power to). Instances of domination, where A exercises power over without the corresponding power to of B, can be found in the example: give me your money or I will shoot. It can also become evident in instances of structural biases such as slavery and other groups so marginalized that they fall outside (are excluded from) the bias of the social system.¹²⁴

The distinction between power as 'legitimate' and power as 'coercive' was made by Haugaard building on previous debates on the relationship between power and the interests of the actors in the power relationship. In 1974, Lukes argued against Dahl that the exercise of A's power with respect to B must *always* be harmful to B's interests. Lukes argued that: "A exercises power over B when A affects B in a manner that is contrary to B's interests".¹²⁵ This claim was later withdrawn by Lukes in 2005 when he stated that he had "plainly erred"¹²⁶ and that the exercise of power can also be interest favouring: "there is really no reason for supposing that the powerful always threaten, rather than sometimes advance, the interests of others; sometimes, indeed, the use of power can

¹²³ Haugaard, *The Four Dimensions of Power* (n 71) 18.

¹²⁴ *ibid* 19–21.

¹²⁵ Lukes, *Power* (n 1) 26–27.

¹²⁶ Steven Lukes, 'Robert Dahl on Power' (2015) 8 *Journal of Political Power* 261, 266.

benefit all, albeit usually unequally.”¹²⁷ Drawing on Wartenberg, Lukes gives the example of paternalism and legislation that obligates car users to wear seatbelts promotes the interests of the actor being controlled: “A [the legislature] seeking to avert harm or promote some benefit to B [the car user], may act against B’s current wants or preferences, thereby limiting B’s freedom to act”.¹²⁸ This point illustrates the scalar nature of power. There is a difference between the exercise of the legislature over a citizen whose interests are not entirely disregarded and the exercise of power over as domination, where A uses their power over (your money or I will shoot) and B consents only because of fear of the coercive threat. Tied with the concept of power as domination and power as legitimate are the zero-sum and positive-sum understandings of power.¹²⁹

4.2.4 Power as ‘zero-sum’ and ‘positive-sum’

Baldwin has pointed out that Dahl’s concept of power has often been misconstrued.¹³⁰ It has been argued (and often assumed) in the literature following Dahl that A and B *must* have conflicting desires or preferences and that this power relationship *must* be characterized as A being the winner while B being the loser.¹³¹ Baldwin argues that there is nothing about Dahl’s abstract concept of power that is inherently zero-sum. Nonetheless, several voices in the debate have, often assumingly, classified Dahl’s concept of power in this way.¹³² Haugaard agrees with Baldwin and locates the problem of Dahl’s ‘power over’ conceptualization being defined negatively as domination as stemming from of a zero-sum understanding of power.¹³³ This is the understanding that there is a limited amount of power in a social system. It is as if power were a pie. One actor or group of actors have power when they hold a piece of pie. They are more powerful if they hold more pieces of pie than other actors who are then powerless. Power can only be held at the detriment to another. It is all or nothing. What follows in this zero-sum understanding of power is that the gains of powerful A are completely at

¹²⁷ Steven Lukes, *Power: A Radical View* (2nd edn, Palgrave 2005) 84; This correction was pointed out by David Baldwin, ‘Misinterpreting Dahl on Power’ (2015) 8 *Journal of Political Power* 209, 216.

¹²⁸ Lukes, *Power* (n 127) 84.

¹²⁹ Haugaard, *The Four Dimensions of Power* (n 71) 21.

¹³⁰ Baldwin, ‘Misinterpreting Dahl on Power’ (n 127) 218.

¹³¹ According to Barnett and Duvall: “there must be a conflict of desires A and B want different outcomes, and B loses”, see Michael Barnett & Raymond Duvall, ‘Power in International Politics’ (2005) 59 *International Organisation* 39, 49; According to Nye this is the ‘ability to get others to act in ways that are contrary to their initial preferences’, see Joseph Nye, *The Future of Power* (Public Affairs 2011) 11–13; Gelb’s understanding of Dahl’s concept of power is one of where A is “pressuring B to act against his will or desire”, see Leslie Gelb, *Power Rules* (Harper Collins 2009) 32.

¹³² John Scott, *Power* (Polity Press 2001); Barnett & Duvall (n 183); Felix Berenskoetter & Michael Williams (eds), *Power in World Politics* (Routledge 2007); Keith Dowding, ‘Why Should We Care About the Definition of Power?’ (2012) 5 *Journal of Political Power* 119.

¹³³ Haugaard, *The Four Dimensions of Power* (n 71) 21–23.

the expense of the less powerful B. Haugaard considers this type of power relation to be power as domination because the less powerful actor complies because of fear of coercion and not because another of their interests is served.¹³⁴ A point to be drawn here is that power as domination and legitimate power represent two different manifestations of power as power over. Returning to Pettit, the political philosophical literature has tended to focus on defining power as domination when it manifests as A interfering with the liberty of B (A makes B do something B would otherwise not have done). While this may make sense in the normative language games of certain political philosophies, it rejects that power over should be understood as, what Haugaard has termed, legitimate power. In this way, such a view rejects legitimate power because this type of power is positive-sum. As an aside, from a normative perspective Haugaard and Clegg problematize Pettit's zero-sum view of power as domination. Haugaard argues that it does not seem that the kind of liberty (even those who argue for negative liberty) that is being argued for is the type of absolute liberty of Robinson Crusoe before Friday arrived. Liberty is not just freedom from the power over of other actors but also entails the power to of a citizen to behave in a particular way.¹³⁵

With positive-sum power, Haugaard proposes that while both parties gain, it is usually the more powerful that has the most gain over the less powerful.¹³⁶ This of course depends on how the interests are weighed, which is a normative endeavour. Take, for instance, a legislature obligating citizens to wear seatbelts or the more recent resurgence of the debate regarding obligatory vaccinations during the coronavirus pandemic. The normative issue at hand as to whether law should obligate seatbelts or vaccinations concerns a balancing of interests and a consideration of which interests should prevail. Different normative standards will guide our personal choices according to whether it is in our interests to be or not to be vaccinated or to wear a seatbelt. The issue at hand is not that there are *no* interests at hand to carry out this balancing act but simply that, depending on the normative language games, some interests are not considered to be *legitimate*, using the term legitimate here in a value-laden sense. Legitimate power is not value laden; it is a statement that someone complies with the power over of another actor because they have accepted that their interests are served in some way by doing so. The content of these interests carries normative value rather than the power to that is generated by the other's power over.

Building on these two understandings of power, Haugaard argues that when the manifestation of power over is power as domination, in the short term the more powerful actor is then advantaged because their coercion allows for a total disregard of the less powerful. Despite this, long-term relationships of zero-sum power over (power as domination) become unstable to the detriment of the more powerful actor. Complex social systems are built on positive-sum power, which is stable because there is less

¹³⁴ *ibid* 21.

¹³⁵ *ibid* 2–3.

¹³⁶ *ibid*.

resistance.¹³⁷ Nevertheless, Haugaard tells us that zero-sum power can, through 4-D power, build social structures based on domination at an ontological level, but that this is exceptional.

4.2.5 Empowerment and 1-D power

The building blocks of 1-D power as agency defined in this section provide conceptual clarity for defining agency as consisting of the concepts of power to, power over and power with, as terms that have become commonplace in the empowerment literature.¹³⁸ Moreover, distinguishing between zero-sum and positive-sum power through the concepts of legitimate power and power as domination offers a more nuanced view of the empirical operation of power in society. This distinction becomes particularly relevant for an analysis of EU consumer empowerment on two fronts. First, as is discussed in more detail in Chapter 3, the debate has tended to (implicitly) define consumer power as zero-sum. Second, the scholarship on consumer empowerment tends to define power primarily as agency and even more restrictively limits agency to power over where, for example, power is defined through the concept of consumer choice.

An important point that arises as a consequence of this discussion on power as agency, but which has yet to be considered in more detail, is that an empowering entity must, through an empowerment strategy, adopt a set of practical methods and approaches for bringing about the empowerment of the disempowered actor/group of actors. This practice/practical dimension of power and empowerment will be discussed in detail in Section 5. In advance, the following preliminary observation can be made. This practical approach of an empowering entity will often entail adopting several different strategic approaches for bringing about empowerment. An LGBTQ+ movement may campaign for the right for same-sex marriage in a country. They use their power with to generate support from other actors in the social system with the aim of bringing about changes in the legal system so that same-sex marriage becomes legal. In this example it may be public discourse on the appropriateness of same-sex marriage and the current legal framework that disempower this community. Their specific tools and empowerment strategies include information campaigns, marches, and public events where they change public opinion and apply political pressure for bringing about changes to the legal system.

The empowerment of EU consumers is unique from these sorts of power with movements for two reasons. First, the entity that has adopted an empowerment agenda aimed at empowering consumers is an EU institution – the Commission – rather than

¹³⁷ Haugaard, *The Four Dimensions of Power* (n 71) 21-22.

¹³⁸ Pamela Pansardi & Marianna Bindi, 'The New Concepts of Power? Power-Over, Power-To and Power-With' (2021) 14 *Journal of Political Power* 51.

an NGO or a grassroots movement. Second, the tool that the Commission has at its disposal to empower *is* secondary legislation. This is an empirical statement of fact. It is not a question of whether we should conceive of law as an instrument but that the Commission does use law as a tool for empowering consumers. In this way, the Commission has the capacity to change the objective conditions of the consumer through law, to give them the power to behave in an empowered way. What constitutes such an empowered behaviour for the Commission can be derived from consumer policy and the preparatory documents/preambles of consumer legislation. Drawing on this latter point, an analysis of how the Commission intends to empower consumers will start with an analysis of what actions the Commission is taking to empower consumers. This requires both qualifying and analysing the consumer legislation that has an empowerment aim. The concepts developed in this section will facilitate such a discussion in Chapters 4 and 5. Moreover, the discussion in Chapter 3 will reveal that the scholarship on consumer empowerment often conceptually limits the concept of power to 1-D agency, where the Commission is considered as empowering consumers by facilitating their power over businesses so that consumers can dictate demand and the production of (sustainable) products.

The following example illustrates the novel perspective that the 1-D concept of power can reveal in conjunction with the other dimensions of power that will be elaborated on subsequently. Moreover, it will illustrate that the ‘power’ in EU consumer empowerment is far more complex than a 1-D agency account of power. In 2020 the Commission set out a new Circular Economy Action Plan and established the empowerment aim that consumers should be empowered to participate in the Green Transition by consuming more sustainably when they repair and reuse goods. Currently, the Commission is in the process of introducing legislation on a new right of repair and these preparatory documents explicitly cite consumer empowerment as a rationale for the legislative proposal and the empowerment of sustainable consumption as a goal of the legislation.¹³⁹ At this time, consumers already have a two-year guarantee that includes a right of repair, as part of a hierarchy of four mandatory remedies from the SGD. According to the SGD, from a 1-D perspective, the consumer ‘A’ has the power over a business ‘B’ to have a good repaired. The consumer has this power over because of an underlying disposition to act (power to) when they are qualified as a consumer according to the scope of the SGD and the 2-D structures that make a consumer a consumer. The right of repair is a power resource used by the consumer to exercise power over the business to have the business carry out the repair. When the business complies, they reproduce the structure that makes the consumer a consumer and the consumer can have a good repaired when the business confirms the structures these 2-D structural bias(es) set out in the SGD, which are what dictate the range of possible actions in a

¹³⁹ The Circular Economy Action Plan and pending legislative proposal are addressed in more detail in Chapter 4, Section 2.6.

social system. This 2-D bias is that consumers have the possibility or power to have a good repaired. The business submits to the legitimate power over of the consumer because, for instance, this gives the business the power to conduct their business in a regulated market. The ‘power’ in consumer empowerment is the capacity power to of consumers to exercise power over businesses, to have items repaired. The empowerment goal of empowering sustainable consumption can be operationalized as being achieved when consumers *do* exercise their power to have a good repaired. This right in the SGD is part of the complex process of EU consumer empowerment that can be conceptualized more broadly than the visible 1-D agency of consumers behaving in an empowered way when they exercise ‘power over’ – bringing about a repair/replacement. The concept of empowerment can then be located in the measures (secondary legislation) that have the effect of maintaining and/or changing the 2-D structural bias that determines what the range of possible actions are for the consumer and that may exclude a certain range of possibilities for businesses. Consumer empowerment also operates at the level of 3-D power as a tacit system of knowledge. These systems form part of the interpretive horizons that trigger consumers/social actors to reflexively reproduce social structures. This perspective allows an examination of the relationship between consumer law and the tacit systems of knowledge that support (un)sustainable consumption patterns.¹⁴⁰

4.3 Dimension two: structure

The second dimension of power (2-D power) developed by Haugaard is another lens that enables the focus of analysis to shift to the structural aspects of power.¹⁴¹ This 2-D power is constituted by the social structures that give rise to the dispositional power to of an actor and the range of possible actions for this actor.¹⁴² To refer to Dahl’s example, these are the structures that turn the person directing traffic into a ‘police officer’. In their role as a police officer, this actor has dispositional power that is reproduced when another actor (the driver) obeys the police officer’s command not to drive straight ahead but instead to turn left or right.¹⁴³ In 2-D power, the actor is not rendered an over-socialized and actionless dupe of the system. Instead, an actor still exercises agency when they enter a conflict over a particular social structure.¹⁴⁴ Drawing on and balancing the work of Elias, Giddens, and Bourdieu, Haugaard proposes that we should not conceptualize social structures as rigid skeletal structures that give a social system its shape. Instead, we ought to understand structure not: “as a thing-in-itself, we should

¹⁴⁰ This point will be addressed in more detail in Chapter 6, Section 4.3.

¹⁴¹ Haugaard, *The Four Dimensions of Power* (n 71) 37.

¹⁴² *ibid* 38–39.

¹⁴³ *ibid* 18.

¹⁴⁴ *ibid* 37.

think of it as a process: a structuring or structuration.”¹⁴⁵ Rejecting methodological individualism, Haugaard proposes that an actor may want to structure and can attempt to do so but that this action of structuration may not be confirmed/reproduced by other social actors. Consequently, their 1-D agency attempt at structural reproduction is not successful.¹⁴⁶ Instead, Haugaard offers a concept of methodological interactionism where actors: “constantly monitor and evaluate the conditions of possibility and structure accordingly.”¹⁴⁷ Methodological interactionism is an approach that attempts to transcend both the absolute agency and under-socialization of methodological individualism and the absolute determinism and over-socialization of methodological collectivism. Haugaard’s introduction of 2-D and 1-D structural conflict into the second dimension of power is therefore neither overly deterministic nor voluntaristic and strikes a middle ground between structure and agency in a way that avoids the overly voluntaristic approach in Giddens’ original structuration theory.

4.3.1 Structural bias

Dahl’s concept of power over was seminal developed by Bachrach and Baratz in 1962 and then again by Lukes in 1974. These following contributions did not necessarily critique Dahl’s abstract concept of power from his 1958 article but rather they argued that Dahl’s operationalization of power over was too narrow in his 1961 book titled *Who Governs? Democracy and Power in an American City*.¹⁴⁸ Bachrach and Baratz proposed that in addition to the overt and observable exercise of power over, there is also a second face of power: A exercises power by suppressing the interests of B by A keeping B’s issues from the agenda of the decision-makers.¹⁴⁹ Baldwin proposes that this view of power is not incompatible with Dahl’s abstract concept of power. The second face of power instead provides a different operationalization of Dahl’s abstract concept.¹⁵⁰ Haugaard agrees and uses this second, structural face of power as the foundational concept for 2-D power. For Haugaard, the second face of power elaborated by Bachrach and Baratz explains the concept of structural bias. In their example of agenda setting, the structural bias was the exclusion of policies from a political agenda. This 2-D structural bias can entail not only the exclusion of issues but also the exclusion of a person or groups of persons from a social structure.

¹⁴⁵ *ibid* 38.

¹⁴⁶ Methodological individualism is defined by Haugaard as the liberal ideal of the absolute agency and freedom of social actors who are seen as free to choose social structures because society cannot exist without actors who reproduce these social structures; see *ibid*.

¹⁴⁷ *ibid*.

¹⁴⁸ Robert Dahl, *Who Governs?* (n 48).

¹⁴⁹ Peter Bachrach and Morton Baratz, “Two Faces of Power” (1962) 56 *The American Political Science Review* 947.

¹⁵⁰ On this point Baldwin argues that agenda setting is a means for A to get B to do something that B would otherwise not do, see David Baldwin, *Power and International Relations: A Conceptual Approach* (Princeton University Press 2016) 17.

Haugaard explains 2-D structural bias that excludes social actors using the example of disenfranchisement. Many democratic societies exclude large groups of persons from democratic participation. In the Netherlands, for instance, only Dutch citizens may vote in national elections.¹⁵¹ On election day this structural bias disenfranchises many groups of persons who are not Dutch nationals. This includes persons who may be in the Netherlands on holiday, persons who are short-term residents such as international students, and persons who are long-term residents. This last category includes persons who may have been born in the Netherlands to non-national parents, persons who live in the Netherlands fulltime, who speak the language, pay their taxes there, have a mortgage, and so on. The point to be made is that the rules on nationality of birth cause disenfranchisement and the exclusion of many persons living in a society from participating in the democratic system over issues that impact their lives. This is just one example of 2-D structural bias.¹⁵² Haugaard picks this example of 2-D structural bias that has an exclusionary effect to trigger the reader into considering whether this form of bias is normatively undesirable and whether long-term residents should *not* be excluded by the structural bias. Noting here that care should be had to not engage in a normative language game because that ascribes negative connotations to the word *bias*. And that these persons are disenfranchised is a social fact. Whether or not this is desirable does not change this qualification of disenfranchisement as a social fact. Moreover, the fact that structural bias disenfranchises does not make the term ‘bias’ normatively malign. Instead, in this model of power the term ‘bias’ is to be understood as a normatively neutral term that *explains* what is permitted and what is not permitted by the 2-D social structure. These social facts exist separate from but are later open to normative evaluation. A structural bias can then be defined as: the conditions of possibility of a given set of social structures.

The internal market for instance is an environment that is fraught with structural biases that relate to who can participate in the market and in what way. The consumer as a legal entity in EU law is generally defined categorically as a natural person who is acting outside of their trade, business craft or profession.¹⁵³ This definition functions as a criterion for qualifying when a person’s behaviour falls within the scope of a particular consumer directive or regulation and when an individual may or may not enjoy the protections and rights afforded to the consumer. The second dimension of power and the concept of 2-D structural bias is then a useful model for thinking about the conditions and rules in the marketplace and how secondary legislation can be connected to these conditions of possibility that the Commission aims to create by using secondary legislation as tool for empowerment.

¹⁵¹ While all long-term residents irrespective of nationality can vote in local elections.

¹⁵² Haugaard, *The Four Dimensions of Power* (n 71) 46.

¹⁵³ See for instance, Art 2(2) Directive 2019/771/EU of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (Sale of Goods Directive).

4.3.2 Structural conflict and structural bias

Building on Bachrach and Baratz's second face of power, Haugaard adds the concept of structural conflict to 2-D power. The opening section of this elaboration on 2-D power proposed that structure is not external to social action but is instead a process of structuring and structuration.¹⁵⁴ This renders the liberal individualist stance of methodological individualism absurd. Such a stance would mean that 2-D acts of structuration, such as the 2017 Catalan referendum, automatically result in the creation of that structuration attempt - an independent Catalan. As we know and as Haugaard points out, the Catalonian people were not successful in creating this structure. The central government in Madrid did not confirm-structure this movement for an independent Catalan because the referendum was unconstitutional. Put differently, the unconstitutional referendum falls outside of what was permitted by the 2-D structuration bias (realm of possibilities) of the Spanish social system. The subsequent actions of the Madrid government were then an act of *destruction*. This example may lead to the conclusion that this 2-D dimension of power is an over-deterministic and structural account of society and social action. This is not the case because as Haugaard contends, individuals: "constantly monitor and evaluate the conditions of possibility and structure accordingly."¹⁵⁵ This connection between structure and agency accounts of power will be worked out in the subsequent discussion on structured conflict and structural conflict.

4.3.3 Structured conflict (1-D) and structural conflict (2-D)

Haugaard defines 2D structural conflict as: "conflict over structural reproductions."¹⁵⁶ These are conflicts *over* structure.¹⁵⁷ On the other hand, 1-D structured conflicts are "*within* structured context."¹⁵⁸ This relies on Haugaard's argument that: "social action is characterised by *interactive structural conflicts*" and that "meaningful social action has a structured and goal orientated aspect."¹⁵⁹ These ideas can be easily in the following example:¹⁶⁰

When a social actor uses a €50 note to make a purchase (their goal), the structural elements include, among others: the Y-status meaning of the €50 note, structures of languages, structures of capitalist modes of production and so on. When I

¹⁵⁴ Haugaard, *The Four Dimensions of Power* (n 71) 38.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid* 46.

¹⁵⁷ *ibid* 39.

¹⁵⁸ *ibid* 39.

¹⁵⁹ *ibid* 38; see also Haugaard, *The Constitution of Power* (n 77) 119–162.

¹⁶⁰ Haugaard, *The Four Dimensions of Power* (n 71) 38–39.

structure the economic Y-status function of a €50 note the interaction is only successful because there are others who are willing to confirm the Y-status. The same applies for authority. The Y-status of a president exists only because there is a ring of reference that is willing to confirm any Y-status based exercises of the authority (structuration) by the president. In validating Y-status, for both the euro and the president, the ring of reference essentially *confirms* the Y-status structure of the initial acts of *structuration*. In short, an individual *structures* and the ring of reference *confirm-structures* and in that instance the social structure is reproduced.

If a consumer purchases something on Amazon, the consumer and the business may not actively consider that the act of purchasing and selling a good are an interactive co-production of the structures of the value of money and the capitalist system of exchange.¹⁶¹ Haugaard argues that these structures are often reproduced *unintentionally* as an effect of the *intentional* action of making a purchase or selling an item on Amazon. If a structure is not contested, it can then be framed as a 2-D structural bias. When a 2-D structure is contested, however, it can be framed as a 2-D *structural* conflict.¹⁶² With 1-D *structured* conflict, a structure becomes reproduced because it receives recognition, which Haugaard has defined in the above example as confirm-structuration. For Haugaard, an actor's structuration and the confirm-structuration of other actors are both necessary conditions for the creation of a systemic structure. This is where Haugaard distinguishes himself from the overly voluntaristic nature of Giddens' structuration theory. For Giddens, the act of structuration itself was enough for structural reproduction to have occurred without the corresponding confirm-structuration of other social actors.¹⁶³

What then is the difference between 1-D structured conflict and 2-D structural conflict? Haugaard tells us that a 1-D structured conflict is generally concerning goals while a 2-D structural conflict is generally concerning structures.¹⁶⁴ To return to the example of the police officer and the driver: the police officer directs traffic, and the driver turns left or right instead of proceeding straight ahead. This is 1-D structured conflict. The driver and police officer, as social actors, both take as a given that the performative X (the police officer's order to drive left or right) counts as a Y-status (authority of the police officer) in circumstances C (a traffic situation). This act of structuration by the police officer and the confirm-structuration of the driver then creates the respective power to and power over of both actors, discussed in the sections on 1-D power. A 2-D structural conflict arises, however, when the power over and power to duality is rejected by one of the social actors. The driver does not agree with the 2-D structural biases at play in the police officer's order and so the driver proceeds

¹⁶¹ *ibid* 39.

¹⁶² *ibid* 39.

¹⁶³ *ibid* 40–41; Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California State 1984).

¹⁶⁴ Haugaard, *The Four Dimensions of Power* (n 71) 53.

straight ahead. This is the refusal to confirm-structure and reproduce the authority of the police officer. This is a 2-D structural conflict, which would in this situation be resolved through a 1-D structured conflict where the driver could receive a fine for ignoring the police officer's order.

Many 2-D structural conflicts are then against a 2-D structural bias that can later be resolved as a 1-D structured conflict. Haugaard uses the example of workers who strike for better wages to distinguish between the two conflicts. Strikes are often resolved through 1-D procedures such as negotiations or labour courts. In contrast, if a strike occurs as part of a communist revolution, the offering of higher wages would not result in a resolution of the 2-D structural conflict. The wages do not change the contested system and thus the strike (the 2-D structural conflict) would continue.¹⁶⁵ Another example is the 19th century suffragette movement that engaged in a 2-D structural conflict against a structural bias (women could not vote) for a Y-status recognition so that they could be part of the 1-D structured conflict mechanism that is voting/democratic elections. As Haugaard explains: "Once part of the political process, these campaigners would have internalized the 2-D constraints and biases of the political system, which would have had a de-radicalising effect, moving 2-D conflict into 1-D."¹⁶⁶

4.3.4 Disconnecting the ideology study from 3-D power

In 1974, Lukes added a third dimension of power to complement the first and second faces of power introduced by Dahl, Bachrach and Baratz.¹⁶⁷ Following in a decidedly Marxist tradition, the third dimension of power was concerned with false consciousness and ideology. False consciousness and ideology are social narratives that serve the interests of the powerful in society to the detriment of the less powerful. Power is then exercised when the less powerful have internalized this false narrative. This corresponds with the Gramscian theory of hegemony, which became prominent in the critical legal studies movement in the US.¹⁶⁸ Foucault in his work on power sought to distance himself from the concept of ideology because it infers that there is a singular truth (true consciousness) to be found in opposition to ideology and false consciousness.¹⁶⁹ This is Foucault's rejection that there is a connection between 'truth' and the absence of power or domination.¹⁷⁰ This entails that 'speaking truth to power' entails a truth that is objective, transcends social relations, and is free from doubt. This is the reified concept

¹⁶⁵ *ibid* 39.

¹⁶⁶ *ibid* 45.

¹⁶⁷ Lukes, *Power* (n 1).

¹⁶⁸ Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (International Publishers 1971).

¹⁶⁹ On this point see for instance Charles Taylor, 'Foucault on Freedom and Truth' (1984) 12 *Political Theory* 152.

¹⁷⁰ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972 - 79* (Colin Gordon (trn), Pantheon 1980) 118 & 113.

of ‘truth from’ and became Foucault’s first project to critically challenge in what has come to be termed his archaeology body of work.¹⁷¹ Haugaard agrees with Foucault and proposes that the idea of false consciousness is a performative contradiction in a ‘supposedly’ egalitarian theory: “privileging the perceptions of the Marxist thinker as the real interest over the observed interests of social actors entails an implicit condescension towards the latter.”¹⁷² Following this Haugaard argues that the dominant ideology study should be situated at the level of 2-D power because ideologies are generally reproduced with the awareness of the less powerful actors. The acquiescence of the less powerful therefore does not constitute a true epistemic or ideological integration into the social system at the 3-D level of power.¹⁷³

In contrast to this, the dominant ideology study depends on the less powerful unknowingly internalizing the narrative of false consciousness that then precludes their realization of their real interest. Haugaard, drawing on Abercrombie and Scott, refutes this lack of awareness of the less powerful.¹⁷⁴ Abercrombie demonstrated that the working class reproduce a system that is biased against them because they are acutely aware of and resigned to the structural constraints they are confronted with. They have a resigned acceptance of the status quo that there is little they can do to change the situation. Instead, it is the upper class and dominant elite that ‘buy into’ the dominant ideology because it legitimizes their status.¹⁷⁵ Scott confirmed, in his anthropological study on peasant revolts, that the less powerful actor would appear to acquiesce to their less powerful position. All the while they instead foster a hidden discourse/narrative that contradicted this overt and visibly subservient behaviour.

4.3.5 Empowerment and 2-D power

From an analytical perspective, the concepts described in this section provide a lens for considering the relationship between power, empowerment and social structures that, depending on perspective, may or may not be qualified as a source of empowerment. In the previous section on 1-D power, a practical example was used concerning EU consumer empowerment, the importance of 2-D structural biases, and the empirical role of law in regulating these structural biases was emphasized. In addition to this example, 2-D power is not just relevant for identifying what the existing ranges of structural

¹⁷¹ See Michel Foucault, *Archaeology of Knowledge: And the Discourse on Language* (Sheridan Smith (trn), Pantheon Books 1982).

¹⁷² Haugaard, *The Four Dimensions of Power* (n 71) 70; see also Stewart Clegg, David Courpassen & Nelson Phillips, *Power and Organizations* (Sage 2006) 212–214.

¹⁷³ Haugaard, *The Four Dimensions of Power* (n 71) 47.

¹⁷⁴ Nicholas Abercrombie, Stephen Hill & Bryan S Turner, *The Dominant Ideology Study* (Allen and Unwin 1980); James Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990); see also the work of Clarissa Hayward, *De-Facing Power* (Cambridge University Press 2000).

¹⁷⁵ Haugaard, *The Four Dimensions of Power* (n 71) 47.

possibility are for consumers and businesses. This dimension highlights that an empowerment agenda must not only give sufficient consideration to what these biases are but also to how they are created, which Haugaard proposes is through structuration as a process of agency and confirm-structuration. The severing of the dominant ideology study also has the effect of expelling normative bias from the 2-D structure. At the same time, this does not preclude a normative analysis of whether the existing power structures are legitimate (normatively construed) following a thorough examination of the empirical workings of 1-D and 2-D power.

In the empowerment literature the researcher or empowering entity either explicitly or implicitly identifies the 2-D structural biases in a social system that are the cause of disempowerment. This is also what makes empowerment a highly context-specific concept. For instance, consumer organizations will consider legislation that falls short of protecting vulnerable consumers as being a source of disempowerment. The 2-D structural bias is then that legislation excludes vulnerable consumers from the range of possible actions made available for consumers. Free marketeers on the other hand would argue that this structural bias that does not extend additional protections to these consumers is what empowers businesses and consumers alike the power to freely participate in the marketplace and maximize utility.

4.4 Dimension three: systems of thought

The following discussion outlines how power can be understood as manifesting through tacit systems of knowledge and sets out the conceptual categories necessary for developing a framework for defining power in this way. In this section, 3-D power is a system of knowledge that consists of practical and discursive consciousness. This discussion will not consider 3-D power in the context of the question of the relationship between power and truth nor Haugaard's discussion on the reification of the concept of truth. The reasons for this being that working out these philosophical quandaries is not necessary for guiding the analysis in the subsequent chapters and for answering the central question in this study.

4.4.1 Social order as social action

Drawing on Weber, Haugaard proposes that social action is qualified as *social* because it is through action that a social actor comes to attach social meaning to these interactions.¹⁷⁶ Social order is then produced when social actors behave in a relatively predictable manner. The ability to behave in such a predictable manner stems from the character of social actors as interpretive beings who place meaning on the world. When

¹⁷⁶ Haugaard, *The Four Dimensions of Power* (n 71) 71.

social actors act, social action is given meaning that comes from structure: “All acts of structural reproduction are ordering practices that constitute acts of interpretation.”¹⁷⁷ Haugaard explains that human beings as social actors are interpretive beings that make sense of the world because we impose concepts on the incoming data: “When I see a chair as a *chair*, it is the consequence of a combination of sense data and the concepts I impose upon those data.”¹⁷⁸ From birth we are then socialized by exposure to the world around us and so we generate concepts that we impose on the world around us that are then relative to our interpretative horizon.

In drawing us towards the concept of the practical consciousness of knowledge, Haugaard argues that socialization is a combination of a kind of generative grammar combined with exposure. Generative grammar is to be understood here using Chomsky’s theory of language acquisition as being *both* a physical basis in the brain structure and as exposure. ‘First nature’ denotes what we are as social actors biologically. ‘Second nature’ is the effect of socialization. Both Chomsky’s linguistic theory and the concept of socialization are “similar to arguing that our capacity to ride a bicycle is based upon biological capacities, including a sense of balance, while simultaneously recognising that acquiring the capacity to ride a bicycle entails a significant amount of learning, which we internalise as second nature.”¹⁷⁹

4.4.2 Practical consciousness as a system of thought

In social theory, Bourdieu, following Elias,¹⁸⁰ developed the concept of habitus to refer to: “a subjective but not individual system of internalised structures, schemes of perception, conception, and action common to all members of the same group or class.”¹⁸¹ For Haugaard, habitus is the “physical-emotional disposition of habit and the epistemic knowledge that sustains our second nature.”¹⁸² Haugaard then splits habitus in two across 3-D power as epistemic and 4-D power as ontological.

The epistemic nature of 3-D power is developed by Haugaard using Giddens’ three-tiered model of consciousness with a focus on practical consciousness and discursive consciousness.¹⁸³ Giddens proposed that a social actor’s knowledge of social life has three components. Discursive consciousness refers to the knowledge that social actors can put into words. Practical consciousness is the tacit knowledge that is used by social actors to navigate most social action in everyday life. This tacit knowledge is not unconscious but rather unquestioned and taken for granted. Unconsciousness is

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid* 73.

¹⁸⁰ Norbert Elias, *The Civilizing Process: The History of Manners and State Formation and Civilization* (Blackwell 1995).

¹⁸¹ Bourdieu, Pierre, *Outline of a Theory of Practice* (Cambridge University Press 1977) 78, 86.

¹⁸² Haugaard, *The Four Dimensions of Power* (n 71) 73.

¹⁸³ Giddens, *The Constitution of Society* (n 163).

distinguished from practical consciousness because this entails a repression of that within social life that is necessary for ontological security, which will be discussed in the section on 4-D power.

The concept of practical consciousness represents a default status, consisting of local language games that constitute the social actor's interpretative horizon.¹⁸⁴ As social actors we have multiple interpretive horizons, each with their own language games. Haugaard uses the example of students who are both young scientists and competent social actors. They were tasked with explaining the physics of flipping a coin in a non-academic setting (a pub). In answering this question, the science students used everyday explanations that they would have known to be false because of their studies in physics. Haugaard proposes that this can be interpreted not just as a potential failure in learning but also as the students applying the appropriate language of the interpretive horizons that was most suitable to the informal setting of the pub rather than the interpretive horizon that would apply in a lab setting.¹⁸⁵

Practical consciousness is then a form of 3-D power and is related to 1-D power because a shared practical consciousness among social actors is enabling/empowering: “that a cup is a cup and that a paper note with ‘50 Euro’ printed on it (an X) is a 50 Euro note (a Y) makes it possible for social actors to engage in interaction with respect to these objects, in a manner that delivers power-to.”¹⁸⁶ Precious metals such as gold or silver have value because social actors routinely engage with other social actors who also confer a status function Y (an economic resource or sacred cultural item) on the precious metal, such as gold. This creates a confirm-structuring ring of reference.¹⁸⁷ Haugaard also proposes that it is practical consciousness that tells a social actor what types of ‘power over’ are reasonable. If a university professor orders their students to take a shower or if they issue parking tickets, the students will not view this as wrong/mistaken but as *unreasonable*. Using their practical consciousness and their interpretive horizons as students, they would not consider this command to be something that a professor has the power-to effect. Practical consciousness is then connected to Dahl's proposition that there are several scopes that limit ‘power over’.

In summary, 3-D practical consciousness is what constitutes a social actor's interpretive horizon. Combined, these concepts manifest as the tacit, shared systems of thought in society that both reproduce and legitimize the 2-D structures and enable 1-D agency.¹⁸⁸ Returning to the dominant ideology study discussed in the previous section, tacit knowledge is not false consciousness. It is the taken for granted knowledge that allows social actors to reproduce social structures, although they can be discursively unaware of what these reproductions may be.

¹⁸⁴ Haugaard, *The Four Dimensions of Power* (n 71) 78.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid* 79; see also Barry Barnes, *The Nature of Power* (Polity Press 1988); John Searle, *The Construction of Social Reality* (Penguin 1996).

¹⁸⁷ Haugaard, *The Four Dimensions of Power* (n 71) 79–80.

¹⁸⁸ *ibid* 84.

4.4.3 Raising discursive consciousness, reification and 3-D epistemic conflict

Haugaard proposes that tacit practical consciousness is not a dominant ideology because there is not yet a subaltern discourse that can act as a counter ideology.¹⁸⁹ The creation of such a subaltern discourse occurs through the raising of practical consciousness to discursive consciousness. Using Simone de Beauvoir's seminal book *The Second Sex*, Haugaard explains that de Beauvoir addressed the practical consciousness of herself, as a body X to realize that she was defined as a woman who had a particular Y status in the social order.¹⁹⁰ Practical consciousness, through socialization, gave de Beauvoir the tacit knowledge necessary to behave as a woman and in this way to 'perform gender'. In an exchange with de Beauvoir's partner, the existentialist Sartre, she realized that she never considered what it meant to be a 'woman' and moreover that she had never *felt* inferior as a woman. When prodded by Sartre to re-consider these thoughts, Beauvoir realized that she was indeed inferior through her socialization as a woman in a masculine world.¹⁹¹ Haugaard proposes that de Beauvoir used her practical consciousness knowledge that told her how to perform as a woman as the basis for developing a (seminal) discursive description of how gender is a social construction. As de Beauvoir famously said: "One is not born but rather becomes a woman."¹⁹² This consciousness-raising exercise made de Beauvoir aware of 2-D structural male biases in everyday life.

Haugaard contends that this discursive awareness of 2-D bias can, but does not always, pave the way for a 2-D structural conflict that can lead to social change. There is a 3-D epistemic conflict when discursive consciousness allows an actor to critique the existing 2-D conditions of possibility. When practical consciousness is raised to discursive consciousness, then it becomes possible for an actor to consider the socially constructed state of everyday life. Drawing on Foucault, this is the realization that because social reality is made, it can also be unmade, which is destabilising for the social order.¹⁹³ For Haugaard reification is: "the process, whereby the social constructedness of structures is denied."¹⁹⁴ This entails that if the social order is a 'transcendent order of things' rather than a social construction then it becomes *unreasonable* to question this order of things.¹⁹⁵ The actor that wishes to maintain the status quo will then reify to resist this destabilizing process. The actor that wishes to change the status quo also reifies to hide the social constructedness of their acts of social construction.

¹⁸⁹ *ibid* 85.

¹⁹⁰ Simone de Beauvoir, *The Second Sex* (First published 1949, Constance Borde & Sheila Malovany-Chevallier (trns), Vintage 2011).

¹⁹¹ Haugaard, *The Four Dimensions of Power* (n 71) 85.

¹⁹² de Beauvoir (n 190) 283.

¹⁹³ Michel Foucault, 'Technologies of Self' in Luther Martin, Huck Gutman & Patrick Hutton (eds), *A Seminar with Michel Foucault* (Tavistock 1988) 36; Haugaard, 'The Four Dimensions of Power: Conflict and Democracy' (2021) 14 *Journal of Political Power* 153, 165.

¹⁹⁴ *ibid* 165.

¹⁹⁵ *ibid*.

4.4.4 Empowerment and 3-D power

There is a relationship between 3-D power as a system of tacit practical consciousness knowledge and 2-D structural bias. In practice, these two can also be at odds. The 2-D structural bias tells a social actor what the range of possibility for action is and what possibilities are excluded. In some social systems, for instance, women may not be entitled to inherit property. This constitutes a 2-D structural bias that excludes the possibility for women to inherit property. This may or may not be accompanied by a 3-D shared practical consciousness of the social actors in that community. Currently, EU consumers are entitled to a 14-day withdrawal right, with some exceptions, for contracts concluded at a distance or away from a business's premises. For many online consumers – especially a younger generation of consumers, the knowledge that this right exists forms part of their practical consciousness. This is information that they – without question from the trader – rely on when making the choice to return a good. Entangled in this practical consciousness is the legislation at the core of the 2-D structural bias that makes such an act of agency on behalf the consumer possible. In other words, this bias makes possible the social actor's disposition (power to) as a consumer to exercise power over the trader who must accept the returned good and issue a refund (if the price has already been paid). Moreover, this 2-D bias is a foundation for the consumer's interpretive horizon that the right to return a good (or cancel a service) is appropriate. As will be seen in the following discussion on the fourth dimension of power, consumers derive ontological security from traders when the trader confirms this 2-D bias by honouring the withdrawal. Efforts to remove the 14-day withdrawal right from the structural bias – for example based on the logic that these returns result in an unacceptably high carbon footprint – will entail more than simply eliminating this right from the 2-D structural bias. It also entails changing the 3-D practical consciousness of consumers from the *appropriateness* of this behaviour to the *inappropriateness* of this behaviour from an environmental perspective.

Although not expressly stated by Haugaard, in my view it is implied in this theory of 3-D power that the 3-D shared practical consciousness of social actors regarding a structural bias, such as whether it is appropriate for women to inherit property, is scalar. On the one end of the extreme there is the absolute majority that shares a practical consciousness about the inappropriate (infelicitous) nature of female property inheritance. On the other extreme is a majority shared consciousness that female property ownership would be appropriate/felicitous. The reality is that a shared consciousness could exist anywhere in between. Haugaard proposes that a social change can be brought about when the private language acts, such as “women should have the possibility to inherit property” become public language acts. This happens when a sub-culture develops with a ring of reference and a shared interpretive horizon that women should be able to inherit property. Haugaard uses the example of same sex marriage in

the Republic of Ireland, which was illegal until the referendum in 2015.¹⁹⁶ Public events and measures such as marches and meets gave the minority LGBTQ+ supporters of same sex marriage a method of reproducing their structure that same sex marriage should be legal (within the 2-D structural bias). This was eventually resolved through the 1-D structured conflict of a referendum that amended the Irish constitution.

For empowerment, 3-D practical consciousness as interpretive horizons represents the dimension of power at which the taken-for-granted practical consciousness knowledge can be an underlying narrative of disempowerment that needs to be changed. In Haugaard's example this is the inappropriateness of gay marriage, or it could be the inappropriateness that women can inherit property. The marches of the 1-D *power with* LGBTQ+ movement engaged in the structuring of the appropriateness of same sex marriage and in doing so raised the practical consciousness of the people of Ireland to a discursive consciousness. This is relevant for empowerment discourse because it indicates that for empowerment to occur, it may require addressing whether the obstacle to empowerment is also present in the 3-D system of tacit knowledge. Moreover, if legislation is also posing an objective obstacle to empowerment, then it will be necessary to change the 2-D structural bias because it has been established through law. Put differently, most people in Ireland could have a shared practical consciousness that same sex marriage is felicitous but this will not change the 2-D structural bias that same sex couples would be excluded from the possibility of becoming legally married. With the 2015 referendum the LGBTQ+ community gained enough power over the people of Ireland who confirm-structured that the 2-D structural bias was to be changed. This resulted in the 1-D dispositional capacity (power to) of same sex couples to become legally married.

In the case of unequal property rights of women in developing countries, it has been noted, in Gahan for instance, that there is deep-seated practical consciousness in tribal communities that it would be appropriate for women to own property. It would become problematic for a top-down empowerment movement – a government organization or NGO – to implement changes to the structural 2-D bias that would give women the equal right to property as men. The 3-D system of knowledge and the majority-shared interpretive horizon of the inappropriateness of equal female property rights would act as a barrier to the empowering measure that gave women the 1-D power to, for example, inherit property. Most of the tribal communities would fail to confirm-structure the structuration attempt, even if this structuration attempt was adopted within the 2-D structure.¹⁹⁷ In practice, the failure to address this deeper 3-D dimension of

¹⁹⁶ Haugaard, *The Four Dimensions of Power* (n 71) 84.

¹⁹⁷ This is a notable problem when new and 'official' legal systems are introduced into developing countries that have many existing customary and tribal legal systems. See for instance Brett Shadle, 'Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60' (1999) 40 *The Journal of African History* 411; On the decolonization of law in Africa see Asikia Karibi-Whyte, 'An Agenda for Decolonising Law in Africa: Conceptualising the Curriculum' (2020) 2 *Journal of Decolonising Disciplines* 1.

power has been classified in the debate as an empowerment paradox that perpetuates the disempowerment, especially in the literature on female empowerment.¹⁹⁸ Moreover, there can also be an empowerment paradox that ensues when the empowering entity considers there to have been an empowerment outcome but the recipient community of the empowerment process considered themselves to have become disempowered.¹⁹⁹ This dimension of a disempowerment paradox was noted by Asante and Hancock in their study on rural development projects in Ghana. They found that Ghanaian community-based rural development projects had failed to consider the relationship between local government officials and traditional chiefs. There was disagreement between the interpretive horizons of the government officials and traditional chiefs that the project officials did not recognise. Neglecting these ‘feuds’ meant that unintended and negative consequences of the project for the communities were not monitored and not managed.²⁰⁰

These findings are important for both the practice of empowerment by the Commission and for the debates that are questioning what needs to be done to protect and empower consumers for the Green Transition and more broadly what protection and empowerment mean in a circular and decarbonized marketplace. These findings force an acknowledgement of the role that (consumer) law does have in society that looks past the narrow confines of debates that focus on the ineffectiveness of consumer law and its empowerment aims. Framing power along this third dimension (and in conjunction with the other three dimensions) offers a broader lens for the debates on EU consumer empowerment to consider what law is already doing to (dis)empower and what can be done differently to successfully bring about the empowerment aims set out in policy and in law.

4.5 Dimension four: social ontologies, ontological security and identity

The fourth dimension entails framing power as the construction of social subjects, using the concepts of identity and ontological security as its basis.²⁰¹ Ontological security is, in

¹⁹⁸ Anne-Emmanuèle Calvès, *Empowerment* (n 22); Richa Nagar & Saraswati Aju, ‘Women, NGOs and the Contradictions of Empowerment and Disempowerment: A Conversation’ (2003) 35 *Antipode* 1.

¹⁹⁹ Kwadwo Adusei-Asante & Peter Hancock, ‘When Empowerment Disempowers: A Case Study of Ghana’s Community- Based Rural Development Projects’ (2012) 19 *Ghana Journal Development Studies* 43.

²⁰⁰ *ibid.*

²⁰¹ To develop this dimension of power Haugaard draws on Giddens’ structuration theory, see Giddens, *The Constitution of Society* (n 163); See also Norbert Elias, *The Civilizing Process: The History of Manners and State Formation and Civilization* (Oxford Blackwell 1995); Erik Erikson, *Childhood and Society* (London Vintage Books 1995); Harold Garfinkle, *Studies in Ethnomethodology* (Cambridge Polity Press 1984); Stanley Milligram, ‘On Maintaining Social Norms: a Field Experiment in the Subway’ in Thomas Blass (ed), *The Individual in A Social World Essays and Experiments* (London Printer and Martin 2010(a)); Stanley Milliband, ‘Some Conditions of Obedience and Disobedience to Authority’ in Thomas Blass (ed), *The Individual in A Social World Essays and Experiments* (London Printer and Martin 2010 (b)); James D Faubion (ed), Michel Foucault, *Power (The Essential works of Michel Foucault 1954–1984 Vol.3)* (The New Press 1994).

brief, the stable and secure identity narratives of an actor or group of actors and their reliance on the stability and predictability of their social and material environments.²⁰² The following discussion outlines the relationship between ontological security and 3-D power, the manifestation of power as a construction of the social subject, and the relationship between 4-D power and empowerment.

4.5.1 Ontological security

Haugaard draws on Giddens' argument that the ontological being in the world of a social actor is connected to their practical consciousness. This creates second nature expectations according to practical consciousness that in turn create ontological security. Ontological security is then a stable mental state of a social actor that depends on the sense of continuity that arises from an actor's individual experiences and practical consciousness.²⁰³ The practical consciousness knowledge of the world of a social actor is then seen as being inseparable from the social actor's being in the world.²⁰⁴ Haugaard argues that the 4-D practical consciousness of an actor/actors is part of a social ontology. Moreover, that 4-D practical consciousness meaning is connected to the essence of a social subject's personality.²⁰⁵ Haugaard points out that the social actor may feel like an individual but they are connected to the shared practical consciousness of other social actors: "While each person may feel individual, their interpretive framework is constituted by frames of reference that are public. Concepts and frames that do not find resonance with others are filtered out in response to infelicity."²⁰⁶

Ontological insecurity is the disruption of social order that threatens an actor's sense of identity. The 'critical' situation of ontological insecurity occurs when the social actor is confronted with a profound disconnection between their internal certainty (ontological security) and outer predictability according to their 3-D practical consciousness of 2-D structures.²⁰⁷ This critical situation is brought about when other social actors do not behave in the predictable manner that would normally ensue according to 3-D practical consciousness. Haugaard tells us that when the 3-D interpretative horizons of practical consciousness collide with 2-D structural reproduction, fundamental differences are exposed. Put differently, the 4-D ontological

²⁰² Giddens, *The Constitution of Society* (n 163); For a debate on ontological security in urban environments, see for instance Yosef Jabareen, Efrat Eizenberg & Omri Zilberman, 'Conceptualizing Urban Ontological Security: 'Being-In-The-City' and its Social and Spatial Dimensions' (2017) 68 *Cities* 1; For a discussion on social actors prioritizing ontological security over physical security, see Tim Harries, 'Feeling Secure or Being Secure? Why it can Seem Better not to Protect Yourself Against a Natural Hazard' (2008) 10 *Health Risk Society* 479.

²⁰³ Haugaard, *The Four Dimensions of Power* (n 71) 143-145

²⁰⁴ *ibid* 143.

²⁰⁵ *ibid* 145 – 146.

²⁰⁶ *ibid* 147.

²⁰⁷ *ibid*; see also Giddens, *The Constitution of Society* (n 163) 61.

security of the natural order of things is not being shared between the social actors. The lack of inner shared certainty becomes manifest as ‘inappropriate structuring’ and therefore: “a fundamental threat to the natural-order-of-things and to the self.”²⁰⁸

The ontological foundations of 4-D can be revealed through breaching experiments that artificially create such critical situations. Haugaard refers to Milgram’s breaching experiment where participants were asked to breach the norms of ‘subway behaviour’.²⁰⁹ The participants were instructed to breach the ‘first come first served’ rule of seat-taking on the subway by requesting the seat from a random individual. The participants experienced anxiety, stress, and/or embarrassment at having to make such a request. Sometimes they could not even vocalize the request. Other times they acted sick or unwell to justify requesting a seat or felt physically faint and unwell for having made the request. This is an example of the socialization of an actor into a set of norms – subway behaviours – as the order of things. There is ontological security derived from this stability that forms a 4-D ontological predisposition to behave according to the 2-D status quo.²¹⁰ As a final remark, ontological insecurity is a perceived and psychological phenomenon and individuals can be seen as moving along a continuum between ontological security and ontological insecurity.²¹¹

4.5.2 The construction of the social subject

As the title of this section implies, for Haugaard, the social subject is constructed. Haugaard contends that this is a dual process. It entails an external imposition of social norms upon an individual and the internalization of these norms that are then reproduced from the bottom up by the identity-creating effects of subjectification. Using Erikson’s 1995 study of the native North American Yurok tribe, Haugaard explains ontological security and subject formation. The Yurok tribe live in a single, narrow valley with a river that provides fish as their only source of protein. The conditions of this environment require that the Yurok people are a group of interdependent individuals that value self-restraint, autonomy and discipline. The socialization of the Yurok child begins in utero, where mothers would rub their abdomens to prevent the foetus from becoming too comfortable. As a baby and then toddler, the Yurok child is weaned early and taught several social norms surrounding food. This includes teaching the child to never heap too much on a spoon and to refrain from greed. This bottom-up socialization process creates a 3-D consciousness of what is reasonable/unreasonable according to

²⁰⁸ Haugaard, *The Four Dimensions of Power* (n 71) 147.

²⁰⁹ Stanley Milgram, ‘On Maintaining Social Norms: A Field Experiment in the Subway’ in Thomas Blass (ed), *The Individual in a Social World: Essays and Experiments* (Pinter & Martin 2010) 34 - 41; Haugaard, *The Four Dimensions of Power* (n 71) 149–150.

²¹⁰ Haugaard, *The Four Dimensions of Power* (n 71) 150.

²¹¹ Rebecca Banham, *Seeing the Forest for The Trees: Ontological Security and Experiences of Tasmanian Forests* (Hobart, University of Tasmania 2019) < <https://eprints.utas.edu.au/31414/>> accessed 5 July 2022.

the structures of the Yurok society. The Yurok individual then derives 4-D ontological security when they behave in this self-restrained way. Haugaard defines this as a 4-D social ontology that enables the tribe member at the level of 1-D power to live the Yurok way of life. In turn, this generates solidarity with the broader Yurok group as 1-D power with.²¹² The construction of the social subject is then a bottom-up process where the individual social actor performs according to the appropriate standards and norms of the social structure – in this case exercising self-restraint – to gain authority and social status.

4.5.3 Empowerment and 4-D power

The fourth dimension of power reveals the invisible role of power in the socialization process of social actors. Conceptualizing power in this way offers a more nuanced view of empowerment as a process that not only interacts with the objective conditions of a disempowered actor's environment but also with the less visible operation of power as subjectivity and ontological security, which will be elaborated on subsequently in Section 5. Moreover, by connecting power with identity and ontological security, the 4-D manifestation of power through the internalized narratives of a (dis)empowered actor that trigger (dis)empowered behaviours offers a starting point for considering the more fundamental nature of the power imbalances that goes beyond the more superficial observations of the 2-D reproduction of social structures through 3-D practical consciousness or discursive consciousness. Put differently, (dis)empowering narratives are often supported by the deep-rooted nature of ontological security that gives meaning to a person's life. Attempts to change these narratives can result in ontological insecurity that render once taken for granted norms meaningless and have adverse effects on empowerment.

The COVID-19 pandemic is an example of how an objective external threat caused disruption to the taken for granted natural order of things and created ontological insecurity for consumers.²¹³ The operation of power as 4-D ontological security and identity also reveals several difficulties for the Commission's use of legislation as a method for empowering consumers. EU citizens as consumers are socialized as consumers by their experiences in the market and by their position in society. Taking the example of the vulnerable energy consumer, the empowerment agenda must contend with the disempowering narratives of this consumer who has become socialized in a disadvantaged social setting and had several negative experiences with, for example, energy companies. Even if objectively this consumer's conditions are changed so that they can access energy efficiency measures, can produce and consume renewable energy,

²¹² Haugaard, *The Four Dimensions of Power* (n 71) 151–153.

²¹³ See for instance, Margaret Campbell, Jeffrey Inman, Amna Kirmani & Linda L. Price, 'In Times of Trouble: A Framework for Understanding Consumers' Responses to Threats' (2020) 47 *Journal of Consumer Research* 311.

and have adequate access to redress mechanisms, the consumer's negative internalized narratives on their 'lot in life', their negative opinion of law and distrust of 'powerful' energy suppliers must be overcome.

5. Empowerment and disempowerment: an objective and subjective phenomenon

As an empirical statement all scholars, policymakers and empowerment practitioners, from social workers and psychologists to NGOs, who study and work towards the empowerment of communities and individual actors in society, take as their (implicit) starting point that a social actor is disempowered. The empirical question that follows is how these notions of disempowerment (depending on what counts as power) are given meaning through context and through what the empowering entity or movement considers having been the cause of the disempowered status. The starting point is then that an actor/group of actors is disempowered because of pre-existing power imbalances that stand in the way of an empowerment outcome. In the context of EU consumer empowerment, I argue for example in Chapter 6 that the Commission's starting point is that the consumer's disempowered status arises because of market conditions, personal conditions and the consumer's position vis-à-vis a business.²¹⁴

The disempowerment of an actor can also be viewed as arising from the structural conditions generated by social institutions that disempower. For instance, the argument has been made that the infrastructure design of consumer energy markets has made it difficult for EU energy consumers to behave in an empowered way.²¹⁵ This not a zero-sum view that consumers are devoid of power. Instead, the literature on sustainable energy consumption tends to emphasize the 'power over' that consumers can gain from 'power with' organizations and that energy frameworks should be amended to facilitate consumers joining Renewable Energy Communities, as an example of empowering 'power with' entities.²¹⁶ Many of the first empowerment studies in the 1960s and 1970s grew out of disciplinary concerns arising from observations that certain groups and individuals within society were marginalized and discriminated against, such as disabled persons or immigrant communities. The concepts of discrimination and marginalization are notably value-laden language games. In the early development of

²¹⁴ This point will be elaborated on in detail in Chapter 6, Section 3.2.

²¹⁵ Shackley and Green point out that this form of disempowerment/powerlessness is also psychological, see Simon Shackley & Ken Green, 'A Conceptual Framework for Exploring Transitions to Decarbonised Energy Systems in The United Kingdom' (2007) 32 *Energy* 221: See also Arwen Collell, *Alternating Current – Social Innovation in Community Energy* (Springer 2021).

²¹⁶ On this point see Coy *et al.* (n 32).

empowerment in several of these fields, particularly but not limited to education,²¹⁷ psychology,²¹⁸ and social work,²¹⁹ there was much emphasis placed on the empirical distinction between subjective and objective disempowerment. These terms represent empirical language games; they are statements based on empirical observation rather than propositions of what disempowerment should be. Disempowerment has therefore come to be conceptualized in the broad empowerment literature as both the internalized, disempowering narratives of an actor in conjunction with the concrete conditions of an individual's environment that disempower.

The discussion that integrated the concept of power into the empowerment framework in the previous sections proposed that empowerment is not a self-contained concept because it is predicated on the concepts of power and relative disempowerment. It was shown that power is not a unitary concept and that one of several dimensions of power can be selected as a lens for analysing the operation of power in an empowerment agenda. This also extends to the concept of relative disempowerment in an empowerment agenda, where the term disempowerment and powerless will be understood synonymously. For instance, Freire's understanding of power and powerlessness (disempowerment) was coloured by Marxist theory and so he understood power as the zero-sum domination and oppression of the Brazilian poor by the elite. Moreover, Freire believed that the balance of power in society could be changed through social transformation, triggered by education. A distinction can be drawn here between Freire's normative treatment of power and the empirical treatment of power. Freire understands power as being normatively malign because he equated it with oppression, where the poor are powerless/devoid of power. Freire implicitly acknowledges that power is a part of the process at play in Brazilian society and does so by classifying power in the context of inequality. I do not argue that there are grounds for Freire's arguments that inequality existed but simply that inequality is also value laden and tells us little about actual the empirical workings of power.

The concept of disempowerment that manifests both subjectively and objectively can be integrated into the four-dimensional model of power. These concepts of subjective and objective empowerment/disempowerment are valuable because they provide a vocabulary for articulating the more abstract aspects of power. Put differently, they connect empirical statements and context-specific statements of what causes disempowerment or what empowers to each of the four-dimensions of power discussed in the previous section. For instance, there is a taken for granted assumption that empowerment entails removing the disempowering conditions from the actor's environment. This could be disempowering legislation or the actor's social situation that limits access to education, which can be analysed using the concept of power as 2-D

²¹⁷ Maragret Le Compte & Kathleen Bennett, 'The Disempowering of Empowerment: Out of the Revolution and into the Classroom' (1992) 6 *The Journal of Educational Foundations* 5.

²¹⁸ Perkins & Zimmerman, *Empowerment Theory, Research and Application* (n 32).

²¹⁹ Bryant Solomon, *Black Empowerment* (n 30).

structural bias and 3-D interpretive horizons that enable 1-D power as agency. The claim has been made in the literature that if an empowerment agenda fails to acknowledge and account for the subjective dimension of an actor's disempowerment, then the empowerment agenda tends to fail at achieving its aims.²²⁰ The concept of power as 3-D practical consciousness and 4-D ontological security can be used to explore why a disempowered actor may continue to perpetuate their own disempowerment despite changes being made to the 2-D structural bias that allow for 1-D empowered behaviours at the level of 1-D agency.

5.1 Subjective disempowerment

In 1986 Lerner developed one of the earliest distinctions between the conceptualizing of powerlessness (disempowerment) as both a subjective and an objective phenomenon. Lerner proposed that surplus (perceived) powerlessness is rooted entirely in the mind of the powerless actor who has internalized the belief that their position in society and their social conditions cannot change. The actor therefore considers it pointless to try (apathy) to gain control or influence over their lives.²²¹ A perceived sense of powerlessness can also be understood as 'global' or 'situational'.²²² Global powerlessness refers to an all-encompassing, totalizing state of powerlessness in all aspects of an actor's life. On the other hand, situational powerlessness refers to an actor feeling disempowered in only some areas of their life. Powerlessness is therefore more complex than the objective, visible and invisible structural forms of inequality in society.

The subjective dimension of disempowerment is confirmed in several studies on empowerment across a range of disciplines and contexts.²²³ Freire's work on empowerment in the 1970s can be considered seminal in the context of developing the subjective dimension of powerlessness because he demonstrated that disempowerment is not simply that people are objectively oppressed but that they internalise a narrative of oppression. Freire observed that those actors who are systemically repressed over a long period of time will do little to change their situation because they internalise a narrative of inferiority. Moreover, Freire contends that these powerless actors lack the

²²⁰ On this see the disempowerment paradox outlined in Section 3.1 of this Chapter.

²²¹ Michel Lerner, *Surplus Powerlessness: The Psychodynamics of Everyday Life* (Humanity Books 1986).

²²² John Lord & Peggy Hutchison, 'The Process of Empowerment: Implications for Theory and Practice' (1993) 12 *Canadian Journal of Community Mental Health* 5, 10.

²²³ See for example, Nicola Denham Lincoln, Cheryl Travers, Peter Ackers & Adrian Wilkinson, 'The Meaning of Empowerment: the Interdisciplinary Etymology of a New Management Concept' (2002) 4 *International Journal of Management Review* 213; Karlyn Geis & Catherine Ross, 'A New Look at Urban Alienation: The Effect of Neighborhood Disorder on Perceived Powerlessness' (1998) 61 *Social Psychology Quarterly* 232; Nina Wallerstein, 'Powerlessness, Empowerment, and Health: Implications for Health Promotion Programs' (1992) 6 *American Journal of Health Promotion* 197; Hilke Brockmann, Jan Delhey, Christian Welzel & Hao Yuan, 'The China Puzzle: Falling Happiness in a Rising Economy' 10 *Journal of Happiness Studies* 387; Warren TenHouten, 'The Emotions of Powerlessness' (2016) 9 *Journal of Political Power* 83.

critical awareness and capacity to identify the injustices that they suffer under and moreover the reasons for these injustices. These actors therefore remain passive, helpless and unable to transform their social reality.²²⁴ Freire's observations on the internalization of disempowering narratives shares commonalities with findings in other fields such as psychology, with Seligman and Maier's²²⁵ learned helplessness and Lerner's surplus powerlessness from political science.²²⁶ Martín- Baró's research on violence and oppression in El Salvador provides another example of how subjective (perceived) powerlessness became manifest in the oppressed class. Martín- Baró argued that the underclass had perpetuated their own oppression from a psychological point of view because they internalized the notion of the 'lazy latino' and thus devalued their sense of self. What follows is the actor's perception that they: "[...] are where they ought to be because they're no good for anything else".²²⁷ In the field of social psychology in the 1980s, Asch drew a similar conclusion regarding the psychological internalization of disempowering narratives by disabled persons. In her study that focuses on persons with disabilities, Asch points out that people with disabilities

[...] have so internalized the general negative attitudes towards them because of their disabilities that they cannot believe that collective action can improve their lives. They have seen the problems as inherent in their medical conditions and have not been urged to join others to demand structural changes that would render the environment useful for them.²²⁸

These experiences and subjectivities of the disempowered actor continue to be a relevant point of analysis in the empowerment literature.²²⁹ Narayan proposes that this is a problem that arises from the distinction between the conceptualisation and operationalisation of empowerment. Much of the empowerment research that focuses on implementation fails to address the subjectivity of disempowerment and instead there is an unequal focus on creating opportunities – objective empowerment – for the disempowered actor.²³⁰

These empirical observations of internalized discourses that an actor has on their role and place in society can be explained using the 3-D interpretive horizons as

²²⁴ Freire (n 3).

²²⁵ Martin Seligman & Steven Maier, 'Failure to escape traumatic shock' (1967) 74 *Journal of Experimental Psychology* 1.

²²⁶ Noting that Lerner was both a psychotherapist and political scientist, see Lerner (n 221).

²²⁷ Ignacio Martín-Baró, *Writings for a Liberation Psychology* (Adrienne Aron & Shawn Corne (eds), Harvard University Press 1994) 98.

²²⁸ Adrienne Asch, 'Will Populism Empower the Disabled?' (1986) 16 *Social Policy* 12.

²²⁹ See for instance, Gözde Yazıcı Cörüt & İlker Cörüt, 'The Neo-Liberal Conception of Empowerment and its Limits: Micro-Credit Experiences of Self-Employed Women in the Bazaars of Bishkek' (2022) 41 *Central Asian Survey* 1.

²³⁰ Deepa Narayan, Raj Patel, Kai Schafft, Anne Rademacher, & Sarah Koch-Schulte, *Voices of the Poor: Can Anyone Hear Us?* (New York: Oxford University Press and The World Bank 2000) 274; Deepa Narayan (ed), *Empowerment And. Poverty Reduction: A Sourcebook* (The World Bank 2002).

the practical consciousness that actors use to get by. If the actor is truly reproducing a social structure unintentionally, by continuing to function in disempowering conditions without a subaltern discourse (they publicly work in such conditions but internally reject them), then it can be argued that there is an unacknowledged ideology in place. If the empowerment agenda considers this to be normatively undesirable, there then needs to be a 3-D discursive consciousness-raising exercise to create a counter-ideology where the actor begins to question the structures that they are reproducing. This could be, for example, the working class in El Salvador developing a new interpretive horizon about the appropriateness of the structural biases that limit their range of possibilities. When actors become discursively conscious or are already discursively conscious, there are then two interpretive horizons at play over the social structure: one interpretive horizon that accepts these working conditions as appropriate and another horizon that does not. If a ring of reference develops that confirm-structures against the 2-D structural bias, then there is the potential for a 2-D structural conflict that can, hopefully, be resolved through the existing 1-D structures. The subjective disempowerment of an actor then refers to the 3-D tacit systems of knowledge and the interpretive horizons of social actors that are considered, by the empowering entity, to be inappropriate.

5.2 Objective disempowerment

In contrast to subjective empowerment, objective disempowerment can be defined as the external conditions that cause the disempowerment of an actor. Lerner proposed that objective disempowerment is generated by economic inequalities and oppressive control, either at the hands of other individuals or by social institutions. This can be extended to, for instance, law, religion, the government, or the family. In this sense, disempowerment can be conceptualized as stemming from the power imbalances that have become objectively manifest through certain personal conditions, relationships with others, or any other structural conditions that the empowering entity has qualified as disempowering. For instance, legal empowerment studies in the field of international development law have focused on the objective, structural form of power imbalances that are caused by poverty and discrimination because of unjust political systems. In Tanzania and Mozambique, widowed and divorced women are framed as objectively disempowered actors when they face gender discrimination regarding their legitimate claims to land ownership in local political systems.²³¹ In India, despite the existence of progressive labour laws, an exemption for small enterprises regarding minimum wage and workers' rights has enabled a labour market consisting primarily of small businesses that are exempt from this legislation. This legal regime has made possible a "mass labour

²³¹ Anita Kapur, 'Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems' in Erica Harper (ed), *Working with Customary Justice Systems: Post-Conflict and Fragile States* (International Development Law Organization 2011).

force of unregulated, unprotected, informally employed workers to remain extant in India.”²³² Indian labour law can then be framed as having created the structural conditions in the labour market that have disempowered the poorest demographic in the labour force because it excludes this demographic from minimum wages and workers’ rights.

These empirical observations on the objective social conditions that are considered to disempower are connected to the second dimension of power described in the previous section. The examples listed above are examples of a 2-D structural bias that the empowering entity has qualified as resulting in the disempowerment of an actor/group of actors. While 3-D and 4-D power offer a lens for examining the subjective dimension of empowerment, 1-D and 2-D power offer a lens for thinking about the objective and more visible conditions in an environment that can be qualified as the cause of disempowerment.

5.3 Consumer empowerment and consumer vulnerability

The concepts of subjective and objective disempowerment discussed so far correlate with a longstanding theoretical debate on the concept of vulnerability²³³ and on the concept of consumer vulnerability in EU consumer law.²³⁴ Vulnerability has been considered from a range of perspectives and can be illustrated through the following diverse approaches to the concept. Vulnerability has been the subject of ethical investigation.²³⁵ In political theory, Goodin advocates for the welfare state²³⁶ and the non-individualistic social responsibility to protect vulnerable members of society.²³⁷ Turner, from a sociological perspective, develops a sociology of rights which defines vulnerability as universal.²³⁸ Focusing on human rights, Turner considers vulnerability to arise for all persons irrespective of the differences that result from the multiplicity of

²³² Rachel Gisselquist, ‘Legal Empowerment and Group-Based Inequality’ (2018) 55 *Journal of Development Studies* 333.

²³³ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in The Human Condition’ (2008) 20 *Yale Journal of Law & Feminism* 1; Marta Fineman & Anna Gear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013).

²³⁴ On EU law, see a recent contribution on vulnerable consumers and the law by Christine Riefa & Séverine Sautier (eds), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2020); For a sociological study on vulnerable energy consumers and access to justice, see Naomi Creutzfeldt, Chris Gill, Marine Cornelis & Rachel McPherson, *Access to Justice for Vulnerable and Energy-Poor Consumers: Just Energy?* (Hart Publishing 2021); On the concept of digital vulnerability, see Natali Helberger, Marijn Sax, Joanna Strycharz, & Hans Micklitz, Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability? (2022) 45 *Journal of Consumer Policy* 175.

²³⁵ Catriona Mackenzie, Wendy Rogers, and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013)

²³⁶ Robert Goodin, ‘Vulnerabilities and Responsibilities: An Ethical Defense of the Welfare State’ (1985) 79 *The American Political Science Review* 775.

²³⁷ *ibid.*

²³⁸ Bryan Turner, *Vulnerability and Human Rights* (Penn State University Press 2006).

cultural beliefs and values. Like Turner, Fineman also proposes that vulnerability is both ‘universal’ and ‘particular’.²³⁹ Vulnerability is universal because all persons exist in an inherently dispositional state of potential vulnerability. ‘Particular’ vulnerability arises when some individuals are at a higher risk of harm than others.

When it comes to defining vulnerability for the purposes of EU consumer law, the question that arises is how consumer vulnerability should be defined and what are the undesirable causes of vulnerability in the marketplace. EU consumer legislation adopts a vulnerability standard in the Unfair Commercial Practices Directive, where the vulnerable consumer is qualified categorically using personal characteristics including physical infirmity, age or credulity and the average consumer test.²⁴⁰ This understanding of vulnerability is limited, however, to the scope of unfair commercial practices. More fundamentally speaking, consumer law is predicated on the idea that those persons acting as consumers in the market are categorically a vulnerable group of actors. This points towards a universal but homogenous view of consumer vulnerability. The issue that lies therein is that the profile of this homogenous consumer is considered within consumer scholarship to be the rational and average consumer. The consumer that is the recipient of interventionist measures is then not considered to be weak or vulnerable but is instead strong, active, cognitively rational and in need of limited intervention through protective measures, which usually takes the form of information disclosure.²⁴¹ Following this view, a study of the objective conditions that consumer law scholarship has qualified as disempowering consumers – the obstacles that prevent empowered behaviours – has tended to take the profile of the rational consumer as the conceptual starting point. This has contributed – alongside a neoliberal definition of the concept of empowerment – to the juxtaposition of EU consumer empowerment against the concept of vulnerability.²⁴²

It will be shown in Chapter 3 that adopting this consumer profile as the starting point for analysis of consumer empowerment is conceptually limiting. Isolating the objective conditions that are considered by the Commission to affect the 1-D power to and 1-D power over relations between traders and consumers requires a discussion of the legislation that has an empowerment rationale. It will be shown in Chapters 4 and 5 that the process of consumer empowerment is not limited to information disclosure in secondary legislation. Taking the broader perspective that all consumers are categorically vulnerable/disempowered allows for a broader conceptual starting point when considering what (objective) conditions and power dynamics between consumers and

²³⁹ Martha Fineman, ‘Equality, Autonomy and the Vulnerable Subject in Law and Politics’ in Marta Fineman & Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013) 20-21.

²⁴⁰ Art 5(3) Directive 2005/29/EU of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market mending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

²⁴¹ This point will be addressed in more detail in Chapter 3, Section 3.

²⁴² See for instance Helberger *et al.* (n 234).

traders are regulated through secondary legislation with the aim of bringing about empowerment outcomes. Moreover, the profile of the average consumer is problematic because it has precluded an analysis of less visible and subjective dimensions of disempowerment that arise at the level of 3-D and 4-D power.²⁴³ The rational and average consumer concepts are ascribed meaning by recourse to the neoclassical rationality study. Although Chapter 3 elaborates on this point further, the point can already be made that viewing consumers in this way eludes a consideration of the internalized narratives, norms and subjective identities that affect consumer behaviour. Behavioural economics, despite taking behaviour into account, is still too methodologically individualistic to delve into the 3-D and 4-D levels of power that represent the subjective dimension of the empowerment process. As will be seen in the following discussion, the process of empowerment is a binary process that is not only objective but also subjective.

6. Empowerment as a process: the dependency on subjective and objective empowerment

In the scholarship of empowerment, it may be the case that the underlying concepts of power and relative disempowerment are implicitly assumed. In these cases, the power imbalance and conditions that have caused the disempowerment of an actor are generally made explicit through the empowering entities narrative on how it is that their empowerment agenda intends to empower and what changes must be made to the actor's environment and their internalized narratives to achieve this empowered status. Conceptualizing of empowerment as a process shares commonalities with the analytical concept of disempowerment, but there is also a nuanced difference. Defining empowerment as a process has a prescriptive aim. Put differently, defining the practice of empowerment as a process offers a conceptual tool that can be used to explain what needs to be done to empower the disempowered actor. Conversely, power/disempowerment are the concepts that tell us what it means to be empowered/disempowered.

6.1 Empowerment as a process

In 1984 Kieffer conducted one of the earliest empirical studies of personal empowerment that conceptualized empowerment as a process. In this study on emerging political activists in grassroots organizations, Kieffer proposed that the process of empowerment consists of four stages: entry, advancement, incorporation, and

²⁴³ This point will be addressed further in Chapter 6, Section 3.1.

commitment.²⁴⁴ The entry stage is a triggering event, where the individual becomes aware of a ‘threat’ to their self or to their family. This is followed by the advancement stage where the individual receives support from another actor such as a mentor or a peer. Alongside receiving support, the advancement stage of empowerment is also characterized by the development of the individual’s critical understanding of the current social and political relations that construct their environment. The third stage consists of the development of political awareness. Lastly, the fourth stage is presented as an ‘active’ stage where the individual begins to participate in society and is no longer existing in an apathetic state of disempowerment.

In 1987 Swift and Levin, working on empowerment in the context of psychology and mental health, proposed one of the earliest distinctions between empowerment as an objective and subjective process. According to Swift and Levin, empowerment as a process is the: “activities directed to increasing people's control over their lives”.²⁴⁵ Their approach bears many similarities to the empowerment as a process first proposed by Kieffer but develops a more sophisticated account of empowerment as a perceived subjective (phenomenological) process and an objective (practical) process.²⁴⁶ In doing so they explicitly develop a conceptual distinction between the psychological, subjective empowerment as a process and the objective, practical empowerment as a process. Being psychologically/subjectively empowered has come to be broadly defined in line with Kieffer’s understanding of empowerment as: “the connection between a sense of personal competence, a desire for, and a willingness to take action in, the public domain”.²⁴⁷ Following the view discussed previously in this chapter, the subjective process of empowerment refers to ways in which an actor is stimulated to *feel* empowered. Whereas objective, practical empowerment can be understood as “the modification of structural conditions in order to reallocate power”,²⁴⁸ the process of objective empowerment is then the changes made to and within this environment. Objective empowerment is then brought about by changes to the objective reality of an actor, such as a change in social policies or legal rules that will improve the objective situation of an individual through, for instance, access to housing, education, healthcare or employment opportunities. It is my contention in this chapter that the concept of power in the objective process refers to the interaction between 1-

²⁴⁴ Charles Kieffer, ‘Citizen Empowerment: A Developmental Perspective’ (1984) 3 *Prevention in Human Services* 9.

²⁴⁵ Carolyn Swift & Gloria Levin, ‘Empowerment: An Emerging Mental Health Technology’ 1987 (8) *Journal of Primary Prevention* 71, 73.

²⁴⁶ Swift and Levin’s work on the perceived and subjective dimension of empowerment continues to be of relevance in the literature on empowerment in the field of psychology and mental health, see more recently Patrick Corrigan, Dale Faber, Fadwa Rashid & Matthew Leary, ‘The Construct Validity of Empowerment Among Consumers of Mental Health Services’ (1991) 38 *Schizophrenia Research* 77; see more generally Ed Diener & Robert Biswas-Diener, ‘Psychological Empowerment and Subjective Well-Being’ in Deepa Narayan (ed), *Measuring Empowerment: Cross-Disciplinary Perspectives* (World Bank 2005).

²⁴⁷ Rappaport, *Terms of Empowerment* (n 13) 746.

²⁴⁸ Swift & Levin, *Empowerment* (n 224) 73.

D and 2-D power. On the other hand, the subjective process of empowerment concerns the operation of power at the 3-D interpretive horizon of the 'disempowered' actor as well as the deeper level of 4-D ontological security and its interaction with identity and social ontologies.

6.2 Empowerment as a subjective process

Empowerment in its phenomenological, subjective form can be conceptualized using Levin's analytical scheme that was developed based on her research into class consciousness. This model is subdivided into three cumulative stages. The first stage is the cognitive awareness of an actor, where the individual acknowledges their feelings of disempowerment. This has similarities with the 3-D consciousness-raising aspect of discursive consciousness. Here the individual is encouraged to become aware of what they consider their own interests are or should be. Levin proposes that they must gain knowledge of the dominant social system's power structures, how power resources are distributed (the 2-D structural biases), and what their own position may be relative to this distribution (their 1-D power to and power over). Alongside this, the individual also gains awareness regarding their position in society with respect to other actors within the social system. The second stage concerns the affective feelings of an actor. Here the individual identifies feelings of loyalty with other individuals in the same situation as themselves and feelings of disaffection against social actors and social conditions that are at the source of their disempowerment. This is the grouping together of actors who create a ring of reference and then confirm-structure each other's acts of structuration. For Levin, this is the stage that the individual actor changes from feeling apathetic (subjective disempowerment) to feeling enthusiastic about taking concrete steps to changing their disempowered state. These are the steps that they need to take to make changes to their social environment and to generate legitimate forms of power, such as 1-D 'power to' and 'power over'. The third stage is the cognitive purposiveness stage where power imbalances are redistributed. At this stage the individual participates in empowerment activities aimed at changing their social condition and advancing their own interests. In the context of the four-dimensional model of power, this could entail joining a 'power with' organization and contributing to their activities that help the organization to generate 1-D 'power over' for the movement and its members, ultimately leading to 1-D structured conflicts that change the disempowering 2-D structural biases.

Levin's three-step process defines the subjective dimension of empowerment as a phenomenological, psychological process involving an individual's awareness of themselves, of their relation to other actors in society and to social structures. There is a critical element (discursive consciousness) to the empowered actor's awareness. The individual actively considers and names the social structures that are the cause of their position in society. This can lead to this actor engaging in a 2-D structural conflict where

they reject the 2-D structural bias. Levin proposes that moving towards this (2-D structural conflict) stage can be achieved through the help and intervention of other actors in society, such as peers or professionals. This could be social workers, communities for disabled persons or consumer rights organizations. The actor is then operationalized as behaving in an empowered way when they begin to structure and confirm-structure against the inappropriate 2-D structural bias. For Levin, this can be observed through the actor's choice to take affirmative action to affect a change in their personal situation.

It is important to note that sometimes an actor is disempowered not because of a 2-D structural bias but because another actor is disempowering them by attempting to structure and is doing so by exercising power as domination. For instance, a disempowered actor may be attempting to escape domestic violence. A social worker will try to empower the abused person by helping them to stop their acquiescent behaviours that are confirm-structuring the structuration attempts by the violent actor. In many cases victims of domestic abuse do not challenge abusive behaviour and respond to abuse by acting in the way that the abuser prefers. In doing so the abused actor is confirm-structuring the abuser's attempt at structuration – their 3-D interpretative horizon may develop to include physical and psychological abuse as falling within the realms of the 2-D structural bias. Empowerment is then about helping the abused actor to recognize their 1-D power to and power over the abuser. A similar example can be made for energy consumers who are exploited by the 1-D power over of large energy companies. Creutzfeldt, in a study on vulnerable energy consumers, demonstrated that poor energy consumers would not challenge an energy company that abused their consumer rights. Their belief was that they had little power to take any action and no power over the energy company to affect a positive outcome.²⁴⁹

The subjective empowerment process can then be defined as an actor acknowledging their disempowered state and the development of an internalized narrative that is conducive to taking action that makes changes to their objective situation. It is the expression of empowerment at the level of the individual actor and the argument can be made that it cannot be readily triggered by top-down empowerment organizations that focus on objective empowerment.²⁵⁰ Drawing once more upon Martín-Baró's study on violence and oppression in El Salvador, the disempowered workers were observed to have internalized a devalued sense of self as 'lazy latino(s)'.²⁵¹ This form of disempowerment is perceived and subjective. It was noted by Martín-Baró that structural changes to the social conditions of the worker's environment did not subjectively empower the underclass worker in El Salvador. It was concluded that even if structural changes are enacted the disempowered worker remains apathetic due to

²⁴⁹ Creutzfeldt *et al.* (n 234).

²⁵⁰ Marc Zimmerman, 'Psychological Empowerment: Issues and Illustrations' (1995) 23 *American Journal of Community Psychology* 581–582.

²⁵¹ Martín-Baró (n 227) 98.

their belief that change cannot occur. What follows is that empowerment as a process requires strategies that will subjectively empower.

As a concluding remark, the feelings and states of mind that constitute feelings of empowerment in an actor resist operationalization through a set of static categories. Where one actor may become empowered when they feel confident, others may become empowered if they feel ‘in control’. As Zimmerman proposes, subjective empowerment is fluid and dynamic rather than static.²⁵² Furthermore, what makes an actor feel empowered may change over time and therefore empowerment as a subjective process has a temporal dimension. The consequence of this is that there is a methodological obstacle to effectively studying empowerment using quantitative methods that rely on limited and static variables determined by the researcher to denote when an actor is subjectively empowered.²⁵³

6.3 Empowerment as an objective process

Empowerment as an objective process can be defined as the concrete changes and modifications that must be made to the existing, structural conditions of a social actor to facilitate empowerment. Thus, empowerment as an objective process is connected to the concept of objective disempowerment proposed in Section 5.2. This dimension of empowerment is considered to be objective because it involves making changes to the social conditions of an actor rather than the process of changing the individual’s psychological and internalised narratives that disempower. The objective empowerment process could include obtaining the resources and skills necessary for empowerment. On the individual level (micro), a vulnerable energy consumer could, for example, gain access to a local renewable energy community and attain the power to create renewable energy and become a self-consumer. On the organizational / community level (meso), empowerment processes could include changes to the internal structure of the renewable energy community that allows for shared leadership and decision-making between members to decide how to manage (produce, consume, store and sell) their renewable energy. On the institutional level (macro), social reforms, policy narratives and legal reforms, and policy changes would constitute the objective processes of empowerment that implement structural changes in society. For instance, the recast of the Renewable Energy Directive (RED(II)) that is discussed in Chapter 5 is an example of secondary legislation that has the empowerment rationale of facilitating more consumers to become ‘renewables self-consumers’ by reforming the current architecture in the energy market.²⁵⁴

²⁵² Zimmerman, ‘Empowerment Theory’ (n 15) 596.

²⁵³ This point will be addressed in more detail subsequently in Section 7 of this Chapter.

²⁵⁴ Directive 2018/2001/EU of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources [2018] OJ L328/82.

6.4 Empowerment strategies

That empowerment is an objective/subjective process can be further broken down into context-specific empowerment strategies. The content of these empowerment strategies depends on the (un)acknowledged underlying concepts of power and disempowerment that support the empowerment agenda. Empowerment strategies also depend on which actor is to be the focus of the empowerment process. Empowerment strategies typically involve interventions by a variety of social actors, including government bodies, social institutions, organizations, communities, and family members. An empowerment strategy can also aim to reallocate power resources. The empowerment strategies of a psychologist or a medical professional for their clients/patients will be different than the strategies of a supranational institution that seeks to empower consumers. To understand how an empowerment agenda intends to objectively or subjectively empower, the focus of analysis must be on what the empowerment strategies adopted by these entities are in practice.

The EU consumer empowerment agenda adopts an empowerment strategy where secondary legislation is the tool that makes changes to the environment of consumers (objective empowerment process) to bring about empowerment aims. Although this point was addressed previously, it is important to reiterate that this view of law as a tool is not a normative claim that this is what the consumer empowerment process should be. It is instead an empirical claim of what *is* being done. The rights, obligations and market changes that are brought about through consumer legislation are strategies of consumer empowerment when the legislation is ascribed an empowerment aim by the Commission. The power ‘imbalances’ that secondary legislation regulates are given substantive content based on types of consumer disadvantage (vulnerability) that are acknowledged (legitimized) in policy and offer the rationale for adopting consumer legislation. Empirically, consumer legislation is used to regulate power imbalances that the Commission considers having illegitimately and objectively disempowered consumers.

7. Empowerment as an outcome

Empowerment processes and strategies of empowerment on the one hand and empowerment outcomes on the other are conceptually distinct.²⁵⁵ Empowerment outcomes are the operationalization of empowerment processes while the empowerment process and context-specific strategies are methods/approaches of empowerment.²⁵⁶ Empowerment outcomes are the test of whether empowerment

²⁵⁵ Swift & Levin (n 224) 73.

²⁵⁶ Zimmerman, ‘Empowerment Theory’ (n 15) 46.

methods have been successful according to whether an empowerment aim has been achieved. If an empowerment movement is working for achieving the right for same sex couples to be legally married, they could cite the process of changing discriminatory legislation as being successful if the empowerment outcome is that same sex marriage falls within the 2-D structural bias. On the other hand, the empowerment aim could also be that the tacit system of knowledge and practical consciousness of a society has changed so that same sex couples do not experience social discrimination from other social actors. In Ireland, for instance, abortion was made legal because of a successful referendum (1-D structured conflict) in 2018. The National Women's Council is a female movement that has identified several issues regarding the empowerment of women and the right to abortion.²⁵⁷ Medical professionals are sometimes afraid to offer abortion because of the fear of prosecution. Moreover, some women are abused on their way into abortion clinics by Pro-Life campaigners who have maintained the interpretive horizon that abortion is not felicitous, despite the recent referendum and changes to the Irish constitution (2-D bias) that make abortion (within certain parameters) legal. The empowerment aim is that women have the structural bias power to have an abortion. Yet, empowerment outcomes can also assess whether women have this 'power to' in practice. They may not have the corresponding power over medical professionals who can choose to refuse abortion services. Moreover, the Pro-Life campaigners intimidating women at the doors of abortion clinics can be framed as exercising power as domination and power over women who cannot access this medial service. How empowerment outcomes are operationalized and tested are then highly relevant. Empowerment outcomes may be possible theoretically: women have the power to have an abortion because of the change to the structural bias. Yet the empirical reality may reveal a different story. Two issues arise in the operationalization of empowerment as an outcome when empowerment as a process is studied as a subjective phenomenon. If disempowerment is psychological, then how can it be defined? Put differently, can feelings of subjective disempowerment/empowerment be operationalized by a researcher, or must these definitions be defined by the disempowered actor/actors themselves.²⁵⁸ The second issue that arises is whether an actor can be considered to have been empowered when the empowerment is primarily subjective, but little has changed objectively.

To address the first issue, it has already been observed that an actor can feel empowered despite the objective cause of disempowerment remaining the same. Gruber and Trickett in their study on organizational change addressed the more fundamental

²⁵⁷ The National Women's Council Ireland <<https://www.nwci.ie>> accessed 11 July 2022.

²⁵⁸ The problems surrounding the measurement of empowerment have been well documented. Based on concerns that empowerment in developmental studies could not be measured, several scholars spanning several disciplines have addressed the challenges of measuring empowerment, see for instance Deepa Narayan-Parker, *Measuring Empowerment: Cross-disciplinary Perspectives* (Oxford University Press 2006).

question of whether one actor could empower another.²⁵⁹ They found that the institutional group (teachers) that oversaw the redistribution of power to another group (parents and students) had worked to subvert the empowerment process. While parents and students reported feeling empowered (power to), in practice there were few changes to the existing structural (2-D) balance of power in the school (power over) and power was not equalized between the parents, students and teachers. Gruber and Trickett caution against the psychological empowerment of an actor alone because this can lead to the perpetuation of power imbalances if the objective conditions that have disempowered remain the same. In short, this can lead to an empowerment agenda that achieves a subjective empowerment outcome but that paradoxically disempowerment continues because power is not redistributed or shared.

Regarding the second issue, there is disagreement between disciplinary boundaries as to whether subjective empowerment can be defined and operationalized by anyone other than the actor experiencing the disempowerment. In social theory, for instance, the perspective that disempowerment is a subjective phenomenon is recognized in the literature on alienation.²⁶⁰ Although the literature on alienation generally does not focus on the concept of disempowerment in the context of empowerment, this literature has nevertheless intensively interrogated the question of the objective and subjective nature of powerlessness.²⁶¹ For example, TenHouten argues, building on the work of Seeman,²⁶² that the cognitive, emotional qualities of an actor's subjective powerlessness can be defined as being primary emotions (sadness, fear, acceptance-acquiescence and anticipation-expectation) and secondary emotions (fatalism, pessimism, resignation, anxiety, submissiveness, and shame).²⁶³

Conversely, Zimmerman's analysis of psychological empowerment challenges the view that subjective feelings relating to empowerment can be predetermined.²⁶⁴ Zimmerman firmly roots psychological empowerment in a social action framework and at the individual level of analysis but with the intention of describing the nomological framework of empowerment.²⁶⁵ It is concluded that universal and global measurements of subjective, psychological empowerment are undesirable for several reasons. First, psychological empowerment is not simply an intrapersonal construct but also necessitates an analysis of both the behavioural and interactional factors of this concept

²⁵⁹ Judith Gruber & Edison Trickett, 'Can We Empower Others? The Paradox of Empowerment in the Governing of an Alternative Public School' (1987) 15 *American Journal of Community Psychology* 353.

²⁶⁰ See for instance Melvin Seeman, 'Powerlessness and Knowledge: A Comparative Study of Alienation and Learning' (1967) 30 *Sociometry* 105.

²⁶¹ For an overview see TenHouten (n 223) 84.

²⁶² Seeman, *Powerlessness and Knowledge* (n 260)

²⁶³ TenHouten (n 223) 8–96.

²⁶⁴ Zimmerman, 'Empowerment Theory' (n 15) 581–599.

²⁶⁵ Zimmerman takes great care to indicate that this does not overlook socio-political or contextual factors nor does it intend to promote a methodologically individualist approach to psychological empowerment, *ibid.*, 582; A nomological framework is to be understood as: "a theoretical framework that specifies relationships among variables in such a way as to help both differentiate and define the construct of concern, and that enables the formulation of a measurement model" *ibid* 582–583.

for a thorough measurement. Second, universal and global measures of psychological empowerment are theoretically inconsistent with empowerment because of different demands and characteristics of life situations. Third, universal and global measures of psychological empowerment can confuse a researcher's understanding of this concept because it "may be inappropriately conceptualized as a static personality trait instead of a more dynamic contextually-driven construct."²⁶⁶ Moreover, Zimmerman argues that a measurement of psychological empowerment may be possible in a specific setting for a particular sample of actors but that this measurement must be connected to the participants' experiences as they portray it as well as being contextually grounded in the participants' life experiences.²⁶⁷

8. Concluding remarks

The theoretical framework and conceptual categories developed in this chapter offer a complex and multi-dimensional lens for defining the concept of empowerment. As a value orientation, empowerment is ascribed meaning by what counts as power and disempowerment for the empowering entity. As a practice, the theory of empowerment consists of the conceptual categories of empowerment as an objective and subjective process with context-specific strategies and empowerment as an outcome. The content of these conceptual categories differs depending on the underlying understandings of power and disempowerment that contour context-specific empowerment agendas. Another central but broader conclusion that can be drawn from the development of this framework is that what counts as empowerment will vary across academic fields, disciplines and contexts.

Narrowing this conclusion down by framing it in the context of EU consumer empowerment raises the question of whether there are different understandings of the concept of EU consumer empowerment. On the one hand, the Commission is the entity that is responsible for the creation of the consumer empowerment agenda. What then does empowerment mean to the EU Commission? This is a relevant question because it is the Commission that concretely adopts context-specific strategies that constitute the consumer empowerment process and it is also the entity that normatively sets out what empowerment outcomes of these strategies should be. Supporting this practice dimension of EU consumer empowerment is the value orientation dimension of empowerment. The content of this dimension is contoured by what the Commission considers to constitute the concepts of power and relative disempowerment. Defining what is meant by the concept of EU consumer empowerment from the viewpoint of the Commission then requires an analysis of the Commission's voice that can be found

²⁶⁶ *ibid* 596.

²⁶⁷ *ibid*.

in policy documents and the preparatory documents for legislative proposals.²⁶⁸ Simply put, defining the concept of EU consumer empowerment requires an analysis of the text of these policy documents and the text of secondary legislation with an empowerment aim. On the other hand, there is a small body of literature that has engaged in a discussion of the Commission's consumer empowerment agenda. This scholarship does not enjoy the status of being an empowering entity. Instead, this literature on EU consumer empowerment sets out what the concept of empowerment means through the prism of the established language games that more broadly contour the debates on EU consumer law and consumer protection and that have been adopted in the empowerment literature to ascribe meaning to the concept of EU consumer empowerment.

There are then two understandings of the concept of EU consumer empowerment that must be deconstructed in the following chapters. First, the scholarly debate on EU consumer empowerment has already engaged in a discussion of EU consumer empowerment. What does EU consumer empowerment mean to this debate and how is this understanding coloured by the established debates within which the concept of EU consumer empowerment agenda has become situated? Second, what does EU consumer empowerment mean to the Commission as the entity that has adopted and developed the consumer empowerment agenda since 2007 in strategic consumer policy? The analysis of the consumer law debate in Chapter 3, of consumer policy and law in Chapter 4, and of energy policy and law in Chapter 5 will deconstruct these two understandings of the concept of EU consumer empowerment using the multi-dimensional theoretical framework and the conceptual categories developed in this chapter to guide this analysis.

²⁶⁸ Noting that the final text of secondary legislation adopted through the ordinary legislative procedure generally involves amendments by the EU Parliament and the Council. The definition of consumer empowerment that is derived from an analysis of the final text of an adopted instrument is then also coloured by these amendments but as the analysis in Chapters 4 and 5 will show this does not radically differ from what empowerment means to the Commission. Instead, the differences generally pertain to whether an intervention should be more or less extensive to achieve a particular empowerment aim.

Chapter 3

Defining EU Consumer Empowerment – The Perspectives in Consumer Law Scholarship

1. Introduction

Having established in Chapter 2 that empowerment has the potential to be framed as a multi-dimensional concept, the question that follows is what meanings have been ascribed to the concept of EU consumer empowerment by consumer law scholarship. Answering this question requires a discussion of several of the prominent strands in consumer law literature that include the localized language games within which understandings of the Commission's consumer empowerment agenda have become situated. The first goal of this chapter is then to assess how the concept of EU consumer empowerment has come to be defined by tracing the debates that consumer empowerment has become located within. The second goal of this chapter is then to shed light on the dimensions of the concept of EU consumer empowerment that currently remain underexplored in the consumer empowerment literature using the conceptual categories developed in Chapter 2. Combined, the central findings that result from this dual analysis will provide a definition of the concept of EU consumer empowerment that can later be contrasted with the definition of consumer empowerment that will be developed through a narrative analysis of the Commission's development of the consumer empowerment agenda in Chapters 4 and 5, which will also adopt the framework developed in Chapter 2 as the conceptual starting point.

To begin, Section 2 introduces the established debates in consumer law scholarship within which the Commission's consumer empowerment agenda has become situated. In this section the broader debates on the character of EU consumer law as a species of national private law or a European Regulatory Private Law will be considered in light of the relevance of these debates for the concept of consumer empowerment. It will be argued that the narratives on the character of secondary consumer legislations are significant for how EU consumer empowerment has come to be defined by the literature. These narratives are significant because consumer empowerment is generally framed as protecting the autonomy of consumers and businesses, as a (neo)liberal agenda that champions limited intervention, as a juxtaposition against consumer protection, and as a strategy that is pursued through information duties and mechanisms that enhance access to justice and the ability for consumers to claim redress. Moreover, the consumer empowerment agenda is considered to be incompatible with the more protective rights that currently exist in the

regulatory framework. In short, these debates offer the conceptual frameworks that are often implicitly adopted by the literature on consumer empowerment when defining the Commission's concept of EU consumer empowerment and in framing the strategies that the Commission has adopted to empower consumers through law.

Drawing on the analysis in Chapter 2, from a practice perspective an empowerment agenda must identify an actor who is disempowered and deemed to need some form of intervention that will both objectively and subjectively empower the disadvantaged actor. In the case of the EU consumer empowerment agenda, this is of course the consumer. In EU consumer policy and in the law of free movement, the Court and the Commission have developed several consumers as yardsticks that are constructed through normative profiles around which the level of consumer protection is developed. In the debate on consumer empowerment, the empowered consumer is generally defined through and equated with the average or rational consumer concept. To understand why this is the case and to provide more nuance for understanding the normative content of these yardstick consumer images, Section 3 analyses the profiles of these yardstick consumers that the debate has used to ascribe meaning to, and to define the content of, the normative profile of the (dis)empowered consumer.

Having established that, in consumer law scholarship, the empowered consumer is the average consumer who is unboundedly rational, Section 4 will answer the question of what strategies of empowerment the literature has qualified as constituting the Commission's process of empowering consumers. It will be shown that this literature primarily considers information duties and mechanisms that enhance access to justice as being the only tools in the Commission's repertoire that are used for empowering EU consumers through law. This perspective arises in part from the qualification of the empowered consumer as an extension of the normative images of the rational and average consumer. The qualification of these legislative tools as empowerment tools has had the consequence of excluding other forms of secondary legislation and by extension other forms of consumer rights as constituting a tool/strategy used by the Commission for empowering consumers. Moreover, the discussion in this section highlights that the debate on consumer empowerment is largely unconcerned with the question of how EU consumer empowerment can be conceptualized as a process.

It was proposed in Chapter 2 that the concept of power is highly significant when defining the concept of empowerment and yet is generally ignored or at the least implicitly defined by the debates on empowerment. The discussion in Section 5 will show that the literature on EU consumer empowerment does not directly engage with the question of what counts as the concept of power that supports the Commission's empowerment agenda. Instead, power as agency appears to be the assumed conceptual starting point and this understanding of what counts as power can be drawn from the consensus in the literature that the purpose of empowering consumers is to enhance consumer sovereignty, consumer choice, and party autonomy. These understandings of

power are derived from the neoclassical economic debates on power, which is a discipline that depends on the axioms of methodological individualism, the under-socialized market actor and an agency account of power for its structural integrity. This results in a narrow understanding of power and of the dimensions of power at play when the Commission empowers consumers through secondary legislation that regulates the environment in the internal market.

To conclude the discussion in this chapter, Section 6 highlights several shortcomings and neglected dimensions in the literature on EU consumer empowerment that arise as a consequence of the limited understandings and meanings ascribed to the concept of empowerment and of EU consumer empowerment discussed throughout the several sections in chapter.

2. Situating the concept of consumer empowerment in the consumer law debate

When consumer empowerment was first introduced by the Commission as a primary objective of strategic consumer policy in 2007, the concept of empowerment itself was not the direct subject of critical discussion in the literature. Instead, consumer empowerment became tethered to the pre-existing debates on the anti-protectionist character and rationales in consumer policy and law. A central theme in the literature on consumer protection questions whether EU consumer law had fallen too far on the side of the internal market rationale and has done so to the detriment of effective consumer protection. This often-treated concern becomes manifest in what seems to be an evergreen debate on the problematic prominence of the information model in the regulatory framework, in the debate on (neo)classical economic assumptions of consumer behaviour that are not a realistic representation of how consumers behave in practice, and the debate that has turned to incorporating behavioural insights into the analysis of consumer law. Against this backdrop, consumer empowerment has become routinely tethered to the information paradigm in consumer legislation, to the dialogue on the (neo)liberal political character of consumer policy, and to the instrumentalization of the consumer to pursue the aims of the internal market rationale. This section provides an overview on how EU consumer empowerment has come to be situated with these debates.¹

¹ See for instance Thomas Wilhelmsson, 'Private Law in the EU: Harmonized or Fragmented Europeanisation' (2002) 10 *European Review of Private Law* 77; Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* 712; Michael Schillig, 'The Contribution of Law and Economics as a Method of Legal Reasoning in European Private Law' (2009) 17 *European Review of Private Law* 853.

2.1 Consumer law and the concept of European private law

In a very general way and as a desirable policy outcome that is pursued through secondary legislation, consumer empowerment as an outcome can be framed as a by-product of consumer law. Conceptually, consumer empowerment then derives some of its meaning from how consumer law is characterized. EU consumer law has posed several conceptual challenges for consumer and private law scholarship. This is evidenced by a large body of literature committed to framing EU consumer law as a form of European private law that is either based on national private law regimes² or is a distinct form of self-sufficient European Regulatory Private Law (ERPL).³ Moreover, there is an expansive body of literature that has considered the development of a common European private law alongside a committed effort on behalf of the Commission towards the introduction of an EU civil code.⁴ This began as early as 1982 with the Lando Commission's development of a European code for contract law, with apparent support from the Parliament as per their call in 1989 that a European Civil Code was developed.⁵ In 2001, the Commission issued a communication on the development of a European contract law, followed by the 2003 action plan for a more coherent contract law with a Common Frame of Reference.⁶ The Draft Common Frame of Reference was published in 2007 and in several respects laid the groundwork for the 2011 proposal on a Common European Sales Law (CESL),⁷ that ultimately culminated in failure and was withdrawn by the Juncker Commission so that the focus could be shifted to the completion of the digital market.⁸ Following the failure of the CESL, it can be said that the attention in the consumer law debate has gradually turned away from

² See for instance Jürgen Basedow, *EU Private Law: Anatomy of a Growing Legal Order* (Intersentia 2021).

³ The term European Regulatory Private Law was first coined by Hans Micklitz. See Hans Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 *Yearbook of European Law* 3.

⁴ In 2001 the European Commission released its Communication on European Contract Law. See Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (Communication) COM (2001) 398 final; see for example, the European Review of Contract Law that was established in 1967 <<https://www.degruyter.com/journal/key/ercl/html>> accessed 11 July 2022. The literature on European Contract Law is vast but for see for example Lucinda Miller, *The Emergence of EU Contract Law – Exploring Europeanization* (Oxford University Press 2011); see also Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (2nd edn, Routledge 2013); Hugh Beale, 'The Story of EU Contract Law – from 2001 to 2014' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016).

⁵ See for instance, European Parliament, 'Resolution on Action to Bring into Line the Private Law of the Member States' (Resolution) 1989 OJ C 158, 400.

⁶ Commission, 'Communication from The Commission to the European Parliament and the Council a More Coherent European Contract Law an Action Plan' (Communication) COM (2003) 68 final.

⁷ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 284 final.

⁸ Commission, 'Work Programme 2015: A New Start' COM (2014) 910 final, see Annex II: List of withdrawals or modifications of pending proposals, item 60.

the questions surrounding the development of a common European contract law.⁹ On the other hand, the more recent ERPL project offers an alternative theory on European Private Law, where consumer law is not conceptualized as a species of national private law. Instead, it forms part of a self-sufficient regulatory private law.¹⁰ In this way ERPL can be defined as: “the rules laid down by the EU legislator that seek to facilitate private law relationships whilst also pursuing specific policy goals, such as consumer protection or the integration of the EU internal market.”¹¹

These different starting points for conceptualizing secondary consumer legislation can be framed as lenses that open several different theoretical starting points for analysing and evaluating EU consumer law. For instance, one prominent strand in the literature is concerned with the question of what values and what types of justice can be said (or not said) to underpin European private law.¹² This strand is connected to the broader, critical debate on a European-wide (social) justice deficit, which is based on concerns that EU consumer law cannot be understood as being founded on ideals of justice that goes beyond achieving the objectives of deeper economic integration.¹³ In general, the argument is made that EU private law justice is a form of economic justice that comes into conflict with the concept of justice that underpins national private law.¹⁴ Conversely, Micklitz’s characterization of consumer law as an aspect of ERPL has made the development of an EU concept of access to justice possible, which he posits can be viewed as an, albeit thin, form of social distributive justice because it is an “[...]institutional design that allows for the participation of EU citizens in civil society.”¹⁵

These understandings of private law, justice and autonomy are relevant for understanding consumer empowerment because these conceptual starting points affect

⁹ For a recent contribution on the rethinking on the normative foundations of a European Contract Law see, Martijn Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021)

¹⁰ Hans Micklitz & Norbet Reich, *Understanding EU Consumer Law* (Intersentia 2009); Hans Micklitz, Yane Svetiev & Guido Comparato, ‘European Regulatory Private Law – The Paradigms Tested’ (2004), European University Institute Working Papers < <https://cadmus.eui.eu/handle/1814/31137>> accessed 14 July 2022; Guido Comparato, Hans-W Micklitz & Yane Svetiev, ‘The Regulatory Character Of European Private Law’ in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016).

¹¹ This definition of European Private Law is made by Mak based on Micklitz’s European Regulatory Private Law project. See Vanessa Mak, ‘The Consumer in European Regulatory Private Law’ in Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2018) 381.

¹² See for example the 2004 manifesto from several prominent private law scholars: The Study Group on Social Justice, ‘European Private Law Social Justice in European Contract Law: A Manifesto’ (2004) 10 *European Law Journal* 653; Hans Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011); Hans Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018).

¹³ For an overview, see Dimitry Kochenov, Gráinne de Búrca & Andrew Williams (eds), *Europe’s Justice Deficit?* (Bloomsbury 2015).

¹⁴ For instance, Collins makes the argument that the aim of EU private law is to enhance consumer choice. See Hugh Collins, ‘Cosmopolitanism and Transnational Private Law’ (2012) 8 *European Review of Contract Law* 311.

¹⁵ Hans Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 2.

how consumer empowerment is defined. For instance, the application of the values and norms that can be derived from national systems of private law, such as the principle of autonomy/ freedom of contract, will frame an approach to consumer empowerment that aims to protect the negative liberty of the consumer. If empowerment is about pursuing this form of freedom, then consumer legislation that pursues empowerment will be limited to a formal approach to consumer protection, which becomes visible in the consumer law framework as legislation mandating information disclosure. Following this thread, consumer empowerment has tended to become tethered to the consumer law debate on the information model and economic theories on consumer rationality and consumer choice. From another perspective, the ERPL position on regulated autonomy offers the potential to connect consumer empowerment to the more protective dimension of EU consumer law.¹⁶ This approach remains underexplored in the debate on consumer empowerment that has instead focused on defining consumer empowerment as an agenda that supports the (neo)liberal, anti-interventionist dimension in EU policy and secondary legislation.

2.2 Neoliberal empowerment

The heading of this section implies that EU consumer empowerment is a neoliberal endeavour, which prompts the question of what neoliberalism is. Neoliberalism has been defined as an ideology,¹⁷ a governance model,¹⁸ a model of economic ordering,¹⁹ an ethos,²⁰ a political rationality,²¹ a political theory,²² and a political swear word.²³ Suffice it to say, neoliberalism is an intensely capacious term, but this does not prevent it commonly being used where it is usually unaccompanied by an explicit explanation of

¹⁶ This point will be considered further in Chapter 7, Section 2.

¹⁷ Vicente Navarro, 'Neoliberalism as A Class Ideology; or the Political Causes of The Growth of Inequalities' (2007) 37 *International Journal of Health Services* 47.

¹⁸ For a brief consideration of the relationship between neoliberalism and governance, see Andrew Ives, 'Neoliberalism and The Concept of Governance: Renewing with an Older Liberal Tradition to Legitimate the Power of Capital' (2015) 14 *Cahiers du MIMMOC* < <https://journals.openedition.org/mimmoc/2263>> accessed 14 July 2022.

¹⁹ See for instance Andrew Land, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (Oxford University Publishing 2011) 1-2.

²⁰ For instance, firms that reject corporate social responsibility and pursue their bottom line can be framed as having adopted a neoliberal ethos, see Manfred Steger & Roy Ravi, *Neoliberalism: A Very Short Introduction* (1st edn, Oxford University Press 2010)

²¹ Mark Beeson & Ann Firth, 'Neoliberalism as a Political Rationality: Australian Public Policy Since the 1980s' (1998) 34 *Journal of Sociology* 215.

²² On neoliberalism as a political theory see for example, Thomas Biebricher, *The Political Theory of Neoliberalism* (Stanford, Stanford University Press 2022).

²³ Oliver Hartwich, 'Neoliberalism: The Genesis of a Political Swearword' The Centre for Independent Studies Occasional Paper 114/2009 <https://www.cis.org.au/publication/neoliberalismthe-genesis-of-a-political-swearword/> accessed 14 July 2022.

how we ought to understand it. For the purpose of clarity in the following discussion, I will adopt Harvey's definition:

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.²⁴

EU policies that facilitate free trade, privatization, deregulation and the creation and opening up of markets have been framed as neoliberal.²⁵ So too has consumer policy and law that pursue a neoliberal internal market rationale rather than a dedicated commitment to consumer protection.²⁶ The neoliberal character ascribed to EU policies have also come to be associated with the erosion and collapse of national welfare systems.²⁷ This juxtaposition of neoliberalism against welfarism can in some respects be traced to the original social agreement of 'embedded liberalism' between the founding Member States where the social systems of the Member States would mitigate the social detrimental impact of the free market.²⁸ EU consumer policy and positive integration through re-regulation is then seen as pursuing this economic and technocratic orientation of the supranational EU institutions in opposition to the political and socially orientated purviews of the Member States.²⁹

With these several facets of the rhetoric that frames EU and consumer policy as neoliberal in mind, there is an extension in the literature of this perspective on consumer policy to the Commission's strategy of consumer empowerment. More specifically, consumer empowerment is considered to enjoy several theoretical parallels with prominent economic theories on consumer behaviour that support this neoliberal

²⁴ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007).

²⁵ For a discussion on neoliberalism and neoliberal policies in the EU, see Christoph Hermann, 'Neoliberalism in the European Union' (2016) 79 *Studies in Political Economy* 61; see also Fritz Scharpf, 'Comment: The Eurocrisis as a Victory of Neoliberalism?' in John Fossum, & Agustín Menéndez (eds) *The European Union in Crises or the European as Crises?* (Arena Report 2014).

²⁶ See for example, Niklas Olsen, *The Sovereign Consumer: A New Intellectual History of Neoliberalism* (Springer 2019) 227 – 258.

²⁷ See for example Englebert Stockhammer, 'The Euro Crisis, European Neoliberalism and the Need for a European Welfare State' (2012) 50 *Surroundings* 121; see also Hermann (n 25).

²⁸ On embedded liberalism, see John Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379. According to Scharpf the national welfare systems have come under increasing pressure from the EU's programme of negative integration that has led to an institutional asymmetry that precludes a European social market economy, see Fritz Scharpf, 'The Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy' (2009) *MPIfG Working Paper* 09/12, Max Planck Institute for the Study of Societies.

²⁹ This view of the asymmetry between the EU and the Member States does not remain uncontested. See Fernanda Nicole, 'Transatlanticisms: Constitutional Asymmetry and Selective Reception of U.S. Law and Economics in the Formation of European Private Law' (2008) 16 *Cardozo Journal of International & Comparative Law* 87.

approach.³⁰ Examples of this framing of the concept of consumer empowerment can be found in the literature on consumer empowerment on consumer credit and financial services,³¹ energy services,³² digitalization,³³ as well as consumer empowerment and environmental sustainability.³⁴

It has become increasingly prevalent that the economic framework used to describe and evaluate EU consumer law begins from a behavioural starting point by drawing a correlation between the normative assumptions of consumer behaviour outlined by the Commission in consumer policy with the rationality study from neoclassical economic theory. This has resulted in a reading of consumer policy where an image of consumers who are a heterogeneous group of rational utility-maximizers emerges. When provided with perfect information, these consumers make optimal decisions based on personal preferences by ranking the options available in their choice set. In turn, the best way for consumer law to enhance this decision-making process is to ensure that consumers have access to relevant information. From a regulatory perspective, a disclosure model or information model is then viewed as the most appropriate form of intervention that can protect consumers from market harms by providing the information necessary for making rational choices. From a legislative perspective, this strategy in consumer policy has become manifest in a regulatory regime that is, from a quantitative perspective, primarily composed of mandated information duties. This regime aims to place consumers on an equal footing with businesses in terms of bargaining power, but nothing more.³⁵ Under this regulatory regime, consumers become responsible for the choices that they make and any subsequent detriment that ensues. Put differently, it is assumed that because consumers are rational actors, they will always make transactional decisions that optimize their welfare. Consumers and, moreover, the empowered consumer therefore do not need additional protections that

³⁰ Mak, *The Consumer in European Regulatory Private Law* (n 11) 387; Andrzej Nalecz, 'Empowering the 'Unempowerable'. Behavioural Insights into Informing Consumers about Internet Access Services in the European Union under Regulation 2015/2120' (2018) 11 *Yearbook of Antitrust and Regulatory Studies* 13.

³¹ In the context of consumer credit, see Niamh Moloney, *How to Protect Investors. Lessons from the EC and the UK* (Cambridge University Press 2010); Catherine Porras & Willem van Boom, 'Information Disclosure in the EU Consumer Credit Directive in Consumer Credit, Debt And Investment In Europe' in James Devenny & Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press 2012); Vanessa Mak, 'The Myth of the 'Empowered Consumer' - Lessons from Financial Literacy Studies' (2012) 1 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 254; Cătălin Gabriel Stănescu, 'The Responsible Consumer in the Digital Age: On the Conceptual Shift from 'Average' to 'Responsible' Consumer and the Inadequacy of the 'information Paradigm' in Consumer Financial Protection' (2019) 24 *Tilburg Law Review* 49.

³² Saskia Lavrijssen, 'Power to the Energy Consumers' (2017) *European Energy and Environmental Law Review* 172; Maria Ioannidou, 'Effective Paths for Consumer Empowerment and Protection in Retail Energy Markets' (2018) 41 *Journal of Consumer Policy* 136.

³³ In the context of digitalization see Patrizia Gazzola, Gianluca Colombo, Roberta Pezzetti and Luminitja Nicolescu, 'Consumer Empowerment in the Digital Economy: Availing Sustainable Purchasing Decisions' (2017) 9 *Sustainability* 693–694.

³⁴ Vanessa Mak & Evelyn Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) *Journal of Consumer Policy* 227, 230–231.

³⁵ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349; Mak, 'The Myth of the 'Empowered Consumer' (n 31) 255.

go beyond enhancing consumer choice, especially when said protections would impact party autonomy.

2.3 Consumer empowerment and the information model in secondary legislation

Moving away from a discussion on the neoliberal quality of consumer policy, the concept of EU consumer empowerment has come to be both defined through a neoclassical economic framework and connected to the literature on the inadequacies of the information model in secondary consumer legislation. In the years before the adoption of consumer empowerment as a primary objective of strategic consumer policy in 2007, the literature was increasingly preoccupied with the proliferation of information duties as the primary form of consumer protection in the internal market.³⁶ The Commission's policy assumption during its early consumer policy was that the imperfect distribution of information is a market condition that leads to market failure. This triggered the development of the rational consumer yardstick as a normative actor that has the capacity to use information to self-protect which has legitimized the evolution of an information model in secondary consumer law. Micklitz has aptly described the contemporary legal landscape of EU consumer law when he claimed that it is saturated with information duties.³⁷ While this claim is anecdotal, Narciso has recently proven the point with an empirical analysis that identified approximately 1,500 pre-contractual information duties in several consumer protection directives.³⁸ The term information 'paradigm' has been used in the literature to describe the predominant regulatory approach in secondary consumer legislation and strategic approach in consumer policy, both of which are considered as having adopted a neoclassical economic rationale of consumer behaviour.³⁹

The debate has consequently come to oscillate between two critiques of the information model. On the one hand the challenge is made to the increasing quantity of information duties and a lack of quality of the information provided by consumer

³⁶ See for instance Stephan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (De Gruyter 2001); Geraint Howells, André Janssen and Geraint Howells (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2005); see also Christian Twigg-Flesner C & Reiner Schulze, 'Protecting Rational Choice: Information and the Right of Withdrawal' in Geraint Howells, Ian Ramsay & Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (2nd edn, Edward Elgar 2018); Mia Junuzovic, 'Transparency of (Pre) Contractual Information in Consumer Credit Agreements: is Consistency the Missing Key?' (2018) 14 *Croatian Yearbook of European Law and Policy* 69.

³⁷ Hans Micklitz, Lucia Reisch & Kornelia Hagen, 'An Introduction to the Special Issue on "Behavioural Economics, Consumer Policy, and Consumer Law"' (2011) 34 *Journal of Consumer Policy* 271, 272.

³⁸ Madalena Narciso, *Reviewing the Information Paradigm: The Role of Online Reviews in the Regulation of Information in EU Consumer Law* (Doctoral Dissertation Maastricht University 2022).

³⁹ Geneviève Helleringer & Anne-Lise Sibony, 'European Consumer Protection Through the Behavioural Lens' (2017) 23 *Columbia Journal of European Law* 607, 616.

legislation.⁴⁰ On the other hand, behavioural insights offer a normative and critical edge for evaluating the strategic approaches that regulate through information by focusing on the profile of the rational consumer.⁴¹ Findings from behavioural economics have challenged the neoclassical rationality study that the consumer law framework is considered as predicated on, and these insights have led to a resounding claim that information cannot protect consumers in the ways envisioned by consumer policy.⁴² Consequently, there is a deep-rooted concern that the information model of consumer protection is focused on achieving deeper market integration and is devoid of a sincere commitment to protecting consumers.⁴³ Additionally, the consumer has become instrumentalized and objectified so as to serve as a vehicle for market integration through the development of the normative ideal of the average and the rational consumer as yardsticks for setting the level of consumer protection in secondary legislation and as a legal test applicable in concrete disputes.⁴⁴

As the Commission's narrative in policy shifted from providing more information to the rational consumer to a narrative of empowering all EU consumers, the debate responded by connecting consumer empowerment to this neoclassical economic character of consumer policy. Consequently, empowerment was tethered to the pre-existing idea of an information model in secondary consumer law and the Court's average consumer concept. This is most explicit in the strand of the literature that argues consumer empowerment as an outcome cannot be achieved through the information model because there is a limited extent to which information can empower

⁴⁰ The literature on this dimension of the critique of the information model is vast but for an example see the following contributions: Joasia Luzak, 'Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?' in Ilse Samoy & Marco Loos (eds) *Information and Notification Duties* (Intersentia 2015) 79; Gerardus de Vries 'Is the General Pre-Contractual EU Notification Duty of Traders to Provide Consumers with Information with Respect to the Main Characteristics of the Goods or Services to Be Supplied in Keeping with the Systems of Private Law of the Member States and Consistent with the *Acquis Communautaire*?' in Ilse Samoy & Marco Loos (eds) *Information and Notification Duties* (Intersentia 2015) 141; Andreas Oehler & Stefan Wendt, 'Good Consumer Information: the Information Paradigm at its (Dead) End?' (2017) 40 *Journal of Consumer Policy* 179, 170; Christoph Busch, 'The Future of Pre-Contractual Information' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (2016 Edward Elgar).

⁴¹ For an argument in favour of adopting behavioural insights into the EU's regulatory approach see Kai Purnhagen, 'Why Do We Need Responsive Regulation and Behavioural Research in EU Internal Market Law?' in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics. Economic Analysis of Law in European Legal Scholarship, vol 2* (Springer 2015); Helleringer & Sibony (n 39).

⁴² See Gómez Pomar & Artigot Golobardes, 'Rational Choice and Behavioural Approaches to Consumer Issues' in Hans Micklitz, Anne-Lise Sibony and Fabrizio Esposito (eds) *Research Methods in Consumer Law – A Handbook* (Edward Elgar 2018).

⁴³ Although how consumers should be protected can be approached from several opposing perspectives ranging from the pursuit of a free market and of protecting party autonomy that can be contrasted with the pragmatic contention that information duties are simply not used in the way envisioned by economic theory and so consumers do not in practice enjoy the level of protection assumed by the information model, for a brief overview see Christoph Busch, 'The Future of Pre-Contractual Information Duties: from Behavioural Insights to Bigdata' in Christian Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016).

⁴⁴ On the move from the consumer as subject to the consumer as a vehicle for market integration, see Marja Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal* 572, 581 – 582.

consumers.⁴⁵ The common foundation for this criticism of empowerment, shared with the information paradigm, is that in reality consumers cannot and do not use information to make perfectly rational decisions.⁴⁶ Information duties that fail to enable consumers to behave in a manner that corresponds with the rationality study that forms the core of older EU consumer policy are also considered as failing to empower consumers to behave according to the empowerment aims laid out in strategic policy post-2007.⁴⁷

2.4 The juxtaposition of consumer empowerment with consumer protection

The framing of the empowered consumer as the rational consumer has had implications for the types of secondary legislation and consumer rights that the literature connects to the concept of consumer empowerment. EU consumer protection consists of several layers. The first is legislation that creates a safe environment for consumers to interact with traders. This environment is constructed through information duties, the prohibition on unfair commercial practices and the regulation of market standards – such as product safety and Ecodesign measures. The second consists of legislation that creates a safety net and additional layer of protections to consumers. This entails protection from unfair standard terms, legal guarantees for non-conforming goods and the horizontal 14-day withdrawal right. The third is the procedural layer consisting of redress mechanisms that aim to give teeth to the protections laid out in consumer legislation. In contrast to characterizing consumer law as a neoclassical economic regulatory model, a paternalistic and interventionist paradigm of consumer protection entails viewing consumers as ‘weak’.⁴⁸ From this perspective it becomes necessary to protect consumers from the disadvantages incurred by poor decision-making. The responsibility for self-inflicted detriment is shifted away from the consumer, despite their behaviour being the cause of their own harm.⁴⁹

⁴⁵ In general, see Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (n 35); In the context of financial services see Mak, ‘The Myth of the ‘Empowered Consumer’’ (n 31); In the context of the energy services sector see Ioannidou (n 32); In the context of sustainability and the green transition see Mak & Terryn (n 34) 227–248.

⁴⁶ This claim threads the debate on consumer empowerment, see for example Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (n 35); on the inability of consumers to use information as assumed by the economic rationality study, see Oren Bar-Gill & Omri Ben-Shahar, ‘Regulatory techniques in consumer protection: a critique of European consumer contract law’ (2013) 50 *Common Market Law Review* 109, 110; Omri Ben-Shahar & Carl Schneider, *More Than You Wanted to Know* (Princeton University Press, 2014); David Kästle-Lamparter, ‘Formation of Contracts’ in Nils Jansen, Reinhard Zimmerman (eds) *Commentaries on European Contract Laws* (Oxford University Press 2018) 405–407; see also Mak & Terryn (n 34).

⁴⁷ Nalęcz (n 30).

⁴⁸ Mak, ‘The Myth of the ‘Empowered Consumer’’ (n 31) 255; see also Oren Bar-Gill, ‘The Behavioural Economics of Consumer Contracts’ (2008) 92 *Minnesota Law Review* 749.

⁴⁹ Mak, ‘The Myth of the ‘Empowered Consumer’’ (n 31) 255.

Esposito encapsulates the consensus in the debate that the approach of the EU consumer empowerment agenda aims to protect the autonomy of consumers, is limited to information duties, and the rationale behind empowerment is opposed to substantive protective measures.⁵⁰ The unprotective ‘help yourself’ ‘empowerment’ character of information duties is then juxtaposed against more interventionist forms of protection: “EU consumer policy is built on two pillars, empowerment and protection, but has typically privileged empowerment. Empowering consumers means help(ing) them help themselves [...]”.⁵¹ Esposito refers to several contributions that advocate for a more intrusive consumer policy as a response to the unprotective nature of consumer empowerment and information duties.⁵² Domurath contends that the emphasis on private law and the principle of freedom of contract as undermining effective consumer protection in the field of consumer credit and mortgages, and advocates for an extension of the vulnerability standard beyond the characteristics of the average consumer benchmark.⁵³ Baisch contends that the regulatory approach to risk assessment should be based on the irrational and uninformed investor rather than the empowered investor.⁵⁴ More generally, Howells points to the shift in consumer policy from focusing on the malevolent trader abusing the consumer through unfair commercial practices and contract terms to the protection of consumers from information asymmetries.⁵⁵ Howells contends that more interventionist policy choices than information duties could include altering default rules, bans and regulation, and risk-sharing.⁵⁶ Each perspective points to the different ways that information duties and, by extension, empowerment are considered as falling short of offering a desirable level of consumer protection for consumers from the harms they may fall prey to in the market.

As an aside, the work of Domurath, Baisch and Howells are indicative of the fissures in the debate on consumer protection. There is no agreement as to what the

⁵⁰ See for instance Stephen Weatherill, ‘Empowerment is Not the Only Fruit’ in Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016); see more recently Natali Helberger, Marijn Sax, Joanna Strycharz, & Hans Micklitz, ‘Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability’ (2022) 45 *Journal of Consumer Policy* 175.

⁵¹ Fabrizio Esposito, ‘A Dismal Reality: Behavioural Analysis and Consumer Policy’ (2017) 40 *Journal of Consumer Policy* 193, 194.

⁵² See for example Rainer Baisch & Rolf Weber, ‘Investment Suitability Requirements in The Light of Behavioural Findings: Challenges for a Legal Framework Coping with Ambiguous Risk Perceptions’ in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2013); Martin Engel & Johanna Stark, ‘Buttons, Boxes, Ticks, and Trust: On the Narrow Limits of Consumer Choice’ in Klaus Mathis, *European Perspectives on Behavioural Law and Economics. Economic Analysis of Law in European Legal Scholarship, vol 2* (Springer 2015); Michael Faure & Hanneke Luth, ‘Behavioural Economics in Unfair Contract Terms’ (2011) 34 *Journal of Consumer Policy* 37; Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (n 35).

⁵³ Irina Domurath, ‘The Case for Vulnerability as the Normative Standard in European Consumer. Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law’(2013) 3 *Journal of European Consumer and Market Law* 124.

⁵⁴ Baisch & Weber (n 52)

⁵⁵ Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (n 35) 351–352.

⁵⁶ *ibid* 365–369.

‘protection’ in consumer protection is or what it should be. More recently, Grochowski has pointed to the shift in consumer policy regarding what counts as consumer vulnerability as well as the social transformations that render inadequate the traditional understandings of the scope of EU contract law and of the concepts of consumer vulnerability and harm.⁵⁷ This point will be returned to later in the argument that the consumer empowerment agenda should be decoupled from the framing of empowerment as an inherently neoliberal and anti-protective agenda in strategic policy and consumer legislation.⁵⁸

3. The profile of the empowered consumer

The framework developed in Chapter 2 proposes that the practice of empowerment through an empowerment agenda is unavoidably directed toward a particular actor or group of actors. In the case of EU consumer empowerment, EU citizens in their role as consumers are categorically the recipients of the Commission’s empowerment endeavours through law. In the discussion in the previous sections, the point was made that consumer policy and legislation are targeted towards a particular type of consumer based on a normatively constructed profile. That is the rational and average consumer who can use information to self-protect. The concept of EU consumer empowerment then gains a part of its meaning within the consumer law debates on the rational and the average consumer concepts. What then does it mean if the empowered consumer is profiled as the average consumer and the rational consumer? Put differently, who is the consumer that can become empowered if this consumer gains its profile from the average consumer benchmark and the rational consumer from strategic policy. This is not simply a question of what the profile and behavioural characteristics of the empowered consumer are, but is also a question of the normativity at play that supports this characterization of the empowered consumer as a rational and average consumer.

Answering these questions requires a brief discussion of the development of the average consumer by the Court in Section 3.1, and the development of the rational consumer by the Commission in strategic policy in Section 3.2. Following this, Section 3.3 considers the neoclassical economic theories that support the average and rational consumer concepts, which support the meanings and definitions that have been used by the literature to be ascribed to the concept of EU consumer empowerment. Section 3.4 considers the behavioural economic critique of the average and rational consumer profiles, which have by extension been applied as a critique of the Commission’s EU consumer empowerment agenda.

⁵⁷ Mateusz Grochowski, ‘European Consumer Law after the New Deal: A Tryptich’ (2020) 39 *Yearbook of European Law* 387.

⁵⁸ This point will be discussed further in Chapter 7.

3.1 The average consumer

The Court developed the average consumer benchmark in internal market law as a yardstick for interpreting when business practices could be considered as deceiving consumers and thus national barriers to intra-state trade could remain in place. This consumer concept then acts as a de-regulatory mechanism and has generally been understood in the debate as serving a purely (neo)liberal political agenda supported by a neoclassical economic model of market ordering.⁵⁹ The average consumer concept is concerned with consumer protection only insofar as it sets a level of protection that facilitates the liberalization of the internal market through deregulation. Taking such a neoliberal standpoint, the consumer interest is best served in the internal market by protecting the consumer's sovereignty by respecting individual autonomy and enhancing a choice set that consists of increasingly diversified products.

The historical paths and stumbling blocks in the European integration project over the last 70 years have been well documented.⁶⁰ Nonetheless, if we are to understand why the Court developed the average consumer concept and the function of the normatively constructed average consumer, it is then necessary to situate the average consumer in the context of market integration. The overriding objective of the Treaty of Rome in 1958 was to create an ambitious roadmap set out to achieve a common market. By 1968 a customs union was established that facilitated the free movement of persons and by 1970 there was some degree of tax harmonization. At that time, the free movement of goods, services and freedom of establishment was not achieved. Legislative progress that aimed to remove the obstacles posed by national frontiers to these freedoms between the Member States was slow during the 1970s until the entry into force of the Single European Act in 1987. The early 1970s were witness to both economic and monetary crises with little support for 'a more integrated Europe' as the solution. As a result, deeper integration and the establishment of the four fundamental freedoms through legislation was politically hampered by the existing constitutional framework. This was chiefly because of the procedure of unanimous voting laid down in the treaty, which at that time allowed a single Member State to veto the adoption of legislative proposals. The unanimous voting procedure in the Council became increasingly problematic beyond the 1970s when the number of Member States had swollen from the original six to twelve by 1986.⁶¹ To illustrate the point, it took a decade of debate before the Product Liability Directive was unanimously adopted in 1985. It

⁵⁹ Liberal here refers to neoclassical libertarianism and is to be understood here as the fundamentally individualistic libertarian political doctrine that promotes the liberalization of markets through deregulation and privatization and that rejects government intervention in the market, see Martijn Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 36–41.

⁶⁰ See for example, Robert Bideleux & Richard Taylor, *European Integration and Disintegration: East and West* (Routledge 2002).

⁶¹ For an overview of the historical, political factors that lead to the insertion of the internal market concept into the treaties, see Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) Chapter 3.

was not until the adoption in the Maastricht Treaty in 1992 and the introduction of qualified majority voting that the adoption of secondary legislation became an easier and faster process. By this time, however, the Court had already made substantial inroads into establishing the internal market through deregulation by removing national barriers to the four freedoms in a line of salient case law that began in the 1970s. The development of a concept of consumer in several rulings that coalesced into the average consumer concept as a benchmark by 1992 in *Gut Springenheide*⁶² was instrumental for the completion of the internal market through deregulation between the 1980s and the early 1990s.

Beginning in the 1970s with landmark cases such as *Dassonville*⁶³ that led to the salient case *Cassis de Dijon* in 1979, the Court consistently broke down national barriers to trade through negative integration. The Court was then the frontrunner EU institution that tackled the issue of fragmented regulatory diversity in the Member States.⁶⁴ As a consequence of the Court's case law, the Member States became increasingly obliged to refrain from enforcing national legislation that would maintain national frontiers in the internal market regarding the free movement of goods, persons, services and, to a lesser extent, capital. During the evolution of the Court's case law, the consumer became an increasingly important actor in the process of completing the internal market through negative integration. A deregulated, liberalized internal market that was to be characterized by consumer choice and a diversity of products and services necessitated a particular type of consumer that could successfully participate and drive competition.⁶⁵ It was therefore problematic for the Court to conceive of consumers as 'weak' in the same way as national consumer law had tended to define weakness. In the national sense this had entailed protections for those consumers who were defined as weak and vulnerable in ways that required paternalistic protection through legislation. Simply put, the national concept of the weak consumer was not a consumer that could successfully navigate a deregulated internal market and so would require legal intervention to ensure their protection. A different conceptualisation of consumer behaviour and the corresponding level of protection to be afforded to consumers in the internal market was therefore necessary for the Court in order to continue the negative harmonization process of removing barriers to trade without needing to trigger the lengthy legislative process in the Council.

It was the insertion of exceptions to consumer protection in *Cassis de Dijon* that initiated the Court's line of salient case law until *Gut Springenheide*. This case law ultimately gave rise to the Court's development of the average consumer as the concept of consumer that sets the level of consumer protection in the internal market in the context

⁶² Case C210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] I-04657.

⁶³ Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* ECR [1974] I-00837.

⁶⁴ Without the need for EEC legislative action.

⁶⁵ Referring here to the economic doctrine of liberalization that (1) intensifies competition through removing government regulation and promoting privatization, and (2) opens up individual markets.

of law of free movement.⁶⁶ Looking at the behavioural characteristics of the average consumer concept, the argument has been made that this concept is readily explained through a neoclassical economic theory of consumer behaviour.⁶⁷ This is a consumer who can self-protect through information by virtue of their rationality, powers of observation, critical thinking and information-gathering skills. It is generally accepted that this view of consumer behaviour was developed by the Court to prevent ‘overly-protectionist’ Member States from maintaining barriers to trade constructed through the application of more paternalistically-orientated national rules on consumer protection that could be legitimized through the consumer protection exceptions from *Cassis de Dijon*.⁶⁸ The function of the average consumer as a benchmark can be understood as just one conceptual cog in the legal mechanisms that drove the completion of a liberalized internal market through negative harmonization at a time when positive harmonization was a political impossibility. In other words, the average consumer precluded the need to set common policy and technical requirements in the hostile political environment at the institutional level of the then EEC.⁶⁹ In this light, the average consumer concept provided a regulatory solution because consumers could self-protect through the information provided by traders because they were “reasonably well informed and reasonably observant and circumspect”.⁷⁰ Relatedly, it is also important to observe the character of the internal market and the supporting role of the average consumer concept in this regard. When the Court adopted the principle of mutual recognition in *Cassis de Dijon*, it set the blueprint for an internal market characterized by choice and diversity. This is because mutual recognition allowed traders to freely market products in all Member States without additional requirements. The consequences of mutual recognition cannot be understated: had the Court not created this principle, then it would have become necessary to develop the internal market through positive harmonization measures. In this scenario the products available across the internal market would have become standardized European products, devoid of national diversity.⁷¹ In short, an internal market characterized by choice amongst an ever-expanding diversity of products and services requires a strong, average consumer as opposed to a weak and vulnerable consumer that requires the paternalistically protective shield of standardization.

As mentioned previously, the *Cassis de Dijon* ruling can be pinpointed as having triggered a line of case law that culminated in the average consumer concept.⁷² At the time of the *Cassis de Dijon* ruling in 1979, the internal market was in its infancy. National

⁶⁶ *Gut Springenheide* (n 62).

⁶⁷ This point will be addressed further in Chapter 3, Section 3.3.

⁶⁸ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*).

⁶⁹ Hans Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer. Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic’ (2012) 35 *Journal of Consumer Policy* 283, 289.

⁷⁰ *Gut Springenheide* (n 62).

⁷¹ Weatherill, ‘Empowerment is Not the Only Fruit’ (n 50) 146–147.

⁷² *Cassis de Dijon* (n 68).

protectionist measures were the norm while Member States and the national judiciaries were unfamiliar with Union legislation that prohibited national frontiers to trade.⁷³ Prior to *Cassis de Dijon*, the *Dassonville* ruling in 1974 was prompted by a national protectionist measure that obliged a certificate of origin for Scottish whiskey. The Court held that “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions”.⁷⁴ *Cassis de Dijon* built upon this foundation from *Dassonville* five years later in 1979 by implementing the principle of mutual recognition where in the absence of harmonization measures those goods that are lawfully produced and marketed in one Member State could be lawfully marketed and sold in other Member States.⁷⁵ The far-reaching deregulatory effects of the principle of mutual recognition were mitigated in *Cassis de Dijon* through the introduction of an ‘objective of public interest’ exception (re-regulation) with “the defence of the consumer” constituting an objective of public interest.⁷⁶ Once a number of cumulative, mandatory requirements were satisfied, an objective of public interest gave grounds for a Member State to retain national protectionist measures (prohibited by the principle of mutual recognition and Article 34 TFEU) that qualified as measures having equivalent effect. This brought all national consumer protection rules within the ambit of the EU prohibitive rules on free movement.⁷⁷ In doing so, the Court placed consumer protection on a par with the four fundamental freedoms when it identified the defence of consumers as one mandatory overriding requirement that can legitimately contravene the principle of mutual recognition.

At first glance, the mandatory requirement of “the defence of the consumer” appeared to have the capacity of providing the Member States with a broad ambit to retain national protectionist measures in the name of protection of national consumers. It became clear, however, from the *Clinique*,⁷⁸ *Mars*⁷⁹ and *Graffione*⁸⁰ rulings and culminating in *Gut Springenheide*⁸¹ that ‘the defence of the consumer’ exception was relatively narrow. These rulings developed the abstract, normative average consumer

⁷³ Damian Chalmers, Giorgio Davis & Gareth Monti, *European Union Law* (2nd edn, Cambridge University Press 2010) 748-749.

⁷⁴ *Dassonville* (n 63) para 5.

⁷⁵ *Cassis de Dijon* (n 68): Although the principle of mutual recognition was not expressly mentioned until later case law, see Case C-110/05 *Commission v Italian Republic* [2009] ECR I-00519 para. 34; see also Case C-385/10 *Elenca Srl v Ministero dell'Interno* [2012] I-3071 para. 23.

⁷⁶ Other mandatory requirements mentioned alongside the “defence of the consumer” included “the effectiveness of fiscal supervision, the protection of public health, [and] the fairness of commercial transactions [...]”, *Cassis de Dijon* (n 68) para. 8.

⁷⁷ Sybe de Vries, “The Court of Justice’s ‘Paradigm Consumer’ in Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 406.

⁷⁸ Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* ECR [1994] I-00317

⁷⁹ Case C-470/93 *Verein Gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] I-01923.

⁸⁰ Case C-313/94 *F.lli Graffione SNC v Ditta Fransa*. [1996] I-06039

⁸¹ *Gut Springenheide* (n 62).

concept that was to be subsequently used as the test for determining the level of consumer protection permitted in the law of free movement. In this way, the average consumer benchmark was developed as a yardstick for national courts when applying the proportionality test for determining when consumers would be deceived by deceptive business practices.

The average consumer benchmark laid down in *Gut Springenbeide* remains the applicable test for assessing consumer behaviour and the level of required protection in internal market law and in various contexts in EU consumer law. The ‘reasonably informed and reasonably observant and circumspect’ consumer can be broken down into possessing three distinct characteristics: (i) reasonably informed, (ii) reasonably observant, and (iii) circumspect. The reasonably well-informed consumer is characterized by the amount of information that consumers are expected to be in possession of. This is a baseline of knowledge that all EU consumers should have. This level of knowledge is not based only on the information that is made available about the product.⁸² This could be, for example, information about the quality and prices of various other products.⁸³ In *Giampietro Torresan*, the Court expected consumers to have baseline knowledge about the characteristics and effects of cannabis even if they were not themselves narcotics users.⁸⁴ The reasonably observant characteristic relates to how closely a consumer will observe a product. In *Adolf Darbo*,⁸⁵ the Court held that a reasonably observant consumer would not be misled by a label that stated a product was ‘naturally pure’ when the product did in fact contain pectin, a gelling agent. This is because the average consumer would not only read the label but also scrutinize the list of ingredients. Lastly, the circumspect nature of the average consumer entails that this ‘ideal’ consumer has the capacity to think critically. To what extent a consumer must think critically about a product that they wish to purchase was outlined by the Court in the *Mars* ruling.⁸⁶ Consumers would not be easily misled by packaging: “reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase.”⁸⁷

⁸² *Clinique* (n 78) para. 25.

⁸³ *ibid.*

⁸⁴ Case T-234/06 *Giampietro Torresan v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2009] ECR II-04185 para. 32)

⁸⁵ Case C-465/98 *Vereingegen Unwesen in Handel und Geverbe Köln eV v Adolf Darbo AG* [2000] ECR I-2297, para. 27.

⁸⁶ *Mars* (n 79).

⁸⁷ *ibid.*, para. 24.

3.2 The rational consumer concept as a yardstick in strategic consumer policy

Although consumer protection did not become an area of official policy until the Maastricht Treaty in 1992, consumer policy has its roots in the first Consumer Programme that was adopted in 1975 with the Preliminary Programme for a Consumer Protection and Information Policy.⁸⁸ The overarching view of consumer behaviour in the newly developing area of EU consumer policy in 1975 was distinct from the protective character of national law that protected weak consumers, which instead took as a starting point the consumer who is weak and vulnerable. Instead, EU consumer policy aimed to protect consumers against disadvantageous market conditions that had swayed the balance of power in favour of businesses and traders.⁸⁹ This view in early consumer policy of consumers as rational actors indicates that the underlying political rationality of this concept of consumer served a similar market liberalization purpose as the average consumer benchmark in the law of free movement, which pursued a deregulated internal market characterized by individual autonomy, consumer choice, and product diversity. This liberal approach to market building and the completion of the internal market can also be said to predominantly characterize the Commission's narrative in consumer policy until the reorientation of the single market, beginning in 2007 with the new strategic vision of the internal market⁹⁰ followed by the Single Market Act of 2011.⁹¹ In terms of market building, the Commission has consistently tied the concept of the rational consumer in consumer policy to market efficiency, where information is viewed as enhancing consumer choice in an increasingly diversified market that has more products at better quality for lower prices. In turn, the consumer drives competition, which is viewed as ultimately achieving the general welfare aims of the treaties.

The first consumer programme in 1975 was concerned with, amongst other aims,⁹² creating a consumer policy where consumers would be protected through a consumer education and information model as the disadvantaged party, *vis-à-vis* their relationship with businesses and traders.⁹³ To remedy the mounting imbalances of

⁸⁸Commission, 'Preliminary Programme of The European Economic Community for a Consumer Protection and Information Policy', C 92/2 (1975); Noting that previously the Single European Act [1986] OJ 169/1 introduced, through Article 100 A.3, a consumer protection element to primary law but did not go so far as to adopt consumer protection as a policy area; see 'The Commission in its proposals concerning health, safety, environmental protection and consumer protection will take as a base a high level of protection'.

⁸⁹ Council Resolution, 'A Preliminary Programme of The European Economic Community for a Consumer Protection and Information Policy' (1975), points 1(A)(6) & 1(a)(8).

⁹⁰ Commission, 'A Single Market for 21st Century Europe' (Communication) COM(2007) 724 final.

⁹¹ Commission, 'Single Market Act Twelve Levers to Boost Growth and Strengthen Confidence "Working Together to Create New Growth' (Communication) COM/2011/0206 final.

⁹² Council Resolution, 'A Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy' (1975) point 8(a): the right to protection of health and safety, (b) the right to protection of economic interests, (c) the right of redress, (d) the right to information and education, [and] (e) the right of representation (the right to be heard)".

⁹³ Council Resolution, 'A Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy' [1975] point 3.

power (defined as an imbalance of information) between consumers and traders that was becoming increasingly intensified through expanding markets and technological advancements, the consumer was viewed as requiring more detailed information to successfully navigate and make use of the internal market.⁹⁴ The Second Consumer Action Plan in 1981 was the first strategic plan to propose that *sufficient* information was necessary for protecting consumer interest. More specifically, this plan recognized that providing consumers with sufficient information was essential for enabling consumers to “assess the basic features of the goods and services offered, such as the nature, quality, quantity, energy consumption and price.”⁹⁵ That consumers should have access to increasing quantities of objective information regarding products and services and not just promotional materials is a point returned to and emphatically made in several of the subsequent consumer policy strategies.⁹⁶ The belief that consumers required better and sufficient information is echoed in each of the consumer protection strategies that span from 1981 to 2002 where enhancing consumer information was continuously adopted as a primary aim in the strategic consumer policy plans.⁹⁷

One of the overriding assumptions of consumer behaviour that has evolved in these consumer policy strategies is that consumers are rational actors capable of self-protecting through information. This assumption is stated throughout several policy documents and has materialized in the evolution of an information model in the consumer law framework. The first explicit mention of the rational consumer in consumer policy strategy can be pinpointed in the 1981 programme which claims that the provision of sufficient information enables consumers to “make a rational choice between competing products and services.”⁹⁸ A second reference to the consumer as a rational actor appears once more in the 1993 programme when the Commission quotes a previous communication on environmental and sustainable development. In this citation, it is proposed that the consumer can only make an informed and rational choice when they are provided with sufficient information regarding all relevant aspects of a

⁹⁴ *ibid*; Commission, ‘Consumer Policy Action Plan 1999-2001’ (Communication) COM (98) 696 final, point 25.

⁹⁵ Council, ‘Council Resolution on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy’ (1981) OJ C 133, point 50.

⁹⁶ Commission, ‘Second Three-Year Action Plan (1993-1995) Placing the Single Market at the Service of European Consumers’ (Communication) COM (1993) 378 point 2(a)(ii).

⁹⁷ ‘Council Resolution on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy’ (1981) OJ C 133; Commission, ‘A New Impetus for Consumer Protection Policy’ (Communication) COM (85) 314 final; Commission, ‘First Three-Year Action Plan of Consumer Policy in the EEC (1990 – 1992)’ (Communication) COM (1990) 98 final; Second Three-Year Action Plan 1993-1995. Placing the Single Market at The Service of European Consumers (n 96) 3; Commission, ‘Third Action Plan for Consumer Policy 1996-1998’ (Communication) COM (95) 519 final; Consumer Policy Action Plan 1999-2001 (n 94); Commission, ‘Consumer Policy Strategy 2002-2006’ (Communication) COM (2002) 208 final point 1.2 where consumer information is cited as a scope covered by the new policy strategy rather than one of the three broad objective aims.

⁹⁸ Council, ‘Council Resolution on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy’ (1981) OJ C 133, point 50.

good.⁹⁹ Throughout the consumer policy strategies, the issue of information asymmetries and inadequate consumer information are often identified by the Commission as being the root of many consumer problems.¹⁰⁰ The solution being that “if proper information can be presented many consumer difficulties can be overcome.”¹⁰¹ The Commission’s early strategic consumer policy plans appear to have been constructed around the idea that the consumer in the market is best served by regulating through information. What follows is the assumption that consumers need a level of knowledge that can only come from increased access to consumer information and education. As the Commission put it in the 1996 – 1998 plan: “The need for information and education of consumers has been apparent for some time now but very limited action has been taken to face up to these needs.”¹⁰² Since consumers’ ability to “self-protect is fundamentally linked to knowledge, it is indeed imperative to endeavour to improve this aspect considerably.”¹⁰³ The practical aim of pre-contractual information duties in this regard is to ‘even the playing field’ in the internal market and to place the rational consumer on an even footing with a trader. Mandated disclosures achieve this aim by giving consumers the means (information) to make autonomous, rational choices based on their personal preferences. After all, for the Commission, facilitating consumers to make rational choices when transacting in the internal market and the confidence that this bestows on consumers is what will drive both competition and market efficiency, a claim repeatedly made by the Commission in strategic consumer policy.

The view of consumer behaviour outlined so far paints an image of a yardstick consumer who is observant and circumspect, echoing the characteristics of the average consumer benchmark developing in the same period in the Court’s case law. The yardstick consumer appears to be a rational consumer who will observe the pre-contractual information provided to them by a trader regarding a product or service and will then consequently scrutinize this information in a circumspect manner. Moreover, this yardstick consumer is presumed to be disadvantaged and experience a detriment in the market when they are not sufficiently informed. The end-goal consumer that emerges because of the secondary consumer legislation that obligates the disclosure of pre-contractual information is the informed consumer. Protecting the consumer’s interest and tackling consumer detriment through information duties is reliant on the belief that consumers are willing and capable of engaging with the totality of the pre-contractual information that is provided by traders. This includes a plethora of pre-contractual information regarding a good or service alongside the terms and conditions that the consumer will need to abide by should they conclude a contract. It is because

⁹⁹ Second Three-Year Action Plan (1993–1995) Placing the Single Market at the Service of European Consumers (n 96) point 26.

¹⁰⁰ Priorities for Consumer Policy 1996–1998 (n 97).

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ *ibid.* 3.

consumers are assumed to be circumspect and observant that they are recognized as having the capacity to make use of this information. They will actively do so to make rational, optimal decisions and if needed will enforce their information rights against traders.

3.3 Neoclassical economic theory: the rationality study and consumer empowerment

The consumer law debate has tended to understand consumer behaviour broadly and consumer empowerment more specifically using the lenses of ‘consumer behaviour’ approaches from the fields of marketing, psychology, and economics. These approaches view the consumer through a neoclassical economic lens as a sovereign actor and this has, as is discussed further in Sections 5 and 6, led to a methodological individualist approach to consumer empowerment that adopts a narrow view of the concept of power and empowerment. From the perspective of consumer behaviour, the literature on the information model and consumer empowerment has conflated the rational consumer and average consumer concept with the *homo economicus* and the neoclassical economic theory on the role of information. There are many parallels that can be drawn between the characteristics of the *homo economicus* and the concept of consumer in EU policy. The rational and informed consumer concept in EU consumer policy is reasonably observant, reasonably informed and circumspect, similar to the Court’s average consumer concept. These behavioural traits mimic the behaviours prescribed to consumers under the rational choice and expected utility study in neoclassical economics. Furthermore, a neoclassical view of information asymmetries and how consumers can utilize information to maximize their welfare also corresponds with the narrative of consumer behaviour in strategic policy.

3.3.1 The rationality study

The economic man or *homo economicus* was first developed in classical, liberal economic thought. Framing consumer behaviour in this way is a fundamental theory in neoclassical economic thought, where the perfect rationality of the *homo economicus* has implications for how the free market is characterized and what consumers require to operate successfully within the economy. Describing mainstream, contemporary economic thought as ‘neoclassical’ is often viewed as a criticism because of the negative connotations attached to neoliberal political ideologies.¹⁰⁴ Political and ideological

¹⁰⁴ David Colander, ‘The Death of Neoclassical Economics’ (2000) 22 *Journal of the History of Economic Thought* 27.

controversy aside, the term ‘neoclassical economics’ can be used to refer to a set of specific theoretical and methodological approaches in mainstream economics, more specifically in microeconomics. For definitional purposes, neoclassical economics will be understood as encompassing any approach in mainstream economics that atomizes the individual through using micro-economic models that are grounded in methodological individualism.¹⁰⁵ Relatedly, this includes approaches that prescribe to the view that an economic system can be explained through models that create testable predictions.¹⁰⁶ Neoclassical economics will also be considered as including approaches where the market as an institution is viewed as having become disembedded from other social institutions. Neoclassical economics can be considered as breaking away from classical economics where the analytical approach has shifted toward how individuals behave in the economy and thus the analytical focus is on price and the exchange of goods and services. In contrast, the school of classical economics sought to understand why the market grows and contracts and therefore the primary analytical focus was on production.

Neoclassical microeconomics is concerned with analysing and predicting individual decision-making through the three axioms of the theory of rational choice: completeness, transitivity, and continuity.¹⁰⁷ Combined, these axioms make it possible for economists to show that individuals are capable of ranking, in order, all possible situations from the least to the most desirable, also known as a utility ranking. From a supply perspective, according to rational choice theory businesses choose what to produce and the corresponding method of production. This optimization approach in rational choice theory imposes a structure on the behaviour of businesses by holding that their choices will be profit-maximizing. To put it differently, they act in their own self-interest by making choices that maximize their utility or welfare, which is assumed to be the driving of profit. The optimization approach from the perspective of demand views consumers as having the freedom to choose what they consume. Following in this vein, the structure imposed on consumer choice is that consumers also act in their own self-interest by making utility-maximizing decisions that are based on a set of unknown but ranked, personal preferences.¹⁰⁸ This approach to consumer behaviour can be divided into two fundamental observations that are foundational for neoclassical

¹⁰⁵Arnsperger and Varoufakis claim that the core of neoclassical economic thought are methodological individualism, instrumentalism and equilibration. See Christian Arnsperger & Yanis Varoufakis, ‘What Is Neoclassical Economics? The Three Axioms Responsible for its Theoretical Oeuvre, Practical Irrelevance and, Thus, Discursive Power’ (2006) 53 *Panoeconomicus* 5; for a general overview on the varying definitions of neoclassical economics as a school, see Tony Lawson, ‘What is this ‘School’ Called Neoclassical Economics?’ (2013) 37 *Cambridge Journal of Economics* 947.

¹⁰⁶This definition of neoclassical economic theory is based on the definition provided by Bronk, building on the work of Fontana. See Richard Bronck, ‘Epistemological Difficulties with Neoclassical Economics’ (2011) Conference Paper for the Southern Economic Association 1, 2–4.

¹⁰⁷For a brief overview of rational choice theory, see Yoshimichi Sato, ‘Rational Choice Theory’ (2007) 16 *Japanese Journal of Sociology* 119.

¹⁰⁸For a detailed explanation of expected utility theory and its axioms, see Shinji Teraji, *Why Bounded Rationality in the Cognitive Basis of Institution* (1st edn, Elsevier 2018) 137–138.

economic analysis; unbounded rationality and methodological individualism. Consumer preference theory views consumers as having the capacity to choose the best ‘bundle’ of goods or services available to them (optimization). This requires the consumer to be unboundedly or perfectly rational. Consumers are considered as behaving in such a perfectly rational way when they make self-interested decisions that maximizes their (ordinal) utility. Lastly, consumers as the *homo economicus* become an unboundedly rational actor that is placed at the heart of the market. The market can therefore only be explained through an analysis of consumer behaviour. Through their autonomous actions, consumers are unaffected by other social forces and they become the atomized and therefore the central unit of analysis (methodological individualism).

3.3.2 The consumer as a rational actor

The imposition of the neoclassical structures (assumptions) on consumer behaviour signifies the standard approach to theory-building in mainstream microeconomic thought. These economic theories begin with *a priori* structures that are then imposed on the behaviour of consumers and businesses. Crucially, these assumptions of behaviour are treated as axiomatic: they are assumed as truths which are not empirically contestable.¹⁰⁹ The incontestable nature of these axioms is essential for the primary methodological approach in neoclassical economics because it is these *a priori* assumptions of behaviour that make it possible for economists to create mathematical predictions of consumer behaviour. In turn, the field of mainstream economics has become dominated by complex, mathematical models that aim to predict behaviour rather than to conduct empirical studies concerned with describing and explaining the economy in practice.¹¹⁰ Put differently, following from approaches such as Friedman’s instrumentalism, the methodological approach in neoclassical economics is for the most part concerned with the prediction of reality based on a small set of assumptions (axioms) of consumer and business behaviour as opposed to representing empirical reality. Neoclassical economics and its research strategy can therefore be broadly characterized as having isolated the economic institution or ‘force’ from other social institutions or ‘forces’.¹¹¹

The neoclassical axioms that prescribe consumer behaviour build a normative image of consumers as perfectly rational, self-interested welfare-maximizers. This image

¹⁰⁹ Alan Issac, ‘The Structure of Neoclassical Consumer Theory’ (1998) *Microeconomics University Library of Munich, Germany* 2.

¹¹⁰ For example, Milton Friedman claimed that a theory should be judged on its ability to predict, not the realism of its assumptions. See Milton Friedman, *The Methodology of Positive Economics 1953* (Chicago University Press 1966).

¹¹¹ The isolation of economics from other social institutions was advocated by economists such as Mills, Jevon and Menger. For a brief overview, see Piet Keizer, ‘The Concept of Institution in Economics and Sociology, a Methodological Exposition’ 2008, *Tjalling C. Koopmans Research Institute Discussion Paper Series* 07-25, 3.

relies on the neoclassical and formalist understanding of an economy where the economy has become isolated and disembedded from other social forces. In turn, consumer behaviour is also viewed as being fundamentally free and unaffected by non-economic and external social forces. In other words, consumers are free agents who do not make market choices that are guided by factors such as emotion, cultural norms or social structures that legitimize or prohibit certain behaviours. This view has implications for what consumers require to act rationally and optimize their welfare. If consumers only make decisions based on the information that is available to them, then what they require is perfect information to be successful market actors. Perfect information, or information symmetry, entails both a seller and a consumer possessing the same information about a good in terms of price, costs and characteristics. Therefore, perfect information represents an ideal market condition that is necessary for achieving a neoclassical view of perfect competition.¹¹²

3.3.3 Paving the way for a behavioural critique

When EU consumer law and more specifically assumptions of consumer behaviour are framed in this neoclassical context, it has paved the way for the debate to mount a behavioural economic critique of EU consumer law that problematizes the conceptual foundations of consumer law. This includes the average consumer benchmark developed by the Court, the rational consumer image in strategic policy, and the information model in secondary legislation. Moreover, when consumer empowerment is characterized as neoclassical economic strategy, the critique then follows that the empowerment strategy ought not to be a replacement for other forms of protection. Twigg-Flesner and Weatherill both warn about the implications for consumers if consumer empowerment is adopted as the primary strategic approach for protection insofar as it ought not to become the replacement for much-needed substantive rights.¹¹³ They present this concern by contextualizing consumer empowerment within the information model. Twigg-Flesner also points out that consumers can be structurally disadvantaged in ways that consumer policy does not appear to consider, and what he proposes is evidenced through the Commission's continued adoption of a rational view of consumer behaviour.

¹¹² For an overview of the development of the theory of perfect competition, see Tsoulfidis Lefteris, 'Classical vs. Neoclassical Conceptions of Competition' (2007) Discussion Paper Series 07/25 <https://www.uu.nl/sites/default/files/rebo_use_dp_2007_07-25.pdf> accessed 18 July 2022.

¹¹³ Geraint Howells, Christin Twigg-Flesner & Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2017) 7; Weatherill, 'Empowerment is Not the Only Fruit' (n 50).

3.4 Behavioural insights and consumer empowerment

The average consumer concept in free movement law and the rational consumer yardstick in policy both developed at a time during the latter half of the 20th century when the EU integration project was preoccupied with market liberalization and the Member States remained responsible for social policy. This view falls in line with the ‘social bargain’ between the founding Member States, where the internal market was to be embedded in the social policies of the Member States.¹¹⁴ The rationale behind this German, ordoliberal model of market ordering was that in the post-war era of Europe, the welfare systems of the Member States were to be responsible for offsetting the negative consequences created by the opening up and liberalization of markets. The implications of this division through the social bargain corresponds with the categorization of consumers as the categorically disadvantaged but rational market actors in the first consumer policy in 1975. As was shown, this view of consumer behaviour was continued by the Commission in subsequent consumer policy strategies because of the capacity of the rational consumer who could as a normatively ideal actor serve these aims of a liberalized internal market. If consumers are rational actors, then through their consumption patterns they would become drivers of a growing, competitive and efficient internal market because they could effectively use information to their benefit. It is in this vein that the argument has been made that the purpose of consumer law is to support the operation of the market rather than the protection of consumers, and that the consumer has been instrumentalized.¹¹⁵ In other words, it has been argued that EU consumer law is therefore predicated on the functioning of the internal market and the consumer interest has become ancillary. The practical realisation of this neoliberal political agenda is understood by the debate to have become manifest in the rational consumer concept as a yardstick in policy and the proliferation of information duties in the consumer law framework. The behavioural turn in consumer law scholarship has increasingly put the rational consumer concept – and correspondingly the consumer empowerment agenda – under increasing pressure. Through this, consumer policy and legislation that depend on the profile of the rational consumer have been revealed as being predicated on a wholly unrealistic view of consumer behaviour, a critique that has been extended to the consumer empowerment agenda.

¹¹⁴ For a comprehensive overview of the social bargain and the ‘embedded liberalism’ of the internal market, see Diamon Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’ (2013) *19 European Law Journal* 303.

¹¹⁵ On this point, see Hans Micklitz, ‘The Consumer: Marketised, Fragmentised, Constitutionalised’ in Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016)

3.4.1 The behavioural turn: a challenge to the concept of perfect rationality

In the second half of the 20th century, a behavioural turn in the 1970s can be identified in mainstream economic thought. This turn was triggered by the seminal work of cognitive psychologists Kahneman and Tversky, joint Nobel prize winners in the field of economics, through their research that developed a new concept of prospect theory in the field of cognitive psychology. In a nutshell, this theory proposes that an agent will make decisions based on potential losses and gains as opposed to the absolute outcome, as is assumed by expected utility theory in neoclassical economics. As Kahneman put it, “The central characteristic of agents is not that they reason poorly but that they often act intuitively.”¹¹⁶ Through their work, Kahneman and Tversky opened the possibility for a behavioural approach to economics because they empirically demonstrated how psychological processes can impact decision-making.

Behavioural economics as a branch of mainstream microeconomic economic theory can be contrasted with microeconomic, neoclassical theory in several ways. In the first instance, behavioural economics justifies its approaches to modelling by aspiring towards empirical realism and the adoption of more realistic assumptions of individual behaviour.¹¹⁷ This can be contrasted with the neoclassical axiomatic assumptions of individual behaviour, as outlined in the previous section. The fundamental assumptions of neoclassical economics can be broadly summarized by the following: the rationality of all persons, individual choices that correspond with expected utility theory and, finally, that when new information is provided, this information will be used by individuals to correctly revise and update opinions and beliefs. In turn, three key assumptions underpin this expected utility theory: (1) unbounded rationality, (2) unbounded self-interest (selfishness), and (3) unbounded willpower.¹¹⁸ Behavioural economics departs from these neoclassical, unrealistic assumptions of behaviour by adopting the following foundational tenets: psychological blind spots cause people to make systemic mistakes in decision-making, and context impacts how decisions are made. Behavioural economics tells us for instance that individuals fail to act or make

¹¹⁶ Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’ (2003) 93 *The American Economic Review* 1469. This was not the first challenge to the unbounded rationality of the *homo economicus* from the field of psychology where previous works in the mainstream field had already challenged the concept of the *homo economicus*; Thaler is also well known outside of the academic community for his popular work with Sunstein on behavioural changes achieved through ‘nudges’. See Richard Thaler & Cass Sunstein, *Nudge* (Yale University Press 2008).

¹¹⁷ Mathew Rabin, ‘Psychology and Economics’ (1998) 36 *Journal of Economic Literature* 11; Matthew Rabin, ‘A Perspective on Psychology and Economics’ (2002) 46 *European Economic Review* 657; Daniel Kahneman & Richard Thaler, ‘Economic Analysis and the Psychology of Utility: Applications to Compensation Policy’ (1991) 81 *American Economic Review* 341; Colin Camerer, ‘Behavioral Economics: Reunifying Psychology and Economics’ (1999) 96 *Proceedings of the National Academy of Sciences of the United States of America* 10575; Colin Camerer, *Behavioral Game Theory: Experiments in Strategic* (Princeton University Press 2003); Colin Camerer & George Loewenstein, ‘Behavioral Economics: Past, Present, Future’ in Colin Camerer, George Loewenstein & Mathew Rabin (eds), *Advances in Behavioral Economics* (Princeton University Press 2004).

¹¹⁸ Sendhil Mullainathan & Richard Thaler, ‘Behavioural Economics’ (2001) 20 *International Encyclopedia of the Social & Behavioral Sciences* 1094.

choices (inertia) and remain with the status quo,¹¹⁹ make decisions based on the positive or negative feelings that they have in response to how a risk is presented (affect heuristic),¹²⁰ act altruistically by making a sacrifice to benefit others without maximizing one's own welfare,¹²¹ order utility preferences according to a reference point instead of an absolute outcome as under expected utility theory (prospect theory),¹²² and by priming individuals with information the decision-making process can be influenced, for example where exposure to a number of factors can influence how and whether a subsequent decision is made (anchoring effect).¹²³ These theories and concepts lend support to the concept of bounded rationality,¹²⁴ where consumer preferences are not perfectly rational but are instead impacted by decision-making shortcuts (heuristics), how information is presented, and an individual's cognitive capacity.

3.4.2 The behavioural economic turn and EU consumer law

The behavioural turn in the field of economics has had implications beyond the discipline's borders. With the aim of improving regulatory policy design, policymakers have become increasingly interested in behavioural insights and particularly the behavioural approaches that seek to change the environment (choice architectures) within which consumers' choices are made.¹²⁵ For instance, the Commission appears to, *prima facie*, take the findings from behavioural insights into account as behavioural research is now one of the six pillars of evidence-based consumer policy formulation.¹²⁶ Behavioural economics provides insights into the cognitive shortcomings of individuals that can cause imperfect decision-making and the external factors that can influence

¹¹⁹ On the status quo bias, see for example William Samuelson & Richard Zeckhauser, 'Status Quo bias in Decision Making' (1988) 1 *Journal of Risk and Uncertainty* 7.

¹²⁰ Paul Slovic, Melissa Finucane, Ellen Peters & Donald MacGregor, 'The Affect Heuristic' in Thomas Gilovich, Dale Griffin & Daniel Kahneman (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press 2002) 397–240.

¹²¹ On altruism see for example Ernst Fehr & Urs Fischbacher, 'The Nature of Human Altruism' (2005) 425 *Nature* 785.

¹²² Daniel Kahneman & Amos Tversky, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 *Econometrica* 263; Nicholas Barberis, 'Thirty Years of Prospect Theory in Economics: A Review and Assessment' (2013) 27 *Journal of Economic Perspectives* 173.

¹²³ Adrian Furnham & Hua Chu Boo, 'A Literature Review of the Anchoring Effect' (2011) 40 *The Journal of Socio-Economics* 35.

¹²⁴ Originally proposed by Herbert Simon, see Herbert Simon, *Models of Bounded Rationality* (Massachusetts Institute of Technology Press 1982).

¹²⁵ For an overview of how behavioural economics has influenced regulatory policymaking in several OECD countries, see Pete Lunn, *Regulatory Policy and Behavioural Economics* (OECD 2014).

¹²⁶ See the webpage, Evidence Based Consumer Policy <https://ec.europa.eu/info/policies/consumers/consumer-protection-policy/evidence-based-consumer-policy_en> accessed 19 July 2022.

choice, such as social influences¹²⁷ and how information is presented (framed).¹²⁸ In the context of consumer law, recent empirical findings have increasingly shown that consumers do not make perfectly rational decisions,¹²⁹ nor do they read the totality of information made available to them about a product or service.¹³⁰ The adoption of behavioural insights in policy is an attractive option for several reasons when it is framed as a form of behavioural regulation through nudging consumer behaviour in a choice architecture. Thaler and Sunstein define this as: “any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives.”¹³¹ On the one hand, a behavioural regulatory approach can provide solutions to the current shortcomings of protecting through information because nudging can improve how information is presented so as to make disclosures meaningful and helpful.¹³² On the other hand, this approach is a cheap alternative to expensive enforcement mechanisms, while it preserves consumer choice and autonomy.¹³³ In the context of EU consumer policy and law, there appears to be a consensus that behavioural insights ought to be adopted in policy-making.¹³⁴ This debate can be roughly divided amongst those who analyse and evaluate EU consumer policy and law through behavioural insights and those who address the

¹²⁷ Anne-Lise Sibony & Alberto Alemanno, ‘The Emergence of Behavioural Policy Making: an EU Perspective’ in Anne-Lise Sibony & Alberto Alemanno (eds), *Nudge and the Law* (Hart Publishing 2015) 4.

¹²⁸ See Irwin Levin, Sandra Schneider & Gary Gaeth, ‘All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects’ (1998) 76 *Organisational Behaviour & Human Decision Processes* 149, 150.

¹²⁹ For data regarding how people in general make judgements, see Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011); Thomas Gilovich, Dale Griffin & Daniel Kahneman (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge 2002); Daniel Kahneman & Amos Tversky (eds), *Choices, Values, and Frames* (Cambridge University Press 2000). In the context of empirical data relevant for regulatory policymaking, see Cass Sunstein, ‘Empirically Informed Regulation’ (2011) 78 *University of Chicago Law Review* 1349.

¹³⁰ The claim has been made that it is unrealistic to expect consumers to read all of the information made available to them. See Ian Ayres and Alan Schwartz, ‘The No-Reading Problem in Consumer Contract Law’ (2014) 66 *Stanford Law Review* 2014, 552; on the general consensus that consumers do not read this information, see Robert Hillman & Jeffrey Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 *New York University Law Review* 436; Omri Ben-Shahar, ‘The Myth of the ‘Opportunity to Read’ in Contract Law’ (2009) 5 *European Review of Contract Law* 1, 2; Oren Bar-Gill & Omri Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law’ (2013) 50 *Common Market Law Review* 109, 117. This assumption has been concretely examined in several studies, see for instance Zev Eigen, ‘Experimental Evidence of the Relationship between Reading the Fine Print and Performance of Form-Contract Terms’ (2012) 168 *Journal of Institutional and Theoretical Economics* 124; for an opposing view that more consumers read contracts than is assumed, see Schmuël Becher & Esther Unger-Aviram, ‘The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction’ (2010) 8 *De Paul Business & Commercial Law Journal* 199.

¹³¹ Richard Thaler and Cass Sunstein, *Nudge: Improving Decision Making About Health Wealth and Happiness* (Yale University Press 2008) 6.

¹³² Cass Sunstein, ‘Empirically Informed Regulation’ (2011) 78 *University of Chicago Law Review* 1349.

¹³³ Sibony & Alemanno (n 127) 2-3.

¹³⁴ Rene van Bavel, Benedikt Herrmann, Gabriele Esposito & Antonios Proestakis, ‘Applying Behavioural Sciences to EU Policy-Making’ (2013) Publications Office of the European Union 1; see also Fabiana di Porto & Nicoletta Rangone, ‘Behavioural Sciences in Practice: Lessons for EU Rule Makers’ in Anne-Lise Sibony & Alberto Alemanno (eds), *Nudge and the Law* (Hart Publishing 2015).

question of how the findings from behavioural economics can from a practical perspective be integrated into policy formation.

Neoclassical economics and behavioural economics provide different starting points and therefore insights into how information is presumed to be used by consumers in the decision-making process. Behavioural economics lends strength to the argument that information does not protect consumers, does not enhance their welfare, and that more information does not enhance decision-making.¹³⁵ Information overload and choice paralysis are just some of the behavioural insights adopted in the consumer law debate that challenge the legitimacy of the neoclassical assumptions of consumer behaviour that can be identified in consumer policy and law. Put differently, behavioural economic theory has been adopted in consumer scholarship that problematizes legislative measures that are predicated on a neoclassical view of perfect rationality. The contention here is that from a behavioural viewpoint, taking as its starting point a more realistic view of individual behaviour that rejects unbounded rationality, information disclosures do not protect consumers in the ways envisioned by strategic consumer policy.¹³⁶

The literature on consumer empowerment follows in much of the same vein. Broadly speaking, behavioural findings have been used to support the claim that information cannot empower consumers. To give two examples. First, in the context of financial services, Mak characterizes consumer empowerment as a neoclassical model

¹³⁵ David Stewart & Ingrid Martin, 'Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research' (1994) 13 (1) *Journal of Public Policy & Marketing* 5; Dolores Albarracín, Joel Cohen & Tarcab Kumkale, 'When Communications Collide with Recipients' Actions: Effects of Post-Message Behavior on Intentions to Follow the Message Recommendation' (2003) 29 *Personality and Social Psychology Bulletin* 834, 834–845; Willem van Boom, 'Price Transparency, Consumer Decision Making and European Consumer Law' (2011) 34 *Journal of Consumer Policy* 359, 360; Jan Trzaskowski, 'The Unfair Commercial Practices Directive and Vulnerable Consumers' (14th Conference of the International Association of Consumer Law 2013) 3; Omri Ben-Shahar & Carl Schneider, *More Than You Wanted To Know: The Failure of Mandated Disclosure* (Princeton University Press 2014) 94; Martien Schaub 'How to Make the Best of Mandatory Information Requirements in Consumer Law' (2017) 25 *European Review of Private Law* 25, 29; Geert Straetmans, 'Information Obligations and Disinformation of Consumers' in Geert Straetmans (ed) *Information Obligations and Disinformation of Consumers* (Springer 2019) 4-5; Luzak (n 40) 85.

¹³⁶ For consumer law in general, see Helleringer & Sibony (n 39); Omri Bar-Gill & Franco Ferrari, 'Informing Consumers about Themselves' (2010) 3 *Erasmus Law Review* 93; Omri Ben-Shahar & Carl Schneider, 'The Failure of Mandated Disclosure' (2010) 159 *University of Pennsylvania Law Review* 647; Hanneke Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Intersentia, 2010); Vanessa Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive' (2011) 19 *European Review of Private Law* 5; Micklitz & Reisch & Hagen (n 37), In the context of the withdrawal right, see Joasia Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers' (2014) 37 *Journal of Consumer Policy* 91; for unfair commercial practices, see Rosella Incardona & Cristina Poncibo, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 *Journal of Consumer Policy* 21; on unfair contract terms, see Faure & Luth (n 52); on financial regulation, see Emilios Avgouleas, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform' (2009) 6 *European Company and Financial Law Review* 440; Gary Low, 'The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology' (2010) 2 *European Review of Private Law* 285; Howells, *The Potential and Limits of Consumer Empowerment by Information* (n 35); Nałęcz (n 30).

that does not effectively protect consumers from the complexities and inherent difficulties of the financial market. Instead, EU law should respond by adopting an alternative view of consumer behaviour and therefore an alternative regulatory approach. Three regulatory alternatives are advanced which include a paternalistic option that draws from behavioural insights, where the rational consumer is not taken as a starting point and varying levels of paternalistic interventions are advocated.¹³⁷ Second, in the energy services sector, Lavrijssen adopts behavioural insights to analyse the empirical findings which indicate that consumers are not empowered to participate in the energy market.¹³⁸ Lavrijssen uses the behavioural concepts of pre-existing preferences, inertia, status quo bias, loss aversion, and the cognitive limitations associated with bounded rationality to explain why consumers fail to search for better deals, to switch energy providers, and why consumers choose the first option over the most optimal choice.¹³⁹

3.5 Interim conclusions

The average consumer concept developed by the Court ought to be separated from the consumer concepts that the Commission has developed in strategic policy, of which there are several.¹⁴⁰ The Court's average consumer concept is a legal test that has the effect of setting the general level of consumer protection in the law of free movement and only to a limited extent in conflicts that arise in the ambit of secondary consumer law.¹⁴¹ The same can be said of the concept of consumer vulnerability that is set by the average and vulnerable consumer concepts in the Unfair Commercial Practices Directive (UCPD).¹⁴² The consumer images developed by the Commission in consumer policy share a functional commonality with the average consumer test but only insofar as these images are regulatory yardsticks. In other words, the consumer concepts in policy are not static legal tests to be applied in cases involving a conflict. Instead, the Commission's concepts of consumer are first and foremost normative yardsticks that guide the formulation of consumer policy, and they are simultaneously an end-goal to be achieved through the adoption of regulatory and non-regulatory measures.¹⁴³ These consumer

¹³⁷ Mak, 'The Myth of the 'Empowered Consumer'' (n 31).

¹³⁸ Lavrijssen (n 32).

¹³⁹ *ibid* 180-181.

¹⁴⁰ See for example the concepts of the consumer considered in several of the chapters in the following edited volume: Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

¹⁴¹ Kai Purnhagen & Hanna Schebesta, 'Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD' (2020) 28 *European Review of Private Law* 293.

¹⁴² Directive 2005/29/EU of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market mending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

¹⁴³ *ibid*.

concepts prescribe and set the theoretical starting point for consumer protection in the internal market in the context of secondary consumer legislation. Put differently, these images are the conceptual core and normative foundation for the several modes of consumer protection that can be identified in EU consumer policy and law.

The normative behavioural characteristics of the rational consumer as a yardstick in policy and the corresponding information model that developed in secondary consumer law are the contextual backdrop against which the literature has situated the consumer empowerment agenda. This understanding of consumer empowerment arises from the pre-existing view – as discussed in Section 2.2 – that EU consumer policy has a neoliberal character and that the consumer concepts developed in policy cannot avoid being intrinsically predicated on the *homo economicus* from economic theory. Clearly, early consumer policy and consumer law have a neoliberal character. It can also be acknowledged that the yardstick consumer in early consumer policy until the turn of the century enjoyed several parallels with the *homo economicus*. Nonetheless, it is my view that today this is the whole picture. Consumer policy and consumer law are not static. Instead, the quirk of consumer law is that it functions as a policy tool capable of dynamically responding to specific problems in the market. Put differently, it is conceptually limiting if the purpose of consumer policy and consumer law is narrowly construed as contributing to the construction and perpetuation of a neoliberal order when it can also be framed as ‘fixing’ problems in the market.¹⁴⁴ Following in this reasoning, the underlying political agenda of the Commission has the potential to shift in a way that impacts the vision of the internal market, the role of the consumer, the consumer’s behavioural characteristics as well as the recognition of new types of consumer interests as well as acknowledging new causes of consumer detriment. A reading of the most recent 2020 New Consumer Agenda reveals that there are radical differences from the first consumer programme in 1975 and onwards in terms of how consumer behaviour is conceptualized, how consumers are disadvantaged or vulnerable, what their interests are, how they need to be protected, what their role in the market is, and what the Commission’s narrative on its vision of the internal market is.¹⁴⁵ The same can be said of the rationales for market intervention that take the consumer as the focal point. As a concluding remark, the concept of the empowered consumer and the approaches of the Commission’s consumer empowerment agenda should first be defined and critically discussed based on a detailed analysis of the Commission’s (changing) narratives in consumer policy. Instead, it is my view and contention that

¹⁴⁴ Svetiev for instance argues that if there is a rationality underpinning the EU, then it is a problem-solving rationality and critiques the perspective that narrowly circumscribes EU private law through the market rationality. See Yane Svetiev, ‘The EU’s Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?’ (2016) 22 *European Law Journal* 659. It is this character of EU consumer law that has given rise to a substantial critique of consumer law, see for example The Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: A Manifesto Study Group on Social Justice in European Private Law’ (2004) 10 *European Law Journal* 653.

¹⁴⁵ This point will be elaborated on further in Chapter 4, Sections 2 & 3.

instead the meaning of EU consumer empowerment is reflexively assumed because of this concept being situated in the debates that define consumer policy as inherently liberal, of consumer law as being predicated on an economic model of consumer protection, and by recourse to the rationality study.

4. The process of empowering consumers: secondary legislation as a tool for empowerment

A central finding from Chapter 2 was the importance of the subjective and objective dimension of empowerment as a process. Moreover, it is necessary to consider what an empowerment entity has qualified as the cause of subjective and objective disempowerment because this not only offers a site for considering the implicit underlying ideals of what counts as power but also concretely affects the strategies that will be adopted by the empowering entity to empower the disempowered actor. Having established in the previous section the profiles of the average and rational consumer that the debate has used to ascribe meaning to the concept of the empowered consumer, the following question that then arises is what are the context specific strategies that the debate considers the Commission to have adopted so as to empower this type of consumer. In the analysis so far, it is clear from the connections drawn between consumer empowerment and consumer choice, autonomy, and (neo)liberalism that the consumer empowerment agenda has been firmly tethered to the concept of the information paradigm in secondary legislation. It is also clear that the debates that characterized empowerment in this way then consider information duties to be the Commission's primary – and in many cases the only – tool that is used or can be used by the Commission to empower consumers. The discussion in this section then has two aims. The first is to reveal any voices in the debate that consider other rights and obligations in the regulatory framework as having an empowerment rationale. The second is to assess whether there are voices in the debate on consumer empowerment that have adopted a more nuanced view of the concept of empowerment as a process.

4.1 Information duties, access to justice, and redress

Following the discussion so far in this chapter, it is unsurprising that the debate on consumer empowerment frames information duties as the Commission's primary tool for empowering consumers.¹⁴⁶ Legislation that facilitates access to judicial settlement,

¹⁴⁶ Nalęcz (n 30); Mak & Terry (n 34); Mak, 'The Myth of the 'Empowered Consumer'' (n 31); Fabrizio Esposito, 'A Dismal Reality: 'Behavioural Analysis and Consumer Policy' (2017) 40 *Journal of Consumer Policy* 193, 194; Howells, 'The Potential and Limits of Consumer Empowerment by Information' (n 35).

alternative dispute resolution and collective redress are also considered by the debate on empowerment to be another tool that the Commission adopts as part of its strategic approach for empowering consumers.¹⁴⁷ To a lesser extent the Commission's support of national support networks for consumers are also considered to form part of the Commission's strategy for empowering consumers.¹⁴⁸ These networks include consumer organizations, national public authorities and European Information Centres. As the Commission put it in a 2011 staff working paper on Consumer Empowerment: "Consumer empowerment is both a function of the skills, knowledge and assertiveness of consumers themselves, and the protection, rules and institutions designed to support them as they play their part."¹⁴⁹ In short, the debate on consumer empowerment, in both horizontal consumer law and in the energy market, generally associate the consumer empowerment agenda with secondary legislation that facilitates consumer choice and with legislation that has a limited impact on the business to consumer (B2C) relationship. In light of the discussion in Section 2.4, it appears to have become a truism that secondary legislation with a more interventionist and protectionist impact on the B2C relationship and consumer autonomy is conceptually incompatible with the consumer empowerment agenda. As the discussion in Chapters 4 and 5 will show, the consumer empowerment agenda has evolved in strategic policy, where the Commission has begun to attach a consumer empowerment rationale to secondary legislation that offers other forms of consumers rights and to consumer legislation that regulates market structures.

4.2 Tools for empowering energy consumers

The Commission has adopted a consumer empowerment agenda in energy policy as the dominant strategic approach for facilitating all consumers participating in the clean transition to a decarbonized economy. While several horizontal consumer instruments are applicable for consumers when they are active in the energy market, there are also several vertical instruments in this market that offer exclusive rights for energy consumers. Like the debate on consumer empowerment through horizontal consumer law, the literature that addresses the empowerment of energy consumers has also tended to primarily qualify the Commission's use of information duties in these vertical instruments as the primary tool for empowerment.¹⁵⁰ This is generally the case because,

¹⁴⁷ Stefan Wrška, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 299–300; Kati Cseres & Annette Schrauwen, 'Empowering Consumer-Citizens: Changing Rights or Merely Discourse?' in Dagmar Schiek, *The EU Economic and Social Model in the Global Crisis Interdisciplinary Perspectives* (Taylor & Francis 2016); Nalecz (n 30) 141.

¹⁴⁸ Mak & Terryn (n 34) 230–231; Wrška 2014 (n 147) 299–300.

¹⁴⁹ Commission, Commission Staff Working Paper, Consumer Empowerment in the EU, SEC(2011) 469 final, 2.

¹⁵⁰ Lavrijssen (n 32); Ioannidou (n 32) 141–142.

prior to the reform of the energy market from 2016 onwards, information duties appear to be the primary legislative tool that the Commission used to achieve the empowerment aims of its energy policy. However, after 2016 the Commission's narratives in energy policy have evolved with a renewed emphasis being placed on the goal of empowering energy consumers. This emphasis has stressed the goal of empowering vulnerable energy consumers and consumers living in energy poverty, a point that will be addressed in detail in Chapter 5. As a response to these changing narratives, the literature on the empowerment of energy consumers has begun to consider the Commission's use of legislative measures beyond information duties to empower energy consumers. This includes for instance legislation that facilitates consumers to become prosumers¹⁵¹ and legislation that aims to enhance access for (vulnerable) consumers to renewable energy communities.¹⁵²

4.3 A turn from empowerment outcomes to the empowerment process

The discussion in the previous sections has considered what legislative measures in the horizontal consumer law framework and in the vertical framework in the energy sector have been qualified by the debates on consumer empowerment as tools of the Commission's empowerment agenda. Due to the connection drawn between empowerment and information duties, the more recent discussions on consumer empowerment tend to reflexively assume that information duties are the exclusive tool in the empowerment agenda without critically considering if this is the case and whether other measures can be qualified as having an empowerment aim.¹⁵³ The most common line of inquiry in the debate on consumer empowerment is then whether information duties can empower consumers by adopting a behavioural critique on the limits of consumer empowerment through information. Apart from a few exceptions, this focus on the inability of consumer legislation to achieve empowerment outcomes has neglected a critical discussion of the process of empowering consumers.¹⁵⁴ The following discussion considers two exceptions where the literature on empowerment moves beyond the behavioural economic critique to consider what is entailed in the process of empowering consumers through law. These exceptions are Ioannidou's rethinking of consumer empowerment in the energy sector as a process and Helberger's

¹⁵¹ Catherine Barnet, 'Prosumer Legislation in Norway: A First Step for Empowering Small Energy Consumers' in Martha Roggenkamp & Catherine Banet (eds), *European Energy Law Report XII* (Intersentia 2018).

¹⁵² Florian Hanke & Jes Lowitsch, 'Empowering Vulnerable Consumers to Join Renewable Energy Communities—Towards an Inclusive Design of the Clean Energy Package' (2020) 13 *Energies* 1615; Katalin Cseres, 'Consumer Social Responsibility in Dutch Law. A Case Study on the Role of Consumers in Energy' (2019) 12 *Erasmus Law Review* 94.

¹⁵³ See for instance Lavrijssen's analysis of the 2016 winter package in comparison to the analysis conducted in this document in Chapter 5, Section 3; see Lavrijssen (n 32).

¹⁵⁴ Ioannidou (n 32) 142.

empirical analysis of the subjective dimension of consumer empowerment in the field of data protection.

In an analysis of consumer empowerment in the energy retail market, Ioannidou draws on Zimmerman's body of work on psychological empowerment as a starting point for treating empowering through consumer legislation as a process.¹⁵⁵ To begin, Ioannidou does begin her analysis by defining both information duties and redress mechanisms as tools of consumer empowerment and that freedom of choice is a manifestation of consumer power. Moving beyond the question of whether these tools can empower consumers, Ioannidou constructs consumer empowerment in the energy services sector as a process that: "encapsulates both consumer capabilities and the respective interaction with their market environment' based on intrapersonal, interactional and behavioural components."¹⁵⁶ For Ioannidou, the intrapersonal component refers to how an individual perceives themselves and their skills. While the extra-personal component refers to how an individual views their environment: "consumer empowerment encapsulates both the process of information disclosure as well as the outcome of acting upon such information."¹⁵⁷ The reorientation to focusing on empowerment as a process gave way to a discussion on the ways in which consumers *can* become empowered instead of directly analysing consumer empowerment as participation in the market by quantitatively measuring mobility as switching between energy providers.

Helberger, Strycharz & Ausloos offer another example of a move towards considering the subjective process of consumer empowerment through secondary legislation but do so through an empirical study on empowerment and the General Data Protection Regulation (GDPR),¹⁵⁸ hailed by the Commission as a pillar of empowerment.¹⁵⁹ The broad aim of this study was to examine individual reactions to the GDPR and whether the GDPR makes consumers *feel* empowered. They asked: "Do they [consumers] feel empowered indeed, and did the GDPR succeed in strengthening individual rights and conveying a feeling of confidence and control?"¹⁶⁰ Their preliminary assumption was that for individuals to feel empowered to participate and utilize their rights, they needed to: "not only be aware of their data protection rights, but also understand them, have a positive attitude towards these rights and believe in their effectiveness".¹⁶¹ This study used the results from a 2019 questionnaire carried out in the Netherlands on the GDPR. The successful mobilization of the consumer – as

¹⁵⁵ *ibid* 141–142.

¹⁵⁶ *ibid* 142.

¹⁵⁷ *ibid* 141.

¹⁵⁸ Natalie Helberger, Jef Ausloos & Joanna Strycharz, 'Data Protection or Data Frustration? Individual Perceptions and Attitudes Towards the GDPR' (2020) 6 *European Data Protection Law Review* 407.

¹⁵⁹ Commission, 'Joint Statement by First Vice-President Timmermans, Vice-President Ansip, Commissioners Jourová and Gabriel ahead of Data Protection Day' (2019) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_461> accessed 19 July 2022.

¹⁶⁰ Helberger, Ausloos & Strycharz (n 158) 408.

¹⁶¹ *ibid* 411.

consumers using their rights afforded by the GDPR – was operationalized as the empowerment outcome. Moreover, the individual's internalized perception of trust and their belief that the GDPR offered protection were the variables that researchers in this study operationalized as the consumer's subjective feelings (narratives) of empowerment. Noting that the individuals taking part in this study did not themselves define 'trust' and 'belief in the protection of the GDPR' as what they personally considered as constituting internalized narratives of empowerment with respect to this legislation. Instead, this operationalization of subjective empowerment was pre-determined by the researchers.

These studies on consumer empowerment as a process add more conceptual depth to the concept of EU consumer empowerment in the context of the GDPR and more generally the legislative measures in the energy retail sector. These studies are also illustrative that the critical discussion and narratives on consumer empowerment in the literature on this concept have heavily neglected the subjective dimension of both disempowerment and empowerment and the subjective dimension of the process of empowering consumers. Moreover, by drawing on empowerment literature from social psychology, Ioannidou raises the issue of the methodological difficulties associated with measuring empowerment as an outcome, which were outlined in Chapter 2.¹⁶² Despite this, the question of how to operationalize the subjective dimension of EU consumer empowerment and whether this is possible from the top-down perspective of the researcher is not considered further in the literature on EU consumer empowerment. Taking these points beyond the energy retail sector and the GDPR to the conceptual debate on EU consumer empowerment, it becomes apparent that a critical discussion is required not only with regard to the process of empowerment but more specifically with respect to the subjective dimension of this process.

5. The theoretical concept of 'power' and the consumer empowerment agenda

An important finding in Chapter 2 was the centrality of the concept of power for contouring how empowerment is defined. In short, different understandings of power impact what counts as empowerment as well as what will be qualified as causing the disempowerment of a disempowered actor. When EU consumer empowerment is defined by the debate as having the aim of enhancing consumer choice,¹⁶³ then this understanding of the EU consumer empowerment agenda can be traced to the type of

¹⁶² Ioannidou (n 32) 142; Marc Zimmerman claims that a universal and global measure of empowerment is neither feasible nor desirable, see Marc Zimmerman, 'Psychological Empowerment: Issues and Illustrations' (1995) 23 *American Journal of Community Psychology* 581.

¹⁶³ It has been proposed that a strong consumer protection policy that empowers consumers to make choices and enforce their rights can be an important driver in promoting good standards and hence enhancing competitiveness. See Howells, Twigg-Flesner & Wilhelmsson (n 113) 40; see also Andrzej Nałęcz (n 30) 14; Weatherill, 'Empowerment is Not the Only Fruit' (n 50) 204.

internal market that was created by the de-regulatory impact of the *Cassis de Dijon* ruling, which prohibited technical standards that could be considered as constituting an obstacle to intra-Union trade.¹⁶⁴ As Weatherill puts it, “This is readily understood as empowerment through choice—the consumer in the market is freed of the oppressive (and protectionist) restrictions anachronistically applied by German law.”¹⁶⁵ This is another reason why the debate proposes that the concept of the empowered consumer finds its expression through the average consumer concept.¹⁶⁶ The Court frames consumers as having the capacity to flourish in a deregulated market because of their ability to use information to act in a circumspect manner. As it was put in a recent report in 2021 on structural asymmetries in digital consumer markets: “The idea(l) of the ‘average consumer’ permeates large parts of European consumer law and has been pivotal in building a narrative of consumer empowerment and enabling consumers to protect themselves through active and well-informed choices in the marketplace.”¹⁶⁷ The ‘power’ in consumer empowerment in the context of the circular economy has also been defined by Mak and Terry as consumers stimulating sustainable production by demand when they make sustainable choices.¹⁶⁸ While this point is made with regard to consumer empowerment and sustainability, the underlying notion of consumer power is the same. It is an economic view of consumer power that relies on the neoclassical atomism of the consumer and the theory that the consumer is a sovereign market actor.

Defining consumer power as ‘consumer choice’ is problematic because by conceptual fiat consumer power becomes limited in scope to consumer choice. Moreover, this definition does not entail a critical discussion of what constitutes consumer power but is instead the application of a theoretical framework onto consumer behaviour and market forces from an economic perspective. Put differently, this view of consumer power does not tell us *why* consumer choice is the exercise of consumer power. I do not argue that it is not one of the aims of consumer empowerment to stimulate (sustainable) production. Instead, the point to be drawn is that this is only one of several potential aims of consumer empowerment and many of these aims cannot be adequately explained through this economic framework of consumer power. Instead, I contend that we ought to look beneath the understanding of consumer power as consumer choice to identify the deeper theoretical basic concept of power that supports this view. The following discussion in this section first deconstructs the concept of power that supports the economic view of consumer power as consumer choice. Second, the discussion will consider the alternative perspectives of the meaning of

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ Ioannidou (n 32) 144.

¹⁶⁷ Natali Helberger Orla Lynskey, Hans Micklitz, Peter Rott, Marijn Sax & Joanna Strycharz ‘EU Consumer Protection 2.0 Structural Asymmetries in Digital Consumer Markets, A Joint Report from Research Conducted Under the EUCP2.0 Project’ (BEUC) (2021) <https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf> accessed 28 July 2022, 5.

¹⁶⁸ Mak & Terry (n 34) 229.

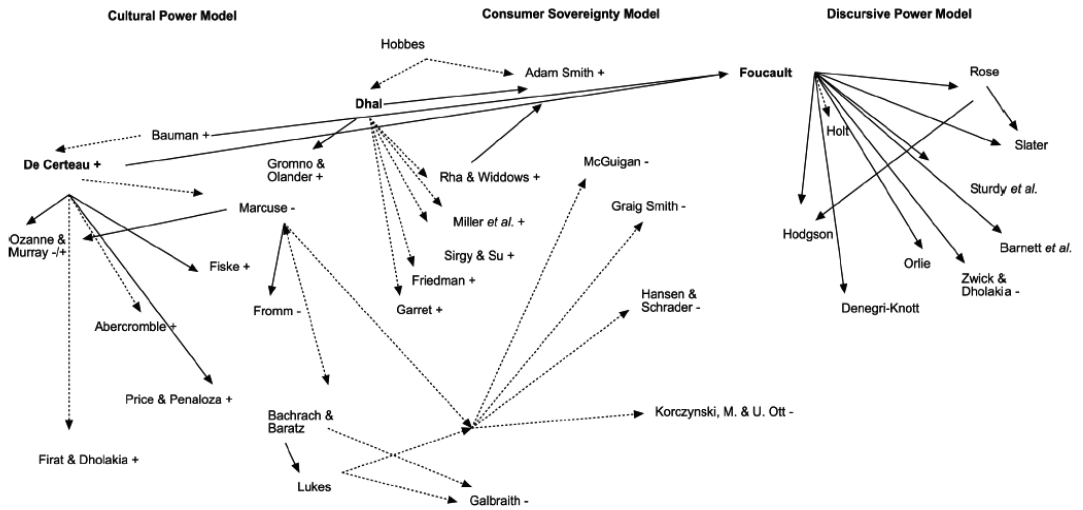
‘power’ in consumer empowerment. The purpose of this analysis is to show how the debates on EU consumer empowerment have adopted a narrow and one-dimensional view on the concept of power that is limited to agency, which is the first of the four dimensions of the model on power in Chapter 2. This discussion reveals that the other three dimensions of power in the EU consumer empowerment agenda remain underexplored, a point that will be considered in detail in Chapter 6.

5.1 Consumer choice: the empowered consumer as the sovereign consumer

Denegri-Knott’s cartography of power and mapping of the empowerment literature in the field of consumer marketing and consumer studies will be used as a first step towards making the connection between consumer choice as consumer power, as seen in Figure 1 below. I have chosen to begin this discussion in this section using this cartography of power because it reveals that the debate on EU consumer empowerment has adopted mid-level theories of power from economic theory as the theoretical starting point for what counts-as consumer power.

Figure 1 ¹⁶⁹

This cartography - modelled on Haugaard’s mapping of the family tree of power – has



the aim of theoretically grounding and connecting the literature on consumer empowerment in the field of consumer studies and the marketing literature on

¹⁶⁹ Janice Denegri-Knott, Detlev Zwick & Jonathan Schroeder, 'Mapping Consumer Power: An Integrative Framework for Marketing and Consumer Research' (2006) 40 *European Journal of Marketing* 950, 954.

empowerment with several underlying theoretical understandings of power.¹⁷⁰ This cartography consists of three prevailing theoretical approaches to power. Denegri-Knott *et al* propose these three approaches can offer a critical and analytical lens for analysing and evaluating the empirical understandings of consumer power that dominate in the literature on marketing and consumer studies. These are the consumer sovereignty model, the cultural model, and the discursive model. In particular, the consumer sovereignty model will be used as an analytical tool in the following discussion. This is because the sovereignty model connects the dominant ideas on consumer power in economic thought with Dahl's politically neutral and abstract concept of power with the debates that frames the 'power' in consumer empowerment as consumer choice. By making this connection, the one-dimensional perspective of consumer power as consumer choice can be subjected to critique.¹⁷¹

The literature on consumer empowerment in marketing and consumer studies has proliferated over the last several decades. A dominant narrative has evolved in both the academic and popular debate on consumer empowerment that the balance of power has shifted from businesses to consumers.¹⁷² The internet has empowered consumers,¹⁷³ enhanced competition has empowered consumers¹⁷⁴ while policy and political agendas enhance consumer power through choice.¹⁷⁵ In short, it is a neoliberal view that the consumer is powerful because they have agency and therefore the ability to exercise free choice.¹⁷⁶ Power is understood as the capacity of the consumer (or consumers collectively) to influence the behaviour of businesses and producers and therefore affect production. Like the debate on consumer empowerment in the field of EU consumer law, the marketing literature has failed to make explicit the definitions of power that support these claims regarding consumer power/empowerment as consumer choice. Denegri-Knott *et al* point to this shortcoming. It is the failure of the debate to acknowledge that the epistemological lineage of their taken for granted understandings of power can be traced to Dahl and instead have come to rely on economic theories of consumer behaviour when defining consumer power/empowerment. Consequently, the literature that adopts an understanding of consumer power as consumer choice falls within the consumer sovereignty model of power. According to the sovereignty model, consumer power is defined as consumer choice where it is the ability of consumers as:

¹⁷⁰ Mark Haugaard, *Power: a Reader* (Manchester University Press 2002).

¹⁷¹ This point will be explored further in Section 6 of this chapter.

¹⁷² Coskun Samli, *Empowering the American Consumer: Corporate Responsiveness and Market Profitability* (Quorum Books 2001).

¹⁷³ Leyland Pitta, Pierre Berthon, Richard Watson & George Zinkhand, 'The Internet and The Birth of Real Consumer Power' (2002) 45 *Business Horizons* 7.

¹⁷⁴ Michael Moynagh & Richard Worsley, 'Tomorrow's Consumer: The Shifting Balance of Power' (2002) 1 *Journal of Consumer Behaviour* 239; William Nelson, 'All Power to the Consumer? Complexity and Choice in Consumers' Lives' (2002) 2 *Journal of Consumer Behaviour* 185.

¹⁷⁵ Margaret Scammel, 'The Internet and Civic Engagement: The Age of the Citizen-Consumer' (2000) 17 *Political Communication* 351.

¹⁷⁶ On the powerful narrative surrounding the consumer and consumer choice see, Yiannis Gabriel & Tim Lang, *The Unmanageable Consumer* (1st edn, Sage Publishing 1995) 11–18.

“free and rational individuals to choose.”¹⁷⁷ Drawing on this, the marketing literature assumes that the well-informed, autonomously-acting consumers when aggregated with other consumers possess greater power than an individual producer and can therefore exert influence (power) over them.

In their development of the consumer sovereignty model, Denegri-Knott *et al* point out that the concepts of consumer sovereignty and consumer empowerment have long been part of (neo)classical economic theory.¹⁷⁸ Smith’s work on the political economy in 1776 proposed that: “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.”¹⁷⁹ Consumer sovereignty was later defined by Hutt in 1933 as: “The consumer is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or refrain from demanding).”¹⁸⁰ These assumptions of consumer power and of consumer behaviour form part of neoclassical economic theory, which considers that the consumer itself is in the best position to make decisions about their own welfare. As discussed earlier, both classical and neoclassical economic theory have developed several axioms of consumer behaviour predicated on this notion. The consumer is a rational and utility-maximizing agent, the *homo economicus*. As a perfectly rational, self-determined actor, consumers will consistently make an optimal choice based on their own selfishly and subjectively defined ends. Social relations and structural forms of power are irrelevant: society is a by-product of the market and of consumer behaviour. Thus, the market becomes isolated from other forms of power. These understandings of consumer behaviour are fundamental in mainstream economic thought because as Denegri-Knott *et al* put it, the consumer has become instrumental for: “directing the market’s so-called invisible hand, which results in more efficient production, better and cheaper products, social progress, and increased general welfare.”¹⁸¹ From a methodological perspective, when consumer behaviour is conceived of in this way, what ensues is that the consumer becomes atomized. Moreover, the starting point and only relevant unit of analysis is therefore the consumer, which leads to methodological individualism. This individualistic stance obscures the perspective that the structural forces structure the environment of consumers and actors in general. This stance therefore ignores the impact of structure on the agency of consumers. This obstructs holistic analysis of the 2-D structural operation of power and empowerment and wholly precludes an analysis of the subjective dimension of consumer empowerment and power at the 3-D and 4-D levels of analysis.

¹⁷⁷ Denegri-Knott, Zwick & Schroeder (n 169) 955; see also Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* (Harcourt Brace Jovanovich 1980),

¹⁷⁸ Denegri-Knott, Zwick & Schroeder (n 169) 955; see also Don Slater, *Consumer Culture and Modernity* (Polity Press 1997).

¹⁷⁹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen & Co 1904) 49.

¹⁸⁰ William Hutt, ‘The Concept of Consumers’ Sovereignty’ (1940) 50 *The Economic Journal* 66.

¹⁸¹ Denegri-Knott, Zwick & Schroeder (n 169) 955.

The social world is a product of individual (consumer) behaviour rather than society being the sum of social relationships that are more than its individual parts.

5.2 Alternative perspectives on the 'power' in consumer empowerment

Denegri-Knott *et al*'s mapping exercise and the vision of the marketing literature into three models have been both cited and adopted as a theoretical starting point for analysing consumer empowerment.¹⁸² Wahlen and Huttuen, through a comparative, genealogical analysis of consumer empowerment in German and Finnish consumer policy, until the point when consumer policy became a joint competence with the EU, address the question of how both national and EU consumer policies advance the concept of consumer empowerment.¹⁸³ Relying on Shankar,¹⁸⁴ they define consumer empowerment as “[...] an enhancement of the agency of the governed consumer and relates to consumer subjectivity as to qualitatively transform power relations in favour of the consumer.”¹⁸⁵ Following this view of power and empowerment, their critical analysis sought to emphasize how public consumer policy provides support for consumers in overcoming the relational imbalances of power between consumers and producers by strengthening the position of the consumer. The discursive view of power developed by Denegri-Knott *et al* provided an analytical lens for Wahlen and Huttuen's analysis of consumer policy to reveal how such policy enhanced the agency of consumers *vis-à-vis* businesses. Their purpose was not to evaluate the political programmes and initiatives in these policies but instead to reflect on the concept of empowerment in consumer policy. Interestingly, the analysis of both Finnish and German consumer policy demonstrated that the notions of consumer power adopted by politicians to emphasize the content of consumer empowerment are not anchored and fixed in any one conceptualization of power. Instead, the underlying concept of power is fluid and shifts over time and across the political spectrum. This indicates the limitations of adopting a sovereign view of power that relies on an economic theory of perfect rationality.¹⁸⁶

The attraction of adopting these models as a starting point for conceptualizing EU consumer empowerment appears to be twofold. Firstly, the field of marketing and consumer studies shares several similarities with consumer policy and law as both are concerned with understanding the behaviours of consumers, businesses and their relations *vis-à-vis* their market interactions. Secondly, both disciplines have a stake in

¹⁸² *ibid.*

¹⁸³ Stefan Wahlen & Kaisa Huttuen, 'Consumer Policy and Consumer Empowerment: Comparing the Historic Development in Finland and Germany' (2012) 36 *International Journal of Consumer Studies* 2.

¹⁸⁴ Avi Shankar, Hélène Cherrier & Robin Canniford, 'Consumer Empowerment: A Foucauldian Interpretation' (2006) 40 *European Journal of Marketing* 1013.

¹⁸⁵ Wahlen & Huttuen (n 183) 3.

¹⁸⁶ *ibid* 7.

understanding how the behaviours of these market actors can be influenced. Conversely, I argue that the attractiveness of these two points masks a problematic drawback of using these mid-level models as a lens for analysing EU consumer empowerment. Denegri-Knott *et al* are clear that the three models developed in their work are based on the cartography of power mapped out by Haugaard in his publication *Power: a Reader*.¹⁸⁷ Following this, the function of the three models is to offer broad and simplified taxonomical categories within which to place the debates on power in political and social theory. The goal of Denegri-Knott *et al* was to loosely group the literature on empowerment in the consumer studies and marketing literature. Their explicit purpose for doing so was a mapping exercise that could illustrate that the different starting points for what counts as power in the consumer and marketing literature on empowerment helps to explain why definitions of empowerment in these fields are so diverse and why these differences are the theoretical cause of much tension in the debate on empowerment in these fields. With this purpose in mind, the models of power developed by Denegri-Knott *et al* have nonetheless been adopted by Wahlen and Huttunen as a tool for tracing and revealing the underlying notion of power in policy. While I see adopting a broader view of power as more than agency as a move in the right direction for the study of consumer empowerment, it is also my view, however, that the three models of power developed by Denegri-Knott *et al* are not as nuanced nor as developed as Haugaard's four-dimensional model of power, which has a stronger analytical capacity.¹⁸⁸ These three models of power are based on a rough diagram of power that was provided by Haugaard for illustrative purposes in his work *Power: a Reader* published some 20 years before his creation of the more complex and robust four-dimensional model of power.¹⁸⁹

6. Problematizing the debate on consumer empowerment

The analysis in this chapter has two aims. The first was to consider several of the prominent understandings of consumer empowerment that have been circulating in the consumer law scholarship. The second was to reveal if there are dimensions of EU empowerment that have yet to be considered within the scholarship on empowerment. Considering the discussion so far, the remainder of this chapter will problematize these gaps in the scholarship on consumer empowerment by highlighting the aspects of EU consumer empowerment that have either been overlooked or excluded from analysis by definitional fiat.

¹⁸⁷ Haugaard (n 170)

¹⁸⁸ See Chapter 2, Section 4.

¹⁸⁹ Haugaard (n 170).

6.1 Beyond consumer empowerment as autonomy and choice

In Chapter 2 it was proposed that there is no singular essence that can describe what counts as empowerment. Instead, this concept is a cluster of concepts contoured by the values and language games of a particular discipline. For instance, while there may be several similarities and overlapping characteristics between scholarship on student empowerment and consumer empowerment, there are likely several differences that make our understandings of empowerment distinct. Sections 2 and 3 of this chapter considered several of these discipline-specific language games that dominate in the literature on EU consumer empowerment and have been used to ascribe meaning to the concept of EU consumer empowerment. It was illustrated that these are the narratives in consumer scholarship that frame EU consumer empowerment as a neoliberal political agenda that furthers the internal market rationale, protects party autonomy, and is an approach that cannot be reconciled with the more interventionist measures in the consumer law framework that protect consumers.

There is good reason as to why consumer scholarship has framed consumer empowerment in these ways. The discussion in Section 3 considered the normative profile of the average/rational consumer that has been attached to the empowered consumer. It was shown that the introduction of the consumer empowerment agenda by the Commission in strategic horizontal consumer policy appears to be a logical continuation of the rational consumer concept that has acted as yardstick from early consumer policy. The rational consumer from policy and the average consumer from free movement case law in tandem have set a level of consumer protection in the market that is considered to protect the unboundedly rational consumer. These consumer concepts have been likened to the *homo economicus* from economic theory and these parallels have given rise to several challenges that have arisen regarding the reality of behavioural assumptions that support the rational consumer concept. These challenges also form that main part of the critique of EU consumer empowerment and are based on the qualification of the empowered consumer as the rational/average consumer.

It is my view that while this understanding of consumer empowerment and of the content of the normative profile of the empowered consumer was an adequate description of the Commission's approach, this is no longer the case. It is possible that what it means to empower EU consumers can change both as a value orientation and from a practice perspective. Indeed, the purpose of this study and more specifically of the framework developed in Chapter 2 was not to develop a normative standard against which the EU consumer empowerment agenda would be evaluated. Instead, the purpose of this framework was to create a conceptual framework that would allow for a more nuanced exploration of what EU consumer empowerment is. Returning to the question of whether EU consumer empowerment can be ascribed the same meanings today as when it was first introduced in 2007, the point can be made that the consumer empowerment agenda is an approach that is developed by the Commission in strategic

policy and, importantly, consumer policy which is not static. Over the last several years, following the New Deal for Consumers, the goals of consumer policy have expanded and become connected to environmental policy and correspondingly the role of the consumer in the market is evolving. Arguably, the traditional understandings of consumer protection are also coming under pressure from these changes. As is illustrated in Chapter 4, the consumer empowerment strategy, rather than fading away, has become embedded in the broader strategy of the Green Deal and the goal of transforming the internal market into a fair and just circular and net-zero economy. This vision of the internal market and the social transformation to an economy where growth is decoupled from environmental degradation – a move away from consumer society – entails reforms of both horizontal consumer law and the energy market, both of which adopt consumer empowerment as a strategic approach. These reforms are not only legislative but also represent several conceptual shifts in the vision of the internal market and of consumer policy. It is my view that a true consideration of what it means to empower consumers and of the role of consumer empowerment in these transformations entails moving beyond the language games in consumer scholarship that have narrowly defined EU consumer empowerment through the vocabulary of neoliberalism, autonomy and consumer choice. In short, if the conceptual backbone of consumer policy is evolving, then the unanswered question is how the Commission's narrative on consumer empowerment in strategic policy has also evolved and with this, what legislative measures can be qualified as tools that the Commission employs for achieving empowerment ends through secondary legislation.

6.2 Consumer empowerment and the limitations of an economic framework

From the discussion in Section 3 it is clear that the rationality study from economic theory has offered consumer scholarship a lens for defining the normative content of the empowered consumer concept. In Section 5, it was illustrated that economic theory on the concept of power and more specifically of consumer power have similarly offered a theoretical framework for defining what counts as the 'power' in consumer empowerment. In Chapter 2 the discussion of the concept of power and the adoption of Haugaard's four-dimensional model of power proposed that power is a multi-dimensional concept. While we can focus on any one dimension such as agency, this does not mean that the other three dimensions cease to exist. To the contrary, each of the four dimensions are intimately interrelated and each offer a lens for examining the several different ways in which power operates and becomes manifest in society. It is my view that economic theory, including behavioural economics, offers a limited understanding of power because of the foundational axioms in the economic discipline that fundamentally adopt agency and methodological individualism as the conceptual starting point. In this section I will then highlight and work through the conceptual

limitations that arise from adopting an economic framework as the starting point for defining consumer empowerment.

To be clear, behavioural economics adds much value to the consumer law debate by adopting a more expansive view than mainstream economics of consumer behaviour and the psychological factors that can affect consumer decision-making. Behavioural insights undeniably offer important insights into how consumer choice is manipulated by business practices. For instance, a recent BEUC study contends that informed consent (in line with the GDPR) has had the practical effect of consumers legally (and freely) offering their personal data to businesses. This data is subsequently used to create choice architectures primed with dark patterns that manipulate consumer biases and heuristics in the digital marketplace.¹⁹⁰ The digital manipulation of consumers is becoming increasingly personalized based on consumer data and is made possible through the legal acquisition of large data streams which include personal information about consumers.¹⁹¹ This information includes data that consumers have consented to share or have been nudged into consenting to share.¹⁹² These structural and relational power imbalances are examples of how information can be used to create power asymmetries in ways that were not possible prior to digitalization. In the context of consumer protection, behavioural economics is useful because it provides the debate with an entry point for anchoring manipulative choice architectures within the scope of misleading commercial practices. Specifically with regard to the Unfair Commercial Practices Directives, this has triggered a debate surrounding the revision of the concept of consumer vulnerability.¹⁹³ Moreover, behavioural insights also offer valuable insights for understanding how consumers process information and how they react to too much information. Consequently, such insights are used to improve the information model by improving the way that information is presented to consumers. Nonetheless, these insights are primarily psychological and limited to discussions on how consumer behaviour can be or is manipulated. This concerns how consumers can be nudged into making ‘beneficial’ decisions as well as when nudging becomes an illegitimate manipulation of decision-making.

There are, however, several conceptual shortcomings in the behavioural economic approach. First is the continued commitment to methodological individualism. Second is the under-socialized view of consumer behaviour. The under-socialized understanding of consumer behaviour that underpins behavioural economics cuts to the core of the behavioural economic turn that proffers ‘realist’ assumptions of

¹⁹⁰ Helberger *et al.* (n 167) 26, 107.

¹⁹¹ For an overview on the relationship between big data and personalisation see Sohini Chatterjee, ‘Big Data Analytics in e-Commerce: Understanding Personalisation’ (2019) 2nd International Workshop on Advances in Social Sciences (IWASS 2019).

¹⁹² Jan Bauer, Regitze Bergström & Rune Foss-Madsen, ‘Are You Sure, You Want a Cookie? – The Effects of Choice Architecture on Users’ Decisions About Sharing Private Online Data’ (2021) 120 *Computers in Human Behavior* 1.

¹⁹³ Helberger, Sax, Strycharz & Micklitz (n 50); Jamie Luguri & Lior Jacob Strahilevitz, ‘Shining a Light on Dark Patterns’ (2021) 13 *Journal of Legal Analysis* 43.

(consumer) behaviour. There are several differences between neoclassical and behavioural economics, but there are also several similarities. Both neoclassical and behavioural economic approaches adopt a rationality study that prescribes individual behaviour, albeit with the contrasting content of bounded versus unbounded rationality. Berg and Gigerenzer contend that the similarities in the methodological foundations of neoclassical and behavioural are greater than is typically recognized in the literature.¹⁹⁴ Friedman's influential logic of the "as if" methodology remains pervasive. This logic postulates that what matters is the accuracy of a scientific theory's predictions rather than the realism of a theory's assumptions.¹⁹⁵ Using the analogy of a billiards player, Friedman argues that it does not matter if the expert player is not making complex mathematical calculations about angles, frictions and movements of a ball because he is playing as if he were. Therefore, if a mathematical model has predictive power, then the realism of its underlying assumptions is irrelevant. Behavioural economics is considered to respond to this tautological logic by committing to modelling approaches that are based on 'realist' assumptions. Yet, Berg and Gigerenzer argue that behavioural economics scholars rarely challenge the realism of a theory's assumptions because of the embedded methodology of 'as if' logic in the economics school of thought. They explicate this claim by showing that behavioural economic models based on prospect theory also adopt tautological, unrealistic 'as if' assumptions, like its predecessor neoclassical expected utility theory.¹⁹⁶ In their view, the shared assumptions of both prospect and expected utility theory are problematic because the assumptions of "transforming, multiplying and adding, as well as exhaustive knowledge of actions and outcomes (i.e., event spaces associated with each action) - are equally defensible, or indefensible, since they play nearly identical roles in both theories."¹⁹⁷

Behavioural and neoclassical economics also share methodological individualism as a common approach. Methodological individualism, first introduced by Weber as a precept for social sciences but coined by Schumpeter, is a normative ideology.¹⁹⁸ It adopts the view of individuals as independent and having the unrestricted will and freedom to make choices which are not impacted by social structures. It is founded on the belief that social phenomena can only be explained through an analysis of human behaviour, and society does not exist independently of human action. Individuals, therefore, become the most fundamental unit of analysis. This includes not only a single individual but also groups and collections of individuals. Both neoclassical microeconomics and behavioural economics take the individual as the starting point for analysis and which analysis depends on the unfettered agency of the individual. In other

¹⁹⁴ Nathan Berg & Gerd Gigerenzer, 'As-If Behavioral Economics: Neoclassical Economics in Disguise? History of Economic Ideas' (2010) 18 *History of Economic Ideas* 133.

¹⁹⁵ Friedman & Friedman (n 177).

¹⁹⁶ Berg & Gigerenzer (n 194) 135 – 137.

¹⁹⁷ *ibid* 136.

¹⁹⁸ Max Weber, *Economy and Society: An Outline of Interpretative Sociology (Vol. 1)* (Bedminster Press 1968); Joseph Schumpeter, 'On the Concept of Social Value' (1909) 23 *The Quarterly Journal of Economics* 213.

words, an individual's choices and actions are not impacted by structural, institutional and cultural forces. There is a social dimension to behavioural research where experiments show that individuals are impacted by the preferences of others.¹⁹⁹ Nevertheless, this approach still falls in line with an unsocialized view of the consumer.²⁰⁰ The behavioural turn is better explained as a turn to psychology rather than a return to sociological theory.²⁰¹ Methodological individualism combined with an under-socialized view of consumer behaviour is problematic when this economic lens is applied to understand consumer empowerment because it is an approach that resists an understanding power that goes beyond the narrow confines of agency.

The theoretical framework developed in Chapter 2 offers a starting point on how power can be conceptualized that attempts to balance agency and structural accounts of social ordering and power dynamics. Methodological individualism was rejected as 'absurd' by the 3-D and 4-D operation of power because it is the socialization process that creates practical consciousness and the deeper concepts of identity and ontological security at the level of 4-D power. On the other hand, the overly deterministic approach of methodological holism was qualified as equally problematic because it renders social actors as passive dupes devoid of agency. This was remedied in the model on power through Haugaard's proposition that an actor can express agency both within 1-D structured conflicts and in 2-D structural conflicts against structure and socialization. When the process of empowerment is conceptualized as both an objective and a subjective process in a system balanced between structure and agency, then behavioural economics becomes problematic because of the over-emphasis on agency and the correspondingly narrow view that is afforded to social structures. Put differently, a behavioural economic lens can tell us how psychological quirks – such as loss aversion - will affect consumer decision-making, but it cannot tell us how internalized narratives of disempowerment effect decision-making.

An issue also arises when a behavioural economic lens is used to conceptualize power dynamics and structures of power. This is because the focus is placed on the 1-D dimension of power as agency and how the visible relations between actors build structures of power. Following this, the pre-existing 2-D structures of power already in place and the invisible operation of 3-D and of 4-D power are conceptually excluded. To give a practical example of the implications of this, a household's food consumption represents one-third of its environmental impact. Food waste is therefore a pressing issue because it forms part of global consumption patterns that currently require 1.5

¹⁹⁹ For a discussion on the social component of behavioural economics, see Luca Zari, 'Behavioral Economics has Two 'Souls': Do They Both Depart from Economic Rationality?' 2010 (39) *Journal of Behavioural and Experimental Economics* 526.

²⁰⁰ On the under-socialization and over-socialization of individuals in economic theory, see Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 *American Journal of Sociology* 481.

²⁰¹ Sabine Frerichs, 'What Is The 'Social' in Behavioural Economics' in Hans Micklitz, Anne Lise Sibony & Fabrizio Esposito (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar 2018) 408-412.

times the resources that the planet can provide.²⁰² The issue of food waste is complex and can result from inadequate preparation and storage conditions and from psychological, behavioural and socio-economic factors.²⁰³ Behavioural economics informs policymakers about the different ways that consumers make choices and respond to the visual presentation of information on food packaging. In this way these approaches are useful for encouraging the adoption of a boundedly rational consumer as the regulatory yardstick that guides the creation of labelling, which can help prevent unnecessary waste of unspoiled goods by nudging certain behaviours.²⁰⁴ On the other hand, 3-D and 4-D power structures also have an important role to play in the prevention of food waste that goes beyond the psychological response of consumers to food labelling. Yngfalk in a study on the power dynamics of consumerism and food labelling applied a Foucauldian approach to subjectification and self-discipline (which is conceptually parallel to 3-D practical consciousness and 4-D ontological security) using 'best before' food labels as a case study.²⁰⁵ The consumption of food past the 'use by' date triggered feelings of 'disgust' for the consumer. Their 3-D practical consciousness informs them that eating this food is inappropriate. To retain ontological security, the consumer then uses and disposes of food past the 'use by' date so that they can participate in society by respecting the 3-D interpretive horizons that determine the boundaries of appropriate behaviour based on the cultural ideals of 'clean' and 'dirty'.²⁰⁶ This example illustrates that empowering consumers not only requires ensuring that consumers are not misguided by how information is presented but also requires acknowledging the interpretive horizons that can pose an obstacle to empowered behaviours. This is especially the case when achieving the green transition to a sustainable economy is not simply a legislative transformation but also a social transformation that requires changing attitudes and thought patterns regarding the ways in which we consume. While behavioural economics offers an approach for considering the former, it cannot offer insights to the latter. The analysis in the following chapters will illustrate that consumer empowerment is not simply about facilitating or nudging consumers to make an informed choice but also entails the creation of an enabling

²⁰² In the United Nations Environment Program's 2021 Food Waste Index Report it was that in 2019 approximately 931 million tonnes of food, which is 17% of total global food production were wasted. Of this waste 61% of which came from households, see the United Nations Environment Programme. Food Waste Index Report 2021 <<https://www.unep.org/resources/report/unep-food-waste-index-report-2021> accessed> 20 July 2022.

²⁰³ Roni Neff, Marie Spiker & Patricia Truant, 'Wasted Food: U.S. Consumers' Reported Awareness, Attitudes, and Behaviors' (2015) 10 *Plos One* 1; Tom Quested, Edie Marsh, Deirdre Stunell & Andre Parry, 'A Spaghetti Soup: The Complex World of Food Waste Behaviours' (2013) 79 *Resources, Conservation and Recycling* 43; Violetta Stancu, Pernille Haugaard & Lissa Lähteenmäki, 'Determinants of Consumer Food Waste Behaviour: Two Routes to Food Waste' (2016) 96 *Appetite* 7; David Evans, 'Beyond the Throwaway Society: Ordinary Domestic Practice and a Sociological Approach to Household Food Waste' (2012) 46 *Sociology* 41.

²⁰⁴ See for example, Medha Srivastava & Saurabh Srivastava, 'Examining the Relevance of Emotions for Regulation of Food Wastage Behaviour: A Research Agenda' (2020) 10 *Social Business* 151.

²⁰⁵ Carl Yngfalk, *The Constitution of Consumption Food Labelling and the Politics of Consumerism* (Stockholm University 2012)

²⁰⁶ *ibid* 191.

structural framework that facilitates the consumer to make a sustainable choice. Combining this aim with the subjective dimension of empowerment entails looking beyond the narrow confines of objectively empowering consumers using behavioural economic insights.

6.3 The limitation of consumer choice as the ‘power’ in consumer empowerment

In the previous section the point was made that the literature on EU consumer empowerment has adopted a narrow view of power that is informed by neoclassical economics theory on consumer sovereignty and consumer choice. The question then becomes why this is problematic. To reiterate, the economic view of power correlates with the 1-D view of power as agency as ‘power over’ developed in Chapter 2. This sovereignty view entails an understanding of the consumer as an actor who is autonomous and under-socialized. In neoclassical economics the consumer is unfettered and free to make choices that are unaffected by cultural and social forces. Behavioural economics represents a move towards the socialized and ‘structural’ end of the scale, but it is still firmly an agency account of consumer behaviour. Supporting this view of consumer power is the formalist view of the economy, which can be identified as far back as Smith, that economic behaviour is independent from social relations. Instead of economic behaviour being embedded in social relations, the theory developed that economic behaviour is instead a self-interested pursuit by rational and atomized actors.²⁰⁷ As a lens, this economic view of consumer power conceptually limits the study of consumer empowerment to the confines of 1-D of agency as power over. As a consequence, this even more narrowly results in the neglect of the other dimensions of 1-D power as ‘power to’ or ‘power with’. The framework of power developed in Chapter 2 offers a more expansive view of the dimensions of power that are simultaneously at play in the process of empowerment. In my view, a truly robust and nuanced discussion of what it means to empower consumers through secondary legislation should not be limited to a discussion of power as 1-D agency. As the discussion in Chapter 6 will show, the EU consumer empowerment agenda is concerned not only with creating an enabling environment for consumers to act in an empowered way (1-D and 2-D power) but it also intends to change the internalized narratives of consumers about how they should consume (3-D and 4-D) power. This requires that a broader theoretical starting point on what counts-as-power should be adopted for both the theoretical discussion on how EU consumer empowerment can be conceptualized and for the empirical study of what consumer empowerment is as a strategic approach that is pursued through secondary legislation.

²⁰⁷ Granovetter (n 200) 482.

7. Concluding remarks

The central questions of this chapter aimed to develop a definition of the concept of EU consumer empowerment that is prevalent in the literature on EU consumer empowerment and to illustrate, using the theoretical framework developed in Chapter 2, several of the dimensions of consumer empowerment that are under-explored by this debate. There are several central findings that can be derived from this analysis. The literature on EU consumer empowerment is not vast. Instead, the concept of EU consumer empowerment is generally defined through several of the established debates on consumer law and on consumer protection. As a result, the concept of empowerment and of EU consumer empowerment is rarely the direct object of the discussion. Apart from a handful of exceptions, the empowerment debate does not question what empowerment is or what it means when the Commission empowers consumers through law. Instead, what empowerment means is often assumed and routinely based on conceptual frameworks from neoclassical economics thought that have come to dominate in consumer law scholarship. This has resulted in a narrow understanding of the concept of consumer empowerment, of consumer disempowerment, of power, of the Commission's practical strategies for empowering EU consumers, and of what outcomes the Commission intends to achieve through secondary legislation. Moreover, there is a prevalent value judgement that the Commission's consumer empowerment agenda is undesirable because it is fundamentally opposed to the protective dimension in EU consumer law. Having considered the state of the art on the concept of EU consumer empowerment in the scholarly debate, the question that then arises as to whether a different understanding EU consumer empowerment can be drawn from an analysis of what consumer empowerment means to the Commission as the empowering entity. This question will be explored in detail in Chapters 4 and 5 through a narrative analysis of the Commission's development of consumer empowerment in horizontal consumer policy and law and the development of consumer empowerment in energy policy and energy law with a consumer element.

Chapter 4

The Commission's Consumer Empowerment Agenda – Consumer Policy and Horizontal Consumer Law

1. Introduction

The meanings that are ascribed to the concept of empowerment and the practical approaches adopted in an empowerment agenda are context specific and vary across disciplinary boundaries. What counts as empowerment also depends on the underlying concept of power, of disempowerment, and of the strategies and goals of the empowerment agenda that are put in place by the empowering entity. The central question in this chapter is what consumer empowerment means to the EU Commission as the empowering entity. This question will be answered by tracing the Commission's narratives on empowerment in consumer policy and the text of several directives that will be qualified as having an empowerment aim. From the highly specific perspective of the EU consumer empowerment agenda, it is interesting that the Commission as a supranational institution with the power to propose policy and legislation of its own volition is the empowering entity. There are, for example, several forms that an empowering entity can take. In the field of female empowerment, it has become the norm – to much criticism – that NGOs and other organizations adopt a top-down approach to empowering women in marginalized communities.¹ For same sex couples the path to empowerment usually lies in joining or forming power with LGBTQ+ communities.² This is a bottom-up, grassroots approach to empowerment. With the Commission as the empowering entity, the EU consumer empowerment agenda is a top-down strategy of empowerment. Moreover, that the Commission is an EU institution adds another layer of complexity to the top-down character of the EU consumer empowerment agenda. The EU consumer empowerment agenda is unique because the scope of the Commission's institutional powers grants it the capacity to trigger structural changes to the consumer's environment – the market – by proposing legislation to the European Parliament and the Council of Ministers that has the aim of removing the obstacles to empowerment outcomes. This can be contrasted for instance

¹ On this critique of top-down empowerment, see for instance Anne-Emmanuèle Calvès, 'Empowerment: The History of a Key Concept in Contemporary Development Discourse' (2009) 200 *Revue Tiers Monde* 735.

² On the bottom-up approaches to empowerment in the LGBTQ+ community, see for instance, Alex Wagaman, 'Changing Ourselves, Changing the World: Assessing the Value of Participatory Action Research as an Empowerment-Based Research and Service Approach with LGBTQ Young People' (2015) 36 *Child and Youth Services* 124.

with NGOs that empower from the top-down but have no comparable institutional powers to trigger such structural changes in the environment of disempowered actors. Instead, their top-down empowerment strategy consists of attempts to make changes to 2-D structures in society by lobbying, campaigning and arranging marches/protests with the hopes of changing disempowering 3-D public narratives about their community and discriminatory 2-D national legislation.

To confront the question of what consumer empowerment means to the EU Commission, Section 2 traces the evolution of the consumer empowerment agenda from its introduction in the Internal Market Reform package and as a primary objective in strategic consumer policy in EU consumer policy strategy communications between 2007 until the most recent strategic policy communication in 2020. The reason for beginning this analysis with consumer policy from 2007 rather than the most recent 2020 communication is that there have been several changes to the blueprint of consumer policy that have affected how EU consumer empowerment can be defined. It will be shown that the strategies and outcomes of the Commission's consumer empowerment agenda and the role of the empowered consumer in the internal market have evolved to such an extent that the established understandings of EU consumer empowerment outlined in Chapter 3 do not capture these changes.

Having traced the Commission's narratives on consumer empowerment in strategic consumer policy, Section 3 will provide a preliminary definition of EU consumer empowerment according to the Commission's narratives based on the findings from Section 2. In Section 3, the point will be made that following the introduction of environmental concerns to consumer policy, the breadth of the aims of the consumer empowerment agenda in consumer policy have become broader than the aim of informing the rational/average consumer and stimulating economic growth through increasing rates of consumption. In my view, this is a key observation on the underlying rationale of the Commission's consumer empowerment agenda that has become obfuscated through the framing of consumer empowerment through the concept of autonomy and through the prevailing view that consumer empowerment is incompatible with consumer rights beyond information duties. This discussion in Section 3 will then offer a preliminary rethinking of the concept of EU consumer empowerment based on the Commission's evolving narratives that offers a broader starting point for the rethinking of EU consumer empowerment in Chapter 6.

In conjunction with the Commission's narratives on consumer empowerment in strategic consumer policy, the consumer empowerment agenda has a practical dimension that is concretely enacted through several legal instruments in the consumer law framework. From this perspective of practice, the question becomes which legal rules has the Commission repurposed or adopted to bring about the goals of its consumer empowerment agenda. The discussion in Sections 4 through 8 will qualify several existing directives in the consumer law framework as having an empowerment aim. Moreover, in 2022 the Commission has proposed several amendments to the

UCPD, the CRD and the SGD that explicitly attach an empowerment rationale to these existing consumer law directives. The currently pending proposal for an Ecodesign Regulation (ER) will also be qualified as an empowerment instrument because of the synergies the Commission has begun to draw between consumer empowerment, consumer policy and environmental aims to achieve the Green Transition and the transition to a circular economic model. The texts of these recent legislative proposals are significant for two reasons and are included in the analysis for two reasons. First, these documents provide a more focused and context-specific source of the Commission's narratives on consumer empowerment than can be found in strategic consumer policy. Second, these documents represent the Commission's account of how exactly the process of consumer empowerment will be achieved through secondary legislation that makes changes to the structures of the internal market and that regulates the relationship between consumers and businesses. The analysis in Sections 4 through 8 then develop the Commission's narratives on the consumer empowerment aspect of the following horizontal consumer directives: the UCPD, the CRD, the SGD, the ER, the Online Dispute Resolution Regulation (ODRR), the Alternative Dispute Resolution Directive (ADRD) and the Representative Actions Directive (RAD).

The (narrative) analysis in this chapter therefore has two aims. The first, as has been outlined extensively so far, is the confrontation of what consumer empowerment means to the Commission as the empowering entity by using a conceptual starting point that is not coloured by the narrower understandings of consumer empowerment that prevail the scholarly debate. The second and related aim of the analysis in this chapter is to develop a more in-depth account of the Commission's narratives on EU consumer empowerment through a rethinking of the Commission's narratives on empowerment in consumer policy and empowerment legislation. The discussion in this chapter will offer a basis that will be drawn upon in the discussion in Chapter 6 that engages in the rethinking of the concept of EU consumer empowerment.

2. Consumer empowerment in strategic consumer policy: 2007–2020

The aim of empowering consumers in strategic consumer policy was first introduced by the Commission in 2007. The introduction of the empowerment narrative coincided with the Commission's emerging narratives on the internal market as a social market economy and the changing relationship envisioned between the consumer and the market following the Eurozone and financial crises. The following development of the main features of the Commission's narrative on consumer empowerment will begin with the introduction of consumer empowerment in the 2007 Reform Package documents and the 2011 Single Market Act. Consumer empowerment was correspondingly adopted by the Commission as a primary objective that spans the several strategic consumer policy plans between 2007 and 2020 and other important policy communications

including the New Deal for Consumers and the New Circular Economy Plan. Each of these policy communications will be reconsidered in light of the following three points, that will then be elaborated on in detail in sub-section 3: (1) how is consumer empowerment defined by the Commission, (2) what profile of the empowered consumer emerges from the Commission's narratives on empowerment, and (3) what is the role of the empowered consumer in the internal market.

2.1 Consumer empowerment as a lever for reform of the internal market

One of the earliest mentions of consumer empowerment by the Commission can be found in the new vision of the 21st century social internal market in the 2007 report on 'A Single Market for 21st Century Europe'.³ In this report, empowering consumers is a key action point, falling under the objective 'harnessing opportunities for citizens'.⁴ This report introduces consumer empowerment as one of the central pillars in consumer policy: "Empowering consumers, including more vulnerable consumers with special needs or disabilities, setting rights and accessibility standards, and protecting them against risks and threats that they cannot tackle as individuals is a central goal of the consumer policy strategy."⁵ This statement forms part of the Commission's acknowledgement that there are several risks and threats that consumers need protection from before they can perform as empowered and successful market actors. Developing on this, the Commission connects consumer empowerment to the goal of ensuring that consumers can benefit from consumer legislation that enhances consumer welfare including, high standards for food and consumer goods, product and food labelling, transparency requirements, rights to redress and protection from unfair commercial practices and misleading advertising.⁶ In keeping with consumer policy that is tied to the market rationale stimulating consumption to maintain and grow the economy, the Commission cites both educating and empowering consumers as drivers of productivity and market efficiency.⁷ Although tentative, the subjective dimension of consumer empowerment is also indirectly acknowledged by the Commission when the report highlights that consumers need to *feel* confident and empowered to make full use of their rights.

The subsequent Single Market Act adopted in 2011 builds on this report where the Commission adopts consumer empowerment as one of twelve levers for relaunching the internal market.⁸ Under the heading 'consumer empowerment', the Commission

³ Commission, 'A Single Market for 21st Century Europe' (Communication) COM (2007) 724 final.

⁴ *ibid* 4-6

⁵ *ibid* 6.

⁶ *ibid* 4-6.

⁷ *ibid*.

⁸ Commission, 'Single Market Act Twelve Levers to Boost Growth and Strengthen Confidence "Working Together to Create New Growth"' (Communication) COM (2011) 206 final, 9 -10.

contends that many consumers lack trust and confidence in their ability to obtain redress from harm. To remedy this lack of consumer confidence, the Commission focuses on the development of an alternative dispute resolution mechanism and the continuation of its work on a European approach to collective redress, although a directive on collective redress would not be adopted for several more years.⁹ Furthermore, to empower consumers by enhancing consumer confidence, the Commission proposes two other key action areas for empowerment. First, that the General Product Safety Directive ought to be revised and that consumers should receive reliable information on the environmental performance of products. Second, the Commission also connects the goal of empowering consumers with the correct application of consumer passenger rights, transparent bank fees in retail financial services, alongside better protection for borrowers in the mortgage market.

In these policy documents on the reform of the internal market between 2007 and 2011, the Commission presented the concept of consumer empowerment as a strategic approach that is predicated on the notion that consumers should be enabled to enjoy their existing consumer rights. In several respects, these documents represent a shift in the Commission's previous narrative that focused on the different approaches in the legal systems of the Member States as a justification for harmonization measures to a new narrative that focuses on the consumer and what it is that consumers need to become successful market actors. This involves not only ensuring that consumers have the practical means to enforce their existing rights but also that consumers should *feel* that they have sufficient protection and adequate access to enforcement. This is operationalized by the Commission as the consumer having trust and confidence in both the market and in their consumer rights. The rationale of enhancing consumer confidence to bolster the efficiency of the internal market is not new narrative in consumer policy. The confident consumer rationale first appeared in the 1990s when a policy shift that occurred from focusing solely on persuading businesses to operate across borders to also encouraging the cross-border consumer.¹⁰ The logic behind developing the consumer confidence narrative in consumer policy and as a justification for adopting secondary consumer legislation can be explained through the consumer confidence indicator that is adopted by economists to understand consumer sentiment in the current market and to predict future consumption habits. Confident consumers spend more while unconfident consumers save.¹¹ Consumer confidence is then part of the market rationale that consumption should be stimulated to enhance competition and

⁹ The Directive on ADR was introduced in 2013, Directive 2013/11/EU of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and amending Regulation [2006] OJ L165/63 (Directive on Consumer ADR); The Directive on Representative Action was Adopted in 2020, Directive 2020/1828(EU) 25 November 2020 on Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC [2009] OJ L409/1 (Directive on Representative Action).

¹⁰ Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2013) 426.

¹¹ See for instance the OECD, 'Consumer Confidence Index' <https://data.oecd.org/leadind/consumer-confidence-index-cci.htm> accessed 26 July 2022.

growth. When the Commission connects consumer confidence to consumer empowerment, the concept of consumer confidence no longer functions simply as an indicator of a consumer's willingness to spend because it is an acknowledgement of consumer confidence as a subjective state of mind. In the context of the internal market reform documents, the Commission is developing a narrative that feeling confident is necessary for the consumer to act in an empowered way. As will be seen in the following discussion, this narrative is consistently adopted by the Commission throughout each of the subsequent consumer policy plans and in the text of secondary legislation with an empowerment rationale. Moreover, supporting this interpretation of the Commission's narrative on consumer confidence and its connection to consumer empowerment is the special Eurobarometer survey on consumer empowerment that operationalizes consumer confidence as a variable for qualifying whether a consumer is empowered.¹²

2.2 Consumer policy 2007–2011: 'Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them'

In the same year that the reform of the internal market was proposed, the 2007 five-year strategic consumer plan was adopted by the Commission, titled 'Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them'.¹³ This is first of the Commission's strategic consumer agendas¹⁴ to explicitly adopt the empowerment of all consumers as a primary objective of consumer policy and as a goal of consumer legislation.¹⁵ In line with the new vision of the 21st century internal market, the Commission proposes that consumer policy is in a unique position to respond to the twin challenges of the new internal market: re-connecting with EU citizens and stimulating growth and more jobs. The primary objective of this strategic agenda is to empower EU consumers because: "putting consumers in the driving seat benefits citizens but also boosts competition significantly."¹⁶ In this policy agenda the Commission does not provide a concrete definition of consumer empowerment but instead proposes that to become (objectively) empowered, consumers need choice, accurate information, market transparency and (subjectively) that they need the

¹² Special Eurobarometer 342: Consumer Empowerment <https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_4_eurobarometers/eurobarometer_empowerment_2011.pdf> accessed 25 July 2022.

¹³ EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them (n 13) 3.

¹⁴ Empowerment is mentioned in the preceding consumer policy strategy but is understood as an ancillary aim as opposed to a primary objective: "EU consumer policy should also empower consumers to understand policies that affect them and to make an input into these policies", Commission 'Consumer Policy Strategy 2000-2006' (Communication) COM (2002) 208 final, point 2.1.

¹⁵ EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them (n 13) 3.

¹⁶ *ibid.*

confidence that arises from effective protections in the market and solid consumer rights.¹⁷

In this strategic plan the Commission tentatively connects the empowered consumer to sustainable consumption when it is proposed that as modern market actors consumers can become empowered to make sustainable environmental choices.¹⁸ The Commission contends that when a consumer is empowered, they will have the ability to easily change their lifestyle and consumption patterns in a way that will improve their health, stimulate a sustainable lifestyle, and contribute towards a net-zero economy.¹⁹ Combined, the informed and empowered consumer then takes on a citizenship role through their consumption patterns because they will make sustainable consumption and lifestyle choices that contribute to a low carbon economy. More specifically, the Commission states that: “the fight against climate change calls for better information in areas, such as energy and transportation, where informed consumers could make a real difference.”²⁰ This represents an early tentative link between consumer policy and the empowered consumer with environmental concerns that go beyond the consumer-society market rationale of enhancing competition, growth and efficiency at the expense of the environment. This link is developed by the Commission throughout each of their subsequent strategic policy communications until the most recent 2020 New Consumer Agenda.

At this point in strategic consumer policy, the Commission's narrative on the meaning of consumer empowerment does not deviate greatly from the narratives on the consumer in the previous strategic policies nor is there a shift away from the narrative on the consumer as a rational market actor. This much is apparent from the Commission's continued narrative in this policy document on the importance of enhancing consumer choice, better information and improving market transparency. Except for the introduction of a connection between consumer empowerment and sustainable consumption, the market rationale of increasing consumption for growth remains the dominant narrative, where “confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency.”²¹ Despite this, a shift in Commission's tone can be acknowledged in the several following statements: “The new economic, social, environmental and political context calls for a change in focus of EU policy towards consumers”²² and “final outcomes for consumers in economic and non-economic terms are the ultimate arbiter of whether markets are failing or succeeding in terms of citizens' expectations”.²³ The

¹⁷ *ibid.*

¹⁸ “It [consumer policy] can provide the market tools to empower citizens, as consumers, to make sustainable environmental choices, *ibid.*, point 1.

¹⁹ *ibid.* 11.

²⁰ *ibid.*

²¹ *ibid.* 2.

²² *ibid.*

²³ *ibid.* 3.

former statement points to the changing vision of the internal market while the latter represents the shift in the Commission's narrative to focusing on the consumer – rather than national legislation – as the grounds for adopting secondary legislation. This is confirmed by the Commission's following statements that consumer policy has the ability to reorientate the focus of regulation toward citizen-focus outcomes: “[consumer policy can] also address market failures that harm consumer welfare and social and economic inclusion by guaranteeing access to essential services at affordable prices”²⁴ and has a role to play “in guaranteeing core European values of fairness, openness, solidarity, sustainability and transparency.”²⁵

2.3 Consumer policy 2012–2019: Boosting Confidence and Growth

In the 2012 five-year strategic consumer policy communication, titled ‘Boosting Confidence and Growth’, the Commission lays out several measures that it considers necessary to: “empower consumers and boost their trust.”²⁶ Building on the previous strategic agenda, the Commission provides the first broad definition of what is required for consumer empowerment and how the Commission thinks the empowered consumer should behave:

Empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy. Empowered consumers who can rely on a robust framework ensuring their safety, information, education, rights, means of redress and enforcement, can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced.²⁷

This definition of consumer empowerment is remarkable for several reasons. The Commission specifies which aspects of the consumer law framework can be qualified as pursuing the aims of the consumer empowerment agenda, including consumer safety, information duties, education, consumer rights and means of redress and enforcement. Noting here that the debate has primarily attached consumer empowerment to information duties and redress and enforcement mechanisms while being framed as incompatible with other consumer rights and protections.²⁸ The

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Commission, ‘A European Consumer Agenda - Boosting Confidence and Growth’ (Communication) COM(2012) 225 final, 1.

²⁷ *ibid.*

²⁸ On this see the discussion in Chapter 3, Section 2.4.

Commission's definition in this communication builds on the narrative in the previous agenda and the internal market reform packages in two ways. First, improving existing consumer rights pertaining to product safety, passenger rights and access to redress and enforcement were connected to the concept of consumer empowerment. Second, these earlier documents also proposed that consumers are empowered when they have confidence that they can make full use of their consumer rights. According to the definition of empowerment provided by this 2012 agenda, from a behavioural perspective the empowered consumer is presented as an active market actor who participates in the market by exercising choice between products and services as well as through actively enforcing their consumer rights when necessary.

Throughout this strategic plan, the Commission cites both several general and specific areas where legislative intervention is required to further empower and protect consumers. The Commission connects the consumer empowerment agenda with several pressing consumer concerns in the context of consumer safety,²⁹ and unenforced rights,³⁰ information overload and knowledge deficit.³¹ The Commission also connects consumer empowerment to several social concerns that impact equality between consumers such as social exclusion, vulnerability and market accessibility.³² Through the lens of consumer empowerment as consumer confidence and trust as well as consumer choice, the Commission also connects the empowerment strategy to the approaches that are concerned with tackling several of the consequences of the economic and sovereign debt crisis. More specifically, the Commission proposes that the 2007 crisis led to a significant drop in income, which has impacted purchasing power. Consequently, it is necessary to decrease social exclusion because citizens in their role as consumers could not afford essential goods and services.³³ The Commission also identifies several challenges in key consumer markets that stand in the way of empowerment, including access to essential goods and services such as food, energy, transport, electronic communications and financial services. For the Commission, new types of consumer harms arise due to complex and risky financial products and services, poor enforcement of EU passenger rights, opaque market conditions in the electricity and gas services sector, the untapped potential for savings in final energy consumption, insufficient transparency in the electronic communications market and increased food waste.³⁴ Moreover, in the context of sustainable consumption, the Commission begins to develop the narrative that consumers are becoming increasingly aware of the environmental impact of their consumption choices. The conclusion is drawn by the Commission that consumers should be empowered to make sustainable and healthy

²⁹ 'A European Consumer Agenda - Boosting Confidence and Growth' (n 26) point 3.1.

³⁰ *ibid*, point 3.4.

³¹ *ibid*, point 3.2.

³² *ibid*, point 3.

³³ *ibid*, point 3.1

³⁴ *ibid*, point 3.5.

choices that result in cost-savings not only for themselves but also for society more generally.³⁵

2.4 Consumer policy 2018: A New Deal for Consumers

In 2018, following the publication in 2017 of the results of the fitness check of several consumer law directives,³⁶ the Commission published the New Deal for Consumers communication³⁷ accompanied by two legislative proposals for a Directive for the Modernisation and Better Enforcement of Existing Consumer Protection Rules³⁸ and the RAD.³⁹ The New Deal was criticized by legal scholars for first maintaining the existing approach in the legal framework that continued the separation of market-based consumer law, environmental law and the digital market.⁴⁰ Second, for preserving existing legislation rather than proposing a more radical response to digital challenges.⁴¹ Grochowski contends, however, that a deeper look at the New Deal reveals a new blueprint for consumer law that introduces a *'pro futuro'* concept of vulnerability paired with individual responsibility to commit to the ideals of sustainability,⁴² a wider view of contract law ethics, and the vision of a market that reaches beyond efficiency by introducing concerns about the responsibility for the welfare of others (a shift from the ideals of market sovereignty).⁴³ In line with Grochowski, it is my view that the Commission's narratives that merge sustainability concerns with the objectives of consumer law is representative of a change in tone in policy that acknowledges market values and the consumer interest in ways that go beyond the classical efficiency-related narratives in the Commission's previous strategic consumer policy communications.⁴⁴ Moreover, this shift in tone coupled with the Commission's narratives on empowering consumers in the New Deal should be viewed as building upon the foundation of the concept of consumer empowerment that the Commission was developing in the two previous strategic consumer agendas discussed so far.

The concluding remarks of the Commission in the New Deal created some dismay because the term 'consumer protection' was omitted and instead the

³⁵ *ibid*, point 3.2.

³⁶ Commission, 'Report of the Fitness Check' SWD (2017) 209 final.

³⁷ Commission, 'A New Deal for Consumers' (Communication) COM (2018) 183 final.

³⁸ *ibid*, 184.

³⁹ *ibid*, 185.

⁴⁰ Hans Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) 8 *Journal of European Consumer and Market Law* 229.

⁴¹ Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) 15 *European Union Private Law Review* 166.

⁴² Mateusz Grochowski, 'European Consumer Law after the New Deal: A Triptych' (2020) 39 *Yearbook of European Law* 387.

⁴³ *ibid* 398 & 407.

⁴⁴ *ibid* 407 – 408.

Commission appears to have favoured consumer empowerment as one of the overriding goals of new approach:⁴⁵

“The 'New Deal for Consumers' is about empowering consumers, promoting fairness and building trust within the Single Market. It will ensure that there are no second class consumers in the European Union and that European businesses operate in a regulatory framework fit for today's challenges and offering a level playing field across the Single market.

The Commission's 2012 strategic agenda offered a narrative on the profile of the empowered consumer as the consumer who is confident in both their rights and their position in the internal market. The Commission continued this narrative in the New Deal by contending that consumers *do* have confidence in the internal market because of the consumer rights that are currently in place. These 'tangible' rights include but are not limited to: “the right to safe products, the right to return a product bought online within 14 days and the right to have a product repaired or replaced within a guarantee period”.⁴⁶ Moreover, the Commission claimed that in general consumer policy is successful in achieving its aims because of the benefits recently conferred upon consumers through: “major pieces of legislation governing passenger rights, consumer rights, unfair commercial practices and unfair contract terms.”⁴⁷ Commission President Juncker's reorganization of the Commission, his political guidelines published in 2014, and the renewed importance that was consequently placed by the Commission on consumer policy are cited in the New Deal as having delivered several concrete benefits to consumers.⁴⁸ Despite these positive results, the Commission also identified several detrimental market conditions that threaten consumer confidence and trust in the market, that threaten trust in consumer rights and that preclude empowered behaviours.⁴⁹ The Commission proposed that the Dieselgate scandal and the widespread use of unfair terms in mortgage contracts had shone a spot light on the question of whether EU law does offer adequately strong mechanisms for ensuring the effective enforcement of consumer protection rules and provides redress for consumer harms. The 2017 REFIT Check and 2018 Commission Recommendation on collective redress are cited by the Commission as a confirmation that EU consumer law must be applied and enforced better because existing individual redress mechanisms are deemed as insufficient for adequately addressing mass-harm situations that arise from events such as Dieselgate. Addressing these concerns through the accompanying legislative

⁴⁵ 'A New Deal for Consumers' (n 37) 16.

⁴⁶ *ibid* 1.

⁴⁷ *ibid*.

⁴⁸ This includes the reinforcement of consumer rights in the energy market pursued as part of the energy union and climate policy approach.

⁴⁹ 'A New Deal for Consumers' (n 37) 2.

proposals, the Commission contends that: “Better enforcement of the rules, effective tools for redress and better consumer knowledge of their rights will enhance consumer trust and confidence.”⁵⁰

While the discussion so far points to the Commission’s indirect narratives on consumer empowerment as consumer confidence, the clearest direct reference to consumer empowerment in the New Deal communication falls under the section ‘Preparing Consumer Policy for Future Challenges and Sustainable Consumption’. The Commission proposes that consumption is placing extensive pressure on the environment and so consumers must be empowered to consume more sustainably. This can only occur provided that sustainable products and services are available. As the Commission put it: “they [consumers] need to be empowered to make informed purchasing choices and have easy access to products that are environmentally friendly.”⁵¹ For the Commission, protecting consumers from being misled about the environmental qualities of a product requires both a rethinking of misleading commercial practices and enhancing consumer awareness regarding the sustainability of the products that they purchase and on the impact of these products for the environment. The former aim of this rethinking and what counts as ‘environmental deceit’ are not revisited by the Commission until the subsequent 2020 New Consumer Agenda.⁵² In the New Deal communication, the Commission does, however, lay out its approach for achieving the latter empowerment goal of enhancing consumer awareness. This will be achieved by the Commission addressing several different forms of product labelling including, the Eco Label, Ecodesign, the EU organic label, the EU Energy label, the EU Car Labelling Directive, the EU Tyre Labelling Regulation and date labels on food products with the aim of preventing food waste.⁵³

The focus of the Commission’s narrative on consumer empowerment in the New Deal is, however, on enforcement and redress and the accompanying legislative proposals that aim to enhance consumers’ opportunity to seek individual redress against unfair practices. This goal of the Commission is to not only give enforcement mechanisms more bite but can also be framed as having an underlying aim of stimulating private enforcement by consumers. As the Commission contends, consumers: “can deter false environmental claims or planned obsolescence practices.”⁵⁴ The narrative on consumer empowerment in this communication is then not just about encouraging the ‘citizen-consumer’ by empowering consumers to be more aware of and to make environmentally-friendly consumption choices.⁵⁵ Instead there is a hidden narrative that

⁵⁰ *ibid* 3

⁵¹ *ibid* 15

⁵² On environmental deceit, see Jozefien Vanherpe, ‘White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content’ (2020) 28 *European Review of Private Law* 251, 260.

⁵³ ‘A New Deal for Consumers’ (n 37) 15 & footnote 54.

⁵⁴ *ibid* 15.

⁵⁵ The debate on the citizen-consumer in EU law is extensive, see Roberta Sassatelli, ‘Consumer Culture, Sustainability and a New Vision of Consumer Sovereignty’ (2015) 55 *Sociologia Ruralis* 483; Mirja Vihersalo,

consumers can regulate (unsustainable) business practices when they are empowered to actively seek redress against unlawful commercial practices.

2.5 Consumer policy 2020–2025: The New Consumer Agenda

In 2019, the new Commission president Ursula von der Leyen published a new set of political guidelines of the Commission, which include a European Green Deal, an economy that works for people and a Europe fit for a digital age.⁵⁶ In connection with this, the 2020 New Consumer Agenda covers five priority areas, several of which are linked to von der Leyen's Commission political guidelines, including the Green Transition, the digital transformation, redress and enforcement of consumer rights, specific needs of certain consumer groups, and international cooperation.⁵⁷ It is my view that there is a deep shift in tone in the Commission's narratives in the 2020 strategic vision of consumer policy, which reflect the Commission's narratives in its 2019 reflection paper on a Sustainable Europe by 2030. For the Commission, the sustainable transition depends on more than speeding up and scaling up sustainable solutions. It also depends on building bridges and increasing coherence between different EU agendas at all levels with a specific focus on policy coherence as a: "critical condition to ensure that we can deliver on the SDGs and ensure long-term green and inclusive growth for the EU."⁵⁸ Following in this approach, the New Consumer Agenda represents a move beyond the silo thinking that the New Deal was criticized for and represents a policy plan that holistically takes other Union policies into account that are relevant for consumers and consumer protection in the context of the Green Transition.⁵⁹ In the text of the New Deal, the Commission confirms this commitment that consumer policy will take the formulation and implementation of other Union

'Climate Citizenship in the European Union: Environmental Citizenship as an Analytical Concept' (2017) 26 *Environmental Politics* 343, 350-352; Peter Söderbaum, 'Democracy, Markets and Sustainable Development: The European Union as an Example' (2004) 14 *European Environment* 342, 345; Gert Spaargaren & Peter Oosterveer, 'Citizen-Consumers as Agents of Change in Globalizing Modernity: The Case of Sustainable Consumption' (2010) 2 *Sustainability* 1887, 1892-1894; Jim Davies, *The European Consumer Citizen in Law and Policy* (Palgrave Macmillan 2011). See also John Clarke & Janet Newman, 'What's in a Name? New Labour's Citizen Consumers and the Remaking of Public Services' (2007) 21 *Cultural Studies* 738.

⁵⁶ The guidelines also include the following: Protecting our European way of life, A stronger Europe in the world and a new push for European democracy. See Ursula von der Leyen, A Union That Strives for More: My Agenda for Europe: Political Guidelines for The Next European Commission 2019-2024 <https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf> accessed 20 July 2022.

⁵⁷ Commission, 'New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery' (Communication) COM (2020) 696 final.

⁵⁸ Commission, 'Towards a Sustainable Europe by 2030' COM (2019) 22 final, 15.

⁵⁹ This has been recognized as an important step away from the 'silo' thinking that separated consumer protection from environmental concerns, but the criticism remains that the New Consumer Agenda has not gone far enough in the context of environmental and sustainability concerns in relation to the impact of the digital transformation on consumers lives, see for example Evelyne Terryn, 'The New Consumer Agenda: A Further Step Toward Sustainable Consumption?' (2021) 10 *Journal of European Consumer and Market* 13.

policies and activities into consideration.⁶⁰ More specifically, the Commission connects the New Consumer Agenda to the European Green Deal,⁶¹ the Circular Economy Action Plan⁶² and the Communication on Shaping Europe's Digital Future.⁶³ The New Consumer Agenda can then be framed as building upon the seeds of the new blueprint laid out in the New Deal in 2017. Following this, the aims of the Commission's empowerment agenda and Commission's strategic approach for achieving these ends have also been undergoing a transformation.

The New Consumer Agenda opens with the following statement: "European consumers rightly expect to benefit fully from the single market and to be empowered to make informed choices and play an active role in the green and digital transition whenever and wherever they are in the EU."⁶⁴ Moreover, all EU consumers are to expect unfettered access to goods and services across the EU and that their consumer rights will be protected.⁶⁵ This new strategic vision of the Commission both sets out five priority areas and several upcoming legislative initiatives. The Commission specifies that the consumer empowerment agenda will play a pivotal role in achieving these priorities and moreover explicitly connects consumer empowerment with several upcoming legislative initiatives. In this way, the New Consumer Agenda differs from the previous strategies in that it openly lays out the future legislative measures that can be qualified as having an empowerment rationale because such measures will remove market-based obstacles to empowerment and will enable consumers to participate in the Green and Digital Transitions.

Starting with the goals of the Green Transition, the Commission connects consumer empowerment to the increasing interest amongst consumers to personally contribute to a net-zero economy, the preservation of natural resources and biodiversity and the reduction of water, air and soil pollution. The challenge, the Commission proposes, is to unlock the potential of consumers in achieving these aims by adopting measures that will: "empower, support and enable every consumer, regardless of their financial situation to play an active role in the Green Transition without imposing a specific lifestyle and without social discrimination."⁶⁶ In keeping with the narrative of the Green Deal, the Commission states that: "Access to sustainable products should not be dependent on the level of income or where you live, but should be available to everyone."⁶⁷ These statements add a new depth to the Commission's narrative on consumer empowerment as a collective endeavour underpinned by hidden concepts such as equality and fairness where all consumers, irrespective of income, should be part

⁶⁰ 'New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery' (n 57) 1 – 2.

⁶¹ Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

⁶² Commission, 'New Circular Economy Action Plan' (Communication) COM (2020) 98 final.

⁶³ Commission, 'Shaping Europe's Digital Future' (Communication) COM (2020) 67 final.

⁶⁴ 'New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery' (n 57) 1.

⁶⁵ *ibid.*

⁶⁶ *ibid* 5

⁶⁷ *ibid.*

of the transition by having equal access to essential services and to sustainable products. In the context of fairness, the Green Transition is linked to the strategy laid out in the European Green Deal that aims to transform the EU into a “fair and prosperous society, with a climate-neutral, resource-efficient, clean and circular economy in which economic growth is decoupled from resource use and where negative impacts on natural capital and biodiversity are reduced.”⁶⁸ In comparison to the previous strategic agendas, the aim of decoupling economic growth from environmental degradation represents a turn away from the market rationale of empowering consumers with the goal of simply stimulating growth through more (and unchecked) consumption. Instead, the purpose of empowering consumers has shifted to stimulating consumers to consume in a sustainable way because they will make the consumption choices necessary for the transition to a circular economy and in a way that contributes to attaining the target of a net-zero economy. Moreover, it is my view that the Commission is developing a narrative that empowering consumers for the Green Transition requires not only addressing disempowering market conditions but also requires tackling the inequality crisis in society because social inequality is also a real and pressing obstacle to empowerment and the Green Transition.

This direct connection by the Commission between its narratives on consumer empowerment and the Green Deal leads to the question of what measures are required and that ought to be subsequently adopted to ensure that every consumer regardless of their financial position can participate, and play an active role, in the Green Transition. The Commission has proposed several initiatives already in place for the empowerment of consumers, including: the Farm to Fork strategy,⁶⁹ the EU Biodiversity Strategy,⁷⁰ the Zero Pollution Action Plan,⁷¹ Chemicals Strategy for Sustainability,⁷² the Renewed Sustainable Finance Strategy,⁷³ and the Renovation Wave.⁷⁴ Several initiatives from the 2020 New Circular Economy Plan are also cited that aim to “promote better value retention, prioritise safer and more durable products and keep materials in the economic cycle (refuse, reduce, repair, reuse, and recycle) for as long as possible”.⁷⁵

⁶⁸ ‘The European Green Deal’ (n 61).

⁶⁹ Commission, ‘A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System’ (Communication) COM (2020) 381 final.

⁷⁰ Commission, ‘EU Biodiversity Strategy For 2030 Bringing Nature Back into our Lives’ (Communication) COM (2020) 380 final.

⁷¹ Commission, ‘Towards Zero Pollution in Air, Water and Soil – EU Action Plan’ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12588-EU-Action-Plan-Towards-a-Zero-Pollution-Ambition-for-air-water-and-soil> accessed 26 July 2022.

⁷² Commission, ‘Chemicals Strategy for Sustainability Towards a Toxic-Free Environment’ (Communication) COM (2020) 667 final.

⁷³ Commission, ‘Action Plan: Financing Sustainable Growth’ (Communication) COM (2018) 97 final.

⁷⁴ Commission, ‘A Renovation Wave for Europe - Greening Our Buildings, Creating Jobs, Improving Lives’ (Communication) COM (2020) 662 final.

⁷⁵ Commission, ‘Including the Sustainable Products Initiative, The Circular Electronics Initiative, Initiative on a Common Charger for Mobile Phones and Other Portable Devices’; Commission, ‘The EU Textiles Strategy and A Review of The Packaging and Packaging Waste Directive’ (Communication) COM (2020) 696 final, 7.

The New Consumer Agenda proposes that to achieve a “socially optimal uptake of goods and services as well as of new approaches to consumption” consumers will require better and reliable information regarding the sustainability of goods and services that must also avoid an information overload.⁷⁶ This includes information on the environmental characteristics of products, including the durability, repairability or upgradeability of products as well as addressing the issue of the reliability and comparability of such information. These aims will be achieved through the proposed directive on Empowering Consumers for the Green Transition that amends the Consumer Rights Directive and the Unfair Commercial Practices Directive.⁷⁷ Moreover, existing tools such as updated labels will raise consumer awareness and manage expectations of the energy performance of products with the aim of contributing to the EUs energy efficiency objective.⁷⁸ The Commission also indicates that consumers will require an effective right of repair to be empowered to participate in the Green Transition by playing a role in the transition to a circular economy. For the Commission, this empowerment aim will be achieved through the pending proposal on amending the right to repair in the SGD, which could potentially result in a new directive on the right to repair.⁷⁹

Under the objective ‘Addressing Specific Consumer Needs’, the Commission makes a connection between the consumer empowerment agenda and several social issues, including an expanded concept of consumer vulnerability and energy poverty. The Commission contends that the affordability of products and services is necessary to ensure access for low-income consumers. Put differently, this is the Commission’s adoption of a narrative that inequality of income is a systemic issue that is impacting the equal opportunity of all EU citizens to equally participate in the Green Transition because many consumers cannot access services or afford sustainable products. In the New Consumer Agenda, the Commission does not propose concrete actions that will be adopted in the future to address energy poverty but instead refers to the Commission Recommendation on Energy Poverty⁸⁰ as guidance for the Member States on how energy poverty can be addressed in a way that can empower vulnerable energy consumers.⁸¹ The Commission’s approach to tackling energy poverty through the consumer empowerment agenda can also be found in sectoral consumer policy that governs the energy market, which will be the focus of Chapter 5.

As a final remark, the New Consumer Agenda also addresses consumer empowerment and the digital transformation. The Commission states that an evaluation

⁷⁶ *ibid.*

⁷⁷ Commission, ‘Proposal for a Directive of the European Parliament and of the Council 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information’ COM (2022) 143 final.

⁷⁸ Consumer empowerment in the energy market will be the focus of analysis in Chapter 5.

⁷⁹ *ibid.*; see also Section 6 of this Chapter.

⁸⁰ Commission, ‘Commission Recommendation on Energy Poverty’ SWD (2020) 960 final.

⁸¹ ‘New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery’ (n 57) point 3.4.

of Regulation 910/2014 in combination with the General Data Protection Regulation will allow consumers to have greater access to and control over their personal data. Furthermore, the Commission places the consumer at the very heart of the data economy. By virtue of the European Strategy for Data in combination with a consumer's right to data portability under the GDPR, consumers are seen as being enabled to choose “services that offer most data protection, switch between service providers, combine services, use other innovative services and choose the services that offer the most data protection.”⁸² The Commission also links the digital transformation with the consumer credit and financial services market. It is pointed out that technological advancements and the increasing use of algorithms for automated decision-making for creditworthiness runs the risk of opaque decision-making. Consequently, the Commission proposes that the existing legislation in this sector should be revised to consider these risks and new digital means of providing financial products and services. The revised legislation should “empower consumers to understand products and to compare and accept offers online, thereby boosting innovation and consumer trust”.⁸³ Moreover, credit consumers are to be empowered to make good decisions about their (personal) finances. The Commission proposes that this is achieved through measures that enhance financial literacy, with coordination of actors at national and EU level to address issues relating to access to education and consumer capacity building.⁸⁴

2.6 Consumer Policy 2020: A New Circular Economy Action Plan for a Cleaner and More Competitive Europe

The New Circular Economy Plan has been included in this discussion on what consumer empowerment means to the Commission as the empowering entity because, in combination with the European Green Deal, the Commission's narrative in these documents has several implications for how we can define EU consumer empowerment and how consumer empowerment is to be achieved through secondary legislation. In this plan, empowering consumers and providing them with cost-saving opportunities is qualified by the Commission as “a key building block of the sustainable product policy framework”.⁸⁵ The empowered behaviour appears to be that consumers will participate in the circular economy, noting here that this is not simply by consuming more but by consuming *sustainably*. The changes to the legislative framework that the Commission contends will stimulate this particular kind of empowered consumption include:⁸⁶

⁸² *ibid* 12.

⁸³ *ibid* 13.

⁸⁴ *ibid* 9.

⁸⁵ ‘New Circular Economy Action Plan’ (n 62).

⁸⁶ *ibid* 5 (original emphasis).

A revision of EU consumer law to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and on the availability of repair services, spare parts and repair manuals. The Commission will also consider further strengthening consumer protection against green washing and premature obsolescence, setting minimum requirements for sustainability labels/logos and for information tools.

In this plan the Commission also proposes the introduction of legislation that will obligate businesses to substantiate their environment claims.⁸⁷ Following this, in mid-2022 the Commission published its proposal for a directive that will amend the Unfair Commercial Practices Directive and the Consumer Rights Directive. This proposal is titled: Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information and will be addressed in more detail in the subsequent discussion in this chapter.⁸⁸

In the New Circular Economy Action Plan, the Commission further expresses the aim of creating a new ‘right to repair’, several new horizontal material rights regarding availability of spare parts or access to repair and the ability to upgrade services for ICT and electronics. Moreover, the role of consumer guarantees will be reconsidered by the Commission during the review of Directive 2019/771. In 2022, the Commission set in motion the Sustainable Consumption of Goods – Promoting Repair and Reuse initiative. The Commission has already indicated that in the pending publication of the proposal for this directive it intends to amend the existing SGD with the possibility of a separate new legislative proposal on the right to repair. In mid-2022, this legislative proposal was in the Public Consultation phase with the Commission’s proposal for the directive expected in the third quarter of 2022.⁸⁹ This proposal is concerned with empowering consumers to make more sustainable choices and to consume more sustainably by promoting the repair and re-use of goods. This adds an interesting dimension to the Commission’s narrative on consumer empowerment. Here we can see that for the Commission the right to repair is in the SGD and prioritizing repair over replacement is an integral part of their strategic approach for empowering consumers. This moves the strategic approach of the Commission that uses law as a tool for empowerment beyond the understanding that the Commission’s strategy of consumer empowerment is confined to information duties and the ‘help yourself’ pillar in the existing regulatory framework.

⁸⁷ *ibid.*

⁸⁸ Proposal for a Directive of the European Parliament and of the Council 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77).

⁸⁹ Commission Initiative, Sustainable Consumption of Goods – Promoting Repair and Reuse <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 25 July 2022.

3. A preliminary definition of consumer empowerment

The discussion so far has taken the starting point that to develop a definition of EU consumer empowerment it is necessary to take the question of what consumer empowerment means to the Commission as the empowering entity seriously. The discussion so far in this chapter has focused on tracing the evolving narratives on consumer empowerment that the Commission has developed throughout strategic consumer policy between 2007 and 2020. This discussion so far has offered substance to the claim that as the blueprint of consumer policy is evolving so too is the meaning of the concept of EU consumer empowerment and the strategic approach where law is used as the process for empowering consumers. The following discussion in this section will then reflect on these changes by considering the following three questions: (1) how is consumer empowerment defined by the Commission, (2) what profile of the empowered consumer emerges from the Commission's narratives on empowerment, and (3) what is the role of the empowered consumer in the internal market.

3.1 Definitions of consumer empowerment in strategic consumer policy

In the strategic consumer policy communications outlined in Section 2, the Commission has tended to operationalize consumer empowerment as an outcome. These outcomes include consumers making an informed choice, making the sustainable choice, using products in a sustainable way, enforcing their consumer rights, and claiming redress for harm. Moreover, several narratives on consumer detriment and harm have arisen that the Commission contends are real obstacles that stand in the way of consumers behaving in an empowered way. These include, for instance, difficulties for consumers that arise from greenwashing, a lack of information on the repairability and durability of goods, the absence of a second-hand market for goods, a limited right to repair for new goods, no right to repair for second-hand goods, and difficulties for low-income consumers who, for example, do not have real access to sustainable products, to energy-efficiency measures and do not have the potential to create and/or consume renewable energy. The Commission's empowerment strategies to address these barriers to empowerment entail the amendment and/or adoption of new consumer legislation to remove the obstacles that stand in the way of a consumer's capacity to behave in empowered ways. These strategies also include, albeit less explicitly, legislation that the Commission considers necessary for the subjective empowerment of consumers. The objective process of empowering consumers can then be defined as consisting of the consumer legislation that regulates trader behaviours in the market (the consumer's environment) as well as the legislation that provides consumers with the tangible rights that give them the dispositional power to act in an empowered way. This legislation includes, but is not limited to, information duties, prohibitions on unfair commercial practices, tangible

consumer rights such as the right to repair and EU mechanisms that facilitate private enforcement, the redress of consumer harms, and the collective redress of consumer harms. These highly context-specific strategies of empowerment are scattered throughout the policy documents analysed so far in this chapter and can be coherently articulated through the definition of consumer empowerment that the Commission provided in the 2012 consumer agenda:

Empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy. Empowered consumers who can rely on a robust framework ensuring their safety, information, education, rights, means of redress and enforcement, can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced.⁹⁰

The strategies (legislation) that can be defined as forming part of the Commission's approach of subjectively empowering consumers are more difficult to identify in the Commission's narratives discussed so far. However, the Commission does indirectly acknowledge the subjective dimension of empowerment in the narrative that for consumers to act in an empowered way, they need to feel confident and trusting. This operationalizes the subjective dimension of consumer empowerment as an outcome where consumers feel confident and have trust regarding their consumer rights, in their relationship with traders, and more generally in the internal market. Consumer legislation that is adopted based on the consumer confidence rationale can then be qualified as having an empowerment aim. In a less visible way, the Commission's commitment to transition from a linear to a circular economy also reveals the type of internalized narrative that consumers should have and that the Commission would consider as corresponding to an 'empowered' narrative. First, this is the attitude of consumers that the right thing to do is to buy the most sustainable good. Second, is the attitude of consumers that they should repair a good or they should opt for the purchase of second-hand, rather than new, goods.

3.2 The profile of the empowered consumer

Consumer policy is formulated around several consumer yardsticks and so the profile of the consumer is not fixed.⁹¹ The empowered consumer in strategic policy does not possess homogenous characteristics. Instead, the image is highly fragmented. This

⁹⁰ 'European Consumer Agenda - Boosting Confidence and Growth' (n 26).

⁹¹ See the several contributions on consumer images in Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

fragmented nature is overlooked when the empowered consumer is defined using the image of either the rational or the average consumer. When 'informed choice' terminology is used by the Commission, it is worth considering whether the profile of the empowered consumer should be conflated with the consumer making informed choices in the same way as the average consumer and the unboundedly rational consumer. *Prima facie* this would appear to me to be the case on a superficial reading of consumer policy, but to answer this question a critical analysis should be carried out on the legislation that is aimed at enabling the consumer to become empowered and to make the 'informed choice'. If behavioural insights have been incorporated into the development of the formal requirements for presenting consumer information, can it still be said that these information duties are predicated on the concept of the unboundedly rational consumer? The energy-efficiency label on electrical goods is an example of presenting consumer information that takes the unboundedly rational consumer as its starting point.⁹² Moreover, as the Commission's narratives on consumer empowerment have evolved, the 'informed choices' of the empowered consumer are not just qualified as informed choice in the sense that the consumer will optimize their welfare. The empowered 'informed choice' can now also be qualified as the sustainable choice. Put differently, the Commission operationalizes empowered behaviours as the consumer making the sustainable choice that was facilitated by information about, for instance, repairability, durability or energy efficiency. As the Commission puts in, the EU citizen in their role as consumers are to be empowered "[...] to make sustainable environmental choices".⁹³

Following this, the empowered consumer can be profiled as being the environmentally-conscious 'green consumer' because they make a purchasing choice that is considered by the Commission's standards to be the sustainable one. Moreover, with the pending proposal on the right to repair, the empowered consumer is the consumer who behaves in an environmentally-conscious way not at the point of conclusion of the contract but during the lifecycle of the product itself. In this vein, the empowered consumer is active and mobilized to use their rights and make use of consumer information. Consumers are then qualified as empowered when they: "actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced."⁹⁴ The empowered consumer is then not just the consumer who makes a rational choice but is a sustainable consumer who is active, mobilized and environmentally conscious.

This move towards viewing consumers as citizen-consumers⁹⁵ has led to a debate on the desirability of the responsabilization of EU citizens in their role as

⁹² Behavioural insights then become relevant for understanding how consumers engage with the information and the way in which it is presented.

⁹³ EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them (n 13) 1

⁹⁴ *ibid.*

⁹⁵ Davies (n 55).

consumers where responsabilization entails that: “consumers should expect to be subject to a number of active duties, particularly to act in a manner which prioritises conduct in line with the circular economy.”⁹⁶ Micklitz proposes that from a legal perspective such responsabilization envisions the consumer as losing their rights if they do not make use of them or to be subject to sanctions if the consumer is found to be liable of misusing their rights. Leaving aside the sticky issue of what ‘right’ exactly the consumer would be excluded from using and what kind of liability would ensure, the responsabilization of consumers by obligating the sustainable use of products is not incompatible with the Commission’s proposed goals of the consumer empowerment agenda.⁹⁷ For the Commission, a goal of the consumer empowerment agenda is to guide consumers collectively toward sustainable consumption patterns. The strategies of this empowerment goal are the legislative measures that facilitate such behaviours. For instance, the pending proposal on the right to repair will be an empowerment measure even if the consumer will be obligated to have a defective good repaired over replacement. The empowerment aim does not change even if the method of achieving the aim does. In the future, it could be the case that consumers are obligated to repair defective goods over replacement *and* national legislation could prohibit the recycling of goods that are not yet obsolete, with fines and penalties put in place at recycling parks for consumers who fail to do so. A tension only arises in this definition of consumer empowerment when empowerment is conflated with consumer sovereignty and defined as the negative liberty of consumers to decide how to both use and dispose of consumer goods. It was argued in Chapter 3 that the language games in the consumer law scholarship on what constitutes consumer empowerment is not the definitive definition of what counts as power or empowerment. As the discussion so far has shown, the Commission’s definitions of, and strategic approach to, empowering consumers is not static. The Commission’s understandings and approaches to empowerment have instead evolved as problems arise in the internal market and the vision of the internal market changes. In this light, it is not outside the realm of possibility that a strategy of consumer empowerment would entail the positive obligation of a consumer to repair goods in a circular economy when the goals of consumer empowerment are to achieve sustainable consumption patterns in a circular economy. The Commission’s move towards profiling the empowered consumer as a green consumer and the legal tools for empowering consumers to behave in this way are then at odds with the profile of the average and rational consumer concepts, which are considered to support the Commission’s anti-interventionist strategy of the information model.

⁹⁶ Micklitz (n 40) 235.

⁹⁷ Is it, for instance, the right to consume that would be prohibited or would it be the right to have an objective repaired? On the latter right, this would appear to be counter-intuitive to the goals of the circular economy as this requires consumers to reuse and repair goods. Excluding this right would be of little benefit. Moreover, it seems highly unlikely in our current political system that citizens would be excluded from the right to conclude contracts, even if this is limited to concluding contracts for certain goods.

The Commission also consistently presents the empowered consumer as the consumer who feels confident. This psychological/cognitive state of mind is for the Commission what ensues from the consumer knowing that they are protected.⁹⁸ Although it will be argued in Chapter 6 that the consumer's knowledge of being protected need not necessarily arise from actual knowledge of their legal rights but instead through the socialization that occurs when the consumer transacts in the marketplace. The rationale of enhancing consumer confidence to bolster the efficiency of the internal market is not a new narrative in EU consumer policy. The consumer confidence rationale first appeared in the 1990s with a policy shift that occurred from focusing solely on persuading businesses to operate across borders to also encouraging the cross-border consumer.⁹⁹ The first policy document to explicitly rely on the notion of consumer confidence as a rationale for enhancing the efficiency of the market was the first of the Three-Year Action Plan of Consumer Policy 1990–1992.¹⁰⁰ In this strategy, consumer confidence was identified as necessary for remedying consumer distrust in the internal market. In the second of the Commission's three-year action plans, the '1993–1995 Placing the Single Market at the Service of European Consumers',¹⁰¹ the Commission once again placed consumers and their confidence in the market as an important stimulant for driving trade: "All in all it is essential that the advent and deepening of the large 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."¹⁰² The following four consumer policy strategies continue this narrative on consumer confidence in much the same vein as the preceding policy agendas.¹⁰³ In the 2012 consumer agenda, 'A European Consumer Agenda - Boosting Confidence and Growth', there was a renewed emphasis on negative impact caused by consumers lacking confidence in the internal market.¹⁰⁴ What is

⁹⁸ Christian Twigg-Flesner points out (and critiques) that it is the presumption of the EU institutions that law matters for boosting consumer confidence and that consumers themselves view EU law as being fundamental for becoming more confident, see Christian Twigg-Flesner, 'The Importance of Law and Harmonisation for the EU's Confident Consumer' in Stephen Weatherill & Dorota Leczykiewicz (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016).

⁹⁹ Weatherill, *EU Consumer Law and Policy* (n 10) 426.

¹⁰⁰ Commission, 'Three-Year Action Plan of Consumer Policy in the EEC (1990 – 1992)' (Communication) COM (90) 98 final.

¹⁰¹ Commission, 'Second Commission Three-Year Action Plan 1993-1995 - Placing the Single Market at the Service of European Consumers' (Communication) COM (93) 0378 final.

¹⁰² *ibid* 7.

¹⁰³ Commission, 'Priorities for Consumer Policy 1996–1998' (Communication) COM (95) 519 final; Commission, 'Consumer Policy Action Plan 1999-2001' (Communication) COM (98) 696 final; Commission, 'Consumer Policy Strategy 2000-2006' (Communication) COM (2002) 208 final.

¹⁰⁴ The Commission's communication from 2012 opens by outlining the significance of consumer expenditure for the internal market as this expenditure accounts for 52% of the EU's GDP. Consumers are identified as unconfident when shopping online because, at that time, 60% of consumers were quoted as not using the internet for making purchases. This lack of confidence was viewed as a barrier to economic growth because using the internet gives consumers better access to the internal market where they have increased consumer choice (they have sixteen times more product options) and have access to a wider array of prices, see 'A European Consumer Agenda - Boosting Confidence and Growth' (n 26).

noteworthy about this strategy is that ensuring consumer confidence is linked to the newly developing model of consumer empowerment, where economic growth in the EU could enjoy a “major boost” because “[e]mpowered and confident consumers can drive forward the European economy”.¹⁰⁵

In the context of consumer empowerment, consumer confidence no longer functions simply as an indicator of a consumer’s willingness to spend but instead becomes an indicator of the empowered status of a consumer. It can also be argued that consumer confidence has come to be framed by the Commission as a behavioural outcome of the empowerment model.¹⁰⁶ It was shown in the preceding analysis of strategic consumer policy between 2007 and 2020 that the Commission consistently defines the empowered consumer as a consumer who is confident.¹⁰⁷ Therefore, the empowered consumer can be profiled as the confident consumer.

3.3 The role of the empowered consumer in the market

The discussion in Chapter 3 illustrated that the strategic vision of the Commission’s approach in consumer policy between 1975–2002 pursued the internal market rationale - that is a competitive, liberalized and efficient internal market where growth is driven by stimulating more consumption.¹⁰⁸ In these strategic policy communications, a normative image of the consumer as a market-building actor was constructed by the Commission and was supported by an image of the consumer who behaved rationally and had an unlimited capacity to use information to make informed choices. From 2007 onwards, in combination with the reform of the internal market, the Commission’s narrative has broadened from aiming to enhance competition through consumption to including a narrative of an internal market that was to be at the service of the consumer interest. Consumer policy was to be the bridge that connected consumers and their interests to the functioning of the market. Alongside this shift in the vision of the role of the internal market was the development of the consumer empowerment agenda. Throughout the evolution of this concept of consumer empowerment by the Commission between 2007 and 2020, the role of the consumer was expanded from driving competition to achieving other goals.

This shift in the role of the consumer is remarkable for two reasons. First, the New Deal for Consumers placed an emphasis on the capacity of consumers to enforce

¹⁰⁵ *ibid*, point 1.

¹⁰⁶ “Empowered consumers need [...] the confidence that comes from effective protection and solid rights”, EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them (n 13) point 3; This point will be argued in more detail subsequently in Chapter 6, Section 2.2.

¹⁰⁷ On the use of consumer confidence as a variable for qualifying the levels of consumer empowerment in the EU, see ‘Special Eurobarometer’ 342 (n 12).

¹⁰⁸ See Section 2 of this Chapter.

their rights. In this way, the consumer was addressed in their capacity to become an active, private regulator of consumer legislation. While the role of the empowered consumer as a private regulator is relatively neglected in the EU consumer law debate,¹⁰⁹ there is a development in regulatory studies that focuses on the regulatory empowerment of the citizen and on citizen-based regulation.¹¹⁰ Second, an important goal of consumer policy is to stimulate sustainable consumption. The role of the EU consumer in the Green Transition is to be a driver of a smart, sustainable and inclusive economy.¹¹¹ This indicates that while consumers were previously framed as participating in the internal market with only their economic interests in mind, consumer policy and consumer empowerment have come to be defined by the Commission as consumers actively participating in the internal market with their social interests in mind. Moreover, the Commission's move towards operationalizing consumer empowerment outcomes as achieving sustainable consumption patterns in the market, the circular economy and, more broadly still, the aims of the Green Deal, indicates that the evolving idea in policy is that the image of the empowered consumer is not as individualistic as the rational consumer.¹¹² Put differently, through the introduction of the empowerment strategy policy communications, the Commission has begun to plant the seeds of a narrative on the role of the consumer in the market that is shifting away from the consumer as a wholly autonomous and sovereign agent in the marketplace towards an actor that takes the implications of their consumption patterns into consideration, implications on both the environment and their fellow citizen-consumers.

3.4 Secondary legislation as a tool for empowering consumers

The discussion so far in this chapter has focused on drawing out the various dimensions of the Commission's narratives on consumer in several of the Commission's strategic horizontal consumer policy plans. This analysis of strategic policy has emphasized that secondary legislation is one of the Commission's primary practical approaches for empowering consumers. The question that follows is what consumer legislation can be qualified as having formed part of the Commission's toolbox for empowering consumers and what the text of these measures can tell us about the meaning of consumer empowerment through law. These questions are addressed in the remainder of the discussion in this chapter, which will qualify the CRD, the UCPD, the SGD, the proposal for an ER, the RAD, the ODRR, and the ADDR as empowerment measures.

¹⁰⁹ Conversely see Stefan Wr̀bka, *Consumer Access to Justice Revisited* (Cambridge University Press 2014).

¹¹⁰ Garry Gray & Benjamin van Rooij, 'Regulatory Disempowerment: How Enabling and Controlling Forms of Power Obstruct Citizen-Based Regulation' (2021) 15 *Regulation and Governance* 800.

¹¹¹ EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them (n 13) point 1.

¹¹² *ibid* 3 & 11.

4. Consumer empowerment and the Consumer Rights Directive (CRD)

The CRD lays down extensive information obligations for businesses regarding the types of pre-contractual information that all traders must provide to consumers.¹¹³ Since this instrument has horizontal applicability, it applies to consumer contracts concluded in several different vertical consumer markets. This includes services in the energy market for the supply of water, gas, electricity or district heating and in some instances to contracts for the supply of digital content.¹¹⁴ Several exclusions do apply and include, for instance, contracts concerning financial services, social services, and gambling.¹¹⁵ The CRD details the information that a trader is obligated to provide to the consumer when concluding in person or distance and off premises contracts.¹¹⁶ For contracts concluded in person, provided that the information is not already apparent from the context, the information provided must include the main characteristics of the goods or services, the identity of the trader, the total price of the goods or services inclusive of taxes, and where applicable information regarding elements such as the arrangements for payment, delivery and performance.¹¹⁷ In the case of distance or off premises contracts, more extensive pre-contractual information must be provided to the consumer, including informing the consumer of their right of withdrawal and specific information for those contracts concluded on online marketplaces.¹¹⁸ This now also includes the obligation, where applicable, to inform consumers that a price was personalized on the basis of automated decision-making.¹¹⁹ Several formal requirements are set out for traders for off premises and distance contracts regarding how the information ought to be provided to the consumer in terms of medium and intelligibility¹²⁰ and the obligation to inform the consumer regarding their right to withdrawal.¹²¹

4.1 The Directive on Empowering Consumers for the Green Transition

Following the strategic vision laid out in the 2020 New Consumer Agenda¹²² and the 2020 New Circular Economy Plan,¹²³ the Commission has set in motion the legislative

¹¹³ Consumer Rights Directive.

¹¹⁴ *ibid*, arts 3(1) and 1(a).

¹¹⁵ *ibid*, art 3(3).

¹¹⁶ *ibid*, art 5 & 6.

¹¹⁷ *ibid*, art 5.

¹¹⁸ *ibid*, art 6 and 6(a).

¹¹⁹ *ibid*, art 6(1)(ea).

¹²⁰ *ibid*, arts 7 & 8.

¹²¹ *ibid*, art 6(1) para (h) – (k), art 6(4), art 7(3), art 8(4) & art 8(8).

¹²² 'New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery' (n 57).

¹²³ 'New Circular Economy Action Plan' (n 62).

procedure for a directive amending the CRD with the proposed title: The Directive for Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information.¹²⁴ The consumer empowerment rationale that supports the proposed directive is defined by the Commission as follows:

Empowering consumers and providing them with cost-saving opportunities is a key building block of the sustainable product policy framework. This is to be achieved through the improved participation of consumers in the circular economy, in particular by providing better information on the durability and repairability of certain products to consumers before concluding the contract and stepping up the protection of consumers against unfair commercial practices that prevent sustainable purchases[...].¹²⁵

Moreover, the Commission's justification that this directive is proportional indicates that the proposed legislative amendments that aim to empower consumers do not go beyond what is necessary to achieve the following empowerment aims:

[...] the objectives of enabling informed purchasing decisions by consumers, to promote sustainable consumption, eliminate unfair commercial practices by traders that cause damage to the sustainable economy and lead consumers away from sustainable consumption choices, and ensuring a better and more consistent application of EU consumer protection rules.¹²⁶

The proposal for this amending directive lists the following gaps in the CRD that cause unreliable consumer information and that stand in the way of consumers making environmentally-sustainable consumption choices.¹²⁷ First, an issue is considered to arise regarding the provision of consumer information on the existence and length of a producer's commercial guarantee of durability or the absence of such guarantee in the case of energy-using goods. A gap is identified in the CRD where traders are obligated to provide information on the legal guarantee regarding conformity but are not obligated to provide information on the absence of commercial guarantees on durability. The Commission proposes that this fails to incentivize traders to provide these types of guarantees to consumers. Moreover, the Commission claims that a problem arises when consumers are provided with information on commercial guarantees because the way this information is provided makes it difficult for the consumer to distinguish the commercial guarantee from the legal guarantee. This is because the information is

¹²⁴ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77).

¹²⁵ *ibid* 1

¹²⁶ *ibid* 6.

¹²⁷ *ibid* 10.

unclear, imprecise or incomplete. In the future, when traders inform consumers of commercial guarantees, the new amendments will obligate traders to make it clear when a commercial guarantee exceeds the compulsory minimum legal guarantee (a time-period of two years).¹²⁸

Second, the Commission has identified an issue regarding consumer information on free software updates for all goods with digital elements, digital content, and digital services. The SGD and the Digital Content Directive (DCD)¹²⁹ provide the legal framework that ensures consumers are issued software updates to ensure that a product remains in conformity for the duration of the contract. Alternatively, consumers are issued updates for a period which the consumer might reasonably expect.¹³⁰ The Commission proposes there is a problematic gap at the point of sale where consumers are not provided with information on the comparability of products with regard to the availability of software updates.¹³¹ The new directive will obligate traders – when such information is provided by the producer – to inform consumers of the existence of software updates and the time period for which the producer commits to provide such updates.¹³²

Third, a gap exists where information is not made available to the consumer on the reparability of products, through a reparability score or other relevant repair information, where available, for all types of goods. The CRD currently obligates traders, where applicable, to inform the consumer of ‘after sale services’ but does not obligate traders to provide consumers with information regarding the reparability of goods. The Commission proposes that information on how easy it would be to repair a product is: “particularly valuable in helping consumers contribute to a circular economy.”¹³³ However, this information is currently not provided by the trader at the point of sale. This is, the Commission proposes, problematic when 80% of consumers report having difficulty finding information the ease of reparability.¹³⁴

4.2 Qualifying the CRD as a consumer empowerment measure

It is not controversial to claim that the information duties set out in the CRD are a tool for empowering consumers. The discussion in Chapter 3 highlighted the consensus in the debate on consumer empowerment that the aims of the Commission’s consumer

¹²⁸ *ibid* 3–4.

¹²⁹ Directive 2019/770/EU of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services [2019] OJ L136/1 (Digital Content Directive).

¹³⁰ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77) 7.

¹³¹ *ibid*.

¹³² *ibid* 6.

¹³³ *ibid* 4.

¹³⁴ *ibid*.

empowerment agenda are consistent only with the level of consumer protection that can be provided through information duties.¹³⁵ As a result, the consumer empowerment agenda has become connected to the consumer's right to information and the information model in secondary law, which consists of an increasingly vast array of information duties.¹³⁶ Although adopted in 2011, the CRD is an amendment of several directives spanning from 1975 to 1999 and it belongs to an era of consumer policy that can, for good reason,¹³⁷ be classified as aiming to enhance informed consumer choice, where the 'informed' aspect enjoys many parallels with the economic rationality study.¹³⁸ The current version of the CRD can then be qualified as an empowerment measure when the aim of the consumer empowerment agenda is defined as consumers exercising informed choice. Drawing on the analysis of consumer policy earlier in this chapter, when the consumer empowerment agenda was first introduced by the Commission in 2007, it appeared that the end-goal of empowering consumers was to facilitate consumers to participate in the market by enhancing choice, providing accurate information, enhancing market transparency, and giving consumers the confidence that can only arise from effective consumer protections and solid consumer rights. Noting that the Commission had already begun to connect the empowered consumer with sustainable consumption.¹³⁹

The empowerment agenda has, however, evolved through each subsequent consumer policy strategy between 2007 and 2020. Within this evolution the sights of the empowerment agenda were increasingly set towards other aims such as the Green Transition as consumer policy began to respond to pressing issues such as decarbonization of the economy, the Covid-19 crisis and energy poverty. The goals of the empowerment agenda along with consumer policy have then evolved in tandem. Informed choice is no longer the sole aim but has also become a means to other ends. It has become a normative goal of consumer policy that consumers should not simply make informed choices but that their choices should be the sustainable choice, the energy-efficient choice, or the choice that would facilitate the consumer to reduce their energy costs. Informed choice in these instances is not the 'rational' choice, as understood according to economic theory, but the 'right' choice in that it is the sustainable one.¹⁴⁰ The proposal for the Directive on Empowering Consumers for the Green Transition that will amend the CRD confirms this shift. The empowerment aims in this proposal are not simply cited as informed choice for the sake of competition. This is confirmed, for example, by the Commission's claim that the aims of this

¹³⁵ See Chapter 3, Sections 2.3 & 2.4.

¹³⁶ *ibid.*

¹³⁷ See Chapter 3, Section 3.2.

¹³⁸ See Chapter 3, Section 3.3.

¹³⁹ See Section 2.2 of this chapter.

¹⁴⁰ This does not negate that there is still an element of the rationality study at play but rather that the focus has shifted away from the rational choice that leads to increased competition to the rational choice that is rational because it is a sustainable choice.

empowerment directive are: “enabling informed purchasing decisions by consumers, to promote sustainable consumption, eliminate unfair commercial practices by traders that cause damage to the sustainable economy and to lead consumers away from sustainable consumption choices.”¹⁴¹

As a concluding remark, the qualification of the CRD as an empowerment measure rests on the aims of the consumer empowerment agenda laid out by the Commission in consumer policy that seek to empower consumers by enabling their participation in the market through legislation that facilitates informed choice. The consumer empowerment agenda in consumer policy has cited enhancing sustainable consumption as a goal of consumer empowerment but this political promise was not directly translated into horizontal consumer legislation until the 2020 proposal for the Directive on Empowering Consumers for the Green Transition. Alongside the developments in policy, this proposal confirms the nuance in the goals of the consumer empowerment agenda that can be articulated as reaching beyond informed choice, market efficiency and competition and as moving towards sustainability goals. The empowered consumer is then qualified as being empowered (acting in an empowered way) not simply when they exercise choice but when this choice has a particular character. That it is the sustainable choice because it is the energy-efficient choice, the sustainable choice, and more generally the environmentally-friendly choice.

5. Consumer empowerment and the Unfair Commercial Practices Directive (UCPD)

The Unfair Commercial Practices Directive (UCPD) is applicable to B2C transactions¹⁴² and prohibits unfair, misleading, and aggressive practices that occur before, during and after a transaction.¹⁴³ The scope of the UCPD is broad and covers all types of B2C transactions.¹⁴⁴ The Annex of the directive contains a blacklist of specific practices that are absolutely prohibited.¹⁴⁵ In the context of unfair commercial practices, a substantive fairness test is applicable and which assesses whether a practice is contrary to the requirements of professional diligence and if a practice materially distorts or is likely to materially distort the economic behaviour of the average consumer.¹⁴⁶ If the consumer falls into the vulnerable category specified by the directive, then specific protections apply.¹⁴⁷ The Commission has provided several communications to guide the correct

¹⁴¹ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77) 6.

¹⁴² Unfair Commercial Practices Directive, arts 2 & 3.

¹⁴³ *ibid*, arts 5, 6, 7, 8 & 9.

¹⁴⁴ *ibid*, arts 1 & 2.

¹⁴⁵ *ibid*, Annex I

¹⁴⁶ *ibid*, art 5.

¹⁴⁷ *ibid*, art 5(3).

application of the UCPD. The most recent communication was updated in 2021 to include legal interpretation for potentially misleading practices created by new technologies and social practices, for instance online reviews, customer reviews, data driven personalization and dark patterns.¹⁴⁸

5.1 The Directive on Empowering Consumers for the Green Transition

The proposal for a Directive on Empowering Consumers for the Green Transition was addressed in the preceding section on consumer empowerment and the CRD. Alongside amending the CRD, this legislative proposal also aims to empower consumers through several amendments to the UCPD which are the focus of the following discussion.

The impact assessment supporting the proposal for the amending directive identifies that misleading commercial practices on the sustainability of products is a problem for consumers.¹⁴⁹ It acknowledges that in practice consumers are at risk of being sold goods that do not last for as long as expected (early obsolescence), they are at risk of being misled when they must contend with unclear or poorly substantiated environment claims (greenwashing), and they are at risk when they are faced with sustainability labels and digital information tools that lack transparency and credibility.¹⁵⁰ To reiterate, the consumer empowerment aims of the Directive on the Empowerment of Consumers for the Green Transition are as follows: “stepping up the protection of consumers against unfair commercial practices that prevent sustainable purchases [...]”¹⁵¹ and to “[...]eliminate unfair commercial practices by traders that cause damage to the sustainable economy and lead consumers away from sustainable consumption choices.”¹⁵²

The proposed directive intends to achieve these consumer empowerment aims by amending the UCPD to prohibit several kinds of commercial practices and trader behaviour. Traders will be prohibited from misleading consumers about the environmental and social impacts of a product, on the durability of products, and on a product's reparability. Moreover, a trader is permitted to make environmental claims related to future environmental performance only when this involves clear commitments. A trader may not advertise that a product has benefits for a consumer if such benefits are a common practice in the relevant market. A trader may only compare

¹⁴⁸ Commission, ‘Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-To-Consumer Commercial Practices in the Internal Market’ (2021) 9320.

¹⁴⁹ *ibid* 10.

¹⁵⁰ *ibid*.

¹⁵¹ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77) 1

¹⁵² *ibid* 6.

a product if the trader provides information about the method of the comparison, the products and suppliers covered, and the measures that keep information up to date. The following bans will also be imposed on traders. There will be a ban on displaying a sustainability label which is not based on a certification scheme or not established by public authorities. A ban on generic environmental claims used in marketing towards consumers, where the excellent environmental performance of the product or trader cannot be demonstrated.¹⁵³ A ban on making an environmental claim about the entirety of the product, when these claims only concern a certain aspect of the product. A ban on presenting requirements imposed by law on all products within the relevant product category on the Union market as a distinctive feature of the trader's offer. Finally, a ban will be adopted regarding certain practices related to the early obsolescence of goods.¹⁵⁴

5.2 Qualifying the UCPD as an empowerment measure

Following the Commission's definition of consumer empowerment as relying on a "robust framework", the 2005 version of the UCPD can be qualified as an empowerment directive because this directive forms the part of horizontal consumer law and robust framework that is considered necessary to empower consumers. The measures in the UCPD are not directly aimed at facilitating informed choice through information duties but instead are targeted at regulating the behaviour of businesses and communication in the B2C relationship to ensure that consumers are not unduly manipulated by traders. Moreover, the UCPD procedurally enables consumers to challenge businesses for the alleged use of unfair, misleading or aggressive commercial practices. This latter procedural dimension is connected to the aim of the consumer empowerment agenda when the consumer empowerment outcome is consumers participating in the market by the enforcing their rights against rogue trader behaviour. This dimension of consumer empowerment can also be identified in the secondary legislation that facilitates enforcement, and which is discussed subsequently in Section 8 of this Chapter. Finally, by regulating commercial practices, the Commission presumes that the consumer will have trust and confidence in the internal market. The 2005 version of the UCPD cites consumer confidence as a rationale for harmonizing national law because differing levels of protection from unfair commercial practices across the market would undermine consumer confidence and negatively impact the functioning of the internal market.¹⁵⁵ In the early stages of development of the consumer empowerment agenda, the empowered consumer was connected to this concept of

¹⁵³ This is in accordance with Regulation (EC) 66/2010 (EU Ecolabel), officially recognized eco-labelling schemes in the Member States, or other applicable Union laws, as relevant to the claim, see *ibid* 2.

¹⁵⁴ *ibid*.

¹⁵⁵ Unfair Commercial Practices Directive, recital 4.

consumer confidence. In the 2007 agenda, the Commission proposed that to become empowered, consumers need choice, accurate information, market transparency, and the confidence that arises from effective protections and solid rights.¹⁵⁶ Moreover, the Eurobarometer survey on consumer empowerment operationalized consumer confidence (consumers feeling confident as consumers) as a variable for qualifying the levels of consumer empowerment across the Member States.¹⁵⁷ The UCPD and the protections it offers to consumers from unfair commercial practices can be qualified as empowerment measures when the aims of the UCPD correspond with the empowerment aims of enhancing consumer confidence in the market. As stated in the preamble to the UCPD:

These disparities [laws of the Member States relating to unfair commercial practices] cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. [...] Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.¹⁵⁸

Following the proposal for the Directive on Empowering Consumers for the Green Transition, the UCPD can now also be qualified as an empowerment measure because it now expressly forms part of the Commission's consumer empowerment strategy that aims to enhance consumer participation in the Green Transition. As was outlined in more detail in the previous section, the amendments to the UCPD will impose several bans on commercial practices that pose obstacles to consumers making sustainable choices. These prohibitions are based on the rationale of eliminating: “[...]unfair commercial practices by traders that cause damage to the sustainable economy and lead consumers away from sustainable consumption choices.”¹⁵⁹ In addition to the discussion in the preceding section on this amending directive, the amendments to the UCPD can be framed as the Commission's repurposing of this directive, which was first adopted to facilitate the original vision of the internal market, as a tool for the achieving the Green Transition and for consumer empowerment that are predicated on a new vision on the character of the internal market. This means that the UCPD can be no longer solely framed as a directive that facilitates the undistorted decision-making of the average consumer. It is my view that for the Commission, a new

¹⁵⁶ EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them (n 13) 3; see also Chapter 4, Section 2.2.

¹⁵⁷ Special Eurobarometer 342 (n 12).

¹⁵⁸ 'A European Consumer Agenda - Boosting Confidence and Growth' (n 26) 225 final, 1, recitals 4 & 13.

¹⁵⁹ *ibid* 6.

rationale of the UCPD is to remove the objective obstacles in the B2C relationship that prevent (disempower) consumers from behaving as the green consumer.

As an aside, it has been debated as to how protective the UCPD can be when its controls are based on the average consumer benchmark and a restrictive view of consumer vulnerability.¹⁶⁰ When the empowered consumer is equated with the average consumer benchmark the conclusion has then been drawn that the criticisms of the average consumer test in the UCPD are by extension also applicable to the consumer empowerment agenda.¹⁶¹ In my view, the consumer empowerment agenda and the empowered consumer concept can be conceptually decoupled from the average consumer benchmark, a point that will be discussed in more detail in Section 3.1 of Chapter 6. With respect to this UCPD, the preliminary point can be made that the UCPD is an empowerment measure because of the protection it provides through controls on unfair commercial practices and because of the ban on commercial practices that trigger unsustainable consumption. The issue as to whether the UCPD provides a desirable level of consumer protection in practice through the average consumer benchmark is irrelevant for qualifying the UCPD as a consumer empowerment measure. If the average consumer benchmark were to be replaced by a more ‘protectionist’ leaning benchmark it would change nothing of empowerment aims that qualify the UCPD as an empowerment directive.

As a final remark, the EU consumer empowerment agenda is a strategic approach that achieves its ends by repurposing the existing legal framework of rights and obligations that structure the internal market. Consumer empowerment then depends on the existing legislation in place such as the CRD and the UCPD, of which the average consumer was already part. It will be argued subsequently in this chapter that newer legislation adopted with an explicit consumer empowerment rationale has tended to adopt a view of the consumer that is at odds with the average consumer concept and that raises the question as to whether the rational consumer concept is conceptually broad enough as the starting point for conceptualizing the profile of the empowered consumer that emerges from the Commission’s narratives on consumer empowerment in both policy and secondary legislation.

6. Consumer empowerment and the Sale of Goods Directive (SGD)

The SGD lays down legal guarantees for consumer goods and a set of remedies if a good presents as faulty during a set period of time.¹⁶² The scope of the directive is broad and

¹⁶⁰ See for example, Thomas Wilhelmsson, ‘The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law — A Comment’ in Geraint Howells, Annette Nordhausen, Deborah Parry & Christian Twigg-Flesner (eds), *The Yearbook of Consumer Law 2007* (Routledge 2007).

¹⁶¹ See Chapter 3, Sections 2.3 & 2.4.

¹⁶² Sale of Goods Directive.

applies horizontally to most B2C contracts for the sale of goods.¹⁶³ This SGD specifies that consumer goods must be delivered in conformity with the contract.¹⁶⁴ If a good does not conform, then the consumer is entitled to, free of charge, a hierarchy of remedies including repair or replacement followed by a price reduction or rescission.¹⁶⁵ Conformity now also relates to the durability of the product, where a product should possess the durability that is normal for a good of the same type and that a consumer could reasonably expect.¹⁶⁶ This requirement was introduced as part of the efforts to transition to a circular economy by stimulating more sustainable consumption patterns. The seller is liable then for a lack of conformity that arises within two years of the consumer receiving the goods.¹⁶⁷ Consumers enjoy a mandatory minimum two-year guarantee, independent of any other commercial guarantees offered by the trader. If a defect becomes apparent within one year of receipt by the consumer, it will be presumed that the lack of conformity existed at the point of delivery and the burden of proof is on the business to prove otherwise. Following the one-year period, the burden of proof is reversed to the consumer.¹⁶⁸

6.1 The pending legislative proposal on the right to repair

In 2022 the Commission issued a call for evidence for an impact statement for a legislative initiative that would consist of targeted amendments to the SGD and a new right to repair. This new right to repair would either be placed within the SGD or be adopted in a separate legislative instrument. In the 2020 New Consumer Agenda and the 2020 Circular Economy Plan, the Commission established its commitment to empowering consumers for the Green Transition by making it easier for consumers to repair and reuse goods. Following this, the Commission has already proposed new legislation to empower consumers to make more sustainable purchasing choices with the Directive on Empowering Consumers for the Green Transition.¹⁶⁹ The current initiative on the right of repair focuses on empowering consumers to make the sustainable choices post-contractually and *during* the product's lifecycle.

¹⁶³ *ibid*, art 3.

¹⁶⁴ *ibid*, art 7.

¹⁶⁵ *ibid*, art 13.

¹⁶⁶ *ibid*, art 7 & recital 32.

¹⁶⁷ *ibid*, art 10.

¹⁶⁸ *ibid*, art 11(1).

¹⁶⁹ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77).

Three levels of intervention are proposed by the Commission.¹⁷⁰ First, low intervention will encourage businesses to voluntarily repair goods. Second, moderate intervention would extend the legal guarantee period for: (i) new goods when consumers choose to repair them instead of replacement, and/or (ii) for second-hand/refurbished goods, which is currently not an option in the SGD. Moderate intervention could also entail that repair will be made as the preferred remedy over replacement when repair is less expensive than or as expensive as replacement. In addition, producers or sellers would be obliged to repair goods beyond the legal guarantee period for a reasonable price. This would be a new right to repair within the directive or a separate instrument. Third, high intervention is broken down into three options. The first would be to amend the SGD so that repair is prioritized over replacement in the hierarchy, thus limiting consumer choice. Producers/sellers would be obliged to repair goods beyond the current legal guarantee and in some instances for free. The second option would extend the legal guarantee period beyond the current minimum period of 2 years. Option three would allow the seller to replace a defective product with a refurbished good rather than replacement with a new product.¹⁷¹

It is expected that the Commission will introduce the legislative proposal in the final quarter of 2022. The Commission contends that the social impacts of the initiative will be to encourage more sustainable behaviour because consumers will be incentivized to use goods for a longer period, to repair broken and faulty goods, and moreover to purchase more second-hand and refurbished goods. Depending on which of the three options is chosen and how it will appear in final modified form following the legislative process, it would appear likely that at least one of the moderate options will be chosen and that will have an impact on the current autonomy of consumers to choose a right of repair over replacement. Changing this hierarchy does not entail that consumer will not be empowered to make sustainable choices since the Commission considers the empowered behaviour is that the consumer *does* repair a good or the purchasing of second-hand and refurbished goods.¹⁷² Put differently, the empowered outcome is not that a choice was exercised but that the consumer behaves in a sustainable way.

6.2 Qualifying the SGD as an empowerment measure

The SGD can be qualified as a consumer empowerment on two fronts. The first has been outlined in detail in the previous section where the right to repair is part of the agenda for empowering consumers to participate in the Green Transition by behaving

¹⁷⁰ Commission, 'Sustainable Consumption of Goods – Promoting Repair and Reuse' (2022) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 24 July 2022.

¹⁷¹ *ibid.*

¹⁷² *ibid.*

in a sustainable manner when they treat goods in a sustainable way by repairing defective goods. Consumer empowerment is then operationalized as consumer participation at the specific moment when a consumer makes the sustainable decision to repair a faulty good – rather than replace it – during the product's life cycle. Pending the outcome of the new legislative proposal, the SGD or new directive which enhances empowered behaviour may also be extended to include consumers purchasing second-hand goods and refurbished goods because they would have a right to repair.¹⁷³

The SGD can also be qualified as an empowerment measure because it has a consumer confidence and trust rationale.¹⁷⁴ If consumers can rely on these guarantees regardless of where they have made this purchase, then they will be empowered to conclude transactions that they may previously have considered to have been too risky should something go wrong. This is an empowerment aim when the empowerment agenda is defined as aiming to facilitate consumer participation by transaction in the market. This also extends to more specifically to purchasing second-hand and refurbished products. If consumers have a right to repair of these goods then they will have confidence and trust that they can more easily have these goods repaired. As a related remark, the SGD also qualifies as an empowerment measure insofar as it encourages consumers to participate in the internal market by invoking and enforcing their legal guarantees against traders.

7. Consumer empowerment and the proposal for an Ecodesign Regulation (ER)

The 2022 proposal for the ER is intended to replace the 2009 EcoDesign Directive (EDD) and will be adopted as part of the Circular Economy policy.¹⁷⁵ The EDD is responsible, for instance, for the ban on energy-inefficient incandescent bulbs from the market in favour of longer-lived and more energy-efficient LEDs. The current scope of the EDD is, however, limited vertically to electrical goods. The proposed ER will transform the scope horizontally to include all goods, with exceptions, and targets the design of products by setting out sustainability standards/requirements for production. This is significant for sustainability aims because, as the Commission cites, the

¹⁷³ Whether or not the amendments to this remedy are fit for purpose regarding stimulating the longevity of the lifecycle of products is debateable but does not detract from the empowerment aims of the Sale of Goods Directive. For a debate on the inadequacy of the CSGD for achieving sustainability aims, see Mónica García Goldar, 'The Inadequate Approach of Directive (EU) 2019/771 Towards the Circular Economy' (2021) 29 *Maastricht Journal of European and Comparative Law* 1.

¹⁷⁴ Sale of Goods Directive, recitals 4 & 8.

¹⁷⁵ Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC' COM (2022) 142 final.

production of a good generally counts for 80% of its environmental impact.¹⁷⁶ Moreover, the requirements in this regulation will set out a framework based on the sustainability and circularity aspects listed in the 2022 New Circular Economy Action Plan. These requirements include product durability, reusability, upgradability and repairability, the presence of substances of concern in products, product energy and resource efficiency, recycled content of products, product remanufacturing and high-quality recycling, and for reducing products' carbon and environmental footprints.¹⁷⁷

7.1 Qualifying the Ecodesign Regulation as an empowerment measure

The proposal for the ER is part of a bundle of initiatives adopted by the Commission concerning the sustainability of products on the market and the enabling of consumers to make sustainable product choices. This includes the initiatives on empowering consumers in the Green Transition through better protection against unfair practices and better information.¹⁷⁸ In the proposal, the Commission contends that the ER forms part of the sustainability policy framework that aims to foster sustainable product design, to empower consumers and public buyers, and to promote circularity in production processes.¹⁷⁹ These three areas of the framework are considered to work in synergy where the ER is primarily focused on fostering sustainable product design.¹⁸⁰ In addition to supporting the goals of the Circular Economy Action Plan, the ER is considered to support the objectives of the Green Deal. The ER goes beyond the production of basic materials and basic material components to also cover final products themselves.¹⁸¹

The proposal for the ER can be qualified as an empowerment measure for two reasons. The first is that it sets out a framework that will set market standards by targeting the minimum sustainability requirements for production of products that can be lawfully sold in the market. Second, the ER facilitates the Commission's strategy to regulate the communication of sustainability information in the B2C relationship, following the adoption of the Directive on Empowering Consumers for the Green Transition. The ER is then an empowerment measure not because it directly regulates the relationship between traders and consumers. Instead, it is an empowerment measure

¹⁷⁶ Commission, 'European Commission – Press Release Green Deal: New Proposals to Make Sustainable Products the Norm and Boost Europe's Resource Independence' (Press Release) 30 March 2022 <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2013> accessed 24 July 2022.

¹⁷⁷ Commission, 'Proposal for a Regulation of The European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC'

COM (2022) 142 final, Article 5(1).

¹⁷⁸ *ibid.*, 1–2.

¹⁷⁹ *ibid.*, 3.

¹⁸⁰ *ibid.*

¹⁸¹ This facilitates action against the negative impacts that are generated along the entire value chain. This includes the embedded emissions of a product throughout its lifecycle and other negative consequences; see *ibid.* 4.

because it sets favourable conditions in the market as the environment that consumers operate within. The ER sets market standards that represent a move towards targeting unsustainable production by prohibiting goods that are produced in an unsustainable way and that pose an obstacle to the transition to a circular economy. Consumers are then empowered to make the sustainable purchasing choice because unsustainable goods will be phased out and made unavailable in the market. In contrast, information duties in the CRD such as labelling and the prohibition on greenwashing the UCPD aim to empower consumers to make the *most* sustainable choice amongst products that meet the sustainability requirements of the ER and the ER's implementing measures. Moreover, the ER will introduce goods into the market that are more conducive to repair and second-hand reuse. In this way, the ER then contributes from a structural perspective to the Commission's empowerment strategy by enabling the shift to the sustainable consumption patterns that are necessary for the transition to a circular economy. Put differently, the burden is not placed on the consumer to trigger sustainable production by using the collective power of supply to influence demand.

8. Consumer empowerment: enforcement and redress

A recurrent thread in the Commission's narrative on consumer empowerment is not only that consumers have a robust framework of rights but that they can in practice enforce these consumer rights against rogue traders and achieve redress from harm. In the 2012 consumer agenda on Boosting Confidence and Growth, the Commission placed a renewed emphasis on improving the redress and enforcement mechanisms within the Union. The third objective of this strategic plan for the following several years was to improve implementation, step up enforcement, and to secure redress for consumers.¹⁸² If the internal market was to succeed, then consumers were to have: “trust in the effective and efficient enforcement of their rights and the availability”¹⁸³ and “only if consumers can enforce their rights throughout the EU and reputable traders see that unfair competitors face appropriate penalties can we expect cross-border trade to continue to increase in the EU of adequate redress mechanisms”.¹⁸⁴ Following the 2017 REFIT Fitness Check of EU Consumer and Marketing Law,¹⁸⁵ the New Deal for Consumers communication placed a renewed emphasis on ensuring that the internal market is a fair market where consumers could enforce their rights.¹⁸⁶ The REFIT Check concluded that the measures under scrutiny were fit for purpose but that more must be

¹⁸² ‘A European Consumer Agenda - Boosting Confidence and Growth’ (n 26) point 4.3.

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ Commission, ‘Staff Working Document: Report on Fitness Check’ (Staff Working Document) SWD(2017) 209 final.

¹⁸⁶ ‘A New Deal for Consumers’ (n 37).

done to ensure that the existing regulatory framework is better applied and enforced.¹⁸⁷ The Dieselgate scandal and the issue of unfair terms in mortgage contracts are cited by the Commission as two instances that throw into focus the question as to whether EU enforcement mechanisms are strong enough to deal with violations of the regulatory framework.¹⁸⁸ In response, the New Deal for Consumers was accompanied by the proposal for a directive on collective redress.¹⁸⁹ Representative action is an empowerment tool because as the Commission puts it, the RAD “[...] level the odds even in disputes with today's Goliaths.”¹⁹⁰ The following sections will consider why the ADRD, the ODRR and the RAD can be qualified as consumer empowerment measures.

8.1 Alternative dispute resolution and online dispute resolution

The 2012 strategic consumer policy communication specified two legislative proposals that were necessary for enhancing consumer empowerment by improving consumer confidence in the internal market and in e-commerce. These included amending the ADRD and the ODRR. The preamble to the amended ADRD adopts consumer confidence as a justifying rationale for market intervention; “Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market”.¹⁹¹ Consumers that lack confidence in being able to resolve disputes quickly and cheaply with traders tend to refrain from shopping across borders.¹⁹² Therefore, in recognition of the growing importance of online commerce as a pillar of the internal market, it is specified that access to alternative dispute resolution (ADR) facilitated by an online dispute resolution framework is “necessary in order to achieve the Single Market Act’s aim of boosting citizens’ confidence in the internal market”.¹⁹³ The ADRD applies, with limitations, to out-of-court resolution mechanisms for B2C disputes arising from contracts for goods and services.¹⁹⁴ Member States are obligated to facilitate consumer access to ADR procedures¹⁹⁵ and that alternative dispute resolution entities adhere to the requirements set down in the directive relating to expertise, independence and impartiality, transparency, effectiveness, fairness, liberty,

¹⁸⁷ Staff Working Document: Report on Fitness Check’ (n 185) 74–87.

¹⁸⁸ ‘A New Deal for Consumers’ (n 37) 2.

¹⁸⁹ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77).

¹⁹⁰ Commission, ‘The Commission Welcomes Confirmation of Provisional Agreement to Strengthen Collective Redress in the EU’ <https://ec.europa.eu/commission/presscorner/detail/cs/statement_20_1227> accessed 25 July 2022.

¹⁹¹ Directive on Consumer ADR, recital 4.

¹⁹² *ibid*, recital 6.

¹⁹³ *ibid*, recital 11.

¹⁹⁴ *ibid*, art 1.

¹⁹⁵ *ibid*, art 5.

legality, and the effects of ADR on limitations and prescription periods for initiating judicial proceedings.¹⁹⁶

In contrast to the ADRD, the objective of the ODRR is to enhance e-commerce and the digital dimension of the internal market by providing an online platform for dispute resolution mechanism. The platform offers traders and consumers free access to the mechanism, which acts as a single point of entry to resolve out-of-court disputes.¹⁹⁷ The platform will assess if a complaint can be processed and, with the agreement of the parties, be conveyed to the ADR mechanism that can appropriately deal with the dispute.¹⁹⁸ Like the ADRD, the ODRR cites consumer confidence as a justification for the creation of the mechanism; “In order for consumers to have confidence in and benefit from the digital dimension of the internal market, it is necessary that they have access to simple, efficient, fast and low-cost ways of resolving disputes which arise from the sale of goods or the supply of services online.”¹⁹⁹ In addition, “Consumers and traders should feel confident in carrying out transactions online, so it is essential to dismantle existing barriers and to boost consumer confidence. The availability of reliable and efficient online dispute resolution (ODR) could greatly help achieve this goal.”²⁰⁰ In the context of the internal market, the preamble also states that; “Being able to seek easy and low-cost dispute resolution can boost consumers’ and traders’ confidence in the digital Single Market”.²⁰¹

8.2 Representative action: the collective redress mechanism

After ten years of debate,²⁰² the RAD was adopted in 2020.²⁰³ The necessity for ensuring a collective right to redress across the Union gained momentum after the 2015 Dieselgate scandal²⁰⁴ and the renewed focus on redress and enforcement in the “New Deal for Consumers” communication in 2018,²⁰⁵ following the results of the Fitness

¹⁹⁶ *ibid*, art 6 – 12.

¹⁹⁷ Regulation 524/2013/EU of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2006] OJ L165/1 (Online Dispute Resolution Regulation), articles 1, 2 & 5.

¹⁹⁸ *ibid*, arts 5, 9, 10.

¹⁹⁹ *ibid*, recital 2.

²⁰⁰ *ibid*, recital 6.

²⁰¹ *ibid*, recital 7.

²⁰² For a commentary, see Peter Rott, 'A Proper EU Collective Redress Mechanism, Finally' (2020) 9 *Journal of European Consumer and Market Law* 223.

²⁰³ Directive on Representative Action.

²⁰⁴ Where Volkswagen took advantage of legal loopholes to avoid compensating consumers. For a detailed report on the aftermath, see BEUC, 'Five Years of Dieselgate: A Bitter Anniversary, 2015-2020: A Long and Bumpy Road Towards Compensation for European Consumers' BEUC-X-2020-081 https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-081_five_years_of_dieselgate_a_bitter_anniversary_report.pdf accessed 21 July 2022.

²⁰⁵ 'A New Deal for Consumers' (n 37).

check published in 2017.²⁰⁶ The RAD builds on the scope from the repealed 2009 Injunctions Directive because it also provides consumers with access to collective redress alongside representative actions to stop or prohibit infringements of EU consumer law.²⁰⁷ The RAD specifies the minimum standards for procedural rules that the Member States must respect for collective redress and injunctions for consumers. The scope of the directive is limited to claims brought on behalf of consumers²⁰⁸ and to claims brought in relation to breaches of 66 instruments (and in some instances specific measures) specified in Annex I.²⁰⁹ Through Qualified Entities, consumers have access to one procedural mechanism that allows these entities to bring representative actions for the purpose of both injunctive measures and redress measures.²¹⁰

The 2019 proposal for the RAD directly connects consumer empowerment with the confidence that arises from consumers having access to effective and efficient representative actions: “More effective and efficient representative actions available across the Union should boost consumer confidence in the internal market and empower consumers to exercise their rights”.²¹¹ In the final version of the RAD, it is proposed that: “Having at least one such procedural mechanism for representative actions available would boost consumer confidence [and] empower consumers to exercise their rights.”²¹² Like the ADRD and the ODRR, enhancing consumer confidence is cited as one justification for the subsidiarity requirement because the effective collective redress mechanism: “will strengthen consumer confidence in the retail internal market, including in the area of e-commerce, and encourage businesses to comply with Union law”.²¹³ This is because fragmentation across the Member States in terms of injunctive measures and for redress measures causes diminished confidence and distorts competition.²¹⁴

8.3 Qualifying the ADRD, ODRR and the RAD as empowerment measures

The opening of this section referred to several instances in strategic consumer policy that connect consumer empowerment with consumers enforcing their rights and

²⁰⁶ ‘Staff Working Document: Report on Fitness Check’ (n 185).

²⁰⁷ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers’ Interests [2009] OJ L10/30 (Directive on Injunctions).

²⁰⁸ Directive on Representative Action, arts 1 & 2.

²⁰⁹ *ibid*, Annex 1.

²¹⁰ *ibid*, art 1.

²¹¹ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77), recital 5.

²¹² Directive on Representative Action, recital 7.

²¹³ Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (n 77) point 2.

²¹⁴ *ibid*; see also Directive on Representative Action, recital 6.

claiming redress. When consumers act against rogue traders, the Commission classifies these behaviours as 'empowered behaviours' and correspondingly a desired behavioural outcome of the consumer empowerment agenda. Moreover, the overriding rationale of the ADRD, the ODRR and the RAD is to enhance consumer confidence. As the discussion in Section 3 highlighted, the Commission has consistently qualified consumers' feelings of confidence and trust as being a state of mind and condition that is necessary for consumers to behave in an empowered and active way, operationalized in the context of these instruments as consumer mobilization and private enforcement.

Qualifying these secondary legislative instruments as having an empowerment rationale is not controversial or novel because several voices in the debate on empowerment have already considered these instruments to form part of the consumer empowerment agenda.²¹⁵ What is novel about this discussion in this section are the reasons why these instruments can be qualified as empowerment legislation. First, when consumers enforce consumer rights and claim redress, they function as private regulators of consumer law. In the context of power, the narrative of the empowered consumer as a regulator has an underlying power over traders (1-D power as agency) by virtue of legislation that amends the 2-D structural bias in the market to allow for structured resolution of 2-D structural conflicts. Put differently, the ADRD, ODRR and the RAD are structural mechanisms that allow for a resolution within the system of rogue trader behaviours, such as a trader refusing to honour a consumer right that is obligatory according to consumer legislation and the 2-D structural bias in the market environment. Second, these legislative instruments can be qualified as empowerment legislation because of the Commission's narrative that the empowered consumer is a confident consumer. This is an acknowledgment that consumer empowerment is not simply a matter of changing the conditions in the market but also requires the subjective empowerment of the consumer who should have a particular state of mind or internalized narrative that is conducive to the consumer behaving in an empowered way.

9. Concluding remarks

The central question in this chapter is what the concept of consumer empowerment means to the Commission as the empowering entity. The interim conclusions in Section 3 summarized three of the key narratives in strategic policy that can be used to define what empowerment means to the Commission. These are the Commission's narratives on the concrete operationalization of consumer empowerment as a strategy and as an outcome, the Commission's narratives on the profile of the empowered consumer, and the Commission's narratives on the role of the consumer in the internal market. These

²¹⁵ See Chapter 3, Section 4.1.

interim conclusions revealed a broader understanding of what EU consumer empowerment means to the Commission that is at odds with the narrow understanding of consumer empowerment that is established in the consumer law debates. To summarize, empowerment outcomes are defined by the Commission as consumers making an informed choice, making the sustainable choice, using products in a sustainable way, consumers enforcing their consumer rights and claiming redress for harm. This can be contrasted with the narrower operationalization of empowerment outcomes in the debate as consumers making the informed choice. The discussion also identified evidence of the Commission's narratives that (dis)empowerment is both an objective and subjective phenomenon and correspondingly that empowerment is an objective and subjective process. On the one hand, consumers are disempowered by objective conditions such as greenwashing, a lack of information on the repairability and durability of goods, a limited right to repair for new products, no right to repair for second-hand products, a limited market for second-hand goods, and difficulties for low-income consumers who do not have equal access to sustainable products, efficiency measures, and the ability to create and consume renewable energy. On the other hand, the subjective dimension is acknowledged as consumers lacking confidence and trust in their position in the market and *vis-à-vis* businesses.

This broader understanding of the Commission's narratives on consumer empowerment has implications for the instruments in the consumer law framework that can be classified as having a consumer empowerment rationale, which is limited by the consumer law debate to information duties and mechanisms for enforcement and redress. The analysis in Sections 4 to 8 considered the Commission's repurposing of the UCPD, the CRD, the SGD and the ER for achieving empowerment aims. Moreover, the pending proposal for the ER that regulates the supply side of the market by controlling what goods can lawfully be marketed and sold in the market was qualified as a consumer empowerment instrument.

Two central conclusions can be drawn from these findings. The first is that the legislative tools used by the Commission for empowering consumers are much more expansive than information duties and can be defined as including secondary legislation with a protective nature that is often considered to be incompatible with the aims of consumer empowerment. For instance, the SGD and the potential changes to the right to repair will limit the autonomy and freedom of consumers by reducing the available choice of remedies of repair or replacement by prioritizing repair. To give another example, the proposal for an ER and associated implementing directives are regulating the choices (autonomy) of consumers by dictating what goods can be made available in the market. Second, when rights and obligations other than information duties are used by the Commission as a tool to empower consumers, then the narrow conceptualization of consumer power as agency comes under increasing pressure. The legislation analysed in this chapter represents a mix of regulatory techniques that directly regulate the B2C relationship and the structural biases in the market. From the perspective of power at

the 3-D and the 4-D dimension, this legislation and especially the pending proposals to amend the SGD, the CRD and the UCPD and the proposal to introduce the ER have an underlying aim to change consumer and businesses perceptions and attitudes towards what forms of consumption and productive are appropriate. Put differently, there is an underlying goal of empowering consumers by changing how they think and feel about the appropriateness of consumption in a linear economic model versus a circular model in a carbon-neutral economy.

In short, the central findings in this chapter offer an alternative perspective on the Commission's narratives surrounding the concept of EU consumer empowerment and a novel view on the legislation that the Commission is using as a tool to empower consumers in practice. From a substantive perspective, the analysis in this chapter traced the Commission's narratives on consumer empowerment in horizontal consumer law in the context of transition to a circular economic model. The second part of the consumer empowerment agenda where a radical change can be identified is the Commission's operationalization of a decarbonized economy as an outcome of consumer empowerment. In this regard, a consumer empowerment agenda in the energy market has been adopted as the primary strategic approach for mobilizing consumers to participate in the transition to a clean and decarbonized economy by 2050. The analysis in Chapter 5 will then continue by asking the question of what consumer empowerment means to the EU Commission in the context of energy consumers in the energy market.

Chapter 5

The Commission’s Consumer Empowerment Agenda – Energy Policy and Sectoral Consumer Legislation in the Energy Market

1. Introduction

The recent changes in energy policy and in the legislative framework in the energy market have come to increasingly rely on a consumer empowerment agenda for achieving the clean transition to a decarbonized economy and the aims of the European Green Deal. In the last several years, consumer empowerment has become the dominant strategic approach for ensuring that all consumers can participate in and benefit from the clean transition to a carbon neutral economy. As part of Europe’s new growth strategy, the von der Leyen Commission proposed a Green Deal premised on a notion of solidarity where: “no person and no place is left behind.”¹ The Commission’s political promise to ensure that the Green Transition to a carbon neutral economy will be socially just and take place in a fair market is echoed throughout Commission policy.² One social justice aspect of this aim entails, for instance, the claim that the burden of the Green Transition should not be disproportionately borne by low-income households.³ One of the strategies for achieving this goal adopted in the Green Deal included the introduction of funding mechanisms, such as the Just Transition Fund⁴ and the Social Climate Fund.⁵ Another strategy entailed the sweeping regulatory reform of the energy market over the last six years. Moreover, the Commission’s 2020 work plan specified that “Europe has a unique social market economy that allows us to combine social fairness, sustainability and economic growth”.⁶ Furthermore, the twin green and digital transitions will impact all aspects of society and social life and cannot be successful if these transitions are not “just and inclusive for all”.⁷ These narratives of the Commission

¹ Commission, ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ (Communication) COM/2015/080 final

² See for instance Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final, 2; Commission, ‘Clean Energy for All Europeans’(Communication) COM (2016) 860 final; Commission, ‘Tackling Rising Energy Prices: A Toolbox for Action and Support’ (Communication) COM 2021 660 final, 19.

³ *ibid* 11.

⁴ Regulation 2021/1056/EU of the European Parliament and of the Council of 24 June 2021 Establishing the Just Transition Fund [2021] OJ L231/1.

⁵ Commission, ‘Proposal for a Regulation (EU) 2021/0206 of the European Parliament and of the Council Establishing a Social Climate Fund Establishing the Social Climate Fund’ COM(2021) 568 final.

⁶ Commission, ‘Commission Work Programme 2020 A Union that Strives for More’ COM (2020) 37 final, 5–6.

⁷ *ibid* 1–2.

have figuratively placed the consumer as an actor at the centre of these transitions, thus empowering each and every consumer to participate is the new standard for regulatory intervention. EU citizens are then addressed by the Green Deal in their capacity as consumers. In doing so, the (empowered) consumer becomes a pivotal market actor that stands at the intersection of several EU policies that pursue a fair and socially just Green Transition, including energy policy, consumer policy, and environmental policy.

Several of the changes in the underlying blueprint in energy policy and the corresponding changes in the approaches and goals of the consumer empowerment agenda in this sector are connected to the broader aims of the Green Deal that have had a similar impact on the blueprint of horizontal consumer policy, as discussed in Chapter 4. The new approach of the Commission has drawn new synergies between horizontal consumer policy and energy policy by focusing both policy areas towards the same end: the Green Transition. A more in-depth examination of the Commission's consumer empowerment approach in energy policy and through vertical energy legislation is relevant for two reasons. First, using the energy sector as a case study demonstrates how both the meaning of consumer empowerment for the Commission and the Commission's approach to empowering consumers is evolving and so requires a rethinking of the established understandings of consumer empowerment, as were outlined in Chapter 3. Second, the discussion in this chapter will illustrate that even within the consumer empowerment agenda, the Commission aims to empower consumers in different ways depending on the particularities of the market and that context impacts the conditions that the Commission qualifies as being a cause of disempowerment for consumers that ought to be remedied by legislative intervention. The central questions that are then answered in this chapter are the same as those that were answered in Chapter 4: what does the concept of EU consumer empowerment mean to the Commission as the empowering entity and what are the strategies that the Commission has adopted to empower EU consumers? While Chapter 4 focused on consumer policy and several instruments in the horizontal consumer law framework, the focus of this analysis in this chapter is on the consumer empowerment agenda in energy policy and several vertical legislative measures in the energy market with a consumer element.

The structure of this chapter follows the same approach as was adopted in Chapter 4. Sections 2, 3 and 4 trace the evolution of the Commission's narrative on consumer empowerment in energy policy by analysing the evolution of the Commission's narrative on consumer empowerment starting with the 2015 Delivering a New Deal for Energy Consumers communication, the 2016 Clean Energy for all Europeans communication, and the 2019 European Green Deal. Several interim conclusions will be drawn in Section 5. This section will explore how the Commission's narratives on the role of empowerment and the significance of consuming energy is changing. Previously, consumption in general was considered to have the sole aim of stimulating growth and efficiency in the market. Following the change in the blueprint

in energy policy (and highlighted more recently through the energy crises in 2012 and 2022), the meaning of the consumption of energy has shifted towards recognizing other values such as health, environmental protection, equality, and fairness. This changing normativity is important for how we can characterize EU consumer empowerment because the Commission has adopted the consumer empowerment agenda as an approach for addressing the structural conditions in the market that are considered as triggering consumer vulnerability and consequently disempowerment. An important conclusion from analysing the Commission's narratives in these energy policy communications will be that the cause of objective consumer disempowerment appears to find expression in an expanded understanding of what the Commission considers to be an illegitimate cause of consumer vulnerability. It will also be concluded that the Commission aims to empower all energy consumers with an emphasis on vulnerable consumers and consumers living in energy poverty.

These interim conclusions will be further explored in the second half of this chapter that will examine the Commission's enactment of the consumer empowerment agenda in several of recent legislative reforms in the energy market that pursue the transition to a decarbonized economy. Sections 6 through 9 analyse the Energy Label Regulation (ELR), the recast Electricity Directive (ED(II)), the Renewable Energy Directive (RED(II)) and the currently pending proposal for a recast of the Energy Efficiency Directive (EED(II)). The aims of this discussion are twofold. The first is to continue developing the Commission's narratives on consumer empowerment in the energy market as one of the Commission's dominant strategic approaches for transitioning towards a decarbonized economy. The second is to trace the legislative measures that the Commission is using as a tool to empower consumers towards this end.

2. The 2015 communication: Delivering a New Deal for Energy Consumers

In 2015, the Energy Union Framework Strategy set out a new vision of the Energy Union that placed EU citizens at its core: "where citizens take ownership of the energy transition, benefit from new technologies to reduce their bills, participate actively in the market, and where vulnerable consumers are protected."⁸ To achieve this new strategic vision, a three-pillar strategy was adopted in the 2015 Delivering a New Deal for Energy Consumers communication that consists of a consumer empowerment pillar, a smart homes and networks pillar, and a data management and protection pillar.⁹ The consumer empowerment pillar is comprised of three action points: saving money and energy through better information, giving consumers a wider choice of action, and maintaining

⁸ 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (n 1).

⁹ Commission, 'New Deal for Energy Consumers' (Communication) COM (2015) 339 final.

full protection for consumers. The following discussion will consider the New Deal for Energy Consumers communication and the narrative on consumer empowerment developed by the Commission.

2.1 Empowering energy-savings through better information

In the New Deal for Energy Consumers, the Commission contends that a lack of awareness about both the energy efficiency of products and of a consumer's consumption habits leads to high energy bills and an inefficient use of energy. This communication highlights the necessity of consumers being empowered to choose energy-efficient products and contends that a revision was necessary for energy-efficiency labelling on energy products such as boilers, TVs, refrigerators and washing machines.¹⁰ The preamble to the amending legislation that was subsequently adopted specifies that the rationale behind the reform of energy labelling requirements is to enable consumers to make informed choices about the energy efficiency of products.¹¹ These labelling requirements are considered to contribute towards the reduction of energy usage by households, the reduction of energy bills and to stimulate the production of energy-efficient products.¹² The objectives of the ELR enjoy a parallel focus with the energy policy aim of empowering consumers to make choices that would both reduce consumer energy costs and more broadly as a strategy to meet the EU's energy efficiency aims, most recently updated with the 2021 Fit For 55 Package.¹³

The New Deal for Energy Consumers communication also focuses on the importance of empowering consumers by increasing consumers' information about their energy consumption patterns and habits. The New Deal for Energy Consumers specifies that measures will be put in place so that consumers in multi-purpose buildings and apartments are to be given access to individual metering and individualized consumption data. Furthermore, the quality of the (bi)annual billing information provided to all energy consumers is to be improved to help consumers understand their energy bills. This includes improving the clarity of billing information, improving comparability as well as enhancing transparency regarding costs, such as network charges, taxes and levies. Instead of consumers providing biannual meter readings to suppliers, the introduction of Smart Meters for all households is probed as being essential for raising consumer awareness of their consumption patterns because such meters provide consumers with accurate and real time consumption data.¹⁴

¹⁰ *ibid* 3.

¹¹ Regulation 2017/1369/ EU of 4 July 2017 Setting a Framework for Energy Labelling and Repealing Directive 2010/30/EU [2017] OJ L198/1 (Energy Labelling Regulation).

¹² *ibid*, recital 2.

¹³ Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the Way to Climate Neutrality' (Communication) COM (2021) 550 final.

¹⁴ 'New Deal for Energy Consumers' (n 9) 3–4.

2.2 Empowerment through a wide choice of action

The second action point in the New Deal for Energy Consumers introduces the Commission's narrative on empowering energy consumers that aims to enhance consumer choice in four ways. First, alongside consumers being aware that they can reduce their energy costs by switching energy suppliers and contracts, there must be a regulatory framework in place that allows consumers to easily do so in practice. The New Deal for Energy Consumers contends that this would entail shortening the time that consumers must wait between switching providers and removing penalties and fees for switching. Second, consumers will be empowered by having the choice to conclude supply contracts based on dynamic pricing, with the caveat that these forms of contracts must be thoroughly explained to consumers. Third, to become empowered, consumers should have the choice to reduce energy costs through self-generation and consumption of renewable energy, such as through solar panels and heat pumps. Fourth, consumers are empowered when they have the choice to participate in intermediation and collective schemes. This includes the opportunity at the local level for consumers to participate in small community schemes that collectively produce and consume renewable energy.¹⁵

2.3 Empowerment by maintaining full protection for consumers

The final action point in the empowerment pillar of the New Deal for Energy Consumers focuses on consumer empowerment through the enforcement of existing horizontal consumer rights and ensuring protection from unfair commercial practices. The Commission indicates that energy consumers already enjoy extensive protection through existing horizontal consumers rights, but that enforcement remains a priority. The Commission places an emphasis on the rise of new energy options and contracts and therefore the need to protect energy consumers from unfair commercial practices. It is also stated that not all consumers will be empowered unless the socio-economic issue of energy poverty is addressed. The Commission contends that consumer vulnerability in the energy market exists at the intersection of social and energy policies. It is acknowledged that the Member States retain the freedom to tackle energy poverty through their social security systems but that, nonetheless, targeted best practices from the energy sector should not be ignored.¹⁶

¹⁵ *ibid* 4–6.

¹⁶ *ibid* 7.

2.4 Interim conclusions

The Commission's narrative on consumer empowerment in the energy market consists of more than enhancing consumer choice through the imposition of more information duties in the regulatory framework. Instead, consumer empowerment is to be achieved by limiting the contractual autonomy of businesses by limiting instances where fines and penalties can be legitimately imposed on consumers for terminating an energy contract and switching to a different provider. The goal of enabling consumer mobility between energy service providers by regulating the contractual terms of an energy service contract can be operationalized as an empowerment outcome. The Commission also frames consumer empowerment as the means for facilitating consumers access to new types of energy contracts and energy services, such as dynamic pricing contracts. Consumer empowerment also extends to reforming the architecture of the existing regulatory framework in the energy market so that consumers are empowered to reduce energy costs through the self-generation and consumption of renewables. This type of empowered behaviour requires changing the objective conditions in the existing centralized energy framework that enables a decentralized energy network. This alters the type of contractual relationship that energy providers must accept by agreeing to treat consumers as prosumers of renewable energy sources. Lastly, consumer empowerment is also concerned with the creation of legal frameworks that enable the creation of local intermediation and collective schemes for renewable energy and that facilitate all consumers to participate.

The empowerment of energy consumers by maintaining full consumer protection in New Deal for Energy Consumers is a conceptual link between consumer empowerment in the energy market and the horizontal consumer law discussed in Chapter 4. Under this heading of the consumer empowerment pillar, the Commission portrays consumer harm arising in three ways. First, when consumers are unable to enforce their existing rights. Second, when consumers are manipulated by unfair commercial practices. Third, consumer harm arises when the consumer is at risk of or lives in energy poverty. As will be seen in the following discussion, energy policy after the 2015 New Deal for Energy Consumers and the recast of several existing directives in the energy market places an emphasis on the empowerment of vulnerable energy consumers and especially those consumers living in energy poverty.

3. The 2016 Clean Energy for all Europeans communication

In 2016 the EU ratified the Paris Agreement and committed to reduce greenhouse gas emissions by at least 40% by 2030 and by 80-95% by 2050.¹⁷ These objectives were subsequently updated and ratified in the Commission's Winter Package that entailed the reform of pre-existing legislation in the energy market. The strategic vision in the 2016 Clean Energy for All Europeans communication¹⁸ sets out the vision of this reform and was subsequently implemented through several legislative reforms adopted between 2018 and 2019.¹⁹ The focus of the 2016 Clean Energy communication and these regulatory reforms were not per se centred on protecting and empowering the energy consumer. Instead, the three goals of this strategy include putting energy first, achieving global leadership in renewable energies, and providing a fair deal for consumers.²⁰ These objectives are in line with the goals of the 2014 policy framework for Climate and Energy in the Period from 2020 to 2030. The aims of that strategy included reducing greenhouse gas emissions, setting an EU-wide renewable energy target, establishing measures for improving energy efficiency, reforming the emission trading system, ensuring the competition and integration of the energy markets, and promoting security of energy supply.²¹ This policy framework from 2014 and the 2016 Clean Energy for all Europeans communication both are in line with the Juncker Commission's ten priorities, where priority three pursued the creation of a resilient energy union with a forward-looking climate change policy.²² The broad purpose of this priority was to complete the internal

¹⁷ The European Commission had considered objectives of 27% and 25% respectively in January of 2014, see Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Policy Framework for Climate and Energy in the Period from 2020 to 2030' (Communication) COM (2014) 015 final.

¹⁸ 'Clean Energy for All Europeans' (n 2).

¹⁹ This includes the following eight legislative measures: on the energy performance in buildings, Directive 2018/844/EU of 30 May 2018 amending Directive 2010/31/EU on the Energy Performance of Buildings and Directive 2012/27/EU on energy efficiency [2018] OJ L156/75; on energy efficiency, see Directive 2018/2002/EU of 11 December 2018 amending Directive 2012/27/EU on Energy Efficiency [2018] OJ L328/210; on Governance of the energy union, see Regulation (EU) 2018/1999 of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L328/1. On the regulation of electricity, see Regulation (EU) 2019/943 of 5 June 2019 on the Internal Market for Electricity [2019] OJ L158/54; on common rules for the internal market on electricity, see the Recast Electricity Directive; on risk preparedness, see Regulation (EU) 2019/941 of 5 June 2019 on Risk-Preparedness in the Electricity Sector and Repealing Directive 2005/89/EC [2019] OJ L58/1; on establishing a European Union Agency for the Cooperation of Energy Regulators, see Regulation (EU) 2019/942 of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators [2019] OJ L58/22.

²⁰ 'Clean Energy for All Europeans' (n 2) 3.

²¹ Commission, 'A Policy Framework for Climate and Energy in the Period from 2020 to 2030' COM (2014) 15 final.

²² The Juncker Commission's Ten Priorities: State of Play in Autumn 2018 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625176/EPRS_STU\(2018\)625176_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625176/EPRS_STU(2018)625176_EN.pdf) accessed 25 July 2022> 13-16

market for energy and to ensure that EU citizens and businesses have secure and affordable energy, while also addressing the causes of climate change.²³ The consumer empowerment agenda in energy policy must then be contextualized within the broader aims of the strategic vision of the Energy Union. The following phrase from the Clean Energy for All Europeans strategy encapsulates the importance of the energy sector's role in the transition to a decarbonised economy: "The Energy Union is the EU's major vector for and contribution to a global and comprehensive transition towards a low carbon economy."²⁴ The following discussion of the Clean Energy for All Europeans communication focuses on the Commission's narratives that connect consumer empowerment to the clean transition, to energy poverty, and to the conditions that the Commission considers as posing an obstacle to consumer empowerment.

3.1 Consumer empowerment: EU citizens as energy consumers and the clean transition

In the Clean Energy for All Europeans communication, the Commission contends that the planned reforms in the energy market will empower EU citizens in their role as energy consumers. As energy consumers, they will be empowered because the changes to the architecture of the energy market will: "enable them to be more in control of their choices when it comes to energy." This means: "better information, possibilities to become more active on the energy market and be more in control of their energy costs."²⁵ The consumer empowerment agenda is also associated with the evolving social justice dimension reaching across energy policy that is aimed towards the pursuit of a clean transition that is fair and just. The term, 'standing in solidarity' is a phrase echoed by the Commission in several other communications concerning the transition to a net-zero economy.²⁶ Under the objective 'Providing a fair deal for consumers', the concept of fairness is framed as ensuring that the transition includes all sectors, regions and vulnerable parts of society that are affected by the transition.²⁷ This entails guaranteeing that all EU consumers, irrespective of place or income, can participate in the clean

²³ *ibid.*

²⁴ 'Clean Energy for All Europeans' (n 2) 3.

²⁵ *ibid.* 10.

²⁶ See for example Executive Vice President of the Commission, Frans Timmermans: "We must show solidarity with the most affected regions in Europe, such as coal mining regions and others, to make sure the Green Deal gets everyone's full support and has a chance to become a reality." Commission, 'The Just Transition Mechanism: Making Sure no one is Left Behind' (Press Release) <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en> accessed 25 July 2022; see also, Commission, 'Commission presents guide for a fair transition towards climate neutrality' (Press Release) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6795 accessed 25 July 2022>.

²⁷ 'Clean Energy for All Europeans' (n 2) 3, 10 & 11.

energy transition, echoing the von der Leyen Commission's promise that no person and no place is left behind.

This narrative on a 'just' and 'fair' Green Transition in the internal market impacts how we are to understand consumer empowerment in the energy market. On the one hand, the Commission connects consumer empowerment and the Green Transition to the concept of fairness as social justice. The emphasis appears to be on redistributing the costs of decarbonizing the economy.²⁸ The Just Transition Mechanism (JTM) and the Just Transition Fund (JTF) form one pillar of ensuring the redistribution of costs of the Green Transition by minimizing the financial impact on regions and industries most dependent on fossil fuels. On the other hand, the Commission connects the objectives of the just Green Transition directly to the socio-economic conditions of all EU citizens by acknowledging energy vulnerability and energy poverty. This social dimension to the Green Transition appears to draw a parallel with the Commission's definition of 'social fairness' as equality between citizens in the context of the European Pillar of Social Rights (EPSR).²⁹ Within the competences of the treaties, the Commission's objective is to meld the EPSR with its political goals laid down for the just and fair green and digital transitions.³⁰ Principle 20 of the EPSR states that "everyone has the right to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications. Support for access to such services shall be available for those in need."³¹ The insertion of energy as an essential service for all citizens draws a link between social rights and consumer law in the energy market. The regulatory framework in the energy market that aims to empower all energy consumers can be conceptualized as constituting the second pillar of the just transition to a sustainable and fair economy (alongside the JTM as the first pillar). This includes horizontal consumer law that lays down several consumer rights and regulates commercial practices. It also includes vertical legislation with a consumer element that governs the relationship between businesses and consumers. While consumer empowerment in past strategic policy pursued linear economic ends, growth and market efficiency, there now appears to be a shift in vision that has expanded to include consideration of social values, social interests, solidarity, sustainability, environmental protection, privacy, and a fair market.³²

²⁸ *ibid* 4–6.

²⁹ Commission, Parliament & Council of the European Union, 'European Pillar of Social Rights' <https://ec.europa.eu/info/sites/default/files/social-summit-european-pillar-social-rights-booklet_en.pdf> accessed 25 July 2022; see also the report on the ESPR action plan, Commission, 'The European Pillar of Social Rights Action Plan' (2021) <<https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/downloads/KE0921008ENN.pdf>> accessed 25 July 2022.

³⁰ Commission, 'Questions and Answers: The European Pillar of Social Rights Action Plan' (Press Release) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_821> accessed 25 July 2022.

³¹ *ibid* 2.

³² On this point see Chapter 4, Sections 2 & 3.

3.2 Energy poverty and consumer empowerment

In the Clean Energy for all Consumers communication, the Commission expands the consumer empowerment agenda by addressing the personal conditions that cause consumer harm when such conditions trigger energy vulnerability and (the risk of) energy poverty. In this communication and the preparatory documents for legislative reform based on this strategy, energy consumers are classified as living in energy poverty based on three general factors. First, consumers in energy poverty are low-income households that spend a larger percentage of their income on energy than average income households.³³ Second, energy poverty is considered as resulting from high energy costs caused by energy-inefficient and poorly insulated housing that costs more to heat or keep cool.³⁴ Third, energy poverty is linked to rising and high energy costs.³⁵ In 2021, rising energy costs had been the subject of significant concern where an energy supply crisis pushed many households into energy poverty when costs of delivery surged by for example 200% in Germany and 400% in Nordic countries. In 2022, the existing crises were exacerbated by the Russian invasion of Ukraine that has threatened to push many European households across all Member States into energy poverty due to rising energy costs following EU sanctions on Russia that have impacted gas supply, which the EU has depended on for energy security.³⁶ As an aside, prior to 2021 energy poverty was not geographically limited to central, eastern and southern Member States. Energy poverty has consistently represented an issue in wealthier Member States, such as Ireland, the Netherlands and France. In 2018, for instance, a study in the Netherlands revealed that 8% of Dutch households (around 650,000) live in energy poverty.³⁷

The forms of consumer detriment and harm that arise for vulnerable energy consumers in the energy market are not framed in purely economic terms. The Commission proposes that energy poverty has ramifications for both the health and social inclusion of EU citizens.³⁸ More specifically, energy poverty is understood to

³³ 'Clean Energy for All Europeans' (n 2) 11.

³⁴ Commission, 'Proposal for A Directive of The European Parliament and of the Council on Common Rules for the Internal Market in Electricity' COM (2016) 864, recital 40.

³⁵ Manon van Middelkoop, Steven van Polen, Remko Holtkamp & Frank Bonnerman, 'Meten Met Twee Maten

Een Studie Naar De Betaalbaarheid Van De Energierekening Van Huishoudens', PBL Planbureau Voor De Leefomgeving [2018] <<https://www.pbl.nl/sites/default/files/downloads/pbl-2018-de-betalbaarheid-van-de-energierekening-van-huishoudens-3124.pdf>> accessed 25 July 2022.

³⁶ On this see for instance Commission, 'Joint Statement by President von der Leyen and President Biden on European Energy Security' (Statement) 27 June 2022 <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_4149> accessed 25 July 2022.

³⁷ On energy poverty in the Netherlands, see Lucie Middlemiss, Peter Mulder, Marlies Hesselman, Mariëlle Feenstra, Sergio Tirado Herrero & Koen Straver, 'White Paper: Energy Poverty and the Energy Transition Towards Improved Energy Poverty Monitoring, Measuring and Policy Action' (2020) <<https://www.tno.nl/en/newsroom/2020/11/energy-poverty-energy-transition/>> accessed 25 July 2022, 11.

³⁸ Commission, 'Commission Recommendation on Energy Poverty' [2020] OJ L 357, point (4).

cause mental health issues alongside physical health problems, caused by extreme heat in the summer and cold, damp conditions during the winter.³⁹ For instance, the 2016 proposal for a revised Electricity Directive (ED(II)) elaborates on the fundamental nature of energy services where “adequate warmth, cooling, lighting and the energy to power appliances are essential services to guarantee a decent standard of living and citizens' health”.⁴⁰ This is in line with the Clean Energy strategy, where under the heading Providing a Fair Deal for Consumers it is stated that: “Consumers are at the centre of the Energy Union. Energy is a critical good, absolutely essential for full participation in modern society.”⁴¹ The proposal for amending the ED developed on this social dimension of consumer empowerment by expressly linking consumer empowerment to the essential nature of access to energy services: “access to these energy services empowers European citizens to fulfil their potential and it enhances social inclusion.”⁴² Through this, the Clean Energy for All Europeans communication and the legislation that forms the now concluded Clean Energy Package⁴³ represent the political promise and subsequent objective measures that are taken with the intent of empowering vulnerable energy consumers and those who are living in energy poverty.

Consumer empowerment is also framed as a collective endeavour that should benefit all consumers. The Clean Energy for All Europeans communication places an emphasis on the objective that the clean transition should not be to the exclusion of vulnerable energy consumers.⁴⁴ Put differently, vulnerable energy consumers should become as equally empowered to participate in and reap the benefits from the Energy Union as average to high income households. In this regard, the legislative measures predicated on this communication intend to: “[...] mitigate the societal impact of the clean energy transition”.⁴⁵ This entails ensuring that the poorest energy consumers do not disproportionately bear the costs of the energy transition in comparison to average and high-income households. In other words, this is a narrative that the energy transition should be socially just and take place in a fair market.⁴⁶ This narrative has been confirmed in the Commission’s communication on energy prices as a response to the energy crises in 2021/2022, where the purpose of the communication was to find ways of responding to the surging energy prices in ways that will “contribute to achieving a socially just and sustainable energy transition”.⁴⁷ The literature has tended to connect

³⁹ *ibid*, point (17): On this point see also Middlemiss *et al.* (n 37) 7, 9, 12 & 19.

⁴⁰ Proposal for a Directive of the European Parliament and of the Council on Common Rules for the Internal Market in Electricity (n 34) recital 40.

⁴¹ ‘Clean Energy for All Europeans’ (n 2) 8.

⁴² Proposal for a Directive of the European Parliament and of the Council on Common Rules for the Internal Market in Electricity (n 34) recital 40

⁴³ ‘Clean Energy for All Europeans’ (n 2).

⁴⁴ *ibid* 3.

⁴⁵ *ibid* 4.

⁴⁶ Recast Electricity Directive, recital 23.

⁴⁷ Commission, ‘Tackling Rising Energy Prices: A Toolbox for Action and Support’ (Communication) COM (2021) 660 final, 19–20.

empowerment as participation primarily with the prosumer and the idea of an energy consumer who uses transparent information and new technologies to benefit financially from lower costs and better access to renewable forms of energy.⁴⁸ This is just one view of empowerment as participation. In the explanatory memoranda to the legislative interventions that form the core of the Winter Package, the proposal for the recast of the ED indicates that consumer participation also includes ensuring that all consumers have access to electricity and renewable energy sources. In this regard consumer empowerment is linked to Community Energy and Community Energy Cooperatives. These are local, small-scale community energy projects that collectively create sources of renewable energy (such as through solar panels, heat pumps or windmills) that reduce consumption and energy tariffs. The collective nature of this participation empowers vulnerable energy consumers to participate in the energy transition by helping to reduce energy poverty created by high energy costs.⁴⁹

3.3 Conditions that pose an obstacle to consumer empowerment

Drawing on the discussion in the previous section, the acknowledgment of energy vulnerability and energy poverty also entails recognizing that the systemic inequalities are causing undesirable harms for energy consumers. Put differently, inequality of outcome amongst EU citizens is acknowledged as posing a threat for their equal participation in the market and in the Green Transition. While it is doubtful that the existing legislative reforms go far enough to address the drawbacks of systemic inequality, the point remains that there is a shift in tone in the Commission's political narrative in strategic policy that is reflected in the reforms of secondary legislation in the energy market, which shift will be discussed subsequently in this chapter.

In the Clean Energy for All Europeans communication, the Commission also acknowledges several other conditions that cause undesirable harms to consumers. A lack of consumer awareness about the energy efficiency of products and of consumption habits was cited as the cause of high consumer energy bills and an inefficient use of electricity and gas. With regard to billing, the communication is focused on the necessity of making consumers more informed about their energy consumption habits. Consumers in multi-purpose buildings and apartments face detriment when they do not have access to individual metering and individualized consumption data. Furthermore, the quality of the (bi)annual billing information provided to energy consumers is a cause of consumer harm because it makes it difficult for consumers to understand their energy bills, to compare bills, and to understand costs, such as network charges, taxes, and

⁴⁸ Saskia Lavrijssen, 'Power to the Energy Consumers' (2017) *European Energy and Environmental Law Review* 172, 179.

⁴⁹ Proposal for a Directive of the European Parliament and of the Council on Common Rules for the Internal Market in Electricity (n 34) recital 30.

levies. The Commission contends that these harms will be tackled by the subsequent reforms that will provide more transparent and clearer information on billing. Moreover, consumers will also be entitled to smart meters. Other forms of harm for energy consumers are considered to arise through obstacles that make it difficult for the consumer to switch energy provider, such as termination fees, penalties and inadequate information about the availability of energy offers because of lack of access to certified comparison tools. The Commission states that these conditions will be addressed by eliminating termination fees and ensuring access to at least one certified comparison tool. Energy security and energy prices are also considered as being a cause of consumer harm that require two action points. The first is shifting from the centralized generation of energy to decentralized, smart and interconnected energy markets. The regulatory reforms will create a framework that empowers the consumer to generate their own energy and participate in a decentralized energy system. They can then directly or as part of an energy cooperative store this energy, share it, consume it or sell it back to the market. The second is introducing smart technologies that will make it easier for consumers to actively manage their consumption and be involved in the energy system by responding to price signals.

4. The 2019 European Green Deal

The 2019 European Green Deal communication is an updated strategic vision on the Commission's approach to the rapidly evolving challenges posed to society by climate and environmental issues.⁵⁰ This document is included for analysis in the context of consumer empowerment in the energy market because consumer behaviour, consumer welfare and transitioning to the use of clean energy are cited by the Commission as being central for achieving the Green Deal's objectives. Consumer empowerment is mentioned once in this document: "Consumer policy will help to empower consumers to make informed choices and play an active role in the ecological transition."⁵¹ Yet, drawing on the analysis of the Clean Energy for all Europeans and the New Deal for Energy Consumers communications, if consumers are to behave in an empowered way, they must, for instance, have real access to energy services, to renewable energy, and to energy-efficiency measures. The Green Deal communication confirms that a renewable power sector must be developed that ensures the energy market is "fully integrated, interconnected and digitalised, while respecting technological neutrality" so that energy is affordable for consumers.⁵² This is an indicator that the consumer empowerment agenda is more complex than simply providing consumers with tangible rights or consumer information. It also involves radically changing the market structures that the

⁵⁰ 'The European Green Deal' (n 2).

⁵¹ *ibid* 8.

⁵² *ibid* 6.

consumer operates in, which, in this instance, is the regulatory framework and the architecture of the energy industry. This is in line with the energy policy communications discussed so far in this chapter that represent the blueprint of the Commission's plan to create a decentralized energy system. The point to be drawn is that the consumer empowerment agenda is not only dependent on consumer legislation that stimulates empowered behaviours, but also on legislation that restructures the consumers' environment – the energy market – so that consumers have the capacity to behave in what the Commission considers to be an empowered way. In the following analysis of consumer empowerment in secondary energy legislation with a consumer element, it then becomes relevant to discuss both the RED(II) and the EED(II) to deconstruct the strategic measures that aim to empower energy consumers by reforming the objective conditions in which they operate.

5. Interim conclusions

The discussion so far in this chapter has offered an alternative reading of the Commission's narrative on consumer empowerment in the energy sector. In this section, several interim conclusions will be drawn on what consumer empowerment means in the energy market before moving on to a discussion in Section 6 of the legislative measures in the energy market that qualify as having a consumer empowerment aim.

The social dimension of consumer empowerment becomes visible not only through the widening of what constitutes consumer harm but also through the co-option of energy legislation with a consumer element for achieving the sustainability aims of a net-zero economy by 2050. When the consumer empowerment strategy is reconsidered as a process that ensures the collective participation of all consumers in a just energy transition, this brings socio-economic forms of consumer harm within the ambit of the vertical consumer law framework that become integrated with the traditional understanding of consumer harms that arise because of market conditions, such as asymmetrical information. This expansive view of consumer harm can be contrasted with the literature on consumer empowerment in the Energy Union that neglects to consider the relationship between consumer empowerment and energy poverty because the empowerment agenda is generally considered as excluding vulnerable (energy) consumers.⁵³

Following the Commission's narrative that the consumer empowerment agenda aims to empower vulnerable energy consumers and consumers living in energy poverty, this represents a shortcoming in adopting the rational consumer as a conceptual lens. Put differently, the dichotomy between viewing consumers as either rational or weak cannot satisfactorily address the connection between empowerment and energy

⁵³ See Chapter 3, Section 2.4.

vulnerability. The 2016 Clean Energy for All Europeans communication states that consumers living in energy poverty are disempowered because they cannot participate in the energy transition and not because they possess behavioural characteristics that render their behaviours irrational. For instance, energy poverty is qualified as a primary form of personal vulnerability/disempowerment of energy consumers in the Energy Market in three ways. First, this disempowerment can be understood as the energy consumer spending a disproportionate amount of income on energy, the inability to pay for energy services, and living in energy-inefficient, poorly insulated housing. Second, it manifests as a lack of access to energy services, sustainable energy products and renewable forms of energy and therefore the inability to participate in the clean energy transition. Third, energy poverty as a form of disempowerment also refers to the category of consumers that are at risk of disproportionately bearing the cost of the clean energy transition. The energy consumer's vulnerability (disempowerment) therefore stems from personal socio-economic factors that go beyond factors such as age and disability to include factors such as income. These factors are not substantiated as behavioural characteristics that render consumers as incapable of exercising informed choice but instead relate to broader personal conditions that cause energy poverty. They are then unrelated to the rationality study. Put differently, the idea behind empowering these consumers is not only to protect them from poor decision-making that can arise from market conditions that cause consumer detriment, such as information asymmetries. The empowerment agenda in the energy market also acknowledges personal forms of vulnerability and personal conditions that give rise to disempowerment and consumer harms.

There is then an implicit normativity to be read from the Commission's narrative that these personal conditions that cause consumer vulnerability and that disempower consumers are also *undesirable* forms of consumer harm that require market intervention. Moreover, the normative assumptions underpinning these personal conditions (what vulnerability ought to be) are at odds with the neoliberal ideals of limited market interference. Instead, these ideals correlate with communitarian concepts such as solidarity and the idea of distributive justice where, for instance, the energy vulnerable and energy poor ought not to disproportionately bear the burden of the costs of the Green Transition in relation to other consumers. This signifies a rising tension in the underlying political agenda in consumer law that supports the consumer empowerment agenda.⁵⁴ Broadly speaking, it indicates a shift in the purpose of vertical consumer law from market building through increasing consumption to environmental and social concerns. Relatedly, this discussion also highlights and confirms the claim in Chapter 4 that there is a shift in the Commission's narrative on the role of the consumer in the market and of the purpose of consumption.⁵⁵ The Commission's narrative on the

⁵⁴ See for instance Natascha van Bommel & Johanna Höffken, 'Energy Justice Within, Between and Beyond European Community Energy Initiatives: A Review' (2021) 79 *Energy Research & Social Science* 1.

⁵⁵ On this point see Chapter 4, Section 3.3.

function of consumption is evolving from the sole purpose of stimulating growth and efficiency towards the socially-orientated goals of health, environmental protection, equality and fairness. This shifting normativity is significant because the Commission has adopted the consumer empowerment agenda as an approach for addressing the structural conditions that are considered to trigger consumer vulnerability and cause disempowerment. In this vein, it can then be argued that objective consumer disempowerment in the consumer empowerment agenda finds expression in this expanded conceptualization of consumer vulnerability. This point will be expanded in more detail in the subsequent examination of the energy legislation that qualifies as empowerment legislation and in the rethinking of the concept of EU consumer empowerment in Chapter 6.

6. Consumer empowerment and the Energy Label Regulation (ELR)

The framework ELR was adopted in 2017 as part of the fairly recent reform of secondary legislation in the energy market.⁵⁶ This regulation can be qualified as having an empowerment rationale because it is indicated by the Commission in the 2015 New Deal for Energy Consumers communication that the labelling requirements in this regulation form part of the strategy for empowering consumers. The ELR lays down labelling requirements as a form of information disclosures that are applicable to B2C contracts for the sale of most electrical goods in the energy market. The ELR specifies that businesses are obligated to include an energy label on electrical goods that they market in the EU.⁵⁷ This label provides a form of pre-contractual information to consumers with purpose of stimulating the sustainable choice by providing information on the energy efficiency of electrical products. The energy label provides several pieces of information regarding the energy efficiency of a product on a label that aims to be clear, easy to read, and easy to understand. The label is standardized through formal requirements on the format and visual identity of the information presented. This entails presenting the energy efficiency of a product on a scale of A through G and information such as the annual energy consumption.⁵⁸ For final consumers in the energy market, this detriment arises more specifically when there is a lack of information about real time consumption patterns and through overly complex billing formatting that impacts consumer decision-making in reducing energy costs. The analysis in this section, however, provides a more nuanced understanding of the nature of the information

⁵⁶ Energy Labelling Regulation.

⁵⁷ *ibid*, arts 1, 3, 4, 5 & 6.

⁵⁸ As of September 2021, the energy label has changed from A++ to A as the highest ranking for the old and new scaling images. For the new images, see Commission 'Simpler EU energy labels for lighting products applicable from 1 September' (Press Release) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4484> accessed 26 July 2022.

duties that can be qualified as forming part of the empowerment strategy in the energy market.

6.1 Qualifying the ELR as an empowerment measure

The purpose of the energy label is not to provide consumers with additional pre-contractual information regarding the characteristics of a product. Instead, the regulation obligates traders to present consumers with certain pre-contractual information in a way that will more easily inform consumers about the potential energy (saving) costs of using a particular brand and model.⁵⁹ The underlying rationale of providing consumers with this information is to empower consumers on two fronts. The first is to empower consumers to make the energy-efficient purchase so that their subsequent electricity use will be reduced and contribute towards the EU's 2020 and 2030 energy efficiency targets. Second, energy labels empower consumers to save money on their energy bills.⁶⁰ This type of information duty is qualified as a consumer empowerment measure when empowerment is conceptualized as making the sustainable choice, as participation in the Green Transition and as the consumer actively reducing their energy costs.

7. Consumer empowerment and the recast Electricity Directive (ED(II))

The 2019 recast of the Electricity Directive (ED(II)) is part of the reform in the energy market set in motion by the strategic vision in the 2016 Clean Energy for All Europeans communication. The scope of the ED(II) in Article 1 explicitly connects the aims of the directive with consumer empowerment: "It [the directive] lays down key rules relating to the organisation and functioning of the Union electricity sector, in particular rules on consumer empowerment and protection".⁶¹ The ED(II) implements several reforms that intend to empower consumers, including new rules on price comparison tools, smart metering, billing information, switching fees and the introduction of obligations for Member States regarding consumer vulnerability and energy poverty. The following discussion outlines several of the measures in the ED(II) that have an empowerment aim. The purpose of this analysis is to reconsider the rights and obligations in the directive that amend the market environment of the energy consumer and the legislative tools that the Commission uses as a means for empowering consumers.

⁵⁹ Energy Labelling Regulation, recital 2.

⁶⁰ *ibid*, recital 8.

⁶¹ Recast Electricity Directive.

7.1 Price comparison tools

In a liberalized energy market, consumers are confronted with a wide range of energy providers and energy offers. Moreover, energy contracts are generally considered to be complex. A consumer must, for instance, not only consider the differences between energy providers but also the benefits that individual providers offer between their long- versus short-term contracts, variable and fixed rates, and more recently the benefits of the complicated dynamic pricing contracts. Put differently, consumers are inundated with information when attempting to make the best choice for one of the most essential services necessary for a healthy life. To help address this information overload in a pre-contractual setting, the ED(II) obligates Member States to ensure that household consumers (and microenterprises) have access to at least one price comparison tool that covers the entire market.⁶² This tool must be provided free of charge to consumers and compare a wide selection of available offers, including the newer form of dynamic electricity price contracts. The ED(II) specifies that consumers are to be informed of this tool through their bills as well as through ‘other’ means.⁶³ This obligates energy providers to inform final consumers of their free access to a price comparison tool. The directive also lays down several minimum standards relating to transparency, impartiality and trustworthiness for these price comparison tools. These standards are to be ensured through the appointment of a national authority that issues trust marks to comparison websites.⁶⁴

The price comparison tool laid down the ED(II) can be qualified as an empowerment measure from two perspectives. In the context of the consumer, it facilitates empowered behaviour when understood as consumers making an informed choice based on the comparison of energy offers. Another type of empowered behaviour that this tool aims to stimulate is the consumer participating in the market through mobilization, that is switching to an energy provider if another offer better suits their energy needs and social situation. In the context of market-based conditions, this is an empowerment measure because it responds to a particular form of consumer detriment and disempowerment. This is the detriment that results from too much information that is caused by too many choices between providers, overly complex information regarding energy offers, and a lack of transparency regarding available offers in the market. Moreover, the measures on energy label, price comparison tools and billing all aim to enhance informed choice but not by providing consumers with more information. Instead, these information requirements aim to help consumers make shortcuts for better decision-making about energy efficiency and energy costs. The energy label, the price indicator tool and formatting energy bills in a more

⁶² *ibid*, art 14.

⁶³ *ibid*, art 14(1).

⁶⁴ *ibid*, art 14(1)(a) – (h).

understandable manner all point towards better quality information and can be explained better through the concept of a boundedly rational consumer.

7.2 The Electricity Directive: smart metering

The ED(II) specifies that the Member States must strongly recommend that electricity undertakings supply consumers with smart metering systems.⁶⁵ By 2024, it is forecasted that 77% of all EU households will have a smart electricity meter and 44% for gas.⁶⁶ The preamble to the ED(II) provides several rationales behind providing smart metering. With smart metering, consumers will have access to dynamic electricity contracts (even in markets where prices have been set), which will facilitate consumer participation in the market in terms of adjusting consumption according to market signals. Smart meters will also ensure that more regular provision of billing will be provided to consumers and that this billing will be based on actual instead of estimated energy consumption.

The ED(II) lays down a general framework regarding the particulars of how the consumption data produced through smart metering is to be presented to the end-consumer.⁶⁷ It specifies that the Member States must ensure that this information meets several objective and qualitative standards. Electricity consumption must be accurately measured by the smart meter and have the capacity to provide information on actual time of use. Likewise, validated historical consumption data must be easily available and visualized to consumers, upon request. Unvalidated consumption data must also be made available, either through a standardized interface or remote access. In the context of prosumers that supply energy to the grid, these consumers are to be provided with access to data on their supply to their grid and on their consumption data, also through a standardized interface or remote access and additionally through a third-party acting on the consumers' behalf. There is an additional requirement in this provision that the data is to be provided in an "easily understandable format" that enables the consumer to compare offers on a "like-for-like basis". More detailed information on the minimum functionalities of the smart metering systems was previously specified previous to the recast of the ED(II) in a Commission communication from 2012. While much of this communication is concerned with privacy and data protection, section III elaborates on the common minimum function requirements of every smart metering system. It is specified that standard interfaces must deliver data to the consumer that is accurate, user-friendly and timely. Furthermore, it is strongly recommended that the standardized interface provide visualized consumption data to the consumer. The information that is provided to the consumer by the metering system must be updated at least every 15

⁶⁵ Recast Electricity Directive, art 19.

⁶⁶ Commission, 'Energy: Smart Grids and Smart Meters' <https://energy.ec.europa.eu/topics/markets-and-consumers/smart-grids-and-meters_en> accessed 26 July 2022.

⁶⁷ Recast Electricity Directive, art. 19.

minutes so that the end-consumer can see how the metering information is responding to their real time energy-saving behaviours. Furthermore, a smart metering system should facilitate consumers in calculating consumption costs by storing, for a reasonable time, past consumption data.

From the above analysis, the ED(II) and the Commission's communication leaves much discretion to the Member States in terms of how to best present consumption data to consumers and prosumers in an accurate and user-friendly way. Unlike price comparison tools and energy-labelling, the provision of real time consumption data to consumers through smart meters cannot be classified as a type of pre-contractual information duty that facilitates informed choice. Instead, smart metering provides final consumers with enhanced objective and qualitative information points (real time consumption data) during their contractual relationship with an energy supplier, with the aim of giving consumers more control over their energy use. The right to real time and transparent consumption data through smart meters can be understood as tool that addresses the consumer detriment that arises from a lack of information on real time consumptions patterns.

The first type of detriment that smart meters address is that high energy costs can occur when a consumer is unaware of their actual energy use. Smart meters enable consumers to reduce their energy costs by empowering them to exert more control over their daily energy consumption. In the same vein, smart meters are framed as a tool that can help reduce energy poverty when energy poverty is the result of high energy bills. For prosumers, smart meters are considered to be empowering these consumers to participate in the energy market by decentralizing energy supply. These consumers are also empowered to overcome detriment resulting from a lack of real time information that impacts their efficient use of energy, either through supplying energy to the grid or through consumption from the grid in a way that reduces their energy costs. Lastly, smart meters allow prosumers to participate in the Green Transition because the use of smart meters encourages these consumers to supply renewable energy to the grid. This decentralizes the energy market, which is considered necessary for European energy security and the transition to a decarbonized economy.

The measures that introduce smart metering qualify as empowerment measures for the following two reasons. It is the intention that smart meters will empower consumers to make choices about their consumption patterns in a way that will facilitate a more efficient consumption of energy and that will help reduce energy costs. Secondly, smart meters empower consumers by engaging with, and incentivizing their participation in, the Green Transition. Smart meters enable consumers to manage their energy consumption using real time data and are necessary for prosumers who wish to feed renewable energy into the grid and thus contribute to decentralizing energy supply.

7.3 Billing information

The ED(II) establishes the importance of billing for informing final consumers: “Electricity bills are an important means by which final customers are informed”.⁶⁸ The purpose of billing for energy services goes beyond informing the final consumer of their payment (contractual) obligations. Billing enables consumers to regulate their consumption habits, while clear and transparent billing helps consumers to compare offers and to switch energy providers if a better deal is available. Aside from the economic dimension of billing, the minimum billing standards adopted in the ED(II) make information available to consumers about their climate footprint and the source of the renewable energy that they consume.⁶⁹ Furthermore, energy billing also provides information to consumers that does not serve the best interests of an energy provider, such as the benefits of switching energy providers and a link to a price comparison tool.⁷⁰

The ED(II) specifies several processes and principles that the Member States must ensure are adhered to in energy service contracts.⁷¹ Firstly, billing information must be “accurate, easy to understand, clear, concise, user-friendly and presented in a manner that facilitates comparison by final customers”.⁷² Final energy consumers must receive their bills and billing information free of charge, must be offered the option of electronic bills and billing information, and must be offered flexible arrangements for actual payment of their bills.⁷³ If an energy contract allows for future changes relating to the product, price or discounts, then the consumer must be informed of these changes on the bill including the date that such changes will occur.⁷⁴ The ED(II) further obligates Member States to consult with consumer organizations regarding changes to the requirements for the content of bills.⁷⁵ The minimum requirements for bills and billing information that Member States must ensure are further elaborated on in Annex I of the directive. These detailed requirements relate to the minimum information to be included in the bill and how important information ought to be displayed distinctly from other parts of the bill, frequency of billing, breakdown of price into three components including energy/supply, networks, and taxes/levies, access to commentary historical data on consumption, and disclosure of energy sources, such as energy mix, environmental impact, and guarantee of origin for renewable energy sources.

First and foremost, these provisions on billing in the ED(II) can be qualified as empowerment measures because they provide consumers with information that they

⁶⁸ *ibid*, recital 48.

⁶⁹ *ibid*, Annex I: art 5.

⁷⁰ *ibid*, art 14(1).

⁷¹ *ibid*, art 18.

⁷² *ibid*, art 18(1).

⁷³ *ibid*, art 18(2) & (3).

⁷⁴ *ibid*, art 18(4).

⁷⁵ *ibid*, Annex I: art 1.3(b).

can use to monitor their current energy consumption costs and to switch energy providers if another contract could provide a better deal. Like smart metering, the empowered behaviour is operationalized as consumers making informed choices that reduces energy costs either by taking control of their consumption or by participating in the market by switching providers for a better deal. Furthermore, a more nuanced understanding of empowerment as informed choice through billing information can be read from both the preamble and the provisions relating to billing. The focus of informing consumers is not simply on providing more information. Instead, the emphasis is placed on how the information is presented to the consumer in a way that is accurate, clear, and easy to understand.⁷⁶ The preamble, for instance, acknowledges that energy bills can be complex and difficult to understand. It indicates that only the most important information could be included in the first pages of a bill with the remainder of information signed-posted to later in the bill, in an additional document or on a website or phone application.⁷⁷ Like the energy label, empowerment through informed choice is not directly concerned with just the consumer detriment that arises because of a potential lack of consumer information but also with the detriment that arises when billing information is not presented to consumers in a format that is clear and easy to understand.

7.4 Consumer empowerment and consumer vulnerability

The Commission's consumer empowerment agenda in the energy market emphatically addresses all consumers and redefines consumer vulnerability to also include socio-economic conditions, such as energy poverty. This adds a new dimension to the forms of consumer detriment that the Commission aims to remedy by empowering consumers through the regulatory framework. Consumer vulnerability in the strategic policy in the energy sector is therefore conceptualized more broadly than the UCPD in horizontal consumer law.

The Commission does not, however, adopt a universal definition of consumer vulnerability in the energy market in the legislative reforms that form part of the Winter Package. Nonetheless, Article 28(1) of the ED(II) specifies that the Member States must: "take appropriate measures to protect customers and shall ensure, in particular, that there are adequate safeguards to protect vulnerable customers." This entails defining a national-centric concept of consumer vulnerability that may include energy poverty as well as: "income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria".⁷⁸ In terms of providing additional protections for vulnerable energy

⁷⁶ *ibid*, art 18(1).

⁷⁷ *ibid*, art 46.

⁷⁸ *ibid*, art 28(1).

consumers, the Member States must: “ensure that rights and obligations linked to vulnerable customers are applied” and that they “shall take appropriate measures, such as providing benefits by means of their social security systems to ensure the necessary supply to vulnerable customers.”⁷⁹ In general, the Member States must: “ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms.”⁸⁰ The concept of energy poverty is elaborated further in Article 29 ED(II). It specifies that regarding energy poverty the Member States must “establish and publish a set of criteria, which may include low income, high expenditure of disposable income on energy and poor energy efficiency.”⁸¹ These national criteria will form the basis for the Member States to conduct assessments of energy poverty at the national level, which are to be reported to the Commission.

Although the Commission does not create a static and universal definition of consumer vulnerability and energy poverty, the provisions on vulnerability and energy poverty are significant because it is recognition that energy consumers are subject to types of detriment that were not previously considered to constitute consumer vulnerability. In doing so, this creates an inroad for developing a regulatory framework that can address an expanded notion of consumer vulnerability. Moreover, these provisions also acknowledge that systemic inequalities that result in social inequalities are objective obstacles that preclude all from participating in the clean transition alongside less vulnerable consumers. This echoes Fineman’s contention that vulnerability is not simply a dispositional universality but also ‘particular’ where some members of society are more at risk of harm and detriment than others.

7.5 Switching fees

In both the 2015 New Deal for Energy Consumers and the 2016 Clean Energy for All Consumers communications, switching fees and lengthy switching times are cited as obstacles that disempower consumers from switching between energy providers. Recital 33 of the ED(II) refers to the fees that arise either directly or indirectly when a consumer switches providers and that make it difficult for the consumer to choose the best offer and to gain a financial advantage from switching. Recital 34 states that shorter switching times will encourage consumers to look for better energy deals and switch between suppliers. This will stimulate mobility between providers. Article 12 lays down the right for consumers to switch and the rules of switch-related fees. The Member States will ensure that switching between suppliers will take no longer than three weeks and by 2026 will take no longer than 24 hours. In terms of switching fees, at a minimum

⁷⁹ *ibid*, art 28(1) & (2).

⁸⁰ *ibid*, art 28(1).

⁸¹ *ibid*, art 29.

household consumers and small enterprises will not be charged any switching fees. An exception applies where the Member States may allow suppliers to impose switching fees when the customer of their own volition terminates a fixed-term and fixed-price contract that is voluntarily entered into and where such fees were clearly communicated.

7.6 Interim conclusions

For the energy consumer the ED(II) is a central piece of legislation in the energy market that sets out several vertical consumer rights and protections. The Commission's narratives on consumer empowerment in the recast of this directive are highly visible, with consumer empowerment codified as part of the directive's scope. Several of the provisions in this directive were qualified as having an empowerment rationale, including the provisions on price comparison tools, smart metering, billing information, switching fees, and vulnerable energy consumers. The Commission's narratives surrounding these provisions are interesting because they represent several different perspectives on the conditions that cause objective consumer disempowerment, where energy poverty and other causes of consumer vulnerability represent a departure from viewing consumer disempowerment as arising solely from market conditions and the B2C relationship. Put differently, there is a change in the narrative to acknowledging that socio-economic factors are a cause of consumer harm and disempowerment. From a practical perspective, the provisions on empowerment in this directive reveal a more nuanced view as to how consumers are disempowered by information asymmetries. There is an acknowledgment that consumers are not just disempowered by information asymmetries, such as not enough information on energy use, but also that overly complex billing information and too much information on the differences between energy providers (and too much choice) are an objective obstacle to consumer empowerment. This directive does not aim to empower consumers simply by offering more information but by making choices easier through price comparison tools, by mandating that billing information must be transparent and understandable, and that real time energy use data should also be easily assembled and understandable. Moreover, energy meters are considered to be an essential part of empowering vulnerable energy consumers and consumers living in energy poverty who can exert more control over their energy use and facilitate all consumers (including vulnerable consumers) to become prosumers/self-consumers who can generate their own renewable energy sources.

8. Consumer empowerment and the recast Energy Efficiency Directive (EED(II))

In 2021, the Commission proposed a recast of the EED.⁸² This pending proposal will recast the most recent version of the directive, which was amended in 2018 in line with the Clean Energy for All Europeans strategy.⁸³ To achieve the goals laid down by the Commission in the ‘Fit for 55 Package’ (aiming to meet 55% net greenhouse gas emissions by 2050) and the 2019 Green Deal, the objective of the EED(II) is to introduce new obligations for Member States and an updated regulatory framework capable of driving forward the changes required for reaching these energy efficiency targets.⁸⁴ The proposal for the recast directive is relevant for the discussion on consumer empowerment on two fronts. First, this directive is not directly concerned with setting out the contractual rights of energy consumers, as is the case in the ED(II) discussed in the previous section. Instead, this directive outlines several obligations of the Member States for facilitating energy efficiency measures and reaching energy targets. Second, the proposed recast of this directive emphasizes the connection between reaching energy efficiency goals and energy use by households. Empowering energy consumers and households is adopted as the strategic approach for achieving these aims, with a marked emphasis on the necessity for empowering vulnerable consumers and consumers living in energy poverty.

8.1 Empowerment justifications in the explanatory memorandum to the EED(II)

The proposal for the EED(II) highlights the important role that energy consumers will continue to play in reaching efficiency targets. This is because private households represent roughly one-quarter of final energy consumption in the market. In the context of consumer empowerment, the Commission acknowledges that the current 2018 version of the directive contains several provisions that pursue consumer empowerment. Despite this, “the lack of strong consumer behaviour and consumer empowerment aspects in promoting energy efficiency, in particular at more local levels, results in insufficient incentives for consumers to realise energy efficiency improvements and to tackle high upfront costs and the split incentives problem”.⁸⁵ With this statement, the Commission is acknowledging the central role of empowering consumers and that the current directive does not penetrate far enough into the Member States’ regulatory

⁸² Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency (Recast)’ COM (2021) 558 final.

⁸³ ‘Clean Energy for All Europeans’ (n 2).

⁸⁴ ‘Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency (Recast)’ (n 82) 1.

⁸⁵ *ibid* 4

framework to empower consumers at the local level. At the same time, the Commission is also contending that consumers are disempowered by market conditions such as high costs and inadequate local incentives that fail to engage consumers in making such energy-efficient choices.

The Commission elaborates in more detail on the obstacles that prevent consumer empowerment, especially empowerment of vulnerable energy consumers. It is acknowledged that the transition period for achieving the targets of the Fit For 55 Package will have significant distributional effects to the detriment of consumers. The rising costs of fuel due to carbon rates will push up business costs and consequently businesses will pass these costs on to final energy consumers. This will particularly impact vulnerable consumers who are at risk of energy poverty or already live in energy poverty.⁸⁶ The explanatory memorandum specifies that investments must take place amongst “the most vulnerable in society”. Furthermore, vulnerable energy consumers, households at risk of living in energy poverty, and consumers in social housing can be empowered and protected by supporting measures that strengthen energy-savings.⁸⁷ In the “spirit of solidarity” the EED(II) and the new Social Climate Fund are proposed as two approaches that will in combination effectively address the negative social effects of the Green Transition.⁸⁸ Consumer empowerment therefore pursues not only the economic interests of consumers but also their social interests as EU citizens. Moreover, in the context of an *ex-post* review of the 2018 EED(II), the Commission confirms the social dimension of consumer empowerment in its statement that there is potential for the proposed EED(II) to “better tackle socio-economic challenges like protecting and empowering vulnerable customers and final users and alleviating energy poverty”.⁸⁹

In the proposal for the EED(II), the Commission contends that consumer empowerment will ensue from the harmonization measures in the EED(II) and these measures are necessary for the EU to collectively achieve the energy efficiency aims tied to decarbonization goals by 2050. In other words, consumers are disempowered by the discrepancies between Member States, and the Commission cites consumer empowerment as a justification for the subsidiarity requirement. Moreover, the Commission emphasizes that the goal of levelling the playing field through harmonization is necessary to “empower and protect vulnerable customers and final users and those affected by energy poverty”.⁹⁰ The Commission contends that these consumers will become empowered by the measures in the EED(II) because of the obligations that the proposal places on the Member States to implement and finance energy efficiency improvement measures, to prioritize vulnerable consumers and consumers living in energy poverty and more generally the supporting financial measures

⁸⁶ *ibid*, 6 & 8.

⁸⁷ *ibid* 8.

⁸⁸ *ibid*.

⁸⁹ *ibid* 15.

⁹⁰ *ibid* 13.

that intend to mitigate the negative distributional effects of the Green Transition.⁹¹ Aside from the obligations placed on the Member States, the proposal specifies that to become empowered, consumers will need “meaningful, accurate and understandable information on energy use, related costs, and easy access to a competitive market of building construction materials (windows, insulation, etc.), heating and cooling solutions, and other products that help improve energy efficiency”.⁹² It is not simply imperfect information that is considered as disempowering to consumers but also conditions that impede real access to energy-efficient products and prices that are non-competitive and unaffordable.

8.2 Consumer empowerment in the preamble to the proposal for an EED(II)

The empowerment aims of the EED(II) are more specifically elaborated upon throughout the preamble to the proposal, with an emphasis on empowering vulnerable consumers, consumers living in energy poverty or at risk of living in energy poverty and, where applicable, consumers living in social housing. The preamble to the proposal is interesting for a discussion on consumer empowerment because it offers an elaboration on the content of the directive in terms of how consumers can become empowered, which consumers are to become empowered, and more generally how consumer empowerment can be defined and the goals that the empowerment articles pursue.

In the context of how consumers can be empowered, the Member States can impose obligations on obligated parties in the Energy Efficiency Obligation schemes adopted after the implementation of the original EED from 2012.⁹³ The Member States can take such action to: “[...] empower and protect vulnerable customers, people affected by energy poverty and people living in social housing, and to implement policy measures as a priority among those people.”⁹⁴ In this regard, obligated parties are generally a Transmission System Operator as a national entity that is entrusted with transport energy (gas and electricity) within a nation or region through a fixed infrastructure. Moreover, “Member States can already require obligated parties to include social aims in energy-saving measures in relation to energy poverty and this possibility should be transformed into an obligation to protect and empower vulnerable customers and final users and to alleviate energy poverty [...]”.⁹⁵ With regard to

⁹¹ *ibid* 13.

⁹² *ibid* 12.

⁹³ These schemes are a legislative mechanism that require obligated parties to meet quantitative energy-saving targets, first introduced in the original Energy Efficiency Directive in 2012. See Directive 2012/27/EU of 25 October 2012 on Energy Efficiency, Amending Directives 2009/125/EC and 2010/30/EU and Repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/14 (Energy Efficiency Directive).

⁹⁴ ‘Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency (Recast)’ (n 82) recital 49.

⁹⁵ *ibid*, recital 60.

Renewable Energy Communities (RECs) and Citizen Energy Communities (CECs),⁹⁶ the Member States should consider and promote the role of RECs and CECs because these communities can support the Member States in achieving the empowerment objectives of the EED(II):

They [the RECs and CECs] can empower and engage consumers and enable certain groups of household customers, including in rural and remote areas to participate in energy efficiency projects and interventions. Energy communities can help fighting energy poverty through facilitation of energy efficiency projects, reduced energy consumption and lower supply tariffs.⁹⁷

In the preamble, there is an emphasis placed on the objective that *all* consumers must be empowered. To achieve this goal, the measures in the EED(II) will consider the empowerment of vulnerable consumers, consumers at risk of, or living in, energy poverty and consumers in social housing:

Member States should empower and protect all people equally [...] and ensure that those most affected or put at greater risk of being affected by energy poverty, or most exposed to the adverse impacts of energy poverty, are adequately protected. In addition, Member States should ensure that energy efficiency measures do not exacerbate any existing inequalities, notably with respect to energy poverty.⁹⁸

Vulnerable consumers are defined as “including those people affected by energy poverty, and, where appropriate, among medium-income households and those people living in social housing, elderly people and those living in rural and remote areas.”⁹⁹ Moreover, in line with the empowerment of all consumers, it is necessary that these consumers “[...] are protected and, to this end, empowered to actively participate in the energy efficiency improvement interventions, measures and related consumer protection or information measures that Member States implement.”¹⁰⁰

⁹⁶ Recast Electricity Directive.

⁹⁷ ‘Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency (Recast)’ (n 82) recital 92.

⁹⁸ *ibid*, recital 99.

⁹⁹ *ibid*, recital 60.

¹⁰⁰ *ibid*, recital 96.

8.3 Consumer empowerment provisions in the proposal for the EED(II)

The elaboration of consumer empowerment in the recitals of the preamble finds legal expression throughout several articles in the proposal for a recast EED(II). To begin, Article 2 contains the following newly inserted definition on energy poverty: “energy poverty means a household’s lack of access to essential energy services that underpin a decent standard of living and health, including adequate warmth, cooling, lighting, and energy to power appliances, in the relevant national context, existing social policy and other relevant policies.”¹⁰¹ This provision does not go so far as to offer universal criteria for what counts as energy poverty as the substantive criteria will depend on the national context. Nonetheless, this definition acknowledges that energy poverty impacts both a decent standard of living and health that depend on adequate heating, cooling, lighting, and energy to power appliances. As the discussion so far has shown, both the explanatory memorandum and the preamble to the proposal for the directive consistently state that consumers who live in energy poverty particularly require empowerment. This definition of energy poverty builds on the narrative in strategic policy that consumers are disempowered by personal and social conditions. Put differently, as will be seen in the following discussion, if personal conditions are a cause of disempowerment then the legislative tools that the Commission adopts to empower these consumers reach beyond the use of information duties.

Article 8(3) specifies that the Member States: shall implement energy efficiency obligation schemes, alternative policy measures, or a combination of both, or programmes or measures financed under an Energy Efficiency National Fund, as a priority among people affected by energy poverty, vulnerable customers and, where applicable, people living in social housing. While energy poverty is defined in Article 2 of the proposal, vulnerable persons are to be defined according to Articles 28(1) and 29 of the ED(II) for energy consumers¹⁰² and Article 3(3) of Directive 2009/73/EC for gas consumers.¹⁰³ Moreover, Article 8(3) of the proposal for the EED(II) requires that the Member States deliver a share of their energy-savings target to the energy poor, to vulnerable households and to those living in social housing. As this article states, in contributing towards a just and inclusive energy transition, “the Member States shall make the best possible use of funding [...] with the aim of removing adverse effects and ensuring a just and inclusive energy transition” and will consider promoting “the role of

¹⁰¹ *ibid*, art 2(49).

¹⁰² See Section 7.4 of this Chapter.

¹⁰³ ‘Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency (Recast)’ (n 82) art 21: For an elaboration on the definition of vulnerable energy consumers in the Recast Electricity Directive, see Section 7.4 of this Chapter: For vulnerable gas consumers “Each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied”, see Directive 2009/73/EC of 13 July 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC [2009] OJ L211/94 (Natural Gas Directive), art 3(3).

renewable energy communities and citizen energy communities in the contribution to the implementation towards these policy measures.”¹⁰⁴

The proposal for the EED(II) also contains a newly inserted chapter titled “Consumer Information and Empowerment” and consists of Articles 20 through 22.¹⁰⁵ Article 20 first lays down several basic contractual rights for the supply of heating, cooling and domestic hot water. This primarily concerns the information that must be included in a supply contract for these services and that the conditions in supply contracts must be ‘fair’. Article 21 sets out several obligations for Member States to disseminate information and raise the awareness of energy consumers in terms of measures that can improve energy efficiency. Furthermore, this article specifies that in relation to energy consumers’ access to enforcement mechanisms and redress for harm, the Member States “shall ensure that final customers, final users, vulnerable customers, people affected by energy poverty and, where applicable, people living in social housing, have access to simple, fair, transparent, independent, effective and efficient out-of-court mechanisms for the settlement of disputes concerning rights and obligations established under this Directive[...].”¹⁰⁶

Article 22 titled “Empowering and protecting vulnerable customers and alleviating energy poverty” specifies that the Member States “shall take appropriate measures to empower and protect people affected by energy poverty, vulnerable customers and, where applicable, people living in social housing”.¹⁰⁷ The information dissemination and awareness-raising requirements laid down in Article 21 and protective measures from Article 8(3) must be implemented as a priority for vulnerable persons, persons living in energy poverty and, where applicable, persons living in social housing, with the aim of alleviating energy poverty.¹⁰⁸ To support these consumers, the Member States have the following obligations. First, to “implement energy efficiency improvement measures to mitigate distributional effects from other policies and measures.”¹⁰⁹ This can include taxation measures, implemented according to Article 9 of the ED(II), or the application of emissions trading in the buildings and transport sector, according to the ETS Directive.¹¹⁰ Second, the Member States must use funding available at the national and the EU level, including from the Social Climate Fund, for investments in energy efficiency improvement measures as priority actions.¹¹¹ Third, the Member States must, where applicable, “carry out early, forward-looking investments into energy efficiency improvement measures before distributional impacts from other

¹⁰⁴ Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency (Recast)’ (n 82) art 8(3)

¹⁰⁵ *ibid*, chapter IV: arts 20, 21 & 22.

¹⁰⁶ *ibid*, art 21(4).

¹⁰⁷ *ibid*, art 22(1).

¹⁰⁸ *ibid*, art 22(2).

¹⁰⁹ *ibid*, art 22 (3)(a).

¹¹⁰ *ibid*.

¹¹¹ *ibid*, art 22(3)(b).

policies and measures show effect.”¹¹² Fourth, the Member States must “foster technical assistance and the roll-out of enabling funding and financial tools, such as on-bill schemes, local loan-loss reserve, guarantee funds, funds targeting deep renovations and renovations with minimum energy gains.”¹¹³ Fifth, the Member States must “foster technical assistance for social actors to promote vulnerable consumers' active engagement in the energy market, and positive changes in their energy consumption behaviour”.¹¹⁴ Sixth, the Member States must “ensure access to finance, grants or subsidies bound to minimum energy gains.”¹¹⁵ Lastly, Article 22 specifies that Member States must “establish a network of experts [...] to develop strategies to support local and national decision makers implementing energy efficiency improvement measures alleviating energy poverty, measures to generate robust long term solutions to mitigate energy poverty and to develop appropriate technical assistance and financial tools”.¹¹⁶

In Article 28 of the proposal titled “The Energy Efficiency National Fund, Financing and Technical Support”, it is specified that the Commission aims to assist the Member States, where appropriate, in setting up financial facilities and project development facilities. These measures have the aim of increasing energy-efficient investments in different sectors and to protect and empower vulnerable customers, people living in energy poverty and, where applicable, people living in social housing by “integrating an equality perspective so that no one is left behind.”¹¹⁷

8.4 Interim conclusions

The discussion in this section on the proposal for the EED(II) has laid out the relationship between energy poverty, consumer empowerment and energy efficiency measures. Putting aside the question as to whether the EED(II) will make a difference in practice for empowering energy consumers, including vulnerable consumers and consumers living in energy poverty, this proposal confirms several of the alternative narratives on consumer empowerment outlined earlier in this chapter. This proposal's focus on energy poverty and vulnerable energy consumers tethers consumer empowerment to new forms of consumer harm. Moreover, this discussion has revealed a more expansive view of the obstacles that disempower consumers and that are the focus of legislative intervention, rather than remaining political promises in strategic documents. Drawing on the theoretical framework of empowerment in Chapter 2, the objective process of empowering consumers that is pursued by the EED(II) contains

¹¹² *ibid*, art 22(3)(c).

¹¹³ *ibid*, art 22(3)(d).

¹¹⁴ *ibid*, art 22(3)(e).

¹¹⁵ *ibid*, art 22(3)(f).

¹¹⁶ *ibid*, art 22(4).

¹¹⁷ *ibid*, art 28(2).

not just a mix of contractual rights for all consumers and access to redress but also specifies several obligations for Member States to ensure the participation of consumers who are vulnerable or living in energy poverty. This entails the Member States making changes to national conditions as the objective environment of energy consumers so that they have the same opportunity to behave in an empowered way as other energy consumers. Namely, to participate through the uptake of energy efficiency measures. In short, the proposal for the EED(II) offers a more nuanced view of the conditions that the Commission, as the empowering entity, qualifies as disempowering energy consumers and the cause of illegitimate consumer harm. This discussion of the proposal also offers a more nuanced view of law as a tool for empowerment and the context-specific strategies that the Commission adopts for creating an environment that is conducive to empowering all energy consumers.

9. Consumer empowerment and the recast Renewable Energy Directive (RED(II))

In 2018, the recast of the RED(II) was adopted, as part of the renewed impetus towards delivering the goals of the 2016 Clean Energy for All Europeans Strategy.¹¹⁸ In 2021, several amendments of the directive were proposed by the Commission with the aim of achieving a 40% renewables target, an increase from the 32% target adopted in the 2018 recast.¹¹⁹ The following analysis in Section 9.1 discusses the text of the Commission's 2016 proposal for the recast of the directive because of the renewed emphasis placed on empowering consumers to participate in the production of renewable energy following the Winter Package proposal.¹²⁰ This is then followed by an analysis in Sections 9.2 and 9.3 of the preamble and empowerment provisions in the final version of the RED(II) adopted in 2018. The most recent 2021 amendments to the directive will not be elaborated upon as this proposal does not contribute to a more detailed understanding of the Commission's narrative on the consumer empowerment agenda that is pursued through this directive.

¹¹⁸ Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources [2018] OJ L328/82 (Renewable Energy Directive Recast).

¹¹⁹ Commission, 'Proposal for a Directive amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the Promotion of Energy from Renewable Sources, and Repealing Council Directive (EU) 2015/652, COM (2021) 557 final, 1.

¹²⁰ Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (Recast) COM (2016) 767.

9.1 The explanatory memorandum to the RED(II)

The proposal for amending the RED(II) recognised that there was much support from stakeholders for empowering consumers to decentralize the energy system and to become prosumers. In particular, this entailed rules that ensured: “consumers have the possibility to produce and store their own renewable heat and electricity and participate in all relevant energy markets in a non-discriminatory and simple way, including through aggregators”.¹²¹ In this vein, the proposal considers several areas that require additional intervention through the RED(II).¹²² In terms of options for increasing renewable energy in the heating and cooling sector, there is an emphasis placed on measures that can facilitate consumer uptake in renewable energy and waste heat through District Heating and Cooling.¹²³ Best practice sharing, energy performance certificates, the opening of access to local heating/cooling and a reinforcement of the consumer rights framework are cited as the best options for empowering consumers. It is proposed that consumers should be empowered to produce renewable heat locally and empowered to create local synergies with other energy users through district heating and cooling systems and in doing so will have a “positive social impact”. The negative consequences for the revenue streams of local district heating and cooling companies that will result from consumers disconnecting from their services would be offset by the positive social and environmental impacts of more consumers creating and sharing renewable heat and cooling sources.¹²⁴

The second area in the explanatory memorandum that addresses consumer empowerment considers how consumers can be empowered to generate, self-consume and store renewable electricity. The Commission highlights the importance of enabling citizens to self-consume and store renewable electricity because it: “maximises consumer's empowerment and their potential participation, mitigates grid deployment costs and grid costs distributional issues and enhances the contribution of rooftop solar PV to the renewable energy target.”¹²⁵ This does not entail the creation of a universal right for consumers to self-consume. Instead, the goal is to create a rights-enabling framework that facilitates the rolling out of decentralized production of renewables, rather than pre-empting the Member States to support a specific type of renewable technology.

¹²¹ *ibid* 10.

¹²² *ibid* 13–19.

¹²³ *ibid* 15.

¹²⁴ *ibid*.

¹²⁵ *ibid* 17.

9.2 The preamble to the RED(II)

Following the explanatory memorandum to the RED(II), the adopted preamble in the directive focuses on empowering consumers to produce, self-consume and store renewable energy or to participate with other energy consumers in district heating and cooling systems. Recital 66 of the RED(II) states that it is necessary to both define the term “renewable self-consumers” and to create a regulatory framework that can empower these self-consumers to “generate, store, consume and sell electricity without facing disproportionate burdens”.¹²⁶ Moreover, collective self-consumption should be permitted so that citizens who, for instance, live in apartments can also be the beneficiaries of consumer empowerment in the same way as those citizens who live in single family homes. Article 2(14) RED(II) defines ‘renewable self-consumer’ as meaning a “final customer [...] who generates renewable electricity for its own consumption, and who may store or sell self-generated renewable electricity, provided that, for a non-household renewables self-consumer, those activities do not constitute its primary commercial or professional activity”. The RED(II) also includes a recital that develops the concept of consumer empowerment by linking this strategy with vulnerability and energy poverty. Recital 67 elaborates that the empowerment of jointly-acting renewables self-consumers creates opportunities for RECs “to advance energy efficiency at household level and helps fight energy poverty through reduced consumption and lower supply tariffs”.¹²⁷ Moreover, the Member States ought to take advantage of this opportunity by “assessing the possibility to enable participation by households that might otherwise not be able to participate, including vulnerable consumers and tenants”.¹²⁸

9.3 Empowerment provisions

The explanatory memorandum for the recast of the RED(II) qualify three provisions in the directive that are concerned with empowering consumers. This includes Article 21 on renewable self-consumers, Article 22 on renewable energy communities and Article 24 on district heating and cooling.¹²⁹

The explanatory memorandum states that Article 21 is an empowerment provision because it will empower consumers by “enabling them to self-consume without undue restrictions, being remunerated for the electricity they feed into the

¹²⁶ Renewable Energy Directive Recast, recital 53.

¹²⁷ *ibid.*, recital 67.

¹²⁸ *ibid.*

¹²⁹ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (Recast)’ (n 120) 22.

grid”.¹³⁰ This provision in the final version of the RED(II) specifies that the Member States shall ensure that consumers are entitled to become renewables self-consumers, within the scope of the provision.¹³¹ This article lays down several obligations of the Member States that shall put in place an enabling framework to promote and facilitate the development of renewables self-consumption. First, the Member States will ensure that these consumers can “generate renewable energy, including for their own consumption, store and sell their excess production of renewable electricity, including through renewables power purchase agreements, electricity suppliers and peer-to-peer trading arrangements.”¹³² The consumers will not be subject to discriminatory or disproportionate procedures and charges, and to network charges that are not cost-reflective regarding electricity that they consume from, or feed into, the grid.¹³³ Moreover, these consumers shall not be subject to discriminatory or disproportionate procedures, and to any charges or fees regarding their self-generated electricity from renewable sources remaining within their premises.¹³⁴ Second, the Member States will ensure that renewables self-consumers are entitled to install and operate electricity storage systems combined with installations generating renewable electricity for self-consumption. Moreover, there shall be no liability for double charges for this stored electricity on their premises.¹³⁵ Third, the Member States will ensure that renewables self-consumers maintain their rights and obligations as final consumers.¹³⁶ Fourth, the Member States will ensure that self-consumers “receive remuneration, including, where applicable, through support schemes, for the self-generated renewable electricity that they feed into the grid, which reflects the market value of that electricity and which may take into account its long-term value to the grid, the environment and society.”¹³⁷ Lastly, regarding renewables self-consumers located in the same building, including multi-apartment blocks, the Member States shall ensure that these consumers are entitled to engage in the same activities and avail themselves of the same protections outlined in this paragraph.¹³⁸

This enabling framework adopts several measures that can be qualified as having an empowerment aim. First, the enabling framework will address the accessibility of renewables self-consumption for all final customers. This is to include those consumers in low-income or vulnerable households.¹³⁹ Second, the framework shall address “unjustified barriers to the financing of projects in the market and measures to

¹³⁰ *ibid.*

¹³¹ Renewable Energy Directive Recast, art 21.

¹³² *ibid.*, art 21(2)(a).

¹³³ *ibid.*, art 21(2)(a)(i).

¹³⁴ *ibid.*, art 21(2)(a)(ii).

¹³⁵ *ibid.*, art 21(2)(b).

¹³⁶ *ibid.*, art 21(2)(c).

¹³⁷ *ibid.*, art 21(2)(d).

¹³⁸ *ibid.*, art 21(4).

¹³⁹ *ibid.*, art 21(6)(a).

facilitate access to finance”¹⁴⁰ as well as “other unjustified regulatory barriers to renewables self-consumption, including for tenants”.¹⁴¹ Third, the framework will “address incentives to building owners to create opportunities for renewables self-consumption, including for tenants.”¹⁴² Fourth, it shall “grant renewables self-consumers, for self-generated renewable electricity that they feed into the grid, non-discriminatory access to relevant existing support schemes as well as to all electricity market segments.”¹⁴³ Lastly, it shall “ensure that renewables self-consumers contribute in an adequate and balanced way to the overall cost sharing of the system when electricity is fed into the grid.”¹⁴⁴

Article 22 is qualified by the Commission as an empowerment measure because it “sets forth new provisions on energy communities to empower them to participate in the market”.¹⁴⁵ This final version of this provision specifies that “Member States shall ensure that final customers, in particular household customers, are entitled to participate in a renewable energy community while maintaining their rights or obligations as final customers, and without being subject to unjustified or discriminatory conditions or procedures that would prevent their participation in a renewable energy community.”¹⁴⁶ Moreover, the Member States are obligated to ensure several entitlements for renewable energy communities (RECs),¹⁴⁷ to carry out an assessment of the existing barriers and potential of development of RECs in their territories,¹⁴⁸ and to provide an enabling framework to promote and facilitate the development of RECs.¹⁴⁹ These enabling frameworks are relevant for consumer empowerment because such frameworks must ensure the following. First, RECs must not be subject to discriminatory treatment regarding their activities, rights and obligations as final customers, producers, suppliers, distribution system operators, or as other market participants.¹⁵⁰ Second, participation in the RECs must be accessible to all consumers. Significantly this is cited as ensuring those in low-income or vulnerable households have access.¹⁵¹ Third, national frameworks must ensure that tools that facilitate access to finance and information are available.¹⁵² Fourth, national frameworks must ensure that rules to “secure the equal and

¹⁴⁰ *ibid*, art 21(6)(b).

¹⁴¹ *ibid*, art 21(6)(c).

¹⁴² *ibid*, art 21(6)(d).

¹⁴³ *ibid*, art 21(6)(e).

¹⁴⁴ *ibid*, art 21(6)(f).

¹⁴⁵ Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (Recast) (n 120) 22.

¹⁴⁶ Renewable Energy Directive Recast, art 22(1).

¹⁴⁷ *ibid*, art 22(2).

¹⁴⁸ *ibid*, art 22(3).

¹⁴⁹ *ibid*, art 22(4).

¹⁵⁰ *ibid*, art 22(4)(e).

¹⁵¹ *ibid*, art 22(4)(f).

¹⁵² *ibid*, art 22(4)(g).

non-discriminatory treatment of consumers that participate in the renewable energy community are in place”.¹⁵³

Lastly, the Commission contends that Article 24 is an empowerment measure because it “empowers energy consumers by providing them with information on district heating energy performance and enables them to stop buying heat/cold from a district heating/cooling system at building level if the consumers, or a party on their behalf, can achieve a significantly better energy performance by measures taken at building level. It also opens local heating and cooling systems for producers of renewables heating and cooling and waste heat or cold and third parties acting on their behalf.”¹⁵⁴ This lengthy provision, consisting of nine subsections in the final version of the directive, lays down several obligations of the Member States with the aim of empowering consumers. Firstly, the Member States will ensure that end-consumers are supplied with information from district heating and cooling suppliers on their energy performance and the share of renewable energy in their systems.¹⁵⁵ Secondly, the Member States will adopt the measures necessary for ensuring that consumers can disconnect from district heating or cooling systems that are inefficient. These consumers are to be enabled to disconnect on their own accord from the production of heating and cooling from renewable sources themselves or to switch to another supplier by terminating or modifying their contract.¹⁵⁶ This right may be exercised by individual customers, by joint undertakings formed by customers or by parties acting on behalf of customers.¹⁵⁷ Moreover, the “rights of consumers and the rules for operating district heating and cooling systems in accordance with this Article are clearly defined and enforced by the competent authority.”¹⁵⁸

9.4 Interim conclusions

The empowerment outcomes of the RED(II) focus on the energy consumer becoming a renewables self-consumer. This obliges the creation of a regulatory framework that will enable consumers to behave in such an empowered way. Articles 21 and 22 of the RED(II) set out several obligations for the Member States to create national legal and regulatory frameworks that facilitate consumers becoming a renewables self-consumer. These articles entail a reform of the architecture of the energy market and the removal of obstacles that stand in the way of or prohibit consumers behaving in this empowered way. Like the EED(II), the Commission, as the empowering entity, uses secondary legislation to make objective changes to the consumer’s environment. In doing so, the

¹⁵³ *ibid*, art 22(4)(i).

¹⁵⁴ Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (Recast) (n 120) 22.

¹⁵⁵ Renewable Energy Directive Recast, art 24(1).

¹⁵⁶ *ibid*, art 24(2).

¹⁵⁷ *ibid*, art 24(7).

¹⁵⁸ *ibid*, art 24(9).

Commission is mediating the relationship between the consumer and energy suppliers by changing the conditions in which they operate. Article 22 RED(II) also acknowledges that vulnerable energy consumers and low-income energy consumers must have an equal opportunity to participate in joining such communities. This is also a confirmation of the Commission's narrative in strategic policy that all consumers must be empowered to participate in the clean transition with an emphasis on vulnerable consumers and an expansive view of the conditions that cause disempowerment. This expanded concept of consumer vulnerability and its connection to the Commission's consumer empowerment agenda will be considered in more detail in Chapter 6.¹⁵⁹

10. Concluding remarks

The central question that guided the analysis in this section was what the concept of consumer empowerment means to the EU Commission as the empowering entity in the context of energy policy and energy legislation with a consumer element. As part of the Green Deal, the consumer is an integral market actor that is envisioned by the Commission as having a pivotal role to play in the transition to a circular and decarbonized internal market. The analysis in this chapter focused on this role of the consumer in the more specific role of energy consumer in the clean transition to a decarbonized economy and how through empowerment all energy consumers will be enabled to participate. While the structure and approach in this chapter was the same as in Chapter 4, the analysis in this chapter revealed several novel findings and a more complex and nuanced view of consumer empowerment as a multidimensional concept.

To summarize, in energy policy and in secondary legislation, especially the EED(II), the Commission's narratives on consumer vulnerability have expanded to encompass causes of vulnerability and types of vulnerability not previously recognized in policy and addressed through secondary law. From a narrative perspective, socio-economic causes of energy poverty and the unequal position of low-income consumers caused by inequality of outcome that affect these consumers from participating in the clean transition are acknowledged by the Commission as constituting illegitimate forms of consumer harm that should be remedied by secondary legislation. This recognition of new causes of consumer disempowerment are connected to the narrative in the Green Deal that no one and no place should be left behind and the Commission's narrative that low-income consumers should not disproportionately bear the burden of the clean transition. The Commission's narrative that all consumers should be empowered to participate in the clean transition coupled with these new narratives on a social and fair energy market have affected the reform of the architecture of the energy market in the legislative instruments analysed in this chapter. By broadening the narrative on what

¹⁵⁹ See Chapter 6, Section 3.2.

causes vulnerability/disempowerment, the consumer empowerment agenda in the energy market becomes focused on addressing consumer detriment that goes beyond the vulnerabilities and disempowering conditions that are acknowledged in horizontal consumer law. Following this, the analysis of the energy legislation that can be qualified as empowerment legislation demonstrated that the objective process of empowering energy consumers regulates the B2C relationship through several rights and protections. More radically, the empowerment agenda is part of the more fundamental reshaping of the fabric of the energy market and the architecture of the energy sector to create a market that is conducive to empowered behaviours, which includes the decentralization of the energy system by prosumers and renewables self-consumers.

Together, the consumer empowerment agenda in horizontal consumer law and in vertical consumer law in the energy market form both sides of the consumer empowerment agenda that is directed towards achieving the Green Transition to a circular and net-zero economy. By tracing the Commission's narratives on consumer empowerment and reassessing the secondary legislation that forms the core of the Commission's practical approach for bringing about consumer empowerment aims, the analysis in this chapter and Chapter 3 challenge the established understandings of EU consumer empowerment in consumer law scholarship that can consequently be qualified as adopting a too narrow and limited understanding of consumer empowerment in light of the recent changes in policy and law. Having traced the changing meaning of EU consumer empowerment, the question that remains and that will be confronted in the following chapter is what context-specific theory of EU consumer empowerment can be developed that more adequately encompasses the nuances of EU consumer empowerment.

Chapter 6

Rethinking the Concept of EU Consumer Empowerment

1. Introduction

Each of the chapters so far in this study have developed several different perspectives on the ways in which both the abstract concept of empowerment and the discipline-specific concept of EU consumer empowerment can be defined. In Chapter 2, the discussion focused on the abstract concept of empowerment and developed a theoretical framework and set of conceptual categories that can be used to define this ambiguous phenomenon. In Chapter 3, the discussion turned to answering the question of how empowerment has already come to be defined by scholarship on consumer law. Here the focus was not on developing a general and abstract concept of empowerment but instead on considering what meanings have been ascribed to the concept of EU consumer empowerment. This discussion then explored the use of several existing and dominant theories in the consumer law debate that have been used to contour the disciplines' understanding of the Commission's development of a consumer empowerment in policy and the Commission's use of law as a tool to empower consumers. In Chapters 4 and 5, the discussion then turned to developing another perspective on consumer empowerment. In these chapters, the discussion constructed the concept of consumer empowerment based on the narratives of the Commission as the entity who is responsible for the creation of the consumer empowerment agenda in EU consumer law. In this chapter, a final perspective and theory on EU consumer empowerment will be developed.

The discussion in this chapter will then answer the primary research question in this study of how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. The discussion in this chapter answers this research question by drawing together the findings from each of the previous chapters to answer the fourth sub-research question, which is what theory of EU consumer empowerment can be developed when the findings from Chapter 4 and 5 are put in dialogue with the abstract concept of empowerment developed in Chapter 2. The goal of the analysis in this chapter and the core contribution of this study is then to develop a novel and discipline-specific theory of EU consumer empowerment. This theory will develop an understanding of EU consumer empowerment as a multifaceted concept and as a practical approach. Moreover, this discussion will consider in detail the four dimensions of power – agency, structure, systems of knowledge and identity – that are at play when the Commission

uses secondary legislation as a tool to implement the practice of consumer empowerment.

To address the central question of this chapter and indeed this study, this chapter is divided into several parts where the analysis will be guided by the set of conceptual categories developed in Chapter 2. To begin, Section 2 considers what empowerment outcomes the Commission expects from the consumer empowerment agenda by ascertaining several empowerment goals and what counts as empowered consumer behaviour. Although it may appear counter-intuitive to begin with the outcomes of the empowerment agenda, it is necessary to begin a reinterpretation of the concept of EU consumer empowerment by first looking at what the Commission – as the empowering entity – intends the empowerment agenda to achieve. Establishing the intended outcomes of the consumer empowerment agenda enables a rethinking of what the broader aims and rationales are of the instruments of secondary legislation that have – in Chapters 4 and 5 – been qualified as empowerment measures and as tools for triggering the objective and subjective empowerment process. It will be shown that while the rights and obligations in the legal framework have not profoundly changed, the more radical transformation can be identified in the fundamental blueprint of consumer policy and in the underlying purpose of consumer law. This requires a rethinking of the established understandings of the purpose of consumer law and of the consumer empowerment agenda.

Following this, Section 3 will move from the broad aims of the Commission's consumer empowerment agenda to focusing on the specifics of how the aims of this agenda are to be achieved by using secondary law as a tool for empowering consumers. Section 3 then draws on the framework in Chapter 2 and the conceptual categories that view empowerment as both an objective and a subjective process that is pursued through highly context-specific empowerment strategies and tools. These conceptual categories guide the reinterpretation of the yardstick (dis)empowered consumer in the empowerment agenda, the broadening of the conditions that the Commission qualifies as disempowering consumers, and the strategies that the Commission has adopted to both objectively and subjectively empower consumers. The discussion in this section is integral for the reinterpretation of the EU consumer empowerment agenda as a complex and multidimensional concept because it will broaden several of the current narrow understandings of consumer empowerment that limit this concept to the rational and average consumer who is to be empowered through information duties.

Having established in Section 3 that secondary legislation is the Commission's primary tool for objectively and subjectively empowering consumers, Section 4 takes this analysis one step further by examining the four co-existing theoretical dimensions of power that both visibly and invisibly permeate the process of empowering consumers through secondary legislation. It is in this section that the most fundamental theoretical reinterpretation of the concept of EU consumer empowerment occurs. This analysis offers a radical rethinking of the power in consumer empowerment as being much

broader and more complex than the narrow view of power as agency. This conclusion is drawn by applying the four-dimensional model outlined in Chapter 2 to both the Commission's narratives on consumer empowerment and the legal rights and obligations that were qualified as the tools and context-specific strategies of empowering consumers through law in Chapters 4 and 5.

2. Rethinking the aims of the EU consumer empowerment agenda

The theoretical framework developed in Chapter 2 distinguished between the concept of empowerment as a process and empowerment as an outcome.¹ Empowerment as an outcome is then an operationalization of the results or ends that should ensue from a successfully implemented empowerment strategy that both objectively and subjectively empowers the disempowered actor. With this distinction in mind, the following discussion sets out to establish the empowerment outcomes the Commission intends to bring about. The implications of the answer to this question are significant because it is through the regulatory framework that these empowerment goals are to be achieved. Like the underlying purpose and function of consumer law changes in strategic policy, the goals and aims of the consumer empowerment agenda now appear to have a rationale that goes beyond maintaining the autonomy of the consumer and economic growth through mass consumption.

A second question also arises of what type of consumer the Commission intends to empower. Put differently, who is the empowered consumer? The analysis in this section then pursues these two questions to develop two perspectives that frame the various ways in which the Commission operationalizes consumer empowerment as an outcome. First, in a broad sense consumer empowerment is operationalized by the Commission as several concrete and desirable outcomes of strategic policy and secondary legislation. Second, while it is obvious to say that the consumer empowerment agenda aims to empower consumers, what is less clear is how the empowered consumer behaves. The following discussion will then consider how the Commission has operationalized EU consumer empowerment as a set of empowered consumer behaviours. Through this discussion it will be revealed that for the Commission, empowered consumer behaviours are considered to go beyond the consumer making an informed and rational choice.

¹ Marc Zimmerman, 'Empowerment Theory' in Julian Rappaport & Edward Seidman (eds), *Handbook of Community Psychology* (Springer Science 2000) 46.

2.1 The goals of the consumer empowerment agenda: rethinking empowerment outcomes

The discussion in Chapter 4 illustrated that following the Eurozone and financial crises, the reform of the internal market in 2007 and the adoption of a new vision of a 21st century social market introduced the new strategic objective of empowering consumers. The new vision of a social market economy was subsequently translated into the 2007 ‘Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them’ communication.² This strategic plan espoused the Commission’s political commitment to reconnect with EU citizens by adopting a strategy of consumer empowerment.³ In the years following the introduction of the consumer empowerment agenda, the result of the 2017 Fitness Check⁴ along with the 2018 New Deal for Consumers,⁵ the 2020 New Consumer Agenda⁶ and the 2020 New Circular Economy Action Plan⁷ have acted as a driving force behind changes to key legislative instruments in the horizontal consumer law *acquis*.⁸ This transformation is not only visible in the adoption of several directives, such as the RAD⁹ and the Omnibus Directive¹⁰ but also through the currently pending proposals for an amending directive on Empowering Consumer for the Green Transition¹¹ and an amending directive concerning the right to repair in the Sale of Goods Directive, with the possibility of a new directive on the right to repair.¹² These

² Commission, ‘EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them’ COM (2007) 99 final, 3

³ Noting that since the Single European Act and the Maastricht Treaty the aims of the then EEC have had a social element, but a European social policy did not begin to build traction until the Lisbon strategy in the 2000s. For a critical overview on the development of the social policy, specifically in the context of EU private law, see Hans Micklitz, ‘Transformative Politics’ in Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge 2020).

⁴ Commission, ‘Staff Working Document: Report on Fitness Check’ (Staff Working Document) SWD(2017) 209 final.

⁵ Commission, ‘A New Deal for Consumers’ (Communication) COM (2018) 183 final.

⁶ Commission, ‘New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery’ (Communication) COM (2020) 696 final.

⁷ Commission, ‘A New Circular Economy Action Plan for A Cleaner and More Competitive Europe’ (Communication) COM (2020) 98 final.

⁸ Marco Loos, ‘The Modernization of European Consumer Law: A Pig in a Poke?’ (2019) 27 *European Review of Private Law* 113; see also Mateusz Grochowski, ‘European Consumer Law after the New Deal: A Tryptych’ (2020) 39 *Yearbook of European Law* 387.

⁹ Directive 2020/1828(EU) 25 November 2020 on Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22/EC [2009] OJ L409/1.

¹⁰ This directive combined several amendments to the existing consumer law *acquis*. See Directive 2005/29/EU of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

¹¹ Commission, ‘Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC And 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information’ COM (2022) 143 final.

¹² Commission Initiative, Sustainable Consumption of Goods – Promoting Repair and Reuse <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 25 July 2022.

legislative transformations in horizontal consumer law follow the approach adopted prior to the New Deal for Consumers insofar as the focus remains on the withdrawal right, disclosure duties and consumer guarantees as the main instruments (legislative tools) for achieving broad consumer policy aims.¹³ It can be said, however, that the real shift has occurred conceptually in terms of the underlying political agenda, new rationales for market intervention, the evolving role of the consumer, and the evolving aims of the consumer empowerment agenda.¹⁴ This transformation is most evident in the new narratives on the economic and social role of consumer policy following the integration of environmental aims into the New Consumer Agenda in 2020.¹⁵ A similar change has taken place in the energy market with the recast of several directives and introduction of new legislation to bring about the policy aims of the 2016 Clean Energy for All Consumers communication and the 2019 Green Deal.¹⁶ Both horizontal consumer policy and energy policy are a part of the transformation of the character of the internal market away from a linear, unsustainable and environmentally-damaging economic model into a circular and carbon neutral economy decoupled from environmental degradation.

The Commission's narrative on the concept of fairness offers an example of the changing values that can be identified in consumer policy. In the 2018 New Deal for Consumers, the idea of fairness was tethered to the aim of ensuring that consumers can enforce their consumer rights against rogue traders and seek redress for harm.¹⁷ Following the New Consumer Agenda in 2020 and the New Circular Economy Plan in 2020, there is evidence of a new narrative developing regarding the concept of fairness, where the Commission has committed to speed up the 'fair' transition to a carbon neutral economy where no person and no place is left behind.¹⁸ A similar narrative exists in energy policy and the several recast directives with a consumer element, which were discussed in Chapter 5. This transformation in the energy sector entails both the adoption of a new vision of the market in strategic policy and a new narrative in the legislative interventions. This new vision/shifting narrative, in light of a standard of fairness where no person and no place are left behind, represents the beginnings of the acknowledgement that the systemic inequalities in society are posing real and problematic obstacles to equal opportunity for low-income and vulnerable energy consumers to participate in the green transition and access the same benefits of other consumers. Through developing a consumer empowerment strategy and through

¹³ Grochowski (n 8) 421.

¹⁴ Grochowski argues the point that the real transformation can be identified in the underlying political agenda of consumer policy. He makes this claim by assessing the legislative reforms after the New Deal for Consumers and the Commission's consumer policy strategies through a triptych of selected issues (vulnerability, autonomy and regulation) that form the 'conceptual backbone' of consumer law; see *ibid.*

¹⁵ 'New Consumer Agenda Strengthening Consumer Resilience for Sustainable Recovery' (n 6).

¹⁶ Commission, 'Clean Energy for All Europeans' (Communication) COM (2016) 860 final; Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

¹⁷ On this point see Chapter 4, Section 2.4.

¹⁸ On this point see Chapter 4, Sections 2.5 & 2.6.

redirecting existing and new secondary legislation towards the goal of empowering consumers, this example of the evolving narrative on ‘fairness’, when connected with consumer empowerment, questions the established understandings of what EU consumer empowerment is for, as outlined in detail in Chapter 3.

As the discussion in the previous two chapters has shown, the consumer empowerment agenda rather than diminishing in importance has instead become an increasingly central strategic approach for both connecting consumers to the Green Transition and utilizing consumers as a driving force for this pivotal social and economic transformation. In response to the political push to transition away from a linear economic model, Micklitz in 2019 posed the highly relevant question of what kind of protection consumers will need in the circular economy.¹⁹ More fundamentally, Micklitz observes that if both the transition to a circular economy and the sustainability aims in the Commission’s policy communications are to be taken seriously, our understandings of consumer protection and consumer law ought to then be at least rethought if not redesigned altogether.²⁰ The discussion in Chapters 4 and 5 shows that the Commission is already embarking on this redesigning of consumer law by amending and adopting new consumer legislation targeted towards the end of the Green Deal. This is the case irrespective of the potential argument that these legislative changes are neither as rapid nor as radical as is needed to bring about the transition to a circular and climate neutral economy as quickly as is necessary. For instance, in the 2020 New Consumer Agenda there is already a marked shift in the Commission’s narrative on consumer harm, which has expanded to classify new types and causes of consumer detriment that require legislative action to bring about the aims of the Green Deal, a point that will be considered in more detail in Section 3.2 of this chapter. The seeds of this narrative can be identified in earlier consumer policy including the 2007 Empowering Consumer communication where the Commission first tentatively connected the concept of the empowered consumer to sustainability aims. Following this, the 2018 New Deal for Consumers placed a renewed emphasis on sustainability but failed to make a connection between consumer and environmental policy.²¹ The Commission’s narrative in the most recent 2020 New Consumer Agenda on the other hand firmly integrates environmental aims into consumer policy, which has had implications for how we can understand the new goals and desired outcomes of the consumer empowerment agenda.

These new narratives in consumer policy contend that consumers face detriment from commercial practices such as greenwashing and a lack of truthful information on the sustainability of products. Moreover, the future detriment that future generations of consumers will suffer from the continued ecological exploitation of the

¹⁹ Hans Micklitz, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) 8 *Journal of European Consumer and Market Law* 229

²⁰ *ibid* 229.

²¹ On this see Evelyne Terryn, ‘The New Consumer Agenda: A Further Step Toward Sustainable Consumption?’ (2021) 10 *Journal of European Consumer and Market Law* 1–3.

planet is an underlying concern in the 2020 New Consumer Agenda and the 2020 New Circular Economy plan. These strategic communications highlight that consumers must have the ability to purchase environmentally- friendly products and be enabled to shift away from unsustainable consumption patterns to consuming goods in a more sustainable (circular) way. These are the specific goals of the 2020 agenda that serve the broader goals of von der Leyen and the Commission's political agenda. The first of their several political priorities between 2019 and 2024 is the European Green Deal, which sets out a roadmap for the economic, social and technological transformation of the EU's economy to an environmentally-sustainable, net-zero economy by 2050. This economic model, where no person is left behind, requires shifting to an economy where economic growth is decoupled from environmental degradation, moving away from the traditional internal market rationale of consuming more to stimulate growth, and acknowledging that growing systemic inequality is negatively affecting equality of opportunity.²²

Achieving the objectives of the Green Deal entails changing both consumer attitudes as well as unsustainable patterns of consumption. This includes both attitudes towards the goods that are purchased and how these goods are used and discarded during their lifecycle. A similar change is required regarding the consumption of resources, such as services for electricity, gas and water. In the legal debate, there is a tendency to evaluate strategic consumer policy, the legislative initiatives directed towards sustainable consumption, and the empowerment agenda by considering whether information duties can impact market standards.²³ These observations are just one piece of the bigger picture.²⁴ Unsustainable consumption patterns are a key problem that must be targeted if the Green Deal is to be achieved. As Micklitz frankly puts it by referring to Trentman's historical account of the evolution of consumption: "The circular economy requires a human being which accepts to be steered into the democratically recognised 'right' direction, at least if we are ready to learn from the 500 years of the 'Empire of Things'."²⁵ In a 2019 reflection paper, the Commission acknowledges this burden that private, mass consumption places on the environment: "our culture of consumption has resulted in excessive resource extraction and growing pressures on natural capital and climate."²⁶ Consumer attitudes regarding the appropriateness of how they should consume – the move from a throw-away culture for instance – and the inability for some consumers to consume sustainably caused by systemic social inequalities are in my view pressing underlying and hidden concerns and objectives of

²² Commission, 'A European Green Deal: Striving to be the First Climate-Neutral Continent' <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 26 July 2022.

²³ Vanessa Mak & Evelyn Terry, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' 2020 *Journal of Consumer Policy* 227, 230 – 231.

²⁴ As Micklitz puts it "there are the lawyers, who tend to break down the big issues into nitty-gritty legal questions of how and by what means the circular economy and sustainability can be squeezed into the existing legal regimes", see Micklitz, *Squaring the Circle* (n 19) 229.

²⁵ *ibid* 233.

²⁶ Commission, 'Towards a Sustainable Europe by 2030, Reflection Paper' COM (2019) 22 final, 15.

the 2019 Green Deal, the 2020 New Consumer Agenda and the 2020 New Circular Economy Plan and in the recent strategic policies in the energy market. These concerns and objectives will remain obfuscated if the debate cannot move beyond an economic view on the role of information duties. Put differently, putting aside the economic lens that focuses on the Green Transition through the interrelation between the concepts of supply and demand, we can isolate the issue of unsustainable consumption from unsustainable production.²⁷ It is a statement of fact and not a question of ethics that if the global population does not change consumption patterns by 2050, we will require three times the resources that the planet can offer.²⁸ At least on paper, the EU's pledge to be a global trailblazer in the transition towards sustainability, the commitment to achieving a climate neutral economy by 2050, and the move towards a circular economy can put aside at least some doubts as to how the EU intends to proceed in this regard.²⁹ The contentious issue is how the EU institutions will approach tackling *both* issues of unsustainable consumption patterns and methods of production. It is my contention that one outcome of the consumer empowerment agenda is to bring about sustainable consumption patterns and methods of production but not by relying on the legislative tools that enhance consumer autonomy and choice, a point that will be considered in the remainder of this section and also in the discussion in Section 4 of this chapter on what it means to empower consumers through law.

Turning back to the Commission's intended outcomes of its consumer empowerment strategy, information duties and the right of repair can be rethought as not simply functioning as a supply-push mechanism for stimulating sustainable production but can also be framed as aiming towards changing consumer attitudes and making sustainable consumption practices the norm. Of course, this proposition is open to the criticism that information duties are ineffective in achieving these aims because social norms and consumer attitudes are not sufficiently taken into consideration by the EU.³⁰ Nonetheless, such criticisms do not negate the fact that for the Commission information duties are part of the process aimed towards achieving a shift in consumer attitudes and consumer culture regarding the appropriateness of sustainable consumption. For instance, in the preparatory documents for the initiative on Empowering Consumers to Play an Active Role in the Green Transition, several findings from Eurobarometer surveys are cited by the Commission as indicators that consumers are already willing to make the sustainable choice and that information on the

²⁷ This is not to imply that in practice both are not interrelated but that it is worth fully engaging in a consideration of both sides of the coin and from non-economic perspectives such as the cultural and social dimensions of consumption.

²⁸ See United Nations, 'Goal 12: Ensure Sustainable Consumption and Production Patterns' <<https://www.un.org/sustainabledevelopment/sustainable-consumption-production/>> accessed 28 July 2022.

²⁹ Commission, 'Towards a Sustainable Europe by 2030, Reflection Paper' COM (2019) 22 final 31.

³⁰ See for instance Caitlin Cseres, 'Consumer Social Responsibility in Dutch Law A Case Study on the Role of Consumers in Energy Transition' (2019) 4 *Erasmus Law Review* 94.

sustainability of a product is part of ensuring consumers can make such choices.³¹ Stimulating sustainable consumption patterns and the move to a circular economy can be qualified as an end of the consumer empowerment agenda as well as a potential push factor for triggering a change in production and market standards. To give an example, the proposal for a directive on Empowering Consumers for the Green Transition was set in motion as part of the Commission's political commitments in the 2020 New Consumer Agenda and the 2020 New Circular Economy Plan. The result of a 2018 behavioural study on Consumer Engagement in the Circular Economy illustrated, through a behavioural experiment, that providing consumers with information on the durability and reparability of a good was highly effective in shifting consumer purchasing towards choosing the more durable and repairable product (the sustainable choice).³² The impact assessment for the proposal on the Empowerment for the Green Transition directive took these findings into account, where consumer information on the reparability and durability were seen as successful drivers in triggering the sustainable choice.³³ Moreover, the recent 2022 proposal for a regulation that will recast the EDD is aimed at making sustainable products the norm by expanding the scope of the current directive horizontally to include all physical goods, with some exceptions.³⁴ By setting sustainability standards for the goods that can be lawfully sold on the market, the proposal for the ER is specifically aimed towards regulating market standards rather than depending on consumer choice to stimulate sustainable production. In this regard, the narrative that consumer empowerment is achieved by empowerment through information duties and that consumers are responsible for changing standards by 'voting with their wallets' becomes rather thin. In contrast, it appears that changing consumer attitudes towards consumption and facilitating a shift to sustainable consumption patterns can be framed as a primary goal of the Commission's consumer empowerment agenda.

To summarize, empowering consumers has become an integral supporting strategy of the Commission's goal to begin transitioning towards a circular, net-zero economy and the other aims set out in the Green Deal. Consumer policy, consumer protection and consumer empowerment have become entangled and tied up in

³¹ Commission, 'Preparatory Study to Gather Evidence on Ways to Empower Consumers to Play an Active Role in the Green Transition' (2022) 29 – 30 <https://ec.europa.eu/info/sites/default/files/5_1_186786_prep_stu_prop_em_co_en.pdf> accessed July 2022.

³² Commission, 'Behavioural Study on Consumers' Engagement in the Circular Economy Final Report' (2018), 10.

³³ The EU institutions do not wholly rely on the demand side to speed up the Green Transition towards a net-zero and circular economy. There is also significant legislation being put in place that impacts producers and the supply side, for instance the Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC' COM (2022) 142 final.

³⁴ This includes food, feed, medicinal and veterinary products, living plants and animals, and products of human origin; see *ibid* 142.

achieving these environmental and sustainability aims, which push the scope of consumer law beyond the pursuit of the economic interests of consumers. These new aims of the consumer empowerment strategy cannot be adequately or convincingly squared with or explained through the older aims of consumer empowerment in policy predicated on the market rationale that focused on stimulating consumers to consume in greater volumes, to consume without a regard for the environment, to dispose of faulty products, and to have disdain for the 'second-hand' product market. Conceptually, this puts a distance between the aims of the consumer empowerment agenda and the market rationale. Moreover, the view that the aims of the consumer empowerment agenda only seek to maintain consumer sovereignty and consumer choice can be challenged.

As a final remark, the qualification of what counts as an empowerment outcome and whether this outcome has been achieved can be operationalized from two perspectives. First, for the entity that intends to empower an actor or group of actors, successful empowerment depends on whether the goals of the empowerment agenda have been achieved. For the Commission, this could be when consumers living in energy poverty participate in the clean transition by making their homes more energy efficient or by joining renewable energy communities. In this way the outcomes of the consumer empowerment agenda are unique. For the Commission, the goal of the consumer empowerment agenda is to use secondary legislation to create an enabling environment and to then steer consumer behaviour towards socially desirable outcomes. Second, when consumer empowerment is conceptualized as a subjective process, it then falls to the actors who are the focus of the empowerment agenda to determine if they are subjectively empowered. In other words, while it is possible to theorize about the ways in which subjective empowerment can become manifest through empowered behaviours, it is not possible to pre-emptively qualify what empowerment actually feels like for those individuals. The argument in Chapter 2 that the continued subjective disempowerment of an actor will undermine the efforts made to objectively empower forces the conceptual debate on consumer empowerment to adopt more 'reality' on what counts as empowerment outcome. The implications of this claim on the aims of a consumer empowerment agenda will be considered further in the discussion in Chapter 7.

2.2 The empowered consumer: qualifying empowered behaviours

If we are to take the recent changes in the Commission's narratives and the underlying conceptual blueprint in consumer policy and energy policy seriously, it is then necessary to consider what types of consumer behaviour can be qualified as an empowerment outcome and whether it is possible to operationalize these behaviours as more than the consumer making an informed choice. Put differently, the question here is what types

of consumer behaviour can be operationalized as empowered behaviours. However, several challenges arise when operationalizing consumer empowerment by focusing on consumer behaviour. First, the desired empowered consumer behaviours presented by the Commission in the strategic vision of consumer policy between 2007 and 2019, in the Staff Working Paper on Empowerment from 2011 and in the Eurobarometer from 2014 all portray several different and at times conflicting narratives on what counts as empowered consumer behaviours than the narratives in the 2020 New Consumer Agenda and the 2020 Circular Economy Plan. The same can be said of the behaviours of the empowered energy consumer and the development of the consumer empowerment agenda in energy policy prior to and post 2015. This can be summarized through the preliminary observation that was made in Chapter 4 that the image of the empowered consumer is fragmented.³⁵

Second, when operationalizing consumer empowerment as set of desired consumer behaviours, the focus of analysis should not be solely on the Commission's narratives in its policy communications. A focus on strategic policy runs the risk of consumer empowerment being too narrowly construed. In other words, the text and narratives of the Commission that are finalized in secondary legislation have an integral role in creating the actual (objective) conditions in the marketplace that are either conducive or detrimental to consumer empowerment. When constructing how empowerment is operationalized from a behavioural perspective, it is therefore also relevant to consider the text and narratives in legislation with an empowerment rationale, including the preparatory documents and the preambles.

With both of these points in mind, the following discussion will offer an interpretation of the Commission's narratives with respect to what these narratives tell us about what the behaviours of the empowered consumer should look like according to the Commission. It is important to note that the consumer may consider themselves to be empowered and to behave in an empowered way that manifests in a behaviour that is neither defined nor predicted by strategic policy and empowerment legislation as an empowerment outcome.³⁶

To begin with the issue of the diverse behaviours of the empowered consumer, it is my view that the following analysis should start with the policy communications that first introduced the consumer empowerment agenda. The empowered consumer was first profiled by the Commission as a rational and informed consumer in a way that is similar to the average consumer concept developed by the Court.³⁷ Put differently, in earlier consumer policy that introduced the concept of consumer empowerment in 2007, the aim of empowering consumers entailed priming an individual in their role as the consumer so as to successfully operate in the liberalized internal market. In this earlier

³⁵ See Chapter 4, Section 3.2.

³⁶ This point will be returned to in Chapter 7, Section 4.3.

³⁷ The profile of the empowered consumer will be discussed in detail subsequently in Sections 2.2 & 3.1 of this chapter.

policy, consumers were qualified as empowered when they actively participated in the internal market. The empowered behaviour as participation could be operationalized as the consumer making a purchase and purchasing products across borders from other Member States. This early view of the empowered consumer entails the consumer behaving in a mobilized way. In this sense, mobilized consumer behaviours are the operationalization of the consumer's subjective willingness to use and take advantage of their rights. This corresponds with the view throughout early consumer policy that once consumers have rights, they will then become confident and assert them. Idealistically, the empowered consumer was then the consumer who was sufficiently informed and knowledgeable about the legal rights made available to them, consisting of information duties alongside mandatory consumer rights and mechanisms that offer access to redress. Therefore, this empowered consumer could recognize when their legal rights had been breached. The assumption of the Commission in these narratives in strategic policy was that this empowered consumer would report a problem when they saw one and, if necessary, seek redress if they became victims of fraud or a scam. As the Commission put it in the staff working paper on empowerment, the empowered consumer would: "[...] complain and seek redress when necessary".³⁸ This entails the empowered consumer actively complaining on their own behalf or on behalf of other consumers.³⁹ Making a complaint involves triggering either legal or non-legal dispute resolution mechanisms.⁴⁰ Less explicitly, the empowered consumer then also functioned as a private regulator of consumer law. Their behaviour could be qualified as empowered when the consumer makes a complaint, seeks redress and enforces their consumer rights. All of these empowered behaviours correspond with the Commission's idea of the empowered consumer from the 2012 strategic communication, which contends that the empowered consumer is one who: "can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced."⁴¹ These empowered behaviours do not represent a departure from what was expected of consumers in strategic policy prior to the adoption of the consumer empowerment agenda. For instance, the discussion of the unamended versions of CRD and the UCPD outlined in Chapter 4 revealed that these instruments did not have an explicit consumer empowerment rationale. Nonetheless, it was still possible to qualify the earlier versions of these instruments as legislative measures with an empowerment rationale because to date, they have created an internal market that facilitates forms of operationalized empowered behaviour. The same can be said of the more recent introduction of legislation on collective representation and on the updated rules on alternative dispute resolution and online dispute resolution.

³⁸ Commission, 'Commission Staff Working Paper on Consumer Empowerment in the EU' SEC(2011) 469 final 2.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Commission, 'A European Consumer Agenda - Boosting Confidence and Growth' (Communication) COM (2012) 25 final 1.

Beginning with the 2018 New Deal for Consumers and the adoption of the most recent strategic vision for consumer policy in the 2020 New Consumer Agenda, a new set of empowered behaviours were introduced in the Commission's narrative. To reiterate several of the propositions offered earlier, the purpose of consumer policy is changing as it becomes merged with environmental policy and is drawn within the scope of the Green Deal. While earlier consumer policy pursued the market rationale of facilitating more consumption to stimulate growth, the new market rationale is economic growth that is decoupled from environmental degradation. This requires wide-ranging systemic transformation of the internal market where the ethics of consumption and the role of the empowered consumer are integral parts.⁴² Whether in practice consumer policy is currently going far enough to play a productive role in the radical transformation to a circular and net-zero economy remains to be seen. It is enough, however, for this discussion on how to operationalize empowered consumer behaviours that such a shift can be identified in strategic policy. With this shift, the operationalization of an empowered behaviour simply as participation by engaging in every increasing level of consumption is too narrow. It is my view that the empowered behaviour should be qualified as the purchase that is environmentally friendly, that is sustainable or that is energy efficient. Moreover, the proposed ER will introduce sustainability requirements for goods that can lawfully be sold in the market. Following the adoption of this regulation, the empowered consumer behaviours will not be qualified as consumers making the sustainable choice between environmentally-friendly and environmentally-damaging products. Instead, consumer choice will be operationalized as consumers making the most sustainable choice between products that have already been produced in an environmentally-sustainable way. As an aside, by addressing production and supply, the proposal for the ER is an indicator that for the Commission one of the goals of the empowerment agenda is not to make consumers (wholly) responsible – as the demand side – for driving the change away from ecologically-unfriendly market standards.

With the pending proposal that will amend the SGD, it remains to be seen how this instrument will be a part of the transition to a circular economy and what the role of the empowered consumer will be. The extent and duration of the consumer's right to repair and whether it will be placed above replacement in the hierarchy of remedies is a distinct possibility. Nevertheless, the empowered behaviour of the consumer can be operationalized as the consumer treating products in a sustainable way during the product's lifecycle. This is an empowered behaviour irrespective of what methods will be used to induce the consumer to behave more sustainably. Put differently, consumers are empowered when they behave in a sustainable way irrespective of whether this behaviour is brought about through the consumer's choice to treat a good in a

⁴² On this, see the introductory chapter and several contributions in David Crocker & Toby Lindon (eds), *Ethics of Consumption: The Good Life, Justice, and Global Stewardship* (Rowman & Littlefield Publisher 1997).

sustainable way during its lifecycle or if they are obligated to do so because repair is prioritized over replacement. Looking forward, the strategies to incite this empowered behaviour may include legislative measures that stimulate the second-hand market of consumer goods or the servitization of several types of products from white goods to clothing. Following this, the empowered consumer will become an ethical consumer but not in the individualised sense that they are making ethical choices according to their subjective morality. Instead, the empowered consumer is better framed as a 'green' consumer because they will collectively change their consumption patterns away from the linear disposal of goods towards behaviours that reuse, refurbish and recycle. This is not necessarily the responsabilization of the consumer where the burden is put on the individual consumer to make the ethical choice. The ER for instance places the burden on the producer to ensure the goods available meet environmental standards. Instead, this is the changing of the structural bias in the market that will make unsustainable consumption inappropriate by making felicitous the consumption patterns that are required in the circular economy.

There is then a conceptual distinction to be made between the ethics of consumption, ethical consumerism and the ethical consumer. The ethics of consumption entails a consideration of consumption as the object of moral evaluation,⁴³ such as questioning the complicity of unrestrained consumption in rising global inequalities and worldwide environmental degradation.⁴⁴ Another perspective problematizes consumption as an issue stemming from social and economic policies.⁴⁵ Ethical consumerism/ethical consumption is not concerned with debating the ethics of consumption but instead adopts the normative starting point that certain consumption practices are ethical. Consumption is then the medium – rather than the object – of moral and political action.⁴⁶ These consumption practices are wide ranging and include choosing fair trade products, sweatshop-free clothing, dolphin-free tuna, non-GMO foodstuffs, cosmetics free from animal testing and – generally speaking – goods that promote social and environmental sustainability. Ethical consumerism is also viewed as a form of political activism where consumers 'vote with their wallet' with either positive consumption or boycotting. In this way, the market can be framed spatially as the site of ethical activism.⁴⁷ The ethical consumer is then both a normative consumer image and a subjective consumer identity. As a normative image, the ethical consumer considers additional moral criteria when making a purchasing choice. This does not entail a rejection of the price and quality as impacting choice. The ethical considerations

⁴³ *ibid* 1–19.

⁴⁴ See Juliet Schor, 'A New Critique of Consumer Society' in David Crocker & Toby Linden (eds), *Ethics of Consumption: The Good Life, Justice, and Global Stewardship* (Rowman & Littlefield Publisher 1997).

⁴⁵ David Luban, 'The Political Economy of Consumption' in David Crocker & Toby Linden (eds), *Ethics of Consumption: The Good Life, Justice, and Global Stewardship* (Rowman & Littlefield 1998)

⁴⁶ *ibid* 21.

⁴⁷ On the importance of spatial context for ethical/green marketplace behaviours, see for example: Andreas Chatzidakis, Pauline Maclaran & Alan Bradshaw, 'Heterotopian Space and the Utopics of Ethical and Green Consumption' (2012) 28 *Journal of Marketing and Management* 494.

of a consumer are motivated by subjectively internalized norms that the consumer considers to be appropriate. These norms can be informed by, for example, politics, religion or spirituality. The consumption of a product deemed ‘ethical’ by the individual consumer plays a role in constructing the consumer’s identity as an ethical consumer.

It is my view that the profile of the empowered consumer should not be conflated with the normative profile of the ethical consumer. Ethical consumption entails an individualized choice based on the consumer’s personal morals and ethics. It is a form of identity and a source of ontological security. Put differently, the identity of the ethical consumer is a bottom-up process of identity construction and can be imposed as a top-down process through 3-D discursive consciousness raising. To give an example, animal rights campaigners may trigger a consumer to avoid meat products or brands that do not adopt a certain level of animal welfare. Other consumers will avoid fast fashion and purchasing products produced through slave labour. While an ethics of consumption can be identified in various EU policies, the EU consumer empowerment agenda does not aim to empower the ethical consumer but instead a ‘green’ consumer who engages in sustainable consumption patterns. For instance, a self-identified ethical consumer may choose an organic product that is animal friendly but environmentally unsustainable because it has a higher carbon footprint than non-organic foodstuffs. Organic milk, for example, has a higher carbon footprint than organic plant-based milk products. The sustainability goals of the consumer empowerment agenda are broader than this and pursue the aim that *all* consumers must be empowered to engage in sustainable consumption patterns, regardless of their personal ethics. The consumer who makes the (most) sustainable choice as a 3-D taken for granted practical consciousness is what qualifies the empowered consumer as the green consumer. The consumer empowerment agenda is then subtly concerned with the invisible process of the social construction of consumer identity.

In the energy market, the focus of the consumer empowerment agenda is not on the transition to a circular model but the transition to a decarbonized and energy-efficient economy. The consumer empowerment agenda is then also connected to sustainability targets, where EU citizens are addressed in their role as consumers because household consumption of resources such as gas and energy are responsible for a quarter of the energy consumption in the market. Putting it bluntly, the Green Transition will fail if all sectors, industries and persons in every EU Member State cannot participate. This is an implicit driving force behind the Commission’s political promises that the Green Deal will leave no person and no place behind. Indeed, it has been well established that the race against climate change and the destruction of our planet cannot be successful if every single person in all countries cannot participate.⁴⁸

⁴⁸ As an aside this also entails the West’s financial support of developing countries to also undergo the transitions that the EU is currently attempting to speed towards. For a discussion, see Anna Wiczorek, ‘Sustainability Transitions in Developing Countries: Major Insights and their Implications for Research and Policy’ (2018) 84 *Environmental Science & Policy* 204.

The recent reform of the energy market entailed changing the architecture of the energy industry by putting a framework in place that enables the transition from the centralized to decentralized provision of information. The empowered consumer behaviours in this market are the sustainable and efficient consumption of these resources. For instance, empowered consumer behaviour involves the consumer becoming aware of their energy consumption and making more efficient energy choices. Switching between providers is an empowered behaviour if it is done to get a better deal that reduces energy costs. Becoming a prosumer is an empowered behaviour because it entails decentralizing the energy system that leads to the production of environmentally green energy and energy security. Participating in local energy communities and citizen initiatives can also be operationalized as empowered behaviours. Likewise, an uptake in energy-efficiency measures for their households is an empowered behaviour. The analysis in Chapter 5 illustrated the emphasis that is being placed in consumer legislation on empowering all consumers that stresses that the Member States must take measures to ensure the inclusion of vulnerable energy consumers and energy consumers living in energy poverty.

2.3 Interim conclusions

Several conclusions can be drawn from this discussion on how the Commission has operationalized consumer empowerment as an outcome and how this operationalization has changed over the last decade. The climate and environmental crises have changed the aims of consumer policy and energy policy. With these changes, the consumer empowerment agenda has become the dominant strategic approach in consumer and energy policy for engaging with EU citizens in their role as consumers. While the empowerment agenda was once focused on driving economic growth by stimulating growth through increasing consumption, the twin-goals of the empowerment agenda have now shifted to achieving the transition to a circular economic model and a decarbonized market. Both of these goals can be operationalized as empowerment outcomes. This qualification that the Green Transition is an empowerment outcome has offered key insights into rethinking how the rationale of empowering consumers has changed.

This operationalization of the broad aims of the Commission empowerment agenda tells us little, however, about the more specific consumer empowerment outcomes that the Commission hopes to achieve by making changes to the horizontal consumer law framework and legislation in the energy market with a consumer element. The second part of the discussion then considered the several new ways in which empowered consumer behaviours can be operationalized when the overarching purpose

of the agenda is to achieve the Green Transition. First, it was shown that in earlier policy documents, empowered consumer behaviours entailed the consumer making the informed and rational choice, the utilization of available consumer rights, and the triggering of enforcement mechanisms to claim redress for harms suffered by the illegitimate behaviour of rogue traders. In short, the empowered consumer was a mobilized consumer. Second, this was contrasted with a new set of empowered consumer behaviours that have emerged in the last several years. The mobilized behaviours of the empowered consumer have changed. Empowerment is no longer qualified as unbridled consumption but instead consuming in a sustainable way. The empowered consumer is one who chooses the energy-efficient product, or the environmentally-friendly product and it is the consumer who reduces their energy use. The empowered consumer is the consumer who is aware of their energy consumption and the environmental consequences of the consumption patterns. The empowered consumer is an energy prosumer or renewables self-consumer, either individually or collectively, by participating in renewable energy communities or local heating systems. Following the amendments to the SGD, the empowered consumer is one who repairs goods rather than replacing them or who chooses a second-hand good rather than a new good. When consumers cannot behave in this way because of an objective obstacle, then they are objectively disempowered and if they choose not to behave in these ways, then they are subjectively disempowered. In short, empowered consumer behaviours can be operationalized in several ways that are more complex and wide-ranging than the current operationalization that empowered consumer behaviours consist of the consumer making the rational and informed choice in a linear economic model.

3. Rethinking the process and strategies of EU consumer empowerment

Having established several of the outcomes that the Commission aims to achieve through its consumer empowerment agenda, the rethinking of the concept of EU consumer empowerment then turns to the question of the Commission's approach to consumer empowerment as a practice. The question that is considered in the following discussion is how the Commission intends to achieve these empowerment outcomes by using secondary legislation as a tool. What are the legal rights and obligations that the Commission uses as context-specific strategies for the process of empowering consumers? Answering this question becomes highly relevant when it is acknowledged that within consumer law scholarship on consumer empowerment there tends to be a narrow view of the legislative tools in the Commission's empowerment toolbox. The discussion of what counts as consumer empowerment for the consumer law debate in Chapter 3 determined that the aims of the EU consumer empowerment strategy are primarily defined as being pursued through the information model in the consumer law

framework and to a lesser degree through enforcement mechanisms and measures that reinforce the consumer's capacity to claim redress. It was also established that the debates on consumer empowerment generally do not adopt a more nuanced view of consumer empowerment that conceptualizes empowerment as a process. Consequently, the framing of empowerment as a process that consists of an objective and subjective dimension is absent. The concept of disempowerment is also neglected and consequently so too is the objective and subjective dimension of disempowerment.⁴⁹ The central question in this section then aims to answer how, in light of the analysis in Chapters 4 and 5, can the processes, strategies and tools of the Commission's consumer empowerment strategy be reinterpreted using these neglected conceptual categories which were developed in framework in Chapter 2.

Several potential difficulties can arise when answering this question by applying these conceptual categories of empowerment as a subjective and objective process and the related concepts of subjective and objective disempowerment. The Commission's narratives in policy and secondary legislation do not make explicit the content of what it considers to constitute the concepts of 'power' and 'disempowerment' that support its consumer empowerment strategy. Instead, these concepts of power and disempowerment instead become manifest in other terminology such as the consumer interest, consumer detriment, and consumer vulnerability/weakness. The question that follows is how the strategic policies and consumer legislation analysed in the previous chapters can be interpreted so as to deconstruct what counts as objective and subjective consumer disempowerment and what the processes are for empowering these consumers both objectively and subjectively. The argument has already been made in Chapter 5 that the consumer's disempowered position can be identified by examining what is qualified by the Commission in policy as the cause of *inappropriate* sources of harm (detriment) for consumers in the market.

The first step for answering the central question of this section then entails a reinterpretation of what consumer image or yardstick consumer the empowerment agenda has been developed around. It is my view that the rational consumer concept and the average consumer benchmark is too narrow for this task. The second step is to then examine the text in both policy and the legislation that were qualified as empowerment measures. The aim here is to construct the objective obstacles that the Commission qualifies as precluding empowerment and so are the cause of disempowerment and that require such legislative interventions. Answering this latter question requires identifying the obstacles to consumer empowerment that are made visible and explicit in the policy communications and legislation detailed in Chapters 4 and 5. The third step requires acknowledging that consumer (dis)empowerment is not only an objective but also a subjective phenomenon. This raises the twofold question as

⁴⁹ The exception being the work of Ioannidou; see Maria Ioannidou, 'Effective Paths for Consumer Empowerment and Protection in Retail Energy Markets' (2018) 41 *Journal of Consumer Policy* 136.

to whether the subjective dimension of consumer (dis)empowerment is explicitly acknowledged by the Commission in policy and legislation and what hidden narratives on subjective (dis)empowerment can be drawn out. Noting that these hidden narratives on subjective consumer disempowerment that can be deconstructed from these texts are most likely unintentional on the part of the Commission but nonetheless relevant. The fourth step focuses on the more concrete question of what actions/context-specific empowerment strategies has the Commission adopted to trigger the process of empowering EU consumers both objectively and subjectively.

3.1 Beyond rationality: the disempowered consumer as the conceptual starting point

In rethinking the aims (outcomes) of the Commission's consumer empowerment strategy earlier in this chapter, it was considered what consumer behaviours can be qualified as empowered behaviours. What remains unclear, however, is the question of who is the consumer that the Commission intends to empower? The answer to this is important because the analysis in both Chapters 4 and 5 indicates that there is a growing disconnect between the type of consumer – the rational and average consumer – that the debate considers to be the subject of the empowerment agenda and the broadening of the empowerment agenda by the Commission in recent years to address consumers that have been traditionally considered to be excluded by the dominant yardstick consumer concepts in strategic policy. Following this, the discussion in this section will not adopt the perfectly rational consumer as the starting point for analysis but instead the binary image of the disempowered consumer who is to become empowered as a consequence of the Commission's empowerment strategies.

Implicit throughout the discussion in this section – and indeed this study – is the centrality of the consumer for the consumer empowerment agenda. For the legal debate, the consumer is both a legal category and a normative entity. From a regulatory perspective, the concept of the consumer serves to distinguish when an individual behaves in a particular way that this conduct qualifies this actor as falling within the scope of secondary legislation with a consumer element. Second, the consumer is also a normative entity with several identities (images) that function as a lens for the scholarly debate to frame their analysis of EU consumer policy and law. In other words, the consumer images/yardsticks are theoretical mechanisms that allow for a discussion of, for instance, the level of consumer protection that legislation affords in the market or for assessing the standards that the Commission has set out in policy. It is then necessary to also acknowledge that consumer policy uses a particular view – or image – of the consumer as a regulatory yardstick because policy must be directed towards the protection of someone. The Commission must then invariably tackle the question of what kind of consumer needs protection, what does this consumer need to be protected

from, and what steps are required to remedy the undesirable and inappropriate conditions in the market that cause consumer harm and detriment when such detriment is an impediment to the functioning of the internal market. Asking these types of questions leads to several conclusions regarding what, in practice, the level of protection is in the market, what according to the Commission are the legitimate interests of market actors, and relatedly what standards have been set in the market.

It is my view that it has become a truism in consumer law scholarship that this consumer image is always – at least at its base - the rational or the average consumer. Put differently, it has become an undisputed truism the confident consumer is the rational consumer and so too is the vulnerable consumer. Hence, the consumer who can be empowered through consumer legislation is also traced through consumer policy back to the image of the rational consumer as a regulatory yardstick. I do not argue that this is not the case nor that the image of the rational consumer is unrelated to consumer empowerment but rather that the rational consumer image offers an unhelpfully narrow lens. This normative image does not facilitate a holistic analysis of the obstacles – both objective and subjective - that are presented by the Commission in its narratives in consumer policy as preventing consumers from behaving in an empowered way. This narrow lens has tended to bring about the conclusion in the literature on empowerment that, from the perspective of the Commission, it is imperfect information that poses the primary obstacle to consumer empowerment. Considering the analysis in Chapters 4 and 5 and the discussion so far in this chapter, this is an inadequate view of the obstacles that the Commission has more recently identified in both policy and law as posing barriers to consumer empowerment. I then propose that the image of a disempowered consumer provides a more useful alternative because it offers an adequately broader conceptual starting point than the rational consumer when the goal is to holistically examine what the Commission considers to be the cause of consumer disempowerment. This disempowered consumer image as a yardstick consumer can be constructed by re-examining the analysis in Chapters 4 and 5 that discussed the several conditions qualified by the Commission in strategic policy and secondary legislation as preventing consumers from behaving in an empowered way.

While it may seem like a logical correlation with the concept of the disempowered consumer, the terminology of the ‘weak’ consumer will not be used in the following discussion on the disempowering conditions acknowledged by the Commission in policy and law. First, the Commission does not refer to consumers as ‘weak’. Instead, this terminology comes from the Court⁵⁰ and from the academic debate.⁵¹ In my view, the term ‘weak’ consumer is problematic both conceptually and

⁵⁰ See for instance the *Océano Grupo* ruling where the Court classified the consumer as the ‘weaker’ party *vis-vis* the trader, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98), *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) & *Emilio Viñas Feliú* (C-244/98) [2000] ECR I- 4941, para 25.

⁵¹ See Chapter 3, Section 2.4; also noting that the debate reads the term ‘weak’ from consumer policy documents when this terminology is not used in the document, see for example Eleni Kaprou, ‘The Legal

normatively. The criticism has been made that consumer policy does not view consumers as being weak and instead takes the rational consumer as the starting point. In this regard, the term weak is value-laden because it gains meaning from paternalistic-leaning theories of consumer protection.⁵² While I take a neutral perspective on this normative stance, I do see this normative standard of what counts as consumer weakness as having led to a debate that has disconnected the consumer empowerment agenda from the ways in which the Commission *does* consider the consumer to be disempowered/disadvantaged. Second, it is my view that the understandings in consumer law scholarship regarding what counts as the ‘weak’ consumer that are contoured by national perspectives on consumer protection may be static and limited by such national approaches and understandings. If what counts as ‘weakness’ is fixed, this then precludes analysing the dynamic ways that consumer disempowerment has shifted and evolved in EU consumer policy in tandem with societal developments and challenges, such as the Covid-19 pandemic and the Green and Digital Transitions. Third, the same concerns may all arise regarding the conceptual content of the ‘vulnerable’ consumer because the understandings of this consumer concept are equally value-laden.⁵³ This vulnerable consumer concept is also conceptually narrow and refers to certain groups of market actors with specific characteristics which cause vulnerability, such as age or infirmity. Like the concept of the ‘weak’ consumer, the vulnerable consumer concept is then too narrow to offer an adequately broad consideration of the objective obstacles laid out in consumer policy that the Commission considers to be a barrier to consumer empowerment. In short, it is my view that each of these shortcomings results in a discussion that is focused on the yardstick consumer itself rather than a discussion of the changes that are taking place in policy that acknowledges new types of consumer harm and detriment, which may be at odds with the established consumer images that currently guide the scholarly debate on consumer empowerment.

3.2 Rethinking the conditions that objectively disempower consumers

The framework developed in Chapter 2 distinguished between objective and subjective (dis)empowerment. The objective disempowerment of an actor is caused by the conditions in the actor’s environment rather than internalized, subjective conditions. To

Definition Of ‘Vulnerable’ Consumers in the UCPD: Benefits and Limitations of a Focus on Personal Attributes’ in Christine Riefa & Séverine Saintier (eds) *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2021).

⁵² See for example Vanessa Mak, ‘The Myth of the ‘Empowered Consumer’ - Lessons from Financial Literacy Studies’ (2012) 1 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 254; Norbert Reich, ‘Vulnerable Consumers in EU Law’ in Stephen Weatherill & Dorota Leczykiewicz (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016).

⁵³ Take for instance the vulnerable consumer standard in the UCPD; see the Unfair Commercial Practices Directive, art 5(3).

substantiate the content of the practice dimension of the EU consumer empowerment agenda, the question that arises is what obstacles are acknowledged by the Commission as being a cause of consumer disempowerment. Put differently, the consumer empowerment agenda is tied up in the understanding of what consumer interests – according to consumer policy and law – are legitimate and what types of consumer harm are inappropriate and require action through legislative intervention. Following this, the causes of consumer detriment and harm in policy and secondary law represent the objective obstacles that the Commission – as the empowering entity – considers as standing in the way of empowered behaviours. It is generally the case that consumer policy and the regulatory framework take the obstacles that objectively disempower EU consumers as a starting point, at least explicitly. This is confirmed by the position that consumers are, categorically, a disadvantaged group of market actors. The following discussion adopts the concept of a disempowered consumer to define these objective conditions that disempower consumers, which will be divided into three ideal type categories with fluid boundaries.⁵⁴ The first is ‘market-based’ and is triggered by market structures and market conditions. The second is ‘relational’ and arises for the consumer *vis-à-vis* their relationship with a trader. The third is ‘personal’ and results from the consumer’s socio-economic circumstances and behavioural profile.

3.2.1 Market structures and market conditions that disempower

It is not controversial to claim that consumers are disempowered by market conditions. In early consumer policy, traders were considered to possess considerable 1-D agency and power to create unfavourable market conditions for consumers. Put differently, traders were considered to have a sweeping capacity to affect the market conditions that enable several relational powers for businesses over consumers. During the development of the internal market, consumer disempowerment was primarily considered to stem from both market conditions and the unequal position of the consumer *vis-à-vis* their relationship with a business. These conditions included insufficient access to the market, information asymmetries, and the inability for consumers to enforce consumer rights because of inadequate redress and enforcement mechanisms. In the first EU consumer policy plan in 1975, these power imbalances were framed as stemming from traders having the capacity to determine the conditions in the market. The shift for consumers from consuming in local markets to consuming as a single unit in a mass market as well as mergers, cartels and self-imposed restrictions on competition are cited in the 1975 strategic vision of consumer policy as the cause of

⁵⁴ Fluid here is referring to the idea that the boundaries between these categories are not rigid. For instance, a market-based condition that disadvantages consumers can give rise to a disadvantageous relationship between consumers and businesses.

consumer disempowerment.⁵⁵ Considering this, the early market conditions presented as a source of consumer disempowerment can be understood as having arisen in the absence of regulation that gave rise to undesirable conditions for consumers – qualified as undesirable because of the negative impact on consumption and competition. Thus, the market rationale – stimulating more consumption for economic growth – remained the primary variable for determining which market conditions posed an inappropriate threat to consumers up until the more recent 2020 strategic policy communication following the New Deal for Consumers in 2018. According to the 2012 strategic communication, for instance, disempowering market conditions materialize as conditions that undermine consumer safety, create an information overload or a knowledge deficit which result in a lack of enforcement of consumer rights and access to consumer markets.⁵⁶

It was argued earlier in Section 3 of this chapter that the internal market rationale is changing. The ‘slogan’ in strategic policy has changed from boosting growth through consumption to the Green Deal’s narrative of transitioning to an economy where economic growth is decoupled from environmental degradation. The 2020 New Consumer Agenda represents a departure from the market conditions that were considered as disempowering consumers in earlier strategic policy. By changing the goals of consumer empowerment from stimulating more consumption to stimulating sustainable consumption, the conditions that disempower consumers have also changed. From a macro perspective, the linear character of the economy is a structural cause of disempowerment for consumers. Consumers lack 1-D dispositional power to behave in a sustainable way if the market is flooded with products that are produced unsustainably and have a limited lifecycle. The 2022 proposal for the ER is an example of legislation that will regulate the range of products that can be lawfully sold to consumers. By setting minimum sustainability standards, the structure of the market generates consumers’ dispositional power to make the most sustainable choice. In this regard, greenwashing practices, a lack of information, imperfect information and false information on the reparability and sustainability of goods can be qualified as market conditions that disempower consumers. The Commission has also embedded the concept of consumer empowerment into how consumers treat goods post-contractually. Following this, the current legislation laying down consumer guarantees is considered to constitute a structural obstacle to empowerment because traders are not obligated to offer an extended right of repair nor is there an EU-wide consumer guarantee for second-hand and refurbished goods. According to the 2022 proposal for amending the SGD, the limited right of repair and even the capacity for consumers to choose between repair and replacement is a cause of disempowerment that prevents sustainable consumption patterns and consumer participation in the transition to a circular economy.

⁵⁵ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy (1975) OJ C92/1, Annex point 6.

⁵⁶ ‘A European Consumer Agenda - Boosting Confidence and Growth’ (n 41) points 3.1 & 3.2.

Energy policy and the reform of the energy market – in line with climate policy – aims to create access to affordable energy services, a sustainable decentralized energy sector and security of energy supply. This prompted a wide-sweeping reform of the architecture of the energy market and the relevant question in the context of consumer empowerment is how these goals become translated into the micro strategies for empowering consumers to take part in this transformation. Put differently, several legislative interventions were identified as necessary for removing the obstacles in the market that prohibited empowered behaviours. To reiterate, in the context of the 2015 New Deal for Energy Consumers, it was shown that disempowering market conditions include the imperfect presentation of information to consumers regarding the energy efficiency of energy products, difficulties for consumers in easily switching energy providers, inadequate frequency and format of billing for energy services, the failure of businesses to provide dynamic pricing contracts, the inadequate ability for consumers to benefit from the self-generation of renewable energy, and inadequate access for consumers to renewable energy communities.⁵⁷ The 2016 Clean Energy for all Consumers communication continued in much of the same vein and elaborated on the following problematic market conditions to be addressed by the consumer empowerment agenda. These included uncompetitive national markets that result in a lack of choice between energy providers, uncompetitive energy prices, inadequate information on available energy offers, unfair standardized terms and conditions, transparency issues related to complex energy contracts, unclear billing formats, a lack of information relating to consumption patterns, the inability for energy consumers to switch energy providers without a penalty, and a regulatory framework that does not facilitate consumers as prosumers participating in the decentralization of the energy system by self-generating renewable energy.⁵⁸

The directives analysed in Chapter 5 illustrated in detail both the market structures and market conditions that constitute obstacles to consumer empowerment. The ED(II), the EED(II) and the RED(II) are part of a broad reform that restructures the energy market and architecture of the energy industry. Aside from liberalizing the market, the energy reform in the RED(II) aims to create conditions where households can generate – individually or collectively – renewable energy to decentralize the energy system. This entails a transition from a centralized fossil fuel driven system to decentralized energy systems fuelled by renewables. The centralized configurations in the market prior to these reforms posed structural obstacles to consumer empowerment because the existing frameworks in the national energy markets posed several obstacles to empowerment. In the context of creating renewable energy, these obstacles for energy consumers include, for example, disproportionate burdens on consumers when generating, storing, consuming and selling electricity. More specifically these include

⁵⁷ See Chapter 5, Section 2.

⁵⁸ ‘Clean Energy for All Europeans’ (n 16); see also the discussion in Chapter 5, Section 3.

charges or fees regarding their self-generated electricity from renewable sources remaining within their premises. Moreover, consumers living in apartment buildings face additional obstacles and difficulties in the participation in renewable energy production than single-family homes. The ED(II) addresses market structures that pose obstacles to empowering consumers to participate in the consumer-driven dimension of the energy transition by addressing market conditions that negatively affect prosumption and efficient use of energy. This includes enhancing consumer information on real-time energy use and billing, access to comparison tools, reduced switching times and switching fees, and rolling out smart meters for all EU households. The proposal for a recast of the EED(II) is a tool for transforming the market to meet the Fit for 55 energy efficiency targets. Energy consumers are addressed in this reform because private households represent roughly one-quarter of final energy consumption in the market. The introduction of legislation and market conditions that cause rising fuel and carbon rates are cited as an obstacle to consumer empowerment as participation in energy efficiency measures. This is especially the case for low-income and vulnerable households. Other conditions stand in the way of empowerment include imperfect information on energy use, uncompetitive markets for energy efficiency goods such as construction materials and heating and cooling systems.

3.2.2 Relational disempowerment

There are several overlaps between market conditions that disempower consumers and the power imbalances that arise relationally between consumers and businesses. The distinction was drawn between these two categories to elucidate that the Commission acknowledges the different situations that cause disempowerment. Put differently, if imperfect or false information were simply cited as a cause of disempowerment, it would tell us little about the ways in which information disempowers the consumer. Information can be used by a trader to capitalize on a relational power imbalance when it is used in a way that is considered to constitute an unfair commercial practice that manipulates and distorts decision-making.

Relational power imbalances can arise between consumers and traders in both the pre- and post-contractual phases. Like market-based forms of consumer disempowerment, in early consumer policy the consumer was viewed as the relationally and categorically the ‘weaker’ party in dealings with traders. In the first consumer policy in 1975, this relational power imbalance was considered as having arisen because of the consumer’s unequal bargaining position: “Purchasers of goods or services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against high-pressure selling

methods.”⁵⁹ This unequal position is further exacerbated by aggressive and misleading advertising practices where businesses manipulate and distort the decision-making process of the consumer. However, if a practice is not prohibited or has the potential to be qualified as fair following the application of the average consumer test, then it does not, or not yet, constitute an obstacle to empowerment.

The 2018 New Deal for Consumers communication acknowledges that consumers are relationally disadvantaged in their contractual relationship with a trader when they cannot enforce their consumer rights and claim redress. Following the REFIT check, the New Deal for Consumers aimed to empower consumers by adopting legislation to facilitate the effective enforcement of consumer protection rules redress for consumer harms. The 2022 proposal for a Directive on Empowering Consumers for the Green Transition is an example of the Commission’s response to traders finding new ways of abusing relational power imbalances with consumers by impacting consumer decision-making.⁶⁰ This proposal cites several business practices that cause barriers to empowered consumer behaviour and are qualified as an illegitimate cause of consumer detriment and harm. These obstacles include inducing consumers into purchasing goods that do not last for as long as expected (early obsolescence), misleading consumers who are forced to contend with unclear or poorly substantiated environment claims (greenwashing), and misleading consumers who are faced with sustainability labels and digital information tools that lack transparency and credibility.⁶¹ Another relational power imbalance between consumers and businesses, which falls within the ambit of the consumer empowerment agenda, arises in the contractual obligation of the trader to offer a remedy for defective goods. The empowerment agenda contends that consumers must have the capacity to have a good repaired. Currently, consumers are disempowered because their right to repair is limited to new goods for a period of two years. In general, consumers must commit to standard term contracts and do not have the power to individually negotiate a longer guarantee or extensive right to repair. The 2022 pending proposal for amending the SGD with the potential for a new directive on a right to repair will address this relationally disempowered position of the consumer.

⁵⁹ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy (1975) OJ C92/1, Annex point 19(i).

⁶⁰ Similarly, in the energy market, the Commission confirms in the 2015 New Deal for Energy Consumers strategy that the third pillar on “consumer empowerment through full protection” that protecting consumers from unfair commercial practices is an important goal of the empowerment agenda; see Chapter 5, Section 2.3.

⁶¹ *ibid.*

3.2.3 Personal conditions that disempower

The discussion so far on market structures, market conditions and relational imbalances that disempower consumers has offered a more nuanced view of the obstacles to empowerment that the Commission acknowledges in the consumer empowerment agenda. This offers a more complex view of the aims of the consumer empowerment agenda and the conditions in the consumer's environment – the market – that stand in the way of empowerment. When consumer empowerment is conceptualized as opposing consumer protection and when the empowered consumer is defined as the rational consumer, this excludes the personal conditions of the consumer that the Commission has more recently acknowledged are causing disempowerment. These personal conditions can be divided into two sub-categories: the consumer's attributes and the consumer's economic and social situation. The personal attributes that disempower consumers have generally been classified by the Commission categorically using the broad term of 'vulnerability'.⁶² Prior to the adoption of consumer empowerment in horizontal consumer policy and in energy policy, the concept of consumer vulnerability was understood to arise cognitively because of conditions such as age, infirmity, or disability. Vulnerability is also considered to arise because of physical impairments, such as blindness or deafness.⁶³ The personal conditions that disempower consumers can be framed as an additional layer of objective barriers to the consumer behaving in an empowered way. It is acknowledged in strategic policy and secondary legislation that not all consumers are equal.

As the discussion in Chapters 4 and 5 have shown, the Commission has extended the boundaries of what counts as 'vulnerability' to include the consumer's economic and social situation that arises because of systemic inequality. The introduction of the Green Deal has emphasized that the clean transition is not simply a matter of introducing new legislation and technological development. It is also a vertical and horizontal socio-economic transformation that will require the inclusion of all persons across social strata. The discussion on energy policy in Chapter 5 has revealed that this specifically refers to vulnerable energy consumers and consumers who are at risk of, or that live in, energy poverty. The cause of these disempowering conditions is cited by the Commission as low income, living in energy inefficient housing and rising energy costs. These consumers are disempowered because they cannot reduce their energy costs, they do not have adequate access to energy services, to uptake energy efficiency measures, and they have no means to produce renewable energy. Moreover, these consumers become systemically disempowered because the lowest income households will disproportionately bear the costs of the energy transition.

⁶² 'A European Consumer Agenda - Boosting Confidence and Growth' (n 41) point 3.4.

⁶³ See for instance the following directive that addresses persons with these disabilities: Directive 2019/882/EU of 7 April 2019 on the Accessibility Requirements for Products and Services [2019] OJ L151/70.

3.3 Making visible the implicit narratives on subjective consumer (dis)empowerment

The concept of subjective disempowerment was defined in the theoretical framework in Chapter 2 as the subjective, internalized narrative of an actor that results in the actor failing to take a specific form of action (the empowered behaviour). In other words, subjective disempowerment is perceived but it concretely manifests as disempowered behaviour(s). The subjective dimension is acknowledged when the Commission operationalizes consumer empowerment as trust and confidence as a variable of empowerment.⁶⁴ The Commission's narrative indicates, for instance, that providing consumers with a robust framework of rights and that facilitating consumers enforcing these rights will lead to the subjective feelings of trust and confidence. Considering this, consumer law is both a process of psychological empowerment and one of the Commission's strategies for triggering this psychological empowerment process. In this vein, consumer confidence has been cited by the Commission as a justification for satisfying the proportionality requirement in several consumer law directives.⁶⁵ Following this, consumer law can be conceptualized as a tool that subjectively empowers consumers when consumer legislation has a consumer confidence rationale. The Commission then proposes that consumers are empowered when they trust the internal market. When consumers lack confidence and trust, it results in apathetic behaviour, where consumers do not buy across borders and do not enforce their consumer rights.

Aside from the narrative on consumer confidence and trust as a variable that the Commission operationalizes as an empowerment outcome, there are several other instances where the internalized narratives of consumers are seen as relevant for defining the subjective dimension of the empowerment agenda. The proposal for a Directive on Empowering Consumers for the Green Transition is predicated on the idea that consumers do want to consume more ethically. For instance, the impact assessment for the proposal refers to the 2009 Flash Eurobarometer Attitudes of European Citizens towards the Environment.⁶⁶ This barometer indicates that "83% of EU-27 citizens considered a product's impact on the environment an important element when deciding which products to buy."⁶⁷ Moreover, the Commission contends that "many European

⁶⁴ See for instance the special Eurobarometer on consumer empowerment: 'Special Eurobarometer 342: Consumer

Empowerment', <https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_4_eurobarometere/eurobarometer_consumer_empowerment_2011.pdf> accessed 25 July 2022.

⁶⁵ See for instance the 2015 proposal for the Sale of Goods Directive, Commission, 'Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and other Distance Sales of Goods' COM (2015) 635 final.

⁶⁶ Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for A Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection against Unfair Practices and Better Information (SWD) 2022/85 final 1

⁶⁷ *ibid*; see also Commission, 'Flash Eurobarometer 256 - Europeans' Attitudes Towards the Issue of Sustainable Consumption and Production: Analytical Report' (2009)

citizens believe that “changing the way we consume” is the most effective way to tackle environmental problems.”⁶⁸ This is an indication that the Commission considers consumers as possessing the required internalised narrative on the ethics of consumption that are necessary for behaving in an empowered way. It can be concluded, however, that the subjective dimension of consumer powerlessness in the consumer empowerment agenda is underdeveloped. The concept of subjective disempowerment developed in Chapter 3 demonstrated that subjective disempowerment is expansive. In other words, it pertains to the actor’s personal narrative about their situation in life that impacts or stunts their ability to behave in a particular way. This indicates that the subjective disempowerment of a consumer is both cognitive and discursive. The internalized narratives that disempower are, therefore, far more complex than feeling unconfident or distrustful. Disempowering narratives can also relate to, for instance, what the consumer thinks about their skills, their capacity to act, their position *vis-à-vis* businesses, their position in society and, moreover, what consumers think about (consumer) law.

The shortcomings of this inadequate conceptualization of the subjective dimension of consumer disempowerment in the Commission’s empowerment agenda becomes evident in the different sites of consumer action that the regulatory framework touches upon. For instance, one such site of action is access to justice, where the regulatory framework aims to empower consumers by improving redress mechanisms and providing access to alternative dispute resolution and judicial settlements. The Commission’s empowerment strategy has been dismissed as unhelpful in Creutzfeldt’s empirical study on access to justice for vulnerable and energy-poor consumers.⁶⁹ Creutzfeldt argues that the empowerment agenda has failed to comprehensively understand the psychological and objective conditions which prevent consumers from pursuing enforcement: “[...] narratives of consumer empowerment, while often well intentioned, have in fact exacerbated problems faced by people who have already been excluded from full market participation before the development of unrealistic policy aspirations in relation to consumer behaviour”.⁷⁰ From a psychological perspective, this study has not linked consumers’ failure to participate with a lack of confidence or trust but instead with the consumer feeling remote from formal sources of support: “[...]while simply removing cost barriers might work for a rational actors, such measures

<https://ec.europa.eu/environment/eussd/pdf/FL256_analytical%20report_final.pdf> accessed 27 July 2022.

⁶⁸ Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Amending Directives 2005/29/EC and 2011/83/EU as regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Better Information (SWD) 2022/85 final 1; see also Commission, ‘Special Eurobarometer 501: Attitudes of Europeans Towards the Environment’ (2020), 48.

⁶⁹ Naomi Creutzfeldt, Chris Gill, Marine Cornelis & Rachel McPherson, *Access to Justice for Vulnerable and Energy-Poor Consumers: Just Energy?* (Hart Publishing 2021).

⁷⁰ *ibid* 29.

would not overcome how people feel about the law and whether they want to use it".⁷¹ This is because these powerless and vulnerable consumers feel their interests are not aligned with the system, where the system is to be understood as energy companies, the government and ADR mechanisms.⁷² By extension, what consumers think and feel about the structural conditions that are mediated by law result in subjective powerlessness, even in cases where the regulatory framework aims to make it easier for these consumers to access justice.

The interaction between the subjective and objective processes of empowerment is complex. If consumer empowerment is not just a theoretical exercise but also a practical endeavour that is pursued through law, then the individual or groups of individuals who are the recipients of an empowerment agenda must be acknowledged. Put differently, it is not enough to make changes to the consumer's environment to change the conditions that cause disempowerment because it is also necessary to make an individual feel empowered, which in itself is a highly complex process that is psychological and heavily influenced by the individual's position in society. This moves beyond the confines of the legal debate that consider the (empowered) consumer as a type of legal category or normative and fictional yardstick in strategic policy, secondary law and the Court's jurisprudence. Despite this, this subjective disempowerment is often hidden within the EU consumer empowerment agenda and overlooked by the academic debate. This is problematic when one takes seriously that empowerment is not simply a matter of making objective changes to an actor's environment but also entails changing the internalized narratives that disempower the actor.

While being at ease with debating the objective conditions in the market that may or may not disempower consumers, there may be quite some unease for the legal scholar if they must also engage with the subjective dimension of the empowerment process. This is problematic because subjective empowerment cuts to the quick of what an individual thinks, feels and how they choose to behave. It is not immediately apparent why the legal scholar should be concerned with subjective empowerment because such considerations usually fall outside of the purview of legal scholarship. Moreover, viewing empowerment as a subjective process that is enacted through law runs the risk of being construed as having the potential to result in undesirable and overly paternalistic interventions through law that normatively set out how a consumer should think. Despite this, law does not function in a vacuum but affects social life.⁷³ The discussion in Section 4 will show that irrespective of whether the subjective dimension of empowerment is acknowledged by the Commission or the consumer law debate, secondary legislation, nonetheless, has an effect on the internalized narratives of

⁷¹ *ibid* 27; see also Ian Ramsay, 'Consumer Redress and Access to Justice' in Charles Rickett & Thomas Telfers (eds), *International Perspectives on Consumer Access to Justice* (Cambridge University Press 2003).

⁷² Creutzfeldt *et al.* (n 69) 135.

⁷³ For a consideration on the different views of the relationship between law and society, see Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001).

consumers (the subjective dimension of empowerment). This is the case because law sets market standards, affects market structures, and intervenes in the relationships between businesses and consumers. Ignoring this dimension of the legal framework and its impact on the subjective (dis)empowerment of consumers does not negate its existence nor its relevance for a holistic discussion of what is meant by EU consumer empowerment and what it means to empower consumers through law.

3.4 The process of consumer empowerment: secondary legislation as a tool for empowering consumers

One of the central findings in Chapter 2 was that conceptualizing the practice of empowerment as process is a commonality that is shared across the empowerment literature in several disciplines. It is worth reiterating that a distinction can be drawn between the related conceptual categories of disempowerment and the subjective and objective dimensions of empowerment as a process. It was shown that the concepts of objective and subjective empowerment both depend on and allow for an examination of what has caused the disempowered state of the disempowered actor. This examination also requires acknowledging what counts as power and what manifestations of power are considered to be complicit in disempowering this actor. On the other hand, conceptualizing of empowerment as an objective and subjective process also allows for an examination of the practice dimension of empowerment. It allows us to ask the question of what actions must be taken or have already been taken to both objectively and subjective empower the disempowered actor.

In Chapter 2 empowerment as a process, like disempowerment, was defined as consisting of both a subjective and objective dimension. Psychological (subjective) empowerment is the creation of a: “connection between a sense of personal competence, a desire for, and a willingness to take action in, the public domain”.⁷⁴ This general definition of subjective empowerment can be translated to any empowerment agenda as the actor’s willingness to participate in a particular aspect of society. For consumer empowerment this can be the consumer’s willingness to participate in a renewable energy community, to adopt sustainable consumption patterns or even just participation by transacting in the internal market. Second, objective, practical empowerment is: “the modification of structural conditions in order to reallocate power.”⁷⁵

Leaving aside the question of what counts as power, which will be considered in more detail in the following section, there are several ways in which the structural and

⁷⁴ Marc Zimmerman & Julian Rappaport, ‘Citizen Participation, Perceived Control, and Psychological Empowerment’ (1988) 16 *American Journal of Community Psychology* 725, 746.

⁷⁵ Carolyn Swift & Gloria Levin, ‘Empowerment: An Emerging Mental Health Technology’ 1987 (8) *Journal of Primary Prevention* 71, 73.

objective conditions of an actor's environment can be modified to create conditions conducive to empowerment. For the purpose of this study, for the EU consumer this environment is both the marketplace in general and the more specifically the energy market when the consumer contracts for energy services. As the EU institution with the power to adopt policy and propose legislation of its own volition, the Commission has the capacity to directly influence the conditions and structures in the internal market. The discussion earlier in this section shows that the Commission directly acknowledges several different forms of objective obstacles that prevent consumer empowerment or that cause disempowerment. These were categorized as relational conditions, market conditions, and personal conditions. It is clear that from the analysis in Chapters 4 and 5 that the Commission has instrumentalized secondary legislation as a tool for empowering consumers because the purpose of several consumer law directives and energy directives are aimed towards removing or mitigating these disempowering conditions. For instance, the 2022 amendments to the UCPD aim to empower consumers to engage in sustainable consumption patterns by removing commercial practices that mislead consumers away making the sustainable purchasing choice. From another perspective, the RED(II) amends the architecture of the energy market to enable consumers to participate in the clean transition when they take steps to create renewable energy either individually or collectively by joining an REC. The broad conclusion that can be drawn from the development of these legal frameworks is that the Commission utilizes secondary legislation and several different rights and duties as context-specific strategies for empowering consumers. Each empowerment instrument is then unique as its constituent rights and obligations aim to empower consumers in different ways. The secondary legislation considered in the previous chapters can then be defined as instruments that are focused on empowering consumers as part of the broader aims of driving the current economic and social transformations in the EU.

3.5 Interim conclusions

In adopting the disempowered consumer rather than the rational consumer as the conceptual starting point, it can be concluded that the consumer empowerment agenda conceives of consumers as being disempowered in several ways that go beyond information asymmetries. This finding challenges a narrow view of EU consumer empowerment as pursuing the empowerment of consumers through information duties and the view that the empowerment agenda as incompatible with more protective measures. In considering the Commission's context strategies for empowering consumers, it was shown that secondary legislation has been instrumentalized as a tool for achieving the several empowerment outcomes outlined in Section 2. Deconstructing the objective process of empowering consumers through legislative measures was a relatively straightforward task when using the yardstick disempowered consumer as a

conceptual frame. The same result same cannot be said for deconstructing the ways in which these legislative measures have a role to play in the subjective empowerment of consumers and what subjective empowerment should look like according to the Commission. There are several potential reasons why the Commission is not more explicit in this regard. The first is that the Commission does not conceive of empowerment as a dual process that is objective and subjective. The second is that the Commission acknowledges – in some form – the subjective dimension of empowerment but it is politically undesirable to develop a narrative in policy that acknowledges its intention to change the ways in which consumers think. This second option seems more likely because policy documents and preparatory documents for new consumer legislation are increasingly acknowledging the central importance of changing consumer attitudes towards sustainability for driving the changes required for the Green Transition and a circular economic model. The discussion in the following section will then move the theoretical analysis and rethinking of the concept of EU consumer empowerment one step deeper by applying Haugaard’s four-dimensional model of power to draw out both the hidden and invisible workings of power when law is used as a tool to empower.

4. Empowering consumers through law: the four dimensions of power in the EU consumer empowerment agenda

The final layer in rethinking the concept of EU consumer empowerment entails confronting the dimensions of power that permeate the practice of consumer empowerment when law is used as a tool/strategy for empowering consumers. The concept of power is not wholly absent in the scholarship on EU consumer empowerment but, as was shown in Chapter 3, what counts as power is often limited to an understanding of power as 1-D agency and more restrictively as consumers’ ‘power over’ businesses. When adopting Haugaard’s four-dimensional model of power as a conceptual starting point for defining what counts as power, it is necessary to reiterate that this model consists of a cluster of several related concepts of power. This means that when focusing on power as 1-D agency, this does not mean that the other four dimensions cease to exist. Instead, the other three dimensions continue to operate in the background. To give an example, focusing on the 1-D ‘power to’ of the consumer to have a good repaired and their ‘power over’ a trader to make the repair is supported by a 2-D structural bias, which indicates to both the consumer and the trader that this 1-D power over of the consumer is appropriate. This is supported by a 3-D system of knowledge – generally as the taken for granted practical consciousness of consumers and traders as to how they should behave. Finally, the 4-D level of ontological security reveals the stable structures that the trader and the consumer rely on and the conventions necessary for these actors to operate successfully within the market as a site of social interaction. Put differently, the 4-D manifestation of power through ontological

security and identity formation supports the 1-D power to of a consumer to be a consumer and the business to act as a business. In short, what this example shows it that it is simply that the most visible layer of ‘power’ in consumer empowerment is at the level of 1-D and 2-D power.

The aim of the following sections is then to make visible the presence and operation of each of these four (underexplored) dimensions of power in the concept of EU consumer empowerment and in the practice of empowering consumers through law. Each of the following four sections will work through and apply the four dimensions of power outlined in Chapter 2 to the analysis in Chapters 4 and 5.

4.1 Empowerment as agency: 1-D power over and power to

Beginning with the view of power as agency, the question arises as to what are the forms of 1-D ‘power to’ that the EU consumer empowerment agenda intends to create for individuals as a form of dispositional power when they behave in their capacity as consumers? To reiterate a conclusion drawn in Chapter 2, consumers attain power over traders because of the underlying disposition to act that arises when they are qualified as a consumer according to scope of the secondary legislation in question.⁷⁶ When consumer participation in the transition to a circular economy and to a net-zero economy is the empowerment aim, the focus then shifts to how this legislation gives consumers the power to participate in these transitions. The power to of consumers can be accompanied by a corresponding power over traders, but this is not necessarily the case, as will be seen in the following discussion.

The consumer law debate drawing on neoclassical economic theory contends that the underlying concept of power in the Commission’s empowerment strategy is that information is a power resource that consumers use to make rational choices. As a collective of actors, consumers use information in a Dahlian way to exercise power over traders. Through their purchasing power – the implicit underlying power to choose what to purchase – consumers dictate demand and affect production/supply. Politically, this has come to be framed in democratic terminology as consumers ‘voting’ with their wallets.⁷⁷ This economic view of consumer power corresponds with the visible and observable qualities of 1-D power. It reveals a visible form of consumer power that manifests as consumers *exercising* power over production by dictating demand. There is then a tendency in the consumer law debate on empowerment to adopt this economic view of consumer choice and sovereignty and to follow the marketing literature on empowerment that reduces consumer power to consumer choice and in turn conflates consumer choice with empowerment.⁷⁸ This understanding of consumer empowerment

⁷⁶ See the discussion in Chapter 2, Section 4.2.5.

⁷⁷ On this see Albert Hirschman, *Exit, Voice and Loyalty* (Harvard University Press 1970).

⁷⁸ See the discussion in Chapter 3, Section 5.

fits with the neoliberal imaginary view of the EU legal order and of EU consumer law, which is technocratic and pursues economic integration (while national law is concerned with social issues and questions of social welfare). Consumer power as consumer choice is just one visible manifestation of 1-D consumer power, but it is not the only manifestation. The question which arises at the 1-D level of power is what the other manifestations of consumer power can be made visible in legislation with an empowerment aim and how does this legislation regulate the power dynamics between consumers and businesses either directly or indirectly.

4.1.1 Information duties

It is interesting to begin this discussion of the concept of power and EU consumer empowerment with information duties because of the connections drawn by consumer law scholarship between consumer empowerment and the information model.⁷⁹ The neoclassical economic ideal of consumer sovereignty relies on the claim that consumers use information as a power resource to exercise 1-D power over traders and that consumers' collective act of consumption affects production. Put differently, this economic position depends on the concept of consumer sovereignty that is predicated on methodological individualism, the under-socialization of the consumer as a market actor and the belief that the consumer has the capacity to pursue and enforce their interests over traders because of their purchasing power in the market. This is certainly one way of framing consumers' 1-D power over businesses. This neoclassical economic view has become translated by the debate into a definition of the consumer empowerment agenda as a strategy that uses consumer information to stimulate demand for environmentally sustainable products and services. Implicit in this understanding of consumer empowerment is that information duties give consumers power over traders. By focusing on the power over of consumers, the conditional power to of consumers has been neglected.

At the 1-D level of power, consumer information can be defined as a power resource that gives consumers the dispositional power to make empowered and informed choices. This is not the observation that the only market interference or protections that consumers require is the provision of perfect information and that information duties should be the only kind of form of intervention that is permitted. Instead, it is a neutral statement that consumers *cannot* make an informed choice or an empowered choice – such as purchasing the environmentally- sustainable product – if they do not have the relevant information. With too much information overload there are also several drawbacks and forms of detriment experienced by consumers who do not have access to enough information. That information is important can be illustrated

⁷⁹ See the discussion in Chapter 3, Section 2.4.

through the harms experienced by disabled consumers who do not have adequate access to pre-contractual information and so their decision-making capacities are impacted.⁸⁰ On the former point on information overload, behavioural economics becomes relevant here for understanding the different outcomes that will ensue depending on how much information the consumer has and the effects that arise because of the way in which this information is presented.

Integrating the ‘sustainable choice’ as an empowerment goal provides more nuance to how we can conceptualize the 1-D dimension of consumer power. Information on the sustainability of a product or service is a power resource that gives consumers 1-D power to make the (most) sustainable choice. Information duties are also a power resource that enables consumers’ 1-D power to participate in the transition to a circular economy, to participate in the transition to a net-zero economy, to reduce energy costs, to use consumer energy more efficiently and to combat energy poverty. The information duties in the proposed directive on Consumer Empowerment that amends the CRD will require traders to provide information on the sustainability of a product. Consumer information on environmental sustainability is a strategy aimed at providing consumers with a power resource that enables their power to make such choices.

This observation on the relationship between information and the ‘power to’ of consumers is, of course, theoretical. In practice, consumers will require more than information to have the actual power to participate in these ways. Nonetheless, it is important to develop these theoretical and conceptual understandings of what counts as of power to so that these categories can be drawn into the debate on consumer empowerment. Take, for instance, the debate that argues that labelling has a limited practical impact on making changes to industry standards in an industry.⁸¹ It is said that labelling on the sustainability of a product will have little noticeable impact on influencing the demand side of the market that results in improved standards and practices but may be a way of creating support for regulators to introduce other measures. Information duties are generally considered to have a limited practical effect on empowering consumers to actually make the sustainable choice and so there is a focus on the failure of information duties as a method of consumer empowerment.⁸² The issue here lies in the reduction of consumer empowerment to a neoliberal view of consumer power as the economic power over production. Drawing on the discussion

⁸⁰ Ieva Eskytė, ‘Disabled People’s Vulnerability in the European Single Market: The Case of Consumer Information’ (2019) 42 *Journal of Consumer Policy* 521; Lisa Waddington, ‘Reading a Duty to Provide Accessible Pre-Contractual Information for Consumers with Disabilities into EU Consumer Protection Law’ (2022) 45 *Journal of Consumer Policy* 307.

⁸¹ Mak & Terryn (n 23) 233; Christine Parker, Rachel Carey & Gyorgy Scrinis, ‘The Meat in the Sandwich: Welfare Labelling and the Governance of Meat-Chicken Production in Australia’ (2018) 45 *Journal of Law and Society* 341.

⁸² Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 *Journal of Law and Society* 349.

so far in this section, the power of information duties also consists of several dispositional forms of enabling consumer ‘power to’.

From another angle, it can be argued that information duties do not fail at empowering consumers but instead the issue at hand is whether, in practice, information duties are an effective power resource that can achieve a speedy Green Transition. In my view the perspective of the debate on EU consumer empowerment should shift away from this economic framework to asking the question of whether information duties can achieve empowerment aims by assessing the role of information on the internalized narratives on consumers. Put differently, does consumer information – in its several forms – affect internalized narratives on sustainable consumption so that consumers will utilize their power to participate in the Green Transition?⁸³ This question becomes highly relevant when information duties are framed at the level of 3-D power, where information is part of the tacit system of knowledge that guides everyday decision-making. Put differently, information duties can be framed as having two functions or, at the very least, as having two effects. The first is to inform. The second is to persuade and change consumer attitudes and choices, such as to make a particular purchasing choice or how to treat a good during its lifecycle.⁸⁴

As a final observation on information duties and the relationship between information and the 1-D ‘power to’ of consumers, it can be noted that information duties are not the only power resource at the disposal of consumers. The analysis in Chapters 4 and 5 qualified several different methods of regulation that have an empowerment aim. While information duties can be isolated as one form of regulation with a consumer empowerment aim, these duties operate in a complex web of rights, obligations and regulation of market standards. The imposition of information duties and the corresponding power of consumers to – broadly speaking – participate in the Green Transition does not operate in a vacuum. Put differently, the enabling dispositional power to of consumers to behave in an empowered way is a combination of information duties and other rights and obligations in secondary legislation.

4.1.2 Mandatory horizontal consumer rights

The pending text of the 2022 proposal for amending the SGD and the possible introduction of a new directive on a right of repair mounts a challenge to the view of consumer empowerment as freedom of choice. While still in the early stages of the legislative procedure, this proposal intends to empower consumers for the transition to a circular economy by enabling consumers to treat goods in an environmentally-

⁸³ Noting here that such a dispositional ‘power to’ of consumers requires more than offering consumers information about the sustainability of products.

⁸⁴ This is a point that will be considered in more detail in subsection 4.3 that considers power as a 3-D system of tacit knowledge.

sustainable way during the good's lifecycle. From a relational perspective, the medium and high levels of intervention being considered in this legislation will grant consumers more power over traders than currently exists in the SGD.

The proposed moderate form of intervention will enhance consumers' power over businesses with respect to a longer guarantee period of repair for new goods and/or second-hand refurbished goods. This particular right would offer consumers more power over traders than the current SGD, which offers a two-year guarantee for new goods and no guarantee for refurbished and second-hand products. This moderate form of intervention would also entail the consumer having increased power over the trader to have a good repaired beyond the legal guarantee period for a reasonable price. This point is confirmed more so in the context of the three options for high intervention. The first is the unconditional prioritization of repair over replacement (provided the good can be repaired). The consumer would be limited in their power to and power over traders to have a good replaced. This would be counterbalanced by the consumers increased power to and power over traders to have a good repaired past the legal current guarantee period. Another high intervention option would restrict the current power over of consumers to have a faulty good replaced with a new product. Instead, the seller could replace the defective product with a refurbished good. Interestingly, this moderate intervention could also potentially reduce the consumer's power over traders and limit their autonomy if repair becomes a primary remedy above replacement in situations when the repair would be less expensive than, or as expensive as, replacement. In the current version of the SGD, repair is placed above replacement in the hierarchy of remedies only when the repair can be made within a reasonable time period.

Despite reducing the autonomy of consumers by limiting the potential range of remedies for consumers against traders, these amendments are still classified by the Commission as empowerment measures. The empowerment aim is to enable consumer participation in the transition to a circular economy and to enable more sustainable patterns of sustainable consumption during the lifecycle of a good. This shifts the focus from consumer power over traders to affect a particular remedy for a faulty good to the conditional power to of consumers to be part of the transition to a circular economy. Unlike information duties, the effect of this proposed regulation will be the regulation of the 'power over' dynamic that exists specifically within the B2C relationship. In other words, while information duties can be framed as enhancing consumer power over production, consumer rights in the SGD (in its current and future form) create a form of power over that allow the consumer to force the trader to behave in a particular way – to repair a faulty good. Through this the consumer then has the dispositional power to participate in the circular economy and this will not necessarily be a choice that the consumer has made if they are obligated to accept the repair of a good over a replacement. Of course, the consumer can choose to throw the good away and thus not participate at all, but the point to be made here is that the effect of the SGD and an

extended and prioritized right to repair nonetheless generates the 1-D power to of the consumer to participate in the transition to a circular economy.

A second power dynamic also exists that is worth considering but is neglected by the literature on empowerment. This is the power dynamic between the legislature as the empowering entity and the consumer. For instance, depending on the level of intervention in the final version of the amendments to the SGD and with the potential for a new directive on a right to repair, the dispositional and conditional power to of consumers limits the consumer's power over traders to affect a particular remedy. This power dynamic is reflected in consumer policy – the 2020 New Consumer Agenda and the 2020 New Circular Economy Plan – that espouses its commitment to empowering consumers for the Green Transition by empowering consumers to consume more sustainably by promoting the repair and re-use of goods. Taking this perspective into account and considering the proposed amendments in the moderate and high intervention options, a tension is made visible between the newer narratives of the Commission in the consumer empowerment agenda in policy and in this pending proposal with a neoliberal definition of consumer empowerment as sovereignty, negative liberty and autonomy. This prompts a rethinking of a more nuanced view of the consumer empowerment agenda as a species of regulated autonomy, where empowerment has the potential to fall on the side of regulation rather than autonomy. Moreover, this second power dynamic is another example of how the Commission – through the consumer empowerment agenda – is seeking to steer the behaviour of consumers by controlling the content of the consumer's right to a guarantee by changing the options that will be made available to the consumer when a good is defective. The Commission does this by using law to make amendments to the 2-D structural bias in the market.

4.1.3 Unfair commercial practices

The Unfair Commercial Practices Directive (UCPD) is directed towards businesses and it determines which commercial practices are acceptable and which are prohibited based on whether such practices are unfair, misleading or aggressive. These prohibitions determine what commercial behaviours are excluded by the permitted range of possibilities in the 2-D structural bias in the market. This has implications for the operation of 1-D power and the empowerment of consumers. Businesses are restricted in their power over consumers when the UCPD dictates which commercial practices that affect consumer behaviour are legitimate/ permissible and those practices that are illegitimate because the distorting effect on the consumer's choice is too high. The scope of what counts/does not count as an illegitimate commercial practice can be determined according to the blacklist in the Annex and by the test for unfairness in conjunction with the several updated Commission guidelines on the application of the UCPD. Take, for

example, the proposed ban in the proposed Directive on Empowering Consumers for the Green Transition that amends the UCPD. Generic environmental claims used in marketing and directed towards consumers will be banned when the excellent environmental performance of the product or trader cannot be demonstrated. This prohibition limits a business in their power over consumers to induce the consumer into making a purchase they otherwise would not have made if they had known the truth of the proposed 'excellent' environmental performance.

The obligations in the UCPD entail the legislature's restriction of the methods that businesses can use to exert power over consumers. By prohibiting such commercial practices, the proposed amendments to the UCPD intend to empower the consumer by limiting the methods (power resources) at a businesses' disposal to exercise 1-D power over the consumer. The empowerment strategy of this legislation entails (in theory) the regulation of the objective environment of the consumer (the market) by limiting businesses and thereby enhancing and making more effective the consumer's 1-D power to make the sustainable and environmental choices. The UCPD also offers the consumer the dispositional procedural power to challenge unfair, misleading or aggressive commercial practices before a court.

4.1.4 Market standards

Consumer empowerment is generally not discussed in the context of legislation that regulates market standards. This is surprising considering that the definition of consumer empowerment offered by the Commission in the 2012 strategic communication contends that empowering consumers requires the existence of a robust framework that ensures consumer safety. This definition conceptually draws, for instance, the Product Safety Regulation within the confines of the consumer empowerment agenda. In the context of consumer empowerment as participation in the Green Transition, the proposal for an ER offers the most recent example of the Commission's regulation of market standards as an approach for empowering consumers. Throughout the discussion on the 1-D agency dimension of consumer empowerment, the framing of consumer empowerment as neoliberal empowerment has been contested. The challenge to this conceptualization of EU consumer empowerment is not that the consumer empowerment agenda is devoid of neoliberal features, but that the legislation adopted to empower consumers is at odds with the neoliberal ideals of negative liberty and autonomy. The proposed ER is an example of the regulation of market standards that will set minimum environmental standards for products that can be lawfully sold in the market. It will extend the vertical scope of the current directive to energy products to horizontal applicability to almost all goods sold in the market. This regulation does not directly address consumers but instead sets environmental standards in the market that exclude goods from the market that fall below sustainable

production standards and goods that do not perform sustainably during the goods' lifecycle. This regulation forms part of consumers' power to participate in the Green Transition by setting standards for the goods that will be made available in the market. The proposal for the ER then offers another layer to the power to of EU consumers because it determines the range of sustainable options that consumers have access to. This perspective is obscured if the focus of the debate on consumer empowerment remains on information duties because it leads to the conclusion that the Commission intends consumers and the push of production to be in the driving seat of the transition to a sustainable, circular economy.

4.1.5 Vertical consumer law: the architecture of the energy market

So far, this discussion on 1-D power as agency has focused on consumer empowerment measures with an empowerment aim in the context of the legislation outlined in Chapter 4, which is horizontally applicable in several consumer markets. Chapter 5 focused on the empowerment legislation that is applicable to market actors in their role as energy consumers. The observations on the power to and power over generated by information duties in horizontal consumer law are also applicable to the information duties in the ED(II), the EED(II) and the RED(II). Moreover, the analysis of these instruments in Chapter 5 offers additional support for a more expansive view of the legislation that has an empowerment aim that extends beyond information duties.

The ED(II) introduced the right of household consumers (and microenterprises) to have access to at least one price comparison tool that covers the entire market. Moreover, energy providers are obligated to inform final consumers of their free access to this price comparison tool. The introduction of smart meters aims to empower consumers to reduce their energy consumption and their energy bills. Also, minimum requirements were set out for the format of energy bills, which must be “accurate, easy to understand, clear, concise, user-friendly and presented in a manner that facilitates comparison by final customers”.⁸⁵ The reduction in switching times and a prohibition on switching fees, with some exceptions, also aim to generate the power to of consumers to reduce their energy costs and the power to produce renewable energy.

The proposal for the EED(II) imposes several obligations on the Member States that aim to create 1-D power to for consumers to engage with and uptake energy efficiency measures. Member States are obligated to take several actions that will empower vulnerable energy consumers by increasing their power to participate in the energy transition. This entails several obligations such as implementing energy efficiency measures which mitigate distributional effects from other policies and measures such as

⁸⁵ Council Directive (EU) 2019/944 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU (recast) [2019] OJ L 158/125 (Recast Electricity Directive), art 18(1).

taxation. This also includes the obligation to use funding available at the national and EU level, including from the Social Climate Fund, to invest in energy efficiency improvement measures as priority actions

The proposal for the RED(II) considers the provision of information to consumers regarding information on district heating energy performance because it will enable consumers to stop buying heat/cold from district heating/cooling systems when they can achieve a significantly better energy performance with other measures. The goal of information provided to consumers can be framed not only through the lens of information choice but also as creating the enabling power to of consumers to make choices that are energy efficient, that reduce consumption costs, and that more generally enable the consumer to participate in the transition to a net-zero economy. The RED(II) also aims to increase the power to of consumers to become 'self-consumers' who generate, consume and store renewable electricity.

4.2 Empowerment and structure: 2-D structural biases that support 1-D power

The application of the second dimension of power developed in the framework in Chapter 2 requires examining the operation of power at a structural level in the market. This dimension is relevant for an analysis of EU consumer empowerment because the Commission, through its capacity to adopt policies and propose legislative initiatives of its own volition, has a direct impact on the market as the environment in which consumers can become (dis)empowered. If the Commission can manipulate the architecture of the market and regulate B2C relationships through secondary legislation, it then becomes necessary to develop a framework on EU consumer empowerment that looks deeper than the visible operation of power at the level of 1-D agency.

A discussion of the structural operation of power in the market raises the question as to how the market can be conceptualized. Perspectives that begin with methodological individualism, collectivism and interactionism would accept that the market is created and sustained by the interactions between market actors but diverge in terms of the degree to which market actors are viewed as (under-)socialized actors. It is then relatively uncontentious to adopt the starting point⁸⁶ that the market is a social construction.⁸⁷ Adopting a methodological interactionist perspective, the market can be viewed as a social fact that is at once subjective and objective.⁸⁸ The objective dimension

⁸⁶ Neoliberal economic theory would also accept this starting point that the market is created by actors. However, their requirement of atomistic behaviours and an absence of social structures for perfect competition is supported by methodological individualism. This has led, as discussed in Chapter 3, to the theoretical isolation of the market from other social structures and under-socialization of consumers as a market actor; see Chapter 3, Section 3.3.2.

⁸⁷ See for instance Nicole Woolsey Biggart & Rick Delbridge, 'Systems of Exchange' (2004) 29 *Academy of Management Review* 28.

⁸⁸ See for example Virgil Henry Storr, 'The Social Construction of the Market' (2010) 47 *Society* 200, 201.

of the market refers to the market as a social phenomenon that has been created through the actions of individuals and the social relations between individuals. This process was explained at the 2-D level of power in Chapter 2, where social structures – such as the market – are the product of a structuring/structuration process. The market is then an objective phenomenon that is constantly under flux through the dynamic action of the actors that both confirm-structure the 2-D structural biases in the market and engage in 2-D structural conflict with these structural biases. The subjective aspect of the market is the phenomenon that individuals in society have come to know because of socialization. This view correlates with the concept of socialization described at the 3-D level of power in Chapter 2. Consumers and traders, often without question but not unconsciously, 2-D confirm-structure the structural biases in the market through consumption patterns and business practices. Reiterating the definition in Chapter 2, a structural bias is defined as “the conditions of possibility of a given set of social structures.”⁸⁹

Both subjectively and objectively, the internal market can be understood as a social construction and correspondingly EU legislation is a repository of structural biases in the marketplace but noting that legislation is not the only source of structural bias. From an empowerment perspective, secondary legislation is then a tool at the Commission’s disposal to manipulate the 2-D structural biases in the market with the aim of creating conditions that it considers conducive to consumer empowerment. The 2-D structural bias offers possibilities and limitations on the 1-D agency of both traders and consumers. The questions that follow are what behaviours are permissible according to the 2-D structural bias and are perpetuated by 3-D practical consciousness. These questions have to a large extent been answered in the previous section on 1-D power, but the following discussion offers several examples that illustrate the objective process of empowerment through secondary legislation where power becomes visible in the 2-D biases in the market.

For traders, the UCPD creates a structural bias that dictates what commercial practices are/are not permissible. The several versions of Commission guidelines on the application of the UCPD and the 2022 proposal to amend the UCPD indicate that businesses practices are constantly evolving because traders find new ways of manipulating consumer behaviour. Greenwashing and the negative impact that this commercial practice has on consumers making the sustainable (empowered) choice is one of the commercial practices that will be prohibited following the adoption of the 2022 proposal for the Directive on Consumer Empowerment. Currently, the UCPD does not expressly prohibit such practices and, through practice, they are a permissible form of business behaviour according the 2-D structural bias in the marketplace. To empower consumers, the Commission will, through legislation, amend the structural bias to exclude the appropriateness of the practice of greenwashing. The UCPD and

⁸⁹ See Chapter 2, Section 4.3.1, 56.

secondary legislation more generally are considered by traders to represent a legitimate form of 1-D domination. Traders who in the future abstain from greenwashing will confirm-structure the structuration attempt of the EU institutions through secondary legislation, whereas those who continue to greenwash consumers will be engaging in a 2-D structured conflict with the bias that prohibits this practice. Power becomes visible through the empowerment measures in the UCPD that prohibit greenwashing and so the empowerment approach here is to enhance the consumer's ability to participate in sustainable behaviours by limiting the agency of traders through a manipulation of the 2-D structural bias.

Information duties in horizontal and vertical legislation also form part of the 2-D structural bias of the market by regulating what consumer information must be provided to the consumer. Put differently, according to the 2-D structural bias in the market, in a B2C relationship traders are prohibited from failing to provide mandated information to consumers. Due to the formal requirements of information duties, the trader's range of 1-D possibilities are limited by the requirements that dictate how businesses can legitimately present information to consumers. Noting that in practice, the trader can always choose to ignore the 2-D structural bias and provide information in a way that does not structurally conform to the rules in secondary legislation. The trader can also fail to provide the mandated information. These are 1-D acts of agency that constitute a 2-D structural conflict because the trader disagrees with the structural bias that limits/dictates what counts as legitimate business practices in a pre-contractual setting. In practice, the trader may unknowingly and due to ignorance fail to act within the ambit of the information duties in the 2-D bias when the trader does not provide the required information to the consumer or when the trader provides the information in an incorrect way. This act does not qualify as a 2-D structural conflict because the character of the act/conflict is not structural. It is simply that the trader has a mismatching 3-D interpretive horizon (practical consciousness) of what is appropriate business behaviour. As a result, the trader's behaviour does not correspond with what is permitted by the 2-D structural bias. A 2-D structural conflict is conditional on both an internal discourse that resists the structure and on an outward act (conflict) against the structure. A trader's 2-D structural conflict can usually be resolved unproblematically as a 1-D structured conflict, which through the respective enforcement and disciplinary mechanisms is mandated by the system. These observations concerning situations when a trader does not confirm-structure a structural bias (either knowingly or unknowingly) apply not just to information duties but to any 2-D structural bias in the market that dictates the trader's range of possibilities when they act in their profession as a trader in the marketplace.

For the consumer, the 2-D structural biases in the market enable a range of behaviours. The UCPD, for instance, not only excludes certain business behaviours from the market, it also creates a 2-D bias that permits consumers to challenge unfair commercial practices. In combination with legislation that facilitates enforcement and

redress for harm, the 2-D structural biases create 1-D power to and power over for consumers. Empowering legislation such as the ADRD, ODRR and the RAD are structural biases that make possible the 1-D conflictual resolution of both 1-D and 2-D structural conflicts between consumers and businesses. The proposed amendments to the SGD and the right to repair are interesting from an empowerment perspective and the potential changes that will be made to the 2-D structural bias. These amendments may relocate the current option of replacing a faulty good from its status as a primary remedy in the hierarchy of the SGD or these amendments may exclude the option to replace a faulty good with a new good. On the other hand, the amendments may render other behaviours permissible for consumers, such as a longer right to repair than the current two-year legal guarantee or the right to have a second-hand good repaired, which is currently not permitted by the SGD. The several recast directives in the energy market have targeted the structures of the energy sector to enable consumer behaviours that were previously not possible, such as taking on the role of a renewables self-consumer without losing protections as a consumer, becoming a prosumer, or purchasing energy from a decentralized system.

4.3 Empowerment and systems of knowledge: 3-D discursive and practical consciousness

The third dimension of power as a system of knowledge represents a shift from considering the more visible objective process of consumer empowerment at the levels of 1-D and 2-D power to the less visible, subjective process of consumer empowerment. To briefly reiterate the discussion of the third dimension of power in Chapter 2, an actor reflexively confirms-structures 2-D structural biases because of the 3-D practical consciousness that constitutes the multiplicity of interpretative horizons that will invariably belong to any one social actor. Power is then identified in the practical consciousness that an individual uses to get by in everyday life. This dimension on power was then connected to the concept of subjective (dis)empowerment, which is comprised of the internalized narratives of an individual that either enable or prevent an empowered behaviour.

The significance of 3-D tacit systems of knowledge for empowering EU consumers is indirectly acknowledged in both the consumer law debate and in the Commission's policy documents that highlight the importance of consumer behaviours, attitudes, preferences and beliefs for achieving empowerment aims. The Commission, for example, consistently operationalizes consumer confidence and consumer trust as an indicator that a consumer is empowered. The concept of consumer confidence not only is a common thread in strategic consumer policy but is also present in the Commission's narratives on the proportionality requirement in several legislative proposals for secondary consumer legislation, including the UTCDD, the UCPD and the

SGD. Looking at consumer confidence from the perspective of power as a 3-D tacit system of knowledge and practical consciousness, for consumers to feel confident in the market they do not need to have actual knowledge of their legal rights to feel confident. Put differently, consumer confidence does not necessarily need to arise from the consumer knowing about and considering all the legal protections and rights that they are afforded in the market when they conclude a transaction. It is noted here that the Commission does tend to define consumer confidence as arising through the consumer possessing actual knowledge of consumer law.⁹⁰ Instead, it is my view that the socialization of a consumer occurs when they conclude contracts on a daily basis. These interactions are part of consumer's evolving tacit system of knowledge that in turn becomes the practical consciousness that informs the consumer about how they will be treated as a consumer in the market and during a transaction with a business. It is through this socialization process that power becomes manifest as the practical consciousness of the consumer and has a role to play in their subsequent decision-making process. In turn, this leads the consumer to confirm-structure the 2-D structural biases in the marketplace and informs the consumer as to what forms of 1-D agency (range of action) they possess in the marketplace. Put differently, consumers conclude several different kinds of contracts every day without directly challenging their interpretative horizons that inform the consumer what is/is not permissible behaviour as a consumer. The same can be said with regard to what is acceptable as (im)permissible business behaviour.

Drawing on the UCPD and the practice of greenwashing as an example, the Commission proposes that consumers gain confidence and trust and are empowered to participate in the Green Transition when their choices are not unduly manipulated by businesses. Once adopted, the ban on greenwashing will empower consumers objectively by making changes to the consumer's environment by removing the practical causes of disempowerment. It can be said, using the vocabulary of power as 1-D and 2-D power, that the Commission is limiting the 1-D agency of businesses to engage in this marketing practice by introducing a ban on greenwashing into the 2-D structural bias using secondary legislation. Subjectively, this ban also has a less visible impact that can be made visible through the third dimension of power. In the future, the consumer will come to expect that the information on the sustainability and the green claims regarding the product will be substantiated. This will form part of their tacit systems of knowledge and practical consciousness. Put differently, the ban on greenwashing has an invisible role to play in changing the consumer's internalized narratives about what to expect from marketing practices with respect to the sustainability of a good/service.

In terms of the internalized narratives that are required for the empowered consumer to behave in a sustainable way, the Commission has stated, in strategic

⁹⁰ EU Consumer Policy Strategy 2007-2013 - Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them (n 2) 3.

consumer policy and the preparatory documents for consumer legislation, its belief that consumers already want to make sustainable choices. Put differently, by adopting this narrative the Commission is asserting that consumers already have a 3-D interpretive horizon on making the sustainable choice and that consumers believe that engaging in sustainable consumption patterns are the felicitous/appropriate way to behave. For the Commission, what stands in the way of consumers making such choices is therefore not the consumer possessing disempowering internalized narratives with regard to sustainability. This would indicate that the Commission is primarily focused on the disempowerment of consumers that arises from the objective conditions in the market and the 2-D structural biases that prevent sustainable behaviours. However, from a governance perspective, at the supranational level of the EU (and at the national level), there are several consciousness-raising efforts in place that aim to raise the 3-D practical consciousness of consumers regarding sustainable consumption patterns to discursiveness consciousness by encouraging consumers to actively consider the environmental impact of their consumption patterns and consumption choices. As was the focus in Chapters 4 and 5, the Commission has publicly adopted in several of its communications the stance (interpretative horizon) that unsustainable consumption and production is inappropriate. In my view, this is the Commission creating a narrative and story with regard to how consumers want to behave and also with regard to how they should behave. Following this, information duties can then be framed as forming part of this 3-D discursive consciousness-raising exercise that is attempting to change how consumers think about consumption. The consumers and producers in the market that do make sustainable choices and do produce sustainably are then confirming-structuring these structuration attempts, which in turn mounts a challenge to 2-D structural biases that currently permit unsustainable consumption patterns and methods of production. It is important to reiterate here that legislation that dictates how actors can and cannot behave is not the only method of structuring and creating 2-D structural bias. Information duties in consumer law can then be rethought as not simply being a tool that informs the consumer and protects the consumers choice/agency but as forming part of a hidden system of power as tacit knowledge, as practical consciousness and as discursive consciousness. Drawing on the concept of discursive consciousness, when there is a majority that shares a similar interpretive horizon (such as the appropriateness of making the choice that will result in sustainable consumption), this makes it easier for changes to occur in or to be made to the 2-D structural bias. For the legislature, such a consensus paves the way for making changes to the regulatory framework and the 2-D structural bias in the marketplace. When secondary legislation is enacted, sustainable patterns of consumption eventually become part of the taken for granted 3-D practical consciousness that guides the everyday actions of consumers.

The question that should then be considered by the scholarship on empowerment is then not simply what the drivers of consumer behaviour are, but what the interpretative horizons of consumers (constituted by practical consciousness) are

that are having an effect on empowered behaviours. The point to be made here is not whether, for example, information duties do result in consumers making the (most) sustainable choice. Instead, the question is to consider the role that information duties have on the changing internalized narratives of consumers regarding sustainability. In this way, the internalized narratives of consumers that may either facilitate them in, or preclude them from, behaving in an empowered way can be identified at the 3-D level of power as practical or discursive consciousness. This offers a novel perspective for the scholarship on consumer empowerment to move forward and move past the criticism that information duties cannot empower consumers. This claim does not negate that the issues surrounding consumer protection and information duties are problematic and it is acknowledged that behavioural economics is useful here for preventing such problems by offering insights into information that should be provided to consumers.⁹¹

4.4 Empowerment and 4-D ontological security and identity

In Chapter 2, ontological security was defined as: “the stable and secure identity narratives of an actor or group of actors and their reliance on the stability and predictability of their social and material environments.”⁹² Ontological security is then a highly personal and subjective phenomenon that is in part constructed by the actor’s sense of self and identity. Following the discussion in Chapter 2, the ontological security of an actor is constructed through 3-D socialization, which is the process that informs an actor of what they can expect from society and what behaviours are appropriate/felicitous. It is noted that a social actor has a multiplicity of 3-D interpretive horizons that inform their practical consciousness in the various dimensions of social life such as the workplace, the home and – most relevant for this discussion – as consumers in the physical/digital marketplace. If we are to ask the question whether consumer legislation empowers consumers and if we are to take the subjective dimension of consumer empowerment seriously, this then requires a consideration of power as it becomes manifest as ontological security and identity.

One starting point for framing EU consumer empowerment through this lens of power is to consider from the Commission’s narratives on what identity the Commission thinks the empowered consumer should have. The discussion earlier in this chapter that reinterpreted the Commission’s narratives on consumer empowerment illustrated that the profile of the (dis)empowered consumer is highly fragmented. In contrast, the Commission’s narrative on the *identity* of the empowered consumer is more

⁹¹ Norm Borin, Douglas Cerf & Ragi Krishnan, ‘Consumer Effects of Environmental Impact in Product Labeling’ (2011) 28 *Journal of Consumer Marketing* 76; Khan Raziuddin Taufique, Andrea Vocino & Michael Jay Polonsky, ‘The Influence of Eco-Label Knowledge and Trust on Pro-environmental Consumer Behaviour in an Emerging Market’ (2017) 25 *Journal of Strategic Marketing* 511.

⁹² See Chapter 2, Section 4.5, 67.

consistent. Put differently, the Commission is relatively clear on what kind of internalized narratives the empowered consumer should have. For instance, the empowered consumer should feel confident, is a consumer who prioritizes the environment (the green consumer), and is a consumer who believes in acting in solidarity with other consumers and future society, which represents a move away from the selfishly motivated individual at the base of earlier consumer policy. This is an operationalization of the Commission's narrative on what empowerment should look like as identity. When law is used as a tool to empower and empowerment is then a top-down process, the power in consumer empowerment at this fourth-dimension manifests as the identities that consumers will internalize and eventually perpetuate through self-discipline when they consume in a particular (sustainable) way. This less visible and top-down imposition of empowerment as a subjective process is triggered by the empowerment legislation that is used to amend the 2-D structural bias. It is noted that consumers and businesses alike accept such changes to the structural bias usually because there is a shared interpretive horizon that these legislative changes are appropriate, such as businesses should not greenwash consumers because such practices negatively impact the Green Transition. From this perspective, all consumer legislation, and not just legislation with an empowerment rationale, is complicit in creating the conditions in the marketplace in which consumers become socialized. In turn, consumers operate in the market on a daily basis using their 3-D practical consciousness and interpretive horizons that are created by the socialization that occurs from the very first moment that they interact as consumers in the marketplace. Secondary legislation then plays an invisible, and often unacknowledged, role in constructing consumer identity and ontological security because is one of the forces that manipulate the 2-D structural biases in the market.

Applying this perspective to the discussion in Chapter, 3 there is a hesitancy in consumer law scholarship to directly acknowledge that law is complicit in creating the environment within which consumers become socialized. Moreover, such questions are largely considered irrelevant by the scholarship on empowerment. This perspective in consumer law scholarship becomes evident from the absence of a discussion on the subjective dimension of empowerment and more generally the absence of scholarship that questions what EU consumer empowerment is beyond using a narrow law and economics framework. Despite this, the consumer's internalized narratives and their sense of identity as a consumer matters. For instance, it is increasingly coming to the fore in the debates on consumer vulnerability that the ways in which the text of secondary legislation defines the concepts of 'vulnerability' and 'weakness' result in consumers choosing not to make use of available protections because they themselves do not identify as weak or vulnerable.⁹³ From another perspective, at several instances

⁹³ Christine Riefa & Séverine Saintier, 'In Search of (Access to) Justice for Vulnerable Consumers' in Christine Riefa & Séverine Saintier (eds) *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2021) 8 – 9.

throughout this study the point has been made that the Commission uses several fragmented profiles of the consumer. While the argument can be made that these profiles – such as the average consumer – do not match the reality of how consumers behave, it is generally overlooked that the choices made in consumer legislation have less visibly but no less significantly had a role to play in the construction of actual consumer identities. Yngfalk's study on consumerism and food labelling in the EU offers an account of the operation of 3-D and 4-D power as subjectification and self-discipline, which is triggered by legislation on labelling. Consumers feel revulsion and disgust – signs of ontological insecurity – if they eat foodstuffs that are past the use-by date even when the foodstuff is still edible. To avoid the identity of 'unclean' or 'dirty' and to get by in society, the consumer is compelled to dispose of edible food.⁹⁴ Framing this example in the context of empowering consumers to engage in the Green Transition by consuming sustainably – not disposing of edible foodstuffs – shows how secondary consumer legislation on food safety has had an unintentional disempowering effect because it promotes unnecessary food waste. However, this connection between secondary legislation, empowerment and identity only becomes visible through the lens of power as identity and ontological security.

From this perspective on power, EU consumer empowerment is then less about the consumer feeling that they have the freedom to consume in any way they wish and is instead the top-down imposition of identity formation that is aimed towards, according to the Commission's narrative, the socially desirable ends where the consumer self-disciplines their behaviour to become the 'green consumer'. Any future study of consumer empowerment concerning these legislative amendments should not only question whether the market becomes a place where the consumer *can* behave sustainably but also whether the legislation has been successful at the level 3-D and 4-D power because consumers have developed the internalized narratives necessary for ensuring that they do engage in these behaviours. On the other hand, another important question that must be asked from a bottom-up perspective is what empowerment means to the consumer and whether there are internalized narratives that are resulting in consumer disempowerment that have not been considered by the Commission or by the debates on consumer empowerment.

4.5 Interim conclusions

The findings of the discussion in Chapter 3 show that the consumer law debate is characterized by a limited theoretical understanding of what counts as 'power' in the context of the EU consumer empowerment agenda. This is the case for two reasons.

⁹⁴ Carl Yngfalk, *The Constitution of Consumption Food Labelling and the Politics of Consumerism* (Stockholm University 2012).

First, power is equated with agency to the neglect of the other three dimensions of power. Second, what counts as agency is also limited to an understanding of agency as ‘power over’ and ignores the dimension of 1-D agency that comes manifest as dispositional ‘power to’. Put differently, consumer sovereignty and consumer choice represent just one way of expressing the 1-D agency of consumers. The reinterpretation of the operation of power in the Commission’s empowerment agenda that utilizes law as a tool for objectively and subjectively empowering consumers challenges this perspective. It was shown through several examples of both 1-D dispositional power to and 1-D power over that empowerment legislation empowers consumers by regulating both B2C relationships and market conditions. Empowerment legislation generates 1-D powers for consumers by regulating the 2-D structural bias of the market to give consumers 1-D dispositional power to participate in the market, to make sustainable consumption choices, to enforce their consumer rights, and to participate in the transition to a circular and carbon neutral market. Tangible consumer rights offer several forms of consumers’ power over traders, with consumer guarantees as a prominent example. The Commission’s consumer empowerment agenda in the energy market creates a different set of dispositional power to for consumers. This includes, for example, the energy consumer’s power to be a prosumer, to participate in renewable energy communities, and to reduce energy costs. The 2-D structural biases created by empowerment legislation challenges the consensus that the tools of the consumer empowerment agenda are limited to information duties and enhancing access to justice and redress. Adopting a more nuanced view of consumer empowerment and the regulation of 1-D power through 2-D structural bias becomes relevant because 1-D and 2-D power offer a lens for analysing the objective process of consumer empowerment enacted by the Commission as the empowering entity. In this way, the Commission uses several different legislative tools to create a marketplace that is conducive to empowered consumer behaviours.

The application of the third and fourth dimensions of power revealed that, despite the Commission’s failure to directly acknowledge the subjective dimension of empowerment, there is nonetheless a subjective process of empowerment at play when law is used as a tool to empower consumers. First, the less visible operation of the empowerment agenda as subjective empowerment operates at the level of 3-D tacit knowledge and 4-D ontological security and identity. If we are to study subjective empowerment, then it is necessary to consider how consumer legislation that alters the 2-D structural bias is already affecting the 3-D tacit knowledge of consumers and their 4-D ontological security and identity as consumers. Second, the questions that follow are whether consumer law can subjectively empower consumers, and in what way is consumer legislation complicit in creating internalized narratives that are (dis)empowering consumers.

5. Concluding remarks

The introduction of environmental and sustainability aims into strategic consumer policy and the reform of the energy market have signalled a change in both the function and values of consumer law and of the consumer empowerment agenda. Moreover, the profiles of the yardstick consumers and the role of consumers in the market are also evolving. That is not to say that these changes have triggered a radical transformation in the regulatory framework. Instead, they represent a radical shift in tone and purpose of the underlying political agenda in consumer policy but are accompanied by a gradual reorientation of the purpose and goals of existing regulatory tools in horizontal and sectoral consumer law. While the transition in secondary legislation is a gradual process – notably because existing regulatory tools are repurposed rather than more interventionist measures being introduced – the implications for consumer law scholarship is more deep-seated. These changes question the established and taken for granted understandings of the conceptual foundations of EU consumer law that are now transforming the internal market away from a linear to a circular model. These changes also question the established understandings in the consumer law debate on consumer profiles, of the role of the consumer in the market, and of what market interventions are required.

Another central finding of this chapter is that the discussion on consumer empowerment should also not be limited to studying the objective process of empowering consumers because subjective empowerment is integral for the successful empowerment of any individual. The analysis in Sections 3 and 4 showed that the Commission does not overtly pursue the subjective empowerment of consumers. Instead, the subjective process of empowering consumers is hidden in the Commission's narratives that consumers should, for example, be made to feel confident or that existing attitudes towards sustainable choices should be encouraged by making objective changes in the market. The theoretical framework developed in Chapter 2 and more specifically the four dimensions of power that were applied in this chapter adopts a broad and consequently oversimplified theory of society and social ordering. Yet in its simplicity and through such broad strokes, this model of power in conjunction with defining empowerment as an objective and subjective process has offered a novel entry point for consumer law scholarship to consider the role of empowerment legislation in society and how to broaden the scope of the question as to whether this legislation empowers consumers to also including the subjective dimension of empowerment.

In light of the changes in policy and secondary law, the theoretical reorientations of the EU consumer empowerment agenda were worked out in detail throughout the analysis in this chapter. Two final questions remain that will be addressed in the following chapter. The first is what the theoretical implications are for consumer law and consumer protection when adopting the new understanding of consumer empowerment. The second question is similar but considers what the implications of

this new perspective on consumer empowerment mean from a practical perspective. This rethinking of the concept of EU consumer empowerment and the development of a new theory of EU consumer empowerment in this chapter was a theoretical exercise that offers an ideal account of what empowerment through law would look like in a vacuum. In practice, the Commission's empowerment agenda must contend with several challenges that arise from layering the new approaches in consumer law over the existing market structures that are interwoven with structures of power.

Chapter 7

The Implications of Rethinking the Concept of EU Consumer Empowerment

1. Introduction

The opening discussion in the introduction to this study laid out the assumptions of the constructivist research paradigm that both supported and contoured the approach of the analysis in each of the chapters of this study. An important implication of this paradigm is the view that there is no singular account of a phenomenon that is the most truthful but rather that several competing realities offer different perspectives and understandings of the phenomenon under scrutiny, which in the study is the concept of EU consumer empowerment. The relevance of writing this study on EU consumer empowerment is based on the recent changes taking place in the Commission's narratives in consumer policy and energy policy as these policy areas have become increasingly targeted towards achieving the ends of the Green Transition. The underlying assumption here being that these changes in policy and law have changed the underlying rationale of the EU consumer empowerment agenda to such a degree that the established understandings of EU consumer empowerment in the scholarship on consumer law are no longer adequate. The analysis in Chapters 4 and 5 confirmed this assumption. Importantly, the term inadequate here should not be conflated with the term incorrect. The central claim of this study is not that the established understandings on EU consumer empowerment in the consumer law debate are wrong but that they are too narrow. Put simply, there is more to the story of EU consumer empowerment than the perspective that it is a legislative agenda that supports the autonomy and freedom of consumers who are perfectly rational agents. There is value to be had in adopting a broader understanding or model of EU consumer empowerment. First, this rethinking of empowerment in Chapter 6 offers future debates on the empowerment concept in the EU consumer law context a more nuanced theoretical framework for conceptualizing what it means to empower consumers through law. Second, looking forward, this rethinking of consumer empowerment has implications for the established understandings of the connection between the consumer empowerment and the internal market rationale, consumer law and consumer protection. With this in mind, the discussion in this chapter will conclude the analysis in this study by answering the final sub-research question that considers several of the theoretical and practical implications that follow from the rethinking of the concept of EU consumer empowerment developed in Chapter 6.

2. Consumer empowerment: regulation or autonomy?

The discussion in Chapter 3 demonstrates that the concept of EU consumer empowerment introduced by the Commission in 2007 has come to be defined through the lens of several (long) established theoretical frameworks that contour how consumer law scholarship generally tends to frame EU consumer law. To briefly reiterate, consumer empowerment is viewed as being embedded in a neoliberal model of consumer protection. Moreover, it has been subject to the criticism that the Commission's policy approach that aims to empower consumers is best understood as an unwanted symptom of the unprotective character of consumer law. There is also an established body of literature that characterizes consumer law as a species of national private law. National private law systems tend to be characterized as being predicated on the normative concepts of negative liberty, formal equality and corrective justice.¹ It is the law that governs the interpersonal freedom and equality of actors.² Applying the concept of liberal autonomy from private law theory within the consumer law debate to the EU consumer empowerment agenda has resulted in the framing of EU consumer empowerment as an agenda that seeks to protect the autonomy and free will of consumers as market actors rather than protecting consumers through (more) paternalistic forms of regulation. Consumer empowerment has then come to be defined as an agenda that prioritizes limited market interventions through information duties and, to a lesser extent, the legislative measures that give teeth to enforcement. There are several challenges that can be made to this conceptualization of consumer empowerment following the analysis of horizontal consumer law in Chapter 4, vertical consumer law in the energy market in Chapter 5, and the rethinking of EU consumer empowerment in Chapter 6.

It is my view that the Commission's strategic approach to empowering consumers can be more readily explained by the concept of regulated autonomy that is proposed by the ERPL project. Through a reading of the Court's case law, Comparato defines regulated autonomy as a balance between the seemingly irreconcilable concepts of autonomy and regulation: "The term 'regulated' refers to the idea of autonomy not only as something which gets limited but that also serves as a regulatory tool."³ Regulated autonomy is then both an extension and limitation of the contractual freedom of parties who accept an intrusion into their economic liberties so that they can access new

¹ According to a formalist conception of private law, the corrective justice of private law is neutral and non-political because it does not concern itself with distributive justice and substantive outcomes; see for example Ernest Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 204.

² This is in contrast to the concept of public law that frames actors and their relations in the context of the paternalistic interventions of the welfare state. Public law is then characterized as being predicated on the concepts of positive liberty, substantive equality and distributive justice, which are pursued through mandatory law and regulation.

³ Guido Comparato, 'Private Autonomy and Regulation in the EU Case Law', in Hans Micklitz & Yane Svetiev (eds), *European Regulatory Private Law – The Paradigms Tested*, EUI Law Working Paper 2012/3 <<http://cadmus.eui.eu/handle/1814/24534>> accessed 27 July 2022, 4 & 18.

economic possibilities in the internal market, which serves both economic and non-economic ends.⁴ The recent goals of the consumer empowerment agenda in strategic policy aim to facilitate consumer participation in a new vision of the internal market that is fair, just, circular and carbon neutral. Consumer empowerment outcomes were operationalized in Chapter 6 as the sustainable consumption patterns that are required for the new economic model where growth is decoupled from environmental degradation. This is achieved through empowerment legislation that intervenes in the market by regulating the B2C relationship either directly or indirectly. In Chapter 6 it was argued that consumer legislation, through the lens of the (rethought) concept of consumer empowerment, aims to guide consumer behaviour towards these normatively desirable ends of a circular and net-zero economy. The concept of positive liberty that supports these empowerment aims is not concerned with the removal of barriers, constraints and non-interference but instead with developing within consumers an internalized concept of control, self-mastery, self-determination and self-realization.⁵ Moreover, the dual claim that consumer empowerment is characterized by negative liberty and that the Green Transition to a circular and carbon neutral economy will be driven by the agency of consumers who are voting with their wallets does not correspond with the current strategic approach of the Commission's consumer empowerment agenda. It is my view that the rethinking of EU consumer empowerment in the previous chapter challenges the idea that consumer empowerment should be conflated with freedom and autonomy.⁶ From one perspective, the autonomy of consumers is already limited by consumer legislation. While consumers retain the right to choose what they consume and who they contract with, this autonomy exists within the confines of secondary legislation that regulates in several different ways what choices are available to consumers, the fairness of contractual conditions and even the conditions in the market in which 'autonomy' is exercised. The internal market is not truly a free market. For decades, EU competition law has regulated how companies can behave. EU consumer law has also for decades regulated standards that impact what goods may be lawfully marketed and are available for consumers to choose from. For example, to ensure consumers' safety the General Product Safety Directive⁷ and sectoral legislation govern the safety standards while other more recent legislation bans products from the market such as incandescent halogen bulbs⁸ and several types of single use

⁴ *ibid* 18.

⁵ On the concept of positive liberty, see Isaiah Berlin, *Two Concepts of Liberty Four Essays on Liberty* (Oxford University Press, 1969) 118-172.

⁶ I use the term 'freedom' here in a broad sense to encompass several understandings of freedom as agency, autonomy, negative liberty, consumer choice and consumer sovereignty.

⁷ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety [2001] OJ L11/4.

⁸ For the most recent Ecodesign Regulation on lighting, see Regulation 2019/2020/EU of 1 October 2019 Laying Down Ecodesign Requirements for Light Sources and Separate Control Gears pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulations (EC) No 244/2009, (EC) No 245/2009 and (EU) No 1194/2012 [2019] OJ L315/209.

plastics.⁹ More recently, a proposal for the EU will provide a general framework that imposes sustainability requirements on products intended for the EU market.¹⁰ This directive will be further supplemented by a series of delegated acts setting more specific requirements for different product groups. This proposal and accompanying delegated acts will set requirements for products based on the sustainability and circularity aspects listed in the Circular Economy Action Plan, including product durability, reusability, upgradability and repairability, the presence of substances of concern in products, product energy and resource efficiency, recycled content of products, product remanufacturing and high-quality recycling, and for reducing products' carbon and environmental footprints.¹¹ The adoption of the horizontal ER and supporting acts does not rely on consumers driving the Green Transition by making the sustainable choice because the goods that can be lawfully marketed will already meet set ecological and sustainability standards. Consumers will then retain the right to choose amongst these goods, but their choice will take place in a regulated environment.

Following this thread, the pending amendments to the UCPD and the CRD that seek to stimulate consumers to make the sustainable purchasing choice can be viewed as being partially aimed towards changing and setting environmentally-sustainable market standards, while the bulk of this aim will be achieved by targeting production through the Ecodesign reform. These legislative instruments can also be rethought as being aimed towards changing the attitudes or interpretive horizons of consumers by normalizing the belief that the most sustainable choice amongst a range of already sustainable options is the most *appropriate* choice. This is an unacknowledged role of consumer law through the lens of the consumer empowerment agenda where existing consumer instruments are repurposed and become integral for the empowerment strategy that seeks to steer European society towards a circular and carbon neutral economy. This to be achieved by changing the existing 3-D systems of knowledge and the interpretive horizons of European consumers with regard to what types of consumption are permissible. This role of the empowerment agenda and consumer law is also evident in the legislative move towards an enhanced right of repair that requires a shift in consumer perceptions regarding the appropriate consumption of goods during their lifecycle. A similar change is happening in the energy market. It was shown in Chapter 5 that to achieve the clean transition to a decarbonized economy, the architecture of the energy market required and continues to require transformation. Against these structural changes, the conditions within which the consumer can make choices are being heavily regulated so that in the near future household consumers will

⁹ Directive 2019/904/EU of 5 June 2019 on the Reduction of the Impact of Certain Plastic Products on the Environment [2019] OJ L155/1.

¹⁰ Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC' COM (2022) 142 final.

¹¹ *ibid* 1.

only have the capacity (power to) consume renewable energy sources in a decentralized energy infrastructure.

To summarize, the discussion so far advocates for a theoretical shift in conceptualizing consumer empowerment not as a strategy that prioritizes and is predicated on consumer autonomy but is instead a strategy that regulates consumer autonomy. In Chapter 6, the application of Haugaard's four-dimensional model of power to several of the secondary instruments that have an empowerment rationale resulted in the broad but central finding that the EU consumer empowerment agenda regulates both power structures in the market and the agency of businesses and consumers. In itself, this perspective offers a novel and more nuanced understanding of the EU consumer empowerment agenda. However, rethinking EU consumer empowerment in this way has broader implications for how we can conceive of the relationship between consumer empowerment, consumer law and consumer protection. More broadly still, in light of the changes in strategic policy, there are grounds for reconsidering, in light of the goals of the Green Transition, the purpose and nature of consumer law and consumer protection, which will be considered in more detail in the following sections.

3. Consumer empowerment and consumer protection

It may have been noted that the discussion in Chapter 6 did not qualify consumer protection as an outcome of the Commission's empowerment agenda. This does not infer that the concepts of consumer empowerment and consumer protection are mutually exclusive, nor that the consumer empowerment agenda inherently undermines the existing protective dimension in EU consumer policy and law. Chapter 3 outlined the concerns that have been circulating within the consumer law debate that the adoption of a consumer empowerment rationale in strategic policy and secondary legislation would shift the focus of consumer policy away from consumer protection. These concerns flow from the framing of consumer empowerment as a strategy that is pursued by prioritizing information duties and as a strategy that is opposed to the more interventionist-leaning approach in EU consumer protection legislation.¹² While there is some agreement as to which legislative instruments can be qualified as protective measures – the UTCD for example – and which instruments are not – information duties in the CRD – there is little agreement as to what the normative standard of consumer protection should be. To comprehensively address these contentions against the consumer empowerment agenda requires a normative theory of consumer protection that sets the desirable standard for what the level of consumer protection should be in the market, which consumer(s) should be protected, and the type of

¹² See Chapter 3, Section 2.4.

legislative instruments that should be adopted to protect this/these consumer(s). While these questions are becoming more relevant because of the recent transformations in consumer law in light of the green and digital transitions, it falls outside the scope of the remainder of this study to first develop such a normative standard against which to evaluate the theory of EU consumer empowerment that was developed in Chapter 6. In my view this is also unnecessary. In the following discussion I will make several observations as to why the discipline-specific theory of EU consumer empowerment developed in Chapter 6 does not correlate with the concept of consumer empowerment that dominates in the literature on consumer law, as was laid out and explored in detail in Chapter 3. Instead, in the following discussion I will reframe the consumer empowerment agenda in horizontal consumer law and vertical energy law with a consumer element as a complementary regime and goal of secondary legislation that exists alongside and in some instances depends on the existing level of protection offered by the existing regime of consumer protection. This is an important conclusion for two reasons. First, alongside viewing consumer empowerment as a strategy of regulated autonomy, it challenges the established understandings of the purpose of consumer legislation and of consumer protection more generally. Second, a rethinking of the relationship between consumer empowerment, consumer law and consumer protection is becoming increasingly relevant in light of the changes to the Commission's narratives and vision of the internal market, which is radically different from the narratives/vision from even just ten years ago, as outlined in both Chapters 3 and 4. Put differently, the continued retention of our existing understandings of what consumer protection is, what it should be and what it should not be are coming under increasing pressure as both society and the structures in the market are evolving in the race to achieve an energy-secure, clean, circular and sustainable internal market.

3.1 Opposing or complementary regimes?

To generalize, the existing standard of consumer protection in the internal market is affected by what, according to the Commission, in strategic policy counts as inappropriate consumer harm and what the normative profiles of the consumer are who requires this protection. These standards are then translated into the legislative instruments that regulate market conditions and the relations between consumers and businesses. The first approach in early consumer policy adopted the perspective of consumers as the homogeneously 'weak' group of market actors, but this weakness was tempered by adopting a profile of the rational consumer as the normative yardstick.¹³

¹³ That all consumers are categorically weak was confirmed by the Court in *Oceano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98) [2000] ECR I- 04941.

The ‘weak’ consumer baseline then becomes the ‘strong’ consumer who is cognitively primed and capable of successfully navigating and functioning in a liberalized internal market. A further distinction can then be made between this view of the ‘strong’ consumer who is categorically and universally ‘weak’ *vis-à-vis* traders and the concept of ‘vulnerability’ as a more specific condition of ‘weakness’ that is categorically attributed to certain groups of consumers, such as the young and the infirm.¹⁴ This offers more nuance to the view of the seemingly homogeneous consumer profile in consumer law that is further fragmented by several other consumer profiles developed in policy and secondary legislation.¹⁵ The discussion in Section 4 of Chapter 6 adopted the disempowered consumer as the conceptual starting point for deconstructing what conditions cause illegitimate harm for consumers because such conditions are considered to preclude consumer empowerment. This standard was adopted to sidestep the conceptual confusion and limitations associated with exclusively adopting as a theoretical starting point any one of the normatively-laden consumer concepts such as the strong consumer, the rational consumer, and the vulnerable or weak consumer. From a policy perspective, the central finding from this analysis revealed that the disempowered consumer is considered as experiencing several types of harms arising from market structures, market conditions and relational harms when interacting with a business and harms that arise due to the consumer’s personal conditions, including behavioural characteristics and socio-economic position in society.

Against this finding, it is my view that the consumer empowerment agenda does not primarily build and capitalize on the profile of the rational consumer but is instead layered over the many fragmented images of the consumer that exist in consumer law, including the ‘weaker’ image of the consumer as the vulnerable consumer. Moreover, when the concept of ‘vulnerability’ is instead equated with the cause of consumer harm – rather than a consumer profile – then the Commission’s consumer empowerment agenda can be rethought as adopting a broader view of consumer vulnerability as its starting point. For instance, in both horizontal consumer policy and vertical energy policy, the Commission’s narrative can be framed as having broadened to acknowledge the social dimension of consumer harm. First, the synergies between consumer policy and environmental policy have repositioned sustainability and environmental protection as a goal of secondary consumer law. Conditions that prevent sustainable consumption patterns can then be qualified as causing harms to consumers that ought to be corrected through secondary legislation. Second, the vision of a carbon neutral and circular economy impacts what is meant by ‘the functioning of the internal market’ because it entails – however idealistically – the decoupling of economic growth

¹⁴ Norbert Reich, ‘Vulnerable Consumers in EU Law’, in Stephen Weatherill & Dorota Leczykiewicz (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 141.

¹⁵ On the several normative images of the consumer, see for example Dorota Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

from environmental degradation. This change in the Commission's vision of the internal market also becomes manifest in energy policy and the recast of several directives that aim to empower all consumers with a focus on vulnerable energy consumers and energy poverty. This represents – at the very least – a move towards acknowledging that consumer vulnerabilities and harm arise from systemic inequalities in society that then impact the ability of all consumers to truly have equal access to the market and to equally participate in the Green Transition. These observations do not preclude a criticism as to whether secondary legislation goes far enough to correct these harms and achieve the Commission's proposed vision of a fair, circular and decarbonized internal market.

In acknowledging these changes, two points can be raised as to how the Commission is redefining consumer harm and vulnerability and how this impacts the purpose of consumer law. First, it is my contention that consumer empowerment is intimately entangled in these transformations. First, the concept of EU consumer empowerment is concerned with more than the protection of the rational consumer from information asymmetries. Second, it is also my contention that consumer legislation has a dual purpose that is both to protect consumers and to empower them. I propose that there is little to be gained by continuing to define EU consumer empowerment as the 'help yourself' pillar in consumer protection that is predicated on the rational consumer concept. Reversing the perspective, it is my view that the 'help yourself' approach in consumer protection that arises from the adoption of the average consumer benchmark and the rational consumer in strategic policy instead has the effect of undermining the goals of consumer empowerment. The Green Transition is an aim of the consumer empowerment agenda. As a concrete outcome, these aims can be operationalized as the normatively desirable empowered consumer behaviours (outlined in Chapter 6) that are problematically layered upon decades of strategic consumer policy that was developed around the yardstick of the rational consumer concept. On the one hand, it is true that this yardstick rational consumer and the average consumer concept have enabled the creation of an internal market predicated on a (neo)liberal capitalist model driven by the ideologies of consumer society. On the other hand, and in light of the analysis of consumer policy and law in this study, is also true to claim that the EU institutions are now attempting to transform away from this model and from the normative doctrines that support unchecked consumerism. Moreover, secondary legislation is not the only force that creates power structures within the marketplace. Traders consistently engage in the structuration of the market through business practices. They primarily do so within the permissible limits laid out by law in the 2-D structural bias and in some cases do so by violating law when they engage in structuration attempts against the 2-D bias. By adopting the rational consumer as the normative standard, businesses have been enabled to adopt business practices that create 1-D power imbalances in their favour. The rational consumer standard has then led to a market with 2-D structural biases that gives businesses the legitimate power to create market conditions and relational conditions that generate power over consumers. Put

differently, businesses have the power to affect consumer behaviour. The adoption of the consumer empowerment agenda in horizontal and vertical legislation does not erase these existing power structures but is instead layered over existing structural biases.

Following this, the conclusion can be drawn that the successes and failures of the consumer empowerment agenda are not isolated from the concept of consumer protection. Instead, the empowerment agenda is in part dependent on the level of consumer protection that currently exists in the market, that is set out by the profiles of the yardstick consumers in consumer legislation and the strength of the consumer protection rules already in place. The issue then becomes that if consumer legislation only protects the rational consumer, only the rational consumer can be enabled through secondary legislation to behave in an empowered way. This does not automatically mean that the profile of the empowered consumer is inherently rational and that the concept of consumer empowerment is inherently liberal. Instead, this is an indicator that the pre-existing standards in consumer legislation should be rethought. This discussion is already taking place in the context of the UCPD both within the debate and by the Commission, more generally with regard to the vulnerability standard and access to justice for vulnerable (energy) consumers.¹⁶ A significant consequence that arises from this rethinking the relationship between consumer empowerment, consumer protection and consumer legislation is the pressure that is placed on the established understandings of consumer protection. Theoretically, if consumer legislation has the dual aim of protecting and empowering consumers, then in practice these aims become merged. Taking the disempowered consumer as the starting point, this consumer must be free from harms in the market that cause disempowerment so that their empowered behaviours can contribute towards the attainment of the broader (social) goals of consumer law, which is in turn instrumentalized to achieve the (new) aims of a sustainable internal market.¹⁷

3.2 Power imbalances: the average consumer benchmark

To illustrate the practical implications that arise when rethinking the relationship between consumer protection and consumer empowerment, the following discussion will consider how the rational consumer yardstick undermines the aims of the consumer empowerment agenda. The analysis in Chapter 6 sets aside the concepts of the rational and average consumer. The intention was not to elide the pervasiveness of the rationality

¹⁶ Naomi Creutzfeldt, Chris Gill, Marine Cornelis & Rachel McPherson, *Access to Justice for Vulnerable and Energy-Poor Consumers: Just Energy?* (Hart Publishing 2021); Christine Riefa & Séverine Saintier (eds), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Routledge 2020).

¹⁷ On the instrumentalization of consumer law and the consumer, see Hans Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in Dorothea Leczykiewicz & Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

study in strategic consumer policy. Instead, the disempowered consumer was adopted as the theoretical starting point for discerning the objective obstacles to consumer empowerment in the market because this standard offers the conceptual breadth for a discussion of the recent transformations that have been taking place in both horizontal consumer policy and sectoral policy in the energy market. The following discussion will problematize the Commission's imposition of the new aims of consumer empowerment agenda on the existing (neo)liberal framework in consumer policy and law that are predicated on the normative profile of the rational/average consumer.

Drawing once more on the Commission's narratives in strategic policy and legislative proposals, one of the claims in this study is that the Commission uses secondary legislation to engineer the new vision of the market and drive forward the radical transformation to a circular and net-zero economy. The 2022 legislative proposal for a Directive on Empowering Consumers for the Green Transition and the pending publication of the proposal on a right to repair are both examples of the Commission's use of secondary consumer legislation to engineer the social transformation to a circular economy. In practice, the Commission is layering these legislative amendments – with the aim of changing linear consumption patterns – over pre-existing legislation that had the opposing aim of facilitating a linear market by stimulating economic growth through increasing rates of consumption (the antithesis of the circular economy). With this in mind, two points should be considered. First, the consumer's new identity as the empowered consumer – the consumer who wants to consume in an environmentally friendly way – is conceptually layered over the older profile of the yardstick empowered consumer who participated in the market simply through consumption.¹⁸ Second, the recent legislative proposals that aim to amend the 2-D structural biases in the market must contend with the existing 2-D structures of power created by traders in the market as an environment where the level of consumer protection has been determined for decades by the average consumer benchmark and the rational consumer in policy.

The UCPD, currently undergoing reform to become an empowerment directive, retains the average consumer benchmark as the standard for the test for fairness and as the standard for the vulnerable consumer benchmark that is applicable to certain categories of consumers.¹⁹ The amended UCPD aims to empower consumers to make sustainable choices by banning practices – such as greenwashing – that pose a barrier to consumers who want to make a sustainable choice. While this is a move in the right direction, these amendments do not take into consideration that the consumer is

¹⁸ Reiterating that the ethical empowered consumer is the empowered consumer whose consumption patterns are consistent with the consumption patterns required in a circular economy. This term does not indicate that the consumer is explicitly voting with their wallet.

¹⁹ Directive 2005/29/EU of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive), arts 5(3).

in many instances the digital consumer. Put differently, the empowerment aim of the UCPD is to regulate the power imbalances between traders and consumers that arise when traders have too much power over consumers because they can manipulate and distort decision-making through misinformation. The focus of these amendments is on the use of unsubstantiated environmental information by traders as a power resource that limits the consumer's power to make a sustainable choice. The scholarly debate²⁰ and more recently the Commission²¹ have acknowledged that with the rise of e-commerce, digital consumers are increasingly vulnerable/at risk of being misled by rapidly evolving and sophisticated marketing practices known as dark patterns that manipulate consumer decision-making. Despite this, the average consumer benchmark and the vulnerability standard remains unchanged in the UCPD. Helberger *et al* have recently illustrated that the *laissez-faire* approach of the liberalized marketplace, the GDPR and the average consumer benchmark have in combination enabled a digital marketplace that is rife with – to frame it in the terminology from Chapter 2 – (2-D) structural and (1-D) relational power imbalances.²² However, the connection between the ways in which traders have gathered this power over consumers by constructing digital environments that manipulate the decision-making process and how such practices affect sustainable decision-making is neglected by both the scholarly debate and consumer policy.

Using the example of greenwashing, the prohibition of such practices will, in theory, enable consumers to make the green choice by ensuring that the consumer is not misled by untrue or unsubstantiated sustainability/environmental claims. Despite this, it can be argued that consumers are at risk of disempowerment and rendered unable to make green choices because of digital architectures and design elements that distort the decision-making process. Traders can use dark patterns to manipulate consumers into making the purchasing choice that most benefits the trader but that may not have been the green choice that the consumer intended to opt for even when there is no misinformation regarding the environmental characteristics of a product.

From another perspective, the environmental concerns that have been integrated into consumer and energy policies require reducing levels of mass consumption. The climate and environmental crises not only stem from the ecological unsustainability of the products themselves but are also caused by the quantity of consumption that leads to overconsumption of natural resources and environmental

²⁰ Natali Helberger, Marijn Sax, Joanna Strycharz, & Hans Micklitz, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 *Journal of Consumer Policy* 175.

²¹ See for instance the Commission's report on dark patterns and manipulative personalisation, Francisco Lupiáñez-Villanueva, Alba Boluda, Francesco Bogliacino, Giovanni Liva, Lucie Lechardoy & Teresa Rodríguez de las Heras Ballell, 'Behavioural Study on Unfair Commercial Practices in the Digital Environment: Dark Patterns and Manipulative Personalisation: Final Report' (2022) <<https://www.eccireland.ie/wp-content/uploads/2022/05/Dark-patterns-study-2022.pdf>> accessed 29 July 2022.

²² Natali Helberger, Marijn Sax, Joanna Strycharz, & Hans Micklitz, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 *Journal of Consumer Policy* 175, 181 – 183.

harms. This goal of reducing mass consumption is an underlying aim of the Green Deal and the New Circular Economy Plan and can also be identified in the recent legislative reforms that are aimed towards the Green Transition. For instance, the proposal for the ER and implementing directives will, in the near future, attempt to tackle the issue of (ultra-) fast fashion, which is damaging not only because of unsustainable production practices but also because of the corresponding rising rates of mass consumption.²³ The proposal for a new right to repair is another example of the move towards reducing rates of mass consumption by prioritizing the repair of defective goods rather than replacement.

In light of this environmental aim of the empowerment agenda, one of the most problematic and common dark patterns in online user interfaces are the design elements that capitalize on the user's scarcity bias. For consumers, these are the design elements that manipulate the consumer into making a purchase that they would normally not have made or to buy more products than originally intended.²⁴ To give an example, Chinese retailer Shein is the world's largest online-only fashion company and a world leader in ultra-fast fashion. Shein's user interface has several dark patterns targeted towards making the consumer purchase in large quantities. In a recent survey of dark patterns, Shein was found to have had eight different types of dark patterns and ranked number 1 out of 33 of the largest fashion companies in the United Kingdom.²⁵ According to this survey these: "Techniques include time-limited discounts with countdowns, extra money-off for app sign-ups, delivery options ordered by most expensive first, suggesting other items you might like, and prompts to spend more to get a free gift or delivery."²⁶ From the legal perspective of the UCPD and the average consumer benchmark, the question is then whether these design elements qualify as illegitimate, manipulative practices (dark patterns) that affect free choice or are just more benign nudges considered to be aimed at persuading the average consumer. The most recent rationale for protecting consumers in the marketplace adopted by the UCPD is the protection of the 'green' consumer and the corresponding ban on greenwashing practices that use false information to manipulate 'green' decision-making. This rationale does not consider or address the issue of protecting the 'green' consumer from practices that distort free choice by manipulating consumers into buying more products than intended and consequently overconsuming. While count-down timers used as part of false limited offers are qualified as distorting the decision-making of the average consumer, several other practices that lead the consumer to buy more do not fall within

²³ This is tackled in the context of textiles; see Commission, 'Proposal for a Regulation of The European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC' COM (2022) 142 final, recitals 13 and 46.

²⁴ A scarcity bias can be defined as when the subjective value of a good increases because of actual or perceived scarcity; see Luigi Mittone & Lucia Savadori, 'The Scarcity Bias' (2009) 58 *Applied Psychology* 453.

²⁵ Rogue Media, 'Shein Ranked Most Manipulative Fast Fashion Brand in our Dark Patterns Study' <<https://www.rouge-media.com/blog/shein-ranked-most-manipulative-fast-fashion-brand-in-our-dark-patterns-study/>> accessed 26 July 2022.

²⁶ *ibid.*

the scope of the UCPD as practices that distort the decision-making of the average consumer. These include the design elements that prompt the consumer to spend more money, such as inducing the consumer to add more items to the basket to claim a free gift or discount offers on one product if the consumer commits to set up a monthly subscription for a set number of other products. The average consumer benchmark sets too low a standard to be capable of prohibiting design elements that manipulate consumers into the environmentally- unsustainable consumption patterns that maintain the current untenable levels of mass consumption. This can be framed as a second order effect where the negative environmental consequences of such practices are not foreseen or taken into consideration.²⁷

The significance of these negative, second order environmental effects for consumer empowerment and the Green Transition that stem from the average consumer concept in the UCPD may seem too far-reaching to be of consequence for the new sustainability aims of consumer empowerment in consumer policy. However, a similar argument has already been made with regard to the second order environmental effects of the 14-day withdrawal right. Following the increase in B2C e-commerce during the corona pandemic, the 14-day withdrawal right is coming under increasing scrutiny for the environmental impact associated with carbon footprint associated with increasing rates of consumer returns.²⁸ The same argument can be applied to design elements and dark patterns that stimulate mass consumption, such as the discounts offered by Amazon on a product if the consumer has reached a set number of monthly subscriptions for other products.²⁹ This design element and potential dark patterns that arguably saves the consumer time and money has the second order effect of both stimulating increasing rates of mass consumption while also increasing the consumer's carbon footprint because they receive multiple different packages per month.

The central point to be made from these examples is to make visible how existing structures of power built by businesses in the marketplace were made possible by the legislative standard in the UCPD that regulates the B2C relationship by using the average consumer benchmark. These power structures have the effect of undermining the more recent goals of the consumer empowerment agenda that are becoming

²⁷ The idea of second order effects can be used to explain what occurs when a policy choice or order has a consequence and the consequences of this consequence. An example of this is the 1902 Great Hanoi Rat Hunt where the French authorities attempted to cull the exploding rat population by offering a bounty for each rat killed. The first order effect entailed citizens killing rats and claiming the bounty. The unintended second order effects entailed the bounty hunters/rat catchers chopping off a rat's tail so as to claim the bounty but leaving the rat alive so that it could continue to breed and produce more rats. Another second order effect arose from citizens breeding rats for the purposes of claiming the bounty. On the Hanoi Rat Hunt, see Michael Vann & Liz Clarke, *The Great Hanoi Rat Hunt: Empire, Disease, and Modernity in French Colonial Vietnam* (Oxford University Press 2019).

²⁸ Evelyne Terryn & Elias van Gool, 'The Role of European Consumer Regulation in Shaping the Environmental Impact of e-Commerce' (2021) 3 *Journal of European Consumer and Market Law* 89.

²⁹ This is Amazon's 'Subscribe and Save' programme <https://www.amazon.com/gp/help/customer/display.html?ref_=hp_left_v4_sib&nodeId=GJ2L.TMLFG.GMH67M7> accessed 29 July 2022.

increasingly focused on consumer behaviour transitioning away from unsustainable consumption patterns. This is a perspective of consumer empowerment that becomes visible when it is conceptualized as a practical approach that regulates consumer autonomy in the market. This becomes obscured by the established understanding of consumer empowerment as an agenda that seeks to empower the neoliberal consumer by protecting autonomy and negative liberty. The standard set by the average consumer benchmark in the UCPD can then be reframed as setting a level of consumer protection that undermines these goals of the empowerment agenda. This practical finding is a confirmation that there is value to be had in conceptually detaching the concept of the empowered consumer from the average consumer benchmark. Future research can use the theory of EU consumer empowerment developed in Chapter 6 to rethink the legislation that aims to empower consumers by critically reconsidering what structures of power in the marketplace are disempowering consumers and where these structures stem from.

4. More than consumer choice: the implications of rethinking the concept of ‘power’ and consumer empowerment

Rarely has the debate on EU consumer empowerment directly addressed the question of how we can understand the underlying conception of power that supports the consumer empowerment agenda. That is not to say that the debate avoids discussing what counts as power but rather that understandings of power and of consumer power are rarely challenged or defined as more than agency. In Chapter 6, the application of Haugaard’s four-dimensional model of power traced the several ways in which the concept of power can become manifest when secondary legislation is used as a tool for empowering consumers. The broadest theoretical implication of the application of this model is that the understanding of power that is the underlying basis of the EU consumer empowerment agenda should be broader than the conceptualization of power as 1-D agency. The discussion in the following sections considers the more specific and nuanced theoretical implications that arise from broadening the scope of what counts as power and what it means to then empower consumers through law.

4.1 The theoretical implications of rethinking consumer empowerment through the prism of power at the first and second dimensions

The first and second dimensions of the model of power integrated into the theoretical framework in Chapter 2 offer two lenses that frame the concept of power as both agency and structure. It is these two dimensions of power that most closely correspond with theorizing empowerment as an objective process and of objective disempowerment

arising from the more visible/tangible conditions in the disempowered actor's environment. There are then three broad implications that ensue from rethinking the concept of EU consumer empowerment through these two dimensions of power.

The first significant implication is the broadening of the legislative tools that the Commission uses to empower consumers. As was established in Chapter 3, information duties and mechanisms that facilitate private enforcement and redress for consumer harm are typically qualified by the debate as measures that empower consumers. Following this, the rationale of empowering consumers is generally considered to be mutually exclusive with the more protective dimension of consumer law and consequently legislative measures other than information duties. The analysis in Chapters 4 and 5 and the rethinking of the concept of EU consumer empowerment in Chapter 6 has offered an alternative perspective where the consumer empowerment agenda is consistent with other consumer rights and the more protective dimension of consumer empowerment. Moreover, in adopting the perspective that the Commission is using secondary legislation to regulate the 2-D structural bias and amend the fabric of the marketplace, such as through the reform of the energy market, the consumer empowerment agenda can be framed as making changes that aim to empower EU consumers from this structural perspective. This draws legislation that does not directly regulate the B2C relationship within the realm of the Commission's empowerment toolbox.

Related to the first point is another significant finding and implication of reconceptualizing of empowerment as objective disempowerment and empowerment as an objective process through the lens of 1-D and 2-D power. This is the new reading of the Commission's narratives in policy on what counts as consumer harm and vulnerability. This reading moves beyond the understanding that the forms of consumer harm and detriment that the consumer empowerment agenda addresses is limited to information asymmetry. In Chapter 6, adopting the disempowered consumer as a starting point, rather than the average consumer concept, framed this objective disempowerment of consumers as arising in the following three ways: through market structures and conditions that disempower, relationally (the B2C relationship), and through personal conditions of the consumer. These categories developed a more expansive view of the harmful conditions that the empowerment agenda aims to remedy through secondary legislation. This rethinking offers a new starting point for the debates on consumer empowerment to reconsider not only what counts as consumer vulnerability. It also raises the question as to whether the current approach in the regulatory framework and the pending amendments to existing legislation can empower consumers.

A third implication of the broadening of the concept of power is the acknowledgement that the Commission's imposition of the consumer empowerment agenda through secondary legislation has the practical effect of regulating several of the 2-D structural biases in the marketplace; noting once more that this is the perspective

that law is not the only source of 2-D structural bias in the marketplace. Business practices – in part enabled and made possible as a consequence of the regulatory framework – are also a source of 2-D structural bias. In line with this rethinking, this confirms the claim made earlier in this chapter that the practice dimension of EU consumer empowerment can be more adequately explained using the concept of regulated autonomy. If there is to be a critical assessment of the Commission's consumer empowerment agenda, for example by considering whether the empowerment agenda can bring about the empowerment aims set out in policy, then the debate should adopt this broader starting point when defining consumer empowerment. Drawing on the findings in the previous section, the rethinking of the relationship between consumer empowerment, the average consumer benchmark and the UCPD challenges the dominant but narrow understanding of consumer empowerment as agency and the corresponding qualification that the aims of the consumer empowerment agenda are consistent with the underlying rationale of the average consumer benchmark.

4.2 The theoretical implications of rethinking consumer empowerment through the prism of power at the third and fourth dimensions

The zero-sum view of power as agency exists primarily along the dimension of 1-D power and even more narrowly through the framing of 1-D agency as power over. A first important finding from the analysis in Chapter 6 is that the dimensions of power at play when consumers are empowered through law are much broader and more complex than the restrictive definition of power as agency. The 3-D and 4-D dimensions that entail the framing of power as practical/discursive consciousness (systems of knowledge), identity and ontological security offer a theoretical approach for rethinking the aspects of power at play when consumers are empowered through law. These dimensions of power then offer novel conceptual lenses for examining how in practice consumer legislation is part of the process where 3-D systems of knowledge and interpretative horizons are created and changed. The same can be said for the role of law in creating an environment within which consumers are socialized as consumers and as a consequence their 4-D ontological security is entwined with their sense of identity, not only as consumers but more generally as social actors. It was proposed that these two dimensions of power combined can be used to examine the subjective dimension of consumer empowerment and the internalized narratives of consumers that are either conducive or a block to empowered behaviours. The significance of the subjective dimension of empowerment was established in Chapter 2.³⁰

The analysis in Chapter 6 illustrated that the operation of secondary legislation in the market is a part of both the objective and the subjective process of empowering

³⁰ See Chapter 2, Sections 5 & 6.

consumers.³¹ Likewise, secondary legislation can also have the paradoxical effect of subjectively/objectively disempowering consumers. The implication is then that if we are to understand not only the objective but also the subjective process of empowering consumers, it is necessary to move beyond attempts at identifying what the internalized narratives of the (dis)empowered consumers are. This also requires a consideration of the effects that secondary law with an empowerment aim has on these internalized narratives. This implication becomes especially relevant when the goals of the empowerment agenda are to concretely shift consumer attitudes and behaviours away from unsustainable consumption patterns. Moreover, the individual's socialization as a consumer occurs in the market as an environment where law has an integral yet often invisible and unacknowledged role to play in the shaping of consumers' 3-D practical consciousness. Rules on contract are, for example, invisible in everyday life and yet as individuals we use them every day to reproduce the deeper structures in society (such as capitalism) to get by on a daily basis. However, not all of an individual's experiences with law are positive and 3-D interpretive horizons about law can have a negative impact on the empowerment process. This point was already explored in the empirical study on empowerment and the GDPR that was discussed in Chapter 3 where the participants' ideas about the GDPR were adopted by the researchers as variables for determining if they were empowered by this regulation.³² Following this, when the relevance of subjective empowerment through law is acknowledged, then there are theoretical implications for how we can conceptualize the role of secondary law with an empowerment rationale and the role of law in society more generally. It is my view that in order to fully acknowledge the third and the fourth dimension of power in the consumer empowerment agenda and the subjective dimension of consumer empowerment, this requires a theoretical reorientation that frames law as constitutive of society.

The justifications for market interventions through law that are offered by the Commission in communications and preparatory documents for secondary legislation are often instrumentalist. Consumer legislation is justified based on the consequences that these instruments will have in and for the market rather than offering a deontological justification for intervention by recourse to a set of rules, such as principles of justice.³³ The philosophical pragmatism of the instrumental approach has implications on how we can conceptualize EU (consumer) law because secondary legislation becomes a means to an end rather than pursuing either a formal or substantive concept of the rule of law. From another perspective, the instrumentalist approach

³¹ See Chapter 6, Sections 4.3 & 4.4.

³² See Chapter 3, Section 4.3.

³³ For a discussion, see Thomas Gutmann, 'Theories of Contract and the Concept of Autonomy' (2013) Preprints and Working Papers of the Centre for Advanced Study in Bioethics Münster, Working Papers 2013/55 <https://www.uni-muenster.de/imperia/md/content/kfg-normenbegrueudung/intern/publikationen/gutmann/55_gutmann_contract_and_autonomy.pdf> accessed 27 July 2022.

conceives of law as a tool for maintaining certain aspects of society (the *status quo*) or as a tool for engineering social change.³⁴ Invariably, the function of law is then to regulate the behaviour of social actors down to the most minute aspects of their lives. In the introductory chapter it was made clear that one of the theoretical starting points of this study is the view that secondary legislation is used instrumentally by the Commission with the intention to bring about desirable ends in European society, albeit in the context of the functioning of the internal market. As was discussed in Chapter 6, the overarching goals of the recent legislative reforms are now becoming pointed towards changing consumer and business behaviours for the successful transition to a circular and net-zero economy. Secondary law is then a tool at the behest of the EU institutions for steering EU society towards these socially-desirable outcomes. This understanding of the role of law is also inherent in the reconceptualization of consumer empowerment legislation as a tool that is aimed towards structuring the marketplace as an environment that is conducive to empowered consumer behaviours.

In the context of consumer empowerment, from a theoretical perspective there are several shortcomings associated with adopting an instrumental perspective of the role of law and of secondary consumer legislation. First, the instrumental theory of law adopts the starting point that law acts upon society, but the legal system and society remain separate spheres.³⁵ Law is then conceptualized as a reflection and mirror of the values and norms in society.³⁶ The ‘law first’ approach of instrumentalist legal scholarship has a limited interest in society and that arises primarily in the context of questions that examine a law’s effectiveness. This approach tends to disregard law’s ‘non-legal’ effects and ramifications *in* society.³⁷ What follows is that law is seen as a mechanism for steering the behaviour of social actors and it does so by acting upon them as an inescapable force. The instrumental theory of law then falls prey to the shortcomings of the social determinism, where individuals are passive dupes because social constructs determine individual behaviours. The discussions in both Chapters 2 and 6 rejected such a narrow view of power as being limited to agency but also the view of power that results in conceptualizing of social actors as over-socialized, passive dupes of social structures. To reiterate the theoretical assumptions of Haugaard’s four-dimensional model of power, it was proposed that individuals are neither free and autonomous agents nor are they social dupes. Haugaard achieved this by introducing the concept of 1-D and 2-D structural and structured conflicts. Following in this line of thought, if an instrumentalist theory of law is adopted, a conceptual fiat then arises that precludes an examination of the subjective empowerment of EU consumers through law because the effects of law in society are rendered irrelevant and excluded from

³⁴ For a discussion, see Austin Sarat & Thomas Kearns, ‘Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life’ in Sarat and Kearns (eds) *Law in Everyday Life* (University of Michigan Press 1995) 23 - 27

³⁵ Robert Gordon, ‘Critical Legal Histories’ (1984) 36 *Stanford Law Review* 57.

³⁶ Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975); Grant Gilmore, *The Age of American Law* (New Haven: Yale University Press, 1977) 110-11.

³⁷ Sarat & Kearns (n 34) 24.

analysis. If we acknowledge that law does not deterministically guide an actor's behaviour and if we are to take seriously the subjective process of empowerment and law affecting this process, it is necessary to adopt a constitutive theory of law and society.

Conceiving of law as constitutive of society rose to prominence in the Critical Legal Studies (CLS) movement and sociolegal scholarship in the US in the 1980s and onwards. More recently, there has also been a turn in law and political economy scholarship towards viewing law not as an external force imposed on the market but law as intrinsically complicit in its creation. Put differently, in law and political economy scholarship law is constitutive of the economy.³⁸ The following discussion adopts the CLS starting point because the focus is on the subjective empowerment of consumers as social actors and so law will be framed as constitutive of society. In the following discussion I then set out the argument that, unlike the instrumentalist starting point, the constitutive theoretical approach to law that developed in the sociolegal scholarship in the US allows for an analysis of the subjective dimension of consumer empowerment through law.³⁹ Instead of viewing law as autonomous from society, the constitutive theory embeds law in society as a social structure. As Silbey puts it: "scholars pursuing the constitutive paradigm turned from the study of law *and* society to the study of law *in* society, from the effectiveness of laws to laws' effects."⁴⁰ Law is then theorized as constituting social structures and is in turn constituted by acts of structuration.⁴¹ Law then has meaning-making power, which becomes visible at the level of 3-D and 4-D power developed in the theoretical framework in Chapter 2. While law may prescribe a specific manner of behaviour, these standards are also assimilated by individuals within society and then reproduced as a natural behaviour without the actor being consciously aware that the said standard is in fact a legal rule.⁴² This can be identified in 3-D power as practical consciousness where a social actor uses tacit systems of knowledge as interpretive horizons to get by in daily life; noting once more that this is not an unconscious but rather a conscious yet unchallenged behaviour. As Sarat contends, the constitutive theory of law emerged because sociolegal research in the US had begun to uncover: "the ways in which the boundaries of race, religion, social class, gender,

³⁸ For an overview see Ioannis Kampaourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) 301 *Europe, Journal of Law and Political Economy* 1. See also Julie Cohen, *Between Truth and Power – The Legal Constructions of Informational Capitalism* (Oxford University Press 2019); see also Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

³⁹ This point of departure can first be traced to Geertz in 1983 when he wrote that law is "constructive of social realities rather than merely reflective of them"; see Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books 1983) at 232; see also Menachem Mautner, 'Three Approaches to Law and Culture' (2011) 96 *Cornell Law Review* 839, 849.

⁴⁰ Susan Silbey, 'After Legal Consciousness' (2005) 1 *The Annual Review of Law and Society* 323, 328.

⁴¹ Susan Silbey & Austin Sarat, 'Critical Traditions in Law and Society Research' (1987) 21 *Law and Society Review* 165; Menachem Mautner (n 39) 253 – 255.

⁴² Mark Suchman & Lauren Edelman, 'Legal Rational Myths: The New Institutionalism and the Law and Society Tradition' (1996) 21 *Law and Social Inquiry* 903, 908.

ethnicity, and nationality help constitute and give meaning to legal phenomena, as well as the ways in which the law's intended and unintended consequences help constitute these social categories."⁴³

In practice, while the instrumental and constitutive conceptions of law may be seen as mutually exclusive, this is not necessarily the case as both spring from the legal realist rejection of legal formalism.⁴⁴ As Sarat and Kearns contend, both the constitutive and instrumentalist approaches are empirical and concerned with behaviour. The constitutive approach considers the: "the ways in which the law has generally shaped the beliefs, attitudes, and understandings of legal subjects, in the ways they imagine their own capacities and their relations with one another."⁴⁵ Whereas the instrumentalist approach: "will be interested in "raw" behaviour, in the extent to which the relevant legal actors are encouraged to act (or abstain from acting) in the indicated or intended ways."⁴⁶ Put differently, these theories of law are simply lenses that make an examination of either the effectiveness or effects of law possible. The constitutive theory of law then becomes a particularly useful lens for making visible and thinking about how secondary EU law is part of the subjective empowerment process where internalized consumer narratives (and identities) are formed that either empower or paradoxically disempower EU consumers.

4.3 Consumer empowerment: constructing consumer identities through law

The constitutive theory of law enables a consideration of the ways in which law is embroiled in the creation of 4-D ontological security and identity. Identity is a concept that is not only significant for a debate on power and empowerment but is also a concept that features in several of the debates on EU law. The concept of identity is embroiled in discussions on the diversity and importance of cultural habits, social practices, lifestyles, values and beliefs that are unique and inherent to each of the Member States, to local communities and to social groups. For example, the importance of the concept of identity is enshrined in the Treaty on the European Union where the EU is obligated to respect the national identities of the Member States.⁴⁷ For many legal scholars, the unique character of national legal systems is considered to be a fundamental part of

⁴³ Austin Sarat, 'The Concept of Boundaries in the Practices and Products of Sociolegal Scholarship: An Introduction' in Austin Sarat, Marianne Constable, David Engel, Valerie Hans, Cornell Law School & Susan Lawrence (eds), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (Northwestern University Press 1998)

⁴⁴ Sarat & Kearns (n 34) 34.

⁴⁵ *ibid* 41.

⁴⁶ *ibid*.

⁴⁷ Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art 4(2).

national identity.⁴⁸ Following this, harmonizing EU legislation has been subject to intense debate in the context of respecting the diverse national legal cultures. Legal identity is, for example, pervasive in the consumer law debate and features heavily in the debate on the Europeanization of private law.⁴⁹ From a micro perspective, consumer identities are also considered relevant to the scholarship on consumer law and empowerment and focus on the normativity behind consumer images in policy and law. These are the theoretical consumer identities that the debate proposes have been created by the EU institutions through case law, secondary law, and policy which in the context of the average/rational consumer images are considered to be too far removed from reality.⁵⁰ These identities also function as a vehicle for the debate that introduces new theoretical perspectives on how consumers should be conceptualized, such as boundedly rather than unboundedly rational. These debates generally do not consider the negative social consequences associated with labels such as ‘weak’, ‘vulnerable’ or ‘disabled’ being relevant for a legal discourse on consumer protection, although this is changing. For example, the literature on consumer vulnerabilities in the last several years has come to acknowledge that consumers who are considered to be vulnerable according to the legal framework may not in practice identify as being ‘vulnerable’ and so they do not avail themselves of existing protections.⁵¹ The conclusion that follows is that not only what the legal qualification of vulnerability is that matters, but also what terminology is used in legislation to define vulnerability matters as well as how this is perceived by the individual who is experiencing this vulnerable state or status.⁵² By and large, however, this broader treatment of identity in consumer law scholarship remains quite limited.

Consumer identities and internalized narratives are then a neglected but highly relevant dimension of the rethought theoretical understanding of EU consumer empowerment developed in Chapter 6 and for the actual practice of empowering consumers through law. The process of subjectively empowering consumers through secondary law was examined in Chapter 6 through the lens of the third and the fourth

⁴⁸ See for instance Pierre Legrand, ‘European Legal Systems are not Converging’ (1996) 45 *The International and Comparative Law Quarterly* 52, 56 – 60.

⁴⁹ See for example Stephanie Law, ‘From Multiple Legal Cultures to One Legal Culture? Thinking About Culture, Tradition and Identity in European Private Law Development’ (2015) 31 *Utrecht Journal of Internal Law* 68.

⁵⁰ In a recent publication on the rethinking of EU consumer law, Howells, Twigg-Flesner & Wilhelmsson make the claim that “The EU approach to consumer protection risks being viewed as insufficiently protective due to its adoption of the average consumer standard and an information-based protection model which has not been developed in a sophisticated manner taking into account the lessons of behavioural economics”, see Geraint Howells, Christin Twigg-Flesner & Thomas Wilhelmsson, *Rethinking EU Consumer law* (Routledge 2017) 6–7.

⁵¹ Riefa & Saintier, *In Search of (Access to) Justice for Vulnerable Consumers* (n 16) 8 – 9.

⁵² Research in both the US and the UK has shown that the notion of ‘vulnerability’ is contested amongst welfare claimants and that some welfare recipients will limit the use of services they are entitled to because of the stereotypes and social stigmas associated with claiming benefits. For an overview of the literature, see Lisa Vanhala & Jacqueline Kinghan, ‘The ‘Madness’ of Accessing Justice: Legal Mobilisation, Welfare Benefits and Empowerment’ (2022) 44 *Journal of Social Welfare and Family Law* 22–23.

dimension of power. This analysis offered an approach for how law with an empowerment aim can be conceptualized as being part of the invisible socialization process that affects the internalized narratives and identities of social actors when they act as consumers in the marketplace. The third dimension, power as consciousness and interpretative horizons, explains how individuals use the knowledge that they have gained through the socialization process to navigate the world around them, in this case the marketplace, and in doing so reproduce existing social structures and structure of power. The interpretative horizons of consumers can to some degree be likened to consumer attitudes, but they are not direct equivalents. Interpretative horizons are broader because they are complex systems of knowledge that guide individuals in how they should navigate the social world. These horizons are rooted in 2-D structural biases that tell an individual what forms of social behaviour are appropriate. In this way, the content of the 2-D structural biases can manifest in particular (consumer) attitudes. In turn, changes to the 2-D structural bias can have the effect of changing such attitudes. The fourth dimension of power, ontological security and identity, offers a way of conceptualizing how fundamental these 3-D internalized narratives and interpretive horizons are for an individual's sense of self and how they belong in the social world.

The banning of incandescent light bulbs from 2012 and onwards in the EU provides an example to illustrate how the changes in the market implemented through law affect 3-D interpretive horizons and 4-D ontological security and by extension the narrower concept of consumer attitudes. Koretsky carried out a novel study on the constituent elements of the downward trajectory of phasing out incandescent light bulbs (ILB).⁵³ The purpose of this study was to examine the constituent elements of the process of the light bulb's downscaling through the lens of the destabilisation (ontological insecurity) created by an intentional destabilization of the meaning of the light bulb by the sales ban to match with the more powerful discourse (narrative) on climate change.⁵⁴ This study is interesting from the perspective of subjective consumer empowerment through law for two reasons. First, initially there were several dissenting voices that objected to the change in meaning of the incandescent light bulbs that were redefined as a 'waste of resources'.⁵⁵ For the dissenting voices, the ILB was associated with important internalized narratives of 'warmth' and 'comfort'. As Koretsky put it: "The supporters of the ILB were not convinced by the argument that a more energy-efficient light bulb is a better light bulb, and sought ways to preserve the ILB's place in the culture, or at least in their homes."⁵⁶ Framing this finding in the context of 4-D power, at the

⁵³ Technology as a processual phenomenon is defined as Koretsky as: "an outcome of processes of co-evolving materiality, meanings, activities and skills integral to them"; see Zahar Koretsky, 'Phasing Out an Embedded Technology: Insights from Banning the Incandescent Light Bulb in Europe' (2021) 82 *Energy Research & Social Science* 1, 1.

⁵⁴ In the author's own words: "I find that intentional push for a destabilising meaning (energy inefficiency) of the light bulb, resonant with powerful larger discourse (climate change), and imitation of existing technology by a group of stakeholders was key in the process of light bulb's downscaling", see *ibid* 7.

⁵⁵ *ibid* 6.

⁵⁶ *ibid*.

level of ontological security, the change in meaning of the traditional incandescent bulbs from something ‘good’ to a ‘waste of resources’ created 4-D ontological insecurity and 1-D resistance. The second interesting dimension of this study for consumer empowerment is that by 2018 European sales of LED bulbs far surpassed ILBs. Koresty proposes that consumer attitudes towards these bulbs were believed to have been transformed by the promise of high energy savings and the environmental friendliness of LEDs. This is an example of the changes that occurred in the 3-D interpretative horizons of consumers regarding the appropriateness of using LEDs and in the inappropriateness of using ILBs. The legislation that introduced the sales ban and changed the 2-D structural bias in the market (the prohibition of incandescent bulbs) along with providing consumers with information on the energy efficiency and cost-savings of bulbs (which was made available to consumers through information campaigns and energy labels) was considered to be an integral part of this process that changed consumer attitudes towards ILBs. In the framing of subjective consumer empowerment, the sales ban was complicit in changing consumers’ 3-D interpretative horizons as to what type of light bulbs are appropriate and should be consumed. This can be defined as the 3-D raising of discursive consciousness as a consequence of the operation of law in society. Consumers became confronted with 4-D ontological insecurity when they were forced by the sales ban to challenge and rethink their interpretive horizons regarding the appropriateness of the ILB as something ‘good’ and an important part of their culture and homelife. Looking to the future, each new wave of consumers that join the market may not even be aware of the older ILBs because they are socialized in a marketplace where such bulbs have never been available. The appropriateness of LED bulbs currently legitimized by the 2-D structural bias of the EDD will then form part of their 3-D practical consciousness. Conceiving of identity through these lenses of power, acknowledging the relevance of identity for EU consumer empowerment and making visible the hidden role that secondary legislation plays in the construction of consumer identities, are all highly relevant but ultimately neglected dimensions in the scholarship on EU consumer empowerment.

6. Concluding remarks

The analysis in this chapter explored several of the implications that arise from the rethinking of the concept of EU consumer empowerment throughout this study and more specifically in light of the findings from Chapter 6. The findings in this chapter can be briefly summarised through the following. First, the concept of EU consumer empowerment should be reframed through the lens of regulated autonomy. Second, the concepts of EU consumer empowerment and of consumer protection are not mutually exclusive but are instead two relatively distinct regimes that have the potential to complement one another. Third, through the lens of empowerment as an objective

process, the process of empowerment entails more than imposing information duties on traders. Relatedly the cause of consumer vulnerability/disempowerment in EU consumer law can be defined more broadly than information asymmetries, and secondary legislation with an empowerment objective has the practical effect of regulating several of the 2-D structural biases in the marketplace. Fourth, scholarship on the empowerment concept in the EU consumer law context should not ignore the subjective dimension of the empowerment process. Consumer legislation has a less visible role to play in the subjective (dis)empowerment of consumers. If future research is to explore the subjective dimension of the EU consumer empowerment agenda then adopting a constitutive understanding of the relationship between consumer law and society would offer a novel theoretical starting point for exploring the complexity of the process of empowering consumers through law.

Chapter 8

Final Summary, Central Findings and Concluding Remarks

1. Introduction

To date, there is no systematic analysis in scholarship on EU consumer empowerment that focuses exclusively on what the empowerment concept means in the EU consumer law context and what it means when law is used a tool to empower consumers. This study sought to fill this gap by asking the question: how can the concept of EU consumer empowerment in consumer policy and secondary legislation be rethought through the lens of empowerment theory? The following sections in this concluding chapter will answer this question by summarising the main findings in each chapter of this study on EU consumer empowerment in light of the five sub-research questions set out in the introductory chapter. This discussion will be concluded with a discussion that sets out the challenges for future research on empowerment in the EU consumer law context.

2. Defining the concept of empowerment

The discussion in Chapter 2 addressed the first sub-research question that asked what is meant by the concept of empowerment and how can it be defined? To answer this question, the theoretical framework developed in Chapter 2 reviewed several of the prevailing theories on empowerment from other fields and disciplines that work with this concept. Following this review of the empowerment literature, the starting point was adopted that empowerment is not a monolithic concept. Instead, definitions of this concept are contoured by the language games in any given field. Often, implicit understandings of what counts as the concept of power are used to qualify when an actor is disempowered and why this actor or group of actors should become empowered. It was illustrated that empowerment is then not a self-contained concept. Instead, the meanings that are ascribed to the concept of empowerment are predicated on the equally contested concept of power.

The literature that systematically addresses the contested concept of power is vast and there were several theories of power that could be selected as the theoretical foundation for the analytical framework developed in Chapter 2. Therefore, the perspective was adopted that power is a family resemblance concept. This means that when taking a bird's eye view of the scholarly debate on power from social and political theory, when we speak of power we are dealing with a cluster of related concepts. There may be an overlap between these concepts but in reality they are distinct constructs that

are each uniquely suited to the language games of a particular field. The question then became what theory of power should be adopted to explain the concept of EU consumer empowerment? The aim of developing the theoretical framework in Chapter 2 was not to create a standard against which to judge the empowerment approach in EU law. Instead, the goal was to create an analytical framework that could be used to develop a richer discipline-specific theory of the concept of empowerment in the EU context. To achieve this goal, it was necessary to adopt a theory of power that has a broad analytical and descriptive capacity and that moves beyond the narrow confines of defining power as either agency or structure, as zero-sum or positive sum or more specifically as consumer choice. Therefore, Haugaard's four-dimensional model of power as agency, power as structure, power as tacit systems of knowledge and power as ontological security and identity was selected because of the potential it offers for analysing the workings of power in an empowerment agenda at several different dimensions. This is expressly the case because Haugaard adopted a pragmatic approach to the concept of power that sought to, as far as is methodologically possible, offer an empirical definition of what power *is* based on the prevailing theories of power as a family resemblance concept.

Having established what theory of power would offer the theoretical blueprint in this study on empowerment, the focus then shifted to how empowerment could be understood as a practice. Bridging the concept of empowerment as a value orientation based on an underlying concept of power and empowerment as a practice, the conceptual category of disempowerment as a subjective and objective phenomenon was explored. Empowerment is a practical endeavour; it entails an empowering entity and a disempowered actor or group of actors. The empowering entity, based on an underlying understanding of power, classifies an actor as existing in a state of disempowerment. Objective disempowerment consists of the visible conditions in an actor's environment that are considered to preclude empowered behaviours. This could be legislation that precludes a particular kind of behaviour or a relationship between two actors that is then framed as a determinate that prevents an individual from behaving in an empowered way. Subjective disempowerment was defined as the internalized narratives of an actor that prevent this actor from behaving in an empowered way. For example, a regulatory framework that offers consumers several types of protections and that creates several possibilities for the consumer, such as becoming a renewables self-consumer, is redundant if the consumer has an internalized, disempowering narrative. While objective disempowerment is best visualized through power on the first and second dimensions, subjective disempowerment can be explained through power at the third and fourth dimensions. Having connected power to objective and subjective disempowerment, the theory of empowerment as a practice consists of several conceptual categories. The first is empowerment as a process that is both objective and subjective. Relatedly, this process consists of strategies of empowerment that differ depending on the options for action available to the empowerment entity. In the case of the EU Commission as the

empowering entity, this is primarily secondary legislation. The second conceptual category consists of empowerment as an outcome. Similar to empowerment as a process, empowerment as an outcome can be operationalized from the perspective of empowerment as a subjective and objective phenomenon.

To briefly conclude, the introductory chapter to this study began by illustrating that empowerment is a contested concept because there are many, often conflicting, perspectives on what empowerment is and moreover on what empowerment should be. It was also proposed that empowerment is a highly complex and multifaceted concept. In light of this complexity, it was in my view necessary to begin this study on EU consumer empowerment by developing the theoretical and conceptual framework in Chapter 2 that would provide the blueprint in this study for developing novel insights and knowledge on the concept of consumer empowerment in EU consumer law context. In light of the complexity of the empowerment concept it was also necessary to develop these frameworks by looking outside of the legal field to other disciplines that engage with the empowerment concept. In doing so, the framework developed in this chapter allowed for a broader and more comprehensive analysis of the empowerment concept in EU consumer law in this study that would not be possible through the application of the prevailing theoretical frameworks currently adopted in scholarship on EU consumer empowerment.

3. Defining EU consumer empowerment: the perspective from consumer law scholarship

Having explored the concept of empowerment from several perspectives and having constructed an analytical framework on empowerment, the focus in Chapter 3 turned towards answering the sub-research question: what does the concept of empowerment mean to the consumer law debate? When the Commission first introduced the consumer empowerment agenda into strategic consumer policy in 2007, the consumer law debates responded by situating the concept of consumer empowerment into several the debates that were prominent at that time. The consequences being that the concept of EU consumer empowerment was defined as a form of neoliberal empowerment that sought to protect the autonomy of consumers and the functioning of the liberalized internal market. The rationale of empowering consumers was then framed as being consistent with the information model in the regulatory framework and the empowered consumer was equated with the average consumer benchmark and the rational consumer concept in strategic policy. The discussion in Chapter 3 considered in-depth the reasons why consumer empowerment was contoured with these meanings and also explored the critique that followed in consumer law scholarship on the consumer empowerment agenda, which was supported by behavioural insights from, for example, behavioural economic theory. The analysis in this chapter also demonstrated that in these debates

the meaning of the concept of empowerment itself is often assumed and rarely the direct object of discussion. Instead, when empowerment was introduced by the Commission as an agenda in strategic policy, the debate connected the practice of empowerment to the critical debate on the proliferation of information duties in the regulatory framework. This embedding of the concept of consumer empowerment into the discussions surrounding the information model also led to the adoption of an understanding of power as consumer choice and as agency to contour the debate's understanding of the concept of power that underpins the empowerment concept in the EU consumer law context. Therefore, one of the central findings in Chapter 3 showed that the complexity of the empowerment concept in the EU consumer law context is obscured by these narrow theoretical understandings of power and empowerment. Moreover, as a practice, the subjective dimension of (dis)empowerment and of empowerment as a subjective process was also shown to be largely absent from scholarship on EU consumer empowerment. Instead, consumer disempowerment is equated with information asymmetries, the objective process of empowering consumers with the information model in secondary legislation and empowerment outcomes with increasing levels of consumption.

4. Defining EU consumer empowerment: the Commission's perspective

Whereas the discussion in Chapter 3 was focused on outlining the ways in which the empowerment concept in the EU consumer law context has come to be defined by the consumer law debate, the focus of the analysis in Chapters 4 and 5 turn to an exploration of the Commission's narratives on empowerment that can be drawn from a narrative analysis of policy and of secondary law with an empowerment aim. An important finding from Chapter 2 illustrated that empowerment is also a practice. This is certainly the case in the context of EU consumer empowerment, where the Commission has adopted an empowerment agenda in policy that is becoming increasingly embedded into the legislative framework that regulates the market. When empowerment is adopted as a practice, it is important to consider the understandings of empowerment that are supporting the empowering entity's empowerment agenda.

In the context of the EU consumer empowerment agenda, there are several reasons as to why the EU Commission can qualified as the empowerment entity, rather than the other EU institutions, such as the EU Parliament or the Council. Noting that the qualification of the Commission as the empowering entity in the EU consumer empowerment context does not negate the complexity of the relationship between the Commission and the other EU institutions and that these institutions may also have a role to play in influencing the approach that is adopted in the EU consumer empowerment agenda. Nevertheless, examining this role falls outside of the scope of this study. Moreover, as this study is just the first step in rethinking the concept of EU

empowerment and what it means to empower consumers through law, the starting point should begin with the institution that is responsible for the introduction of this agenda into consumer policy and that has increasingly integrated the consumer empowerment concept into secondary legislation.

It is then necessary to both trace and analyse the Commission's narratives on consumer empowerment to reach a conclusion about what the concept of empowerment means in the EU consumer law context. Chapters 4 and 5 traced these understandings of consumer empowerment through an analysis of policy and secondary legislation in two key areas. Chapter 4 focused on strategic, horizontal consumer policy and the corresponding body of horizontal consumer law that intersects several consumer markets. Chapter 5 focused on energy policy and energy law with a consumer element. There are two reasons why energy policy and energy law with a consumer element were chosen in addition to the study on empowerment in horizontal consumer policy and law. First, the Commission has consistently developed a strategy in policy that focuses on the EU citizen in their role not only as the consumer in several consumer markets but also as the consumer in the energy market. In their role as a consumer in several consumer markets and as energy consumers, the EU citizen is to be empowered to both participate in and become a driver towards a decarbonised and circular model of economic ordering. Second, beginning in 2016 onwards, four recast directives that impact energy consumers were adopted in the energy sector. What was decisive for including these energy directives in the analysis of consumer empowerment in this study was that the Commission proposed the recast of these directives to achieve several aims, of which one was consumer empowerment.

The discussions in Chapters 4 and 5 carried out a narrative analysis of the text of several consumer policy documents and of secondary legislation to build a picture of what consumer empowerment means to the Commission as the empowering entity. The scope of the analysis in these chapters consists of two parts. First, the focus was on the question of how the consumer empowerment agenda in policy has evolved in light of the changes that have been introduced in both consumer and energy policy as these policy areas are becoming increasingly focused on the Green Transition. The analysis in Chapter 4 considered the Commission's narratives on consumer empowerment in strategic consumer policy and several secondary instruments in horizontal consumer law that the Commission has qualified as forming part of the consumer empowerment agenda. The analysis in Chapter 5 then considered the Commission's narratives on consumer empowerment in energy policy and energy legislation with a consumer element. The analysis in Chapters 4 and 5 showed that the meaning of consumer empowerment has evolved as consumer and energy policy have become reorientated towards achieving the goals of the Green Transition. To broadly summarize the central findings from these two chapters, several of the Commission's narratives on consumer empowerment in both the text of policy and in secondary legislation cannot be adequately explained by the understandings of consumer empowerment that currently

prevail in the consumer law debate. First, the Commission is utilizing several legislative approaches to empower consumers that are not limited to measures that obligate businesses to disclose information to consumers. Second, the Commission's narratives acknowledge that consumers are subjected to harms that go beyond information asymmetries and that these harms arise from market structures, market conditions, the B2C relationship and the personal conditions of the consumer itself. Third, the vision of the internal market is changing from a linear economic model where growth is achieved through ever-increasing levels of consumption to a market that is circular, carbon neutral and where growth is decoupled from environmental degradation. With this changing vision, new types of consumer harms and vulnerabilities are being introduced and there is also evidence of a growing narrative on the social dimension of the Green Transition and future of the internal market. Fourth, the analysis in these two chapters illustrated that the consumer empowerment agenda is one of the Commission's dominant strategic approaches for driving the Green Transition and in turn this has affected what the role of the empowered consumer is, what tools are necessary for empowering consumers, and how empowerment outcomes can be operationalized.

5. Rethinking the concept of EU consumer empowerment

In Chapter 6 a discipline-specific theory of EU consumer empowerment was developed by applying the theoretical framework on empowerment developed in Chapter 2 to the understandings of consumer empowerment drawn from the Commission's narratives that were the focus of analysis in Chapters 4 and 5. The discussion in Chapter 6 then fully confronted the primary research question of how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. From the perspective of empowerment outcomes, it was argued that the consumer empowerment agenda has become reorientated towards the Green Transition where empowered outcomes were operationalized as both the aims of the Green Transition and several empowered behaviours, such as consumers making the 'green' choice and vulnerable consumers participating in the Green Transition by joining renewable energy communities. In applying the conceptual categories of objective and subjective disempowerment, the objective dimension of consumer disempowerment was established based on the types of consumer harm that the empowerment agenda is focused on by remedying through the regulatory framework. Adopting the disempowered consumer rather than the rational consumer as the starting point offered a rethinking of the conditions that disempower consumers beyond information duties. Following this, three conceptual categories of the objective conditions that disempower consumers were developed, including market structures and market conditions, the relationship between consumers and other market actors and the personal conditions of the consumer. The application

of the concept of subjective disempowerment revealed the hidden dimension of the consumer empowerment agenda that is predicated on the subjective causes of consumer disempowerment. Most visibly, consumer disempowerment is caused by consumers' lack of confidence and trust in businesses and in the market. Less visibly, subjective disempowerment also appears to arise from consumers' internalized narratives that preclude green behaviours. Following this discussion on the context specific conditions that disempower consumers, the legislation that the Commission uses as a tool for bringing about empowerment outcomes was broadened to include the secondary legislation that was classified as having an empowerment rationale in Chapters 4 and 5.

The application of the four-dimensional model of power to this secondary legislation that was qualified as having an empowerment aim in Chapters 4 and 5 offered a novel view of the theoretical implications of instrumentalizing law as a tool for empowering consumers. It was shown that the power in consumer empowerment can become manifest as a more nuanced understanding of power that includes agency but also moves beyond this perspective to acknowledging power as the 2-D structural biases in the market, as 3-D interpretive horizons and practical consciousness and as 4-D identity and ontological security. This gave way to the examination in Chapter 7 of inadequacies of defining consumer empowerment as a neoliberal model that protects the autonomy of consumers. Moreover, despite the neglect of the subjective dimension of empowerment both by the debate on empowerment in the EU consumer law context and by the Commission, the application of the third and fourth dimensions of power offered a lens for considering what empowerment looks like as a subjective process when it is pursued through secondary legislation in the market. This led to the novel conclusion that the empowerment of EU consumers is then occurring at a deeper level where law is part of the socialization process and of constructing consumer identities and ontological security.

6. The implications of rethinking the concept of EU consumer empowerment

In Chapter 7 several of the theoretical and practical implications that arise from the rethinking of the concept of EU consumer empowerment in Chapter 6 were explored. The first implication suggests that the concept of EU consumer empowerment should be reframed through the lens of regulated autonomy because several of the Commission's empowerment strategies fall on the side of regulation rather than the protection of consumer autonomy. The second finding claimed that the concepts of EU consumer empowerment and of consumer protection are not diametrically opposed but are rather two inter-dependant regimes that have the potential to complement one another. The third set of findings in Chapter 7 explored several of the implications of reconceptualizing the concept of power in EU consumer empowerment as more than consumer choice/agency and the implications of using law as a tool for empowerment.

Several implications were considered to arise through the lens of power at the first and second dimensions. First, the claim was made that several aspects of the legislative framework beyond the information model form part of the Commission's current approach in the consumer empowerment agenda. Second, the concept of consumer vulnerability/disempowerment should be applied to fully explore define the consumer harms that are the target of the consumer empowerment agenda. Third, the Commission's imposition of the consumer empowerment agenda through secondary legislation has the practical effect of regulating several of the 2-D structural biases in the marketplace. Through the prism of 3-D and of 4-D power, it was argued that in order to fully appreciate and consider the subjective dimension of consumer empowerment, consumer law scholarship should consider adopting a constitutive rather than an instrumental understanding of the role of law in society. Moreover, consumer law scholarship on empowerment should acknowledge the integral role that law has to play in the construction of consumer identities and in the empowerment/disempowerment of consumers.

7. Empowering consumers through law?

To conclude this summary on the central findings of thesis on the concept of empowerment in the EU consumer law context, the following remarks will revisit the primary research that asked: how can the concept of EU consumer empowerment in consumer policy and secondary legislation could be rethought through the lens of empowerment theory?

In Chapter 2, several arguments were made that concept of empowerment is a highly complex, multifaceted but contested concept that acquires different meanings depending on social, political, economic and cultural contexts. Theoretically, the empowerment concept is ascribed meaning by (often implicit) underlying theories of power and relative disempowerment that prevail in any given field. It is because empowerment is a contested concept that it is impossible for this study to develop a singular, definitive definition of the empowerment concept. Therefore, such a definition will not be offered here. Moreover, it is questionable whether such a definitive definition is necessary or even desirable. In light of this, the primary research question in this study focused on the meanings that have been ascribed to the concept of EU consumer empowerment in scholarly debate and was committed to revealing and exploring understandings of empowerment in the EU consumer law context that are neglected in scholarship on EU consumer empowerment. In light of this approach, an important assumption that threads the analysis in this study is that the concept of EU consumer empowerment should be considered from a plurality of perspectives that may at times be in conflict but that nevertheless equally constitute the complexity of empowerment as a theoretical construct and as a practice.

In Chapter 3, it was argued that the debates on EU consumer empowerment have neglected several of the dimensions of the empowerment concept in the EU consumer law context. For several justifiable reasons, these debates tend to adopt theoretical starting points for analysing EU consumer empowerment that are drawn from disciplines such as economics that limit definitions of power to agency. The primary research question in this study therefore aimed to explore the ways in which the prevailing understandings of the EU consumer empowerment concept could be rethought through the more complex theory of empowerment that was developed in Chapter 2. The rethinking the concept of EU consumer empowerment in this study therefore adopted the established understandings of EU consumer empowerment in consumer law scholarship as the point of departure with the objective of developing a more complex and multifaceted understanding of the empowerment concept in the EU consumer law context.

What then is the more complex and multifaceted understanding of empowerment in the EU consumer law context that was developed throughout this study? To a large extent, this question has been answered in the discussion so far in this chapter that has summarised the central findings from each chapter of this study. Nevertheless, in the following I will explicitly outline several of findings that I believe have contributed to the development of a more complex understanding of empowerment in EU consumer policy and law. To begin, from a practice perspective an important finding of this study reveals that the (objective) determinants that lead to the (dis)empowerment of EU consumers extend beyond information asymmetries to include: (1) market structures, (2) the relationship between consumers and other actors, and (3) personal factors relating to the consumer's personal context, such as socio-economic factors or cultural background. Therefore, rather than analysing the EU consumer empowerment strategy through the lens of the average consumer concept, the disempowered consumer concept offers a broader lens for tracing the ways in which disempowered status of EU consumers is framed by the EU consumer empowerment agenda. This also opens up the possibility for the debate to first explore what actions are then subsequently taken by the Commission, increasingly through the legal framework, to remedy the disempowered status of EU consumers. Second, this through the lens of the disempowered consumer, the debate is enabled to mount a more nuanced critique of the empowerment agenda. For instance, by acknowledging a broader set of consumer harms that are the target of empowerment legislation, the bigger question emerges that asks whether consumer law with an empowerment rationale is perpetuating imbalances in society that undermine, for example, the empowerment aims of the Green Transition.

Perhaps because the concept of EU consumer empowerment is considered with such distrust by consumer law scholarship, the process of empowering EU consumers has neither been explored nor scrutinised in depth by scholarship on empowerment in the EU consumer law context. Instead, the consumer empowerment agenda is dismissed as a strategic approach that aims to strengthen the agency of the

rational consumer and that is incompatible with the aspects of the regulatory framework that sincerely pursue the consumer protection objective. Therefore, by framing EU consumer empowerment as an objective and subjective process, this study confronts this perspective in consumer law scholarship by revealing the complexity of the empowerment process that arises through the use of secondary legislation as a tool to remedy consumer disempowerment. This confrontation revealed the complex ways in which power permeates the practice of EU consumer empowerment when law is used as a tool to empower. This rethinking of empowerment in the EU consumer law context has therefore made possible a rethinking of EU consumer empowerment as a practice that utilises law as a tool to amend the structural conditions in the market (as a social institution) that disempower consumers. This is an important finding because it reveals a highly obscured dimension of the empowerment concept in the EU consumer law context through the reframing consumer legislation as a central force that establishes the structural biases in the market, which regulate the 'agency' of market actors.

Relatedly, in this rethinking of the empowerment process and on how consumers can become empowered through law, this study emphasises that while empowerment is at once an objective phenomenon (that necessitates making changes to the disempowered actor's environment) it is also a subjective process, where the disempowered actor(s) must engage in the exercise of removing thought patterns that contribute to their objectively disempowered status. Importantly, these thought patterns are the product of the actor's embeddedness in society. In other words, subjective empowerment recognises that disempowered actor is socialised. This is an important finding because the subjective dimension of the empowerment process is rarely acknowledged by scholarship on consumer empowerment in EU consumer policy and law. In my view, the subjective dimension is neglected because in academic debate the consumer is generally extracted from social context and defined abstractly, even when behavioural insights are adopted for developing a more realistic understanding of consumer behaviour. The findings in this study have shown that the subjective process of empowering consumers cannot be adequately framed through behavioural findings that are conceptually limited by the foundational tenet of methodological individualism in economic theory that adopts an under-socialised view of market-actors and dismisses structural accounts of power and of society. This study therefore offers a valuable perspective and rethinking of the empowerment concept in EU consumer law by situating and exploring the subjective process of empowering consumers through the third and fourth dimensions of power. This an acknowledgement that the practice of empowering consumers through law has a distinctly social dimension because it impacts the systems of knowledge that guide consumers' taken for granted practical consciousness of consumers and traders as to how they should behave. Moreover, this perspective also acknowledges that consumer law has a role to play in the creation of consumer identities and ontological security. These are the stable structures that the consumer relies on and the conventions necessary for consumers to operate successfully

(according to 2-D biases) in the market as a site of social interaction and practice. While the implications of this rethinking were considered in detail in Chapter 7 and summarised above, it is important to reiterate that future discourses on the empowerment concept in the EU consumer law context should look beyond the frameworks offered by behavioural insights that focus primarily on the cognitive limitations of consumers.

As a final remark, the discussion in Chapter 7 offers a rethinking of the established view that frames EU consumer protection and consumer empowerment as being diametrically opposed. Instead, it was proposed that consumer empowerment and consumer protection can be conceived of as interdependent and complimentary regimes. This is perhaps one of the more controversial findings in this rethinking of the EU consumer empowerment concept. However, it is worth exploring the relationship between consumer protection and consumer empowerment and how these regimes can work in tandem to protect the consumer interest. This need to do comes under increasing pressing from the changes that need to occur if the transition to a circular, decarbonised model of economic ordering is to be achieved.

8. Looking forward: challenges for future research

To conclude the discussion in this study, there are two points that should be taken into consideration by future scholarship on the concept empowerment in the EU consumer law context. The first relates to the normative questions that can be raised by future research on empowerment in light of the rethinking of EU consumer empowerment in this study. The second, addressed implicitly on several occasions throughout the discussion in Chapter 7, is to consider more generally what the relevance of the findings in this study are for future discourses on the concept of empowerment in the EU consumer law context.

First, the current strategic approach of the Commission and the use of several secondary instruments as tools to achieve consumer empowerment, as understood through the reframing of the concept of EU consumer empowerment in this study, has yet to be evaluated. Briefly and simply put, what should consumer empowerment be for? For instance, should the approach of the consumer empowerment agenda respect the freedom and autonomy of consumers and traders and therefore carefully avoid the creation of structural biases that impact consumer choice? On the other hand, the EU institutions and Member States are already working towards transitioning to a sustainable economy that is circular and decarbonized. This transition puts pressure on the values that can be said to have supported an internal market based on a linear model of economic ordering. There needs to be more critical discussion and reflection that ask the bigger question as to what values can be considered to support the EU consumer empowerment agenda.

Second, implicit in the discussion in this study is the idea that the consumer is used by the Commission to achieve the empowerment aims of the Green Transition. This can lead to the conclusion that the Commission is continuing to instrumentalize the EU citizen in their role as the consumer to achieve internal market aims and that consumers are now targeted towards achieving the Green Transition. Two questions then arise that are possible avenues for future debate. Should consumers be used as instruments to achieve the Green Transition? Can it be said that consumers are empowered if they are used as mere instruments for ends other than empowerment? Regarding the latter question, the findings in this study suggest that it would be necessary to first determine if an actor can be empowered for empowerment's sake. The task here would be to answer the question as to whether consumers should be given power because it is desirable that consumers should have power simply for the sake of being powerful. This becomes theoretically problematic, however, if it is accepted that empowerment is a value orientation. Therefore, the practice of empowering an actor is always with the aim of achieving some sort of desirable empowerment end, such as the Green Transition or making society more inclusive of marginalized persons and communities. In light of this, answering this question faces three difficulties.

First, if consumers should be given power and therefore can become empowered for empowerment's sake this would require adopting a narrow zero-sum view of power as agency and that power is something that can be given and taken from an actor. This also entails a value judgement that autonomy should be prioritised and protected above all else in society. Second, it therefore becomes clear that the normative benchmarks for answering this question would need to be established by asking the question of what the purpose of consumer law and consumer protection should be in the internal market. Answering this question in the empowerment context then circles back to setting out what consumers are/should be empowered for and invariably the consumer once again becomes an instrument for achieving a particular desirable social/economic outcome. Third, in my view, the current scholarship on consumer law and consumer protection requires a new impetus that reconsiders what consumer law and consumer protection should be in a circular model of economic ordering and an economy that is carbon neutral, and how consumer empowerment can be a productive part of this rethinking.

Of course, the argument could be made that the Commission should stop its pursuit of consumer empowerment. However, two remarks can be made in this regard. First, from a practical perspective, with the increasing integration of consumer empowerment as a strategy in policy and an objective of the legislative framework, it does not seem likely that this is a route that the Commission will take. It is therefore my view that the issue is less the question of whether consumers should (or can) be given power for power's sake but instead the focus should shift to the question of what consumers are disempowered by (through the four-dimensional model of power) and what the normatively desirable ends the consumer empowerment agenda should aim for,

irrespective of whether the consumer is used as an instrument to achieve these ends. Second, following the discussion in Section 4 of Chapter 6 on the analysis of the dimensions of power at play when consumers are to be empowered through law, the observation can be made that the operation of law in society is at once permeated by power structures while also mediating relations of power in society. Whether the Commission continues to pursue consumer empowerment or not, this study reveals that law is not neutral and forms part of the social structures and institutions that have either an empowering or disempowering effect on consumers, depending on how empowerment is construed as an outcome.

As a final remark on the normative questions that arise through the rethinking of consumer empowerment in this study, an important finding of this study is the recognition of the subjective dimension of EU consumer empowerment and consequently the role that law plays in the construction of consumer identities. For example, the outcomes of the Green Transition require consumers to consume in a 'green' way and the process of changing consumption patterns cannot be divorced from the internalised (subjective) consumer narratives and attitudes towards that inform consumers about what consumption behaviours are appropriate. In recognising that secondary legislation with an empowerment rationale does shape consumer identities then, aside from the question of what these identities are in reality, it is also worth considering what the green consumer identity should be as a yardstick in consumer policy and in secondary legislation. Consumer law scholarship is already concerned with a similar question but a different context. It has been established that the identity and characteristics of the boundedly rational consumer from behavioural economics offers a more realistic view that corresponds with the identity and characteristics of the actual EU consumer. Having connected the profile of the empowered consumer to the concept of consumer disempowerment and to the Green Transition, what follows is that several questions remain about what the normative content should be of these yardstick consumers in policy and law. For example, what should the normative profile of the (dis)empowered green consumer be in policy? A similar question can be raised about the (dis)empowered energy consumer.

Moving away from the normative implication of this study, the remaining question is what the practical relevance of the findings in this study are for the scholarly debate on consumer empowerment and consumer law, more broadly. Drawing on the claim made earlier in this section, even if the Commission chooses to abandon its consumer empowerment agenda in policy and law, it is difficult to avoid the finding in this study that indicate that (consumer) law is nevertheless an integral part of society and social life. Law is therefore a part of the social processes that mediate the empowerment/disempowerment of consumers. The pragmatic question then becomes how the Commission's empowerment strategy in consumer law can become a productive approach for meeting consumers' needs and what these needs are in a transforming economy. Society and social life are dynamic and always in flux.

Nevertheless, as a consequence of increasing ecological, technological and political pressures, European societies are currently undergoing a transformation that is at once an amalgamation of economic, technological and cultural change. For example, the Russian/Ukrainian war and the impact that this has had on energy security in the EU has thrown into focus questions ranging from how the EU can transition away from a dependence on (Russian) gas, how the European economy can become a clean economy based on renewables, and how this transition can take place in a fair, effective and inclusive way. On the last point, this clean transition cannot take place unless all persons and businesses in all Member States can produce or at least have access to renewable energy. Looking forward, achieving these goals means that national energy systems and architectures will be radically transformed from the current centralized approach to decentralized, smart, integrated energy systems consisting of networks of actors. From a consumer perspective, these systems will change how households access energy and from whom, which raises problems for both consumer protection and consumer empowerment.

With this example in mind, the findings in this study suggest that the Commission's strategy of empowering consumers through law should be conceptualized as a distinct regime from consumer protection so that future debates on consumer empowerment can take seriously the role that secondary legislation does play in driving the economic and societal adjustments necessary for this technological transformation. This does not have the consequence of rendering questions of consumer protection irrelevant. Instead, the findings in this study also suggest that there is an increasing need for consumer scholarship to rethink first what consumer protection should mean in the future market and second what types of consumer protection will be needed in, for example, a decentralized energy system or a circular economy. Such discussion should take place in conjunction with what consumers need to be both protected and empowered. While consumer empowerment and consumer protection can be conceptualised as distinct regimes, the discussion in Chapter 7 also claimed that in practice the two are interconnected. Put differently, while the Commission's strategic approach to consumer empowerment has the potential to undermine consumer protection the same can also be argued that the current standard of consumer protection offered by consumer legislation undermines the aims of the empowerment agenda. Switching the perspective, is it not possible for consumers to be protected through empowerment and *vice versa*? The findings in this study suggest a refocusing on the consumer and on what stands in the way of the consumer being both empowered and protected. The study developed a theory of EU consumer empowerment that offers future scholarship on these regimes a tool for answering the questions of why/how consumers become disempowered/empowered that moves beyond the narrow confines of the established theories and concepts in consumer law scholarship that are currently used to define the concept of EU consumer empowerment. The findings of this study suggest that answering these questions requires a rethinking of consumer

vulnerability/disempowerment in the existing regulatory framework in a way that can incorporate and address the problems posed by the transition to a sustainable model of economic ordering, where sustainability is construed broadly and not limited to ecological sustainability. More specifically, in the context of the energy sector, one line of inquiry could be to consider what will disempower/empower energy consumers in decentralised energy systems/energy communities? The same question can be posed in the context of consumer disempowerment/empowerment in the circular economy.

As a final remark, the scholarship on consumer law and on consumer empowerment rarely considers the importance of consumers' internalized narratives that can have an impact on empowerment outcomes. This is the subjective dimension of (dis)empowerment. The discussion in Chapter 7 suggested the adoption of a constitutive theory of law as an entry point for the consumer law debate to consider the role that consumer law with an empowerment rationale has in society and how such legislation is affected through social interaction. This moves the discussion beyond the one-sided perspective that law autonomously acts upon society. This is important not only for scholarship on consumer empowerment but also more broadly on consumer protection and the debates on consumer vulnerability. The findings in this study show that the internalized narratives of a vulnerable or disempowerment consumer and their sense of identity can cause as much of an obstacle to this consumer availing of consumer rights or acting in an empowered way as the more visible and objective obstacles that pose a barrier to such behaviours. Future research on consumer empowerment and indeed consumer protection should address this gap in the literature by conducting more empirical research that is consumer focused and takes seriously the internalized narratives of the consumer and what they have to say about law and their personal sense of (dis)empowerment.

9. Final remarks

The contribution that this study makes to scholarship on EU consumer empowerment, and consumer law more broadly, represents only a first step in a rethinking of empowerment in the EU consumer law context. The findings in this study show that there is need for a renewed conceptual and critical discussion on the concept and practice of EU consumer empowerment and that such discussions should avail of the valuable insights that can be drawn from other fields and disciplines that work with this concept. Moreover, there is also much need for empirical research on EU consumer empowerment to be carried out that not only engages with the question of whether consumers are empowered by EU consumer law but that also that aims to understand the complexity of the empowerment process in practice. Taking each of these final remarks into account, there should be further discussion on the appropriate

methodological approaches and qualitative methods that should be adopted when researching EU consumer empowerment.

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SUMMARY

This study on EU consumer empowerment is driven by the concern that the prevailing, static definitions of the EU consumer empowerment concept are too narrow and that interdisciplinary insights on the empowerment concept from other fields can offer more nuance for understanding empowerment in the EU consumer law context. At this juncture it is becoming increasingly important to engage in a renewed debate on the concept of EU consumer empowerment. In policy, the consumer empowerment agenda is moving from strength to strength, secondary legislation is becoming increasingly reorientated towards empowerment ends and the Commission's narratives are in flux regarding what it means to empower consumers and to what ends consumers are to be empowered for. However, despite the growing centrality of the EU consumer empowerment agenda in consumer policy and law there has been, to date, no systemic analysis that focuses on the question of how this concept can or should be understood in the EU consumer law context. The central question that this study then sought to answer was how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. This is a complex question addressed from several perspectives throughout this study, which will be summarised briefly in the following.

CHAPTER 2: DEFINING EMPOWERMENT

Empowerment is a widely used but highly contested concept. The contested nature of this concept arises from the multitude of (conflicting) perspectives regarding what this concept should mean. In other words, the essentially contested nature of the empowerment concept stems from disagreement as to what empowerment should mean as opposed to the inability of defining the concept empirically. Another problem that compounds the contested nature of the empowerment concept lies in the fact that empowerment is not simply a term used in philosophical, political, social and legal discourses but is also practice. Empowerment is often an agenda that is adopted by one actor in society (such as an individual, an organisation or a government institution) with the intention of empowering another disempowered actor or group of actors. Whether the aim is to empower consumers in the EU context or to empower women for greater gender equality in society, the questions that follow are always the same. Why is this actor or group of actors (such as consumers or women) considered to be disempowered? When we begin to unpack this question, it becomes clear that the concept of empowerment cannot be divorced from another contested concept, power. How power is construed, such as agency or as structure, determines whether an actor is disempowered and also what the empowering entity will claim must be done to remedy

this disempowered position in society. Once this is established, what concrete actions should then be taken to empower? How do we know when the disempowered actor is no longer disempowered but empowered? What was the process behind this transition? Or is it the case that the empowerment agenda simply perpetuated the underlying relations and structures of power that it sought to combat?

In light of these questions, the discussion in Chapter 2 developed an analytical, theoretical framework consisting of two parts. The first part of this framework approached the puzzle of the concept of empowerment as a value orientation that gains meaning based on underlying and often implicit understandings of the concept of power for gaining meaning. The aim of the framework in Chapter 2 was to provide the theoretical and conceptual blueprint for analysing the concept of empowerment in the EU consumer law context. It was therefore important to adopt a theory of power that was broad enough to explore the several ways in which the concept of power permeates the empowerment agenda in EU consumer law. Therefore, a holistic model of power as a four-dimensional cluster of concepts was integrated as the theoretical foundation of the theory of empowerment developed in Chapter 2. The second part of this framework then focused on the concepts of empowerment that constitute empowerment as a practice. The approach in the second half of Chapter 2 then aimed to build a set of conceptual categories layered over the four-dimensional model of power that could then be used to explore the meanings and implications of EU consumer empowerment as a practice. These conceptual categories consist of subjective and objective disempowerment, empowerment as a subjective and objective process and empowerment as an outcome. In conclusion, the purpose of analysis in this chapter was to build a framework that would be used to guide the subsequent analysis of EU consumer empowerment in the subsequent chapters of this study.

CHAPTER 3: DEFINITIONS OF EMPOWERMENT IN CONSUMER LAW SCHOLARSHIP

Having established the theoretical framework and the conceptual categories that will guide the analysis of EU consumer empowerment in this thesis, Chapter 3 considered the meanings and theoretical frameworks have already been adopted in consumer law scholarship to contour the discipline specific definitions of EU consumer empowerment. There are several, legitimate reasons as to why consumer law scholarship has ascribed meaning to the concept of EU consumer empowerment through the lens of the average consumer concept and unboundedly rational *homo economicus* from economic theory. There are several legitimate reasons as to why the EU consumer empowerment agenda has become situated in scholarship on the information model in EU consumer law and consequently that the Commission's empowerment approach is considered to undermine the goals of consumer protection. The conclusion that is

generally drawn by scholarship on EU consumer empowerment is that the EU Commission should desist in pursuing an agenda of empowerment because the pursuit of this agenda undermines the interests of the consumers. The analysis in Chapter 3 explores and acknowledges the reasons behind each of these understandings of empowerment in the EU consumer law context and the critique of EU consumer empowerment that current prevails in scholarship on this concept. It was shown that (neo)liberal political and (neo)classical economic frameworks are primarily employed as the (implicit) theoretical frameworks that give meaning to the concept of EU consumer empowerment in the prevailing discourses. The lineage of these frameworks was traced to the Court's development of the benchmark average consumer in free movement case law and the adoption of this standard into both consumer policy and secondary consumer law. It was also shown that the body of consumer law scholarship that adopts behavioural insights to critique the information paradigm in consumer law and the average consumer standard have also critiqued the consumer empowerment agenda through these behavioural frameworks. The perspectives generated by this scholarship on EU consumer empowerment represent the prevailing and established understandings of empowerment in the EU consumer law context as an approach that is restricted to empowering the rational consumer through information duties to achieve the ends of the liberalised internal market based on a linear model of economic ordering.

Having established and explored the reasoning behind the prevailing meanings ascribed to the concept of consumer empowerment in the EU context, the discussion in this chapter concludes with the argument that several dimensions of consumer empowerment in the EU consumer law context remain underexplored as a consequence of the theoretical frameworks that support the prevalent perspectives on EU consumer empowerment in consumer law scholarship. It is not claimed that these established perspectives are invalid or incorrect but rather that the application of the theoretical framework on empowerment developed in Chapter 2 shows that such perspectives are too narrow to fully engage with and explore the complexity of the empowerment concept in EU consumer law and what it means when law is used as a tool to both objectively and subjectively empower consumers. The concluding discussion in Chapter 2 applies the framework developed in Chapter 2 to the prevalent understandings of empowerment in consumer law scholarship and consequently several of the underexplored aspects of the EU consumer empowerment concept are made visible.

CHAPTERS 4 & 5: DEFINITIONS OF EMPOWERMENT IN POLICY AND LAW

A central finding from the theoretical framework developed in Chapter 2 illustrated that it is important to consider the meanings of empowerment that are adopted by the empowering actor or institution. In the case of EU consumer empowerment, it is the

EU Commission that first adopted the empowerment agenda in consumer policy in 2007. This means that any discussion of what empowerment means in the EU consumer law context requires a thorough analysis of what empowerment means to the EU Commission, as the supranational entity that has adopted the empowerment agenda. There are two places that these understandings can be drawn from: the text of policy documents and the text of secondary legislation. This observation on the significance of secondary legislation as a site for establishing what empowerment means in the EU context comes with the acknowledgement that while the text of legislative proposals is drafted by the Commission, these documents can be amended and are ultimately finalised through the co-legislative procedure that involves both the EU Parliament and the Council. Nevertheless, this does not negate the importance of the texts of adopted legislation as a site for exploring what legal rules are adopted with the aim of empowering consumers. It is therefore important to consider not only what the EU Commission has to say about empowerment in policy but also to explore the process of empowering consumers through law, which requires setting out exactly which rules have an empowerment objective.

Two key areas were selected for developing insights into the concept of empowerment that is developed by the EU Commission. The first was strategic, horizontal consumer policy and the corresponding body of horizontal consumer law that intersects several consumer markets. The second was energy policy and energy law with a consumer element. Energy policy and the corresponding legislative instruments were chosen to compliment the study on empowerment in horizontal consumer policy for two reasons. The first is that the Commission has consistently developed a strategy that the EU citizen in their role not only as the consumer in several consumer markets but also as the consumer in the energy market should be empowered to participate in and become drivers towards a decarbonised and circular model of economic ordering. The second reason is that from 2016 onwards in the energy sector four directives that impact energy consumers were recast. Crucially, these directives were recast to achieve several aims, one of which was consumer empowerment. In each of these directives, consumer empowerment is then cited not only in the recitals of these legal instruments but is also inserted into the text of legal provisions. This is an indicator that consumer empowerment is becoming more deeply embedded not only in policy but also in the legislative framework that regulates the market. This is a signal for scholarship on empowerment in the EU context that it is time for a renewed debate on how we can understand empowerment in the current EU context that moves beyond what empowerment meant when it was introduced more than fifteen years ago.

The discussions in Chapters 4 and 5 then carried out a narrative analysis of the text of consumer policy and of secondary legislation to build a picture of what consumer empowerment means to the Commission as the empowering entity. The approach that was adopted in both of these chapters is as follows. First, several of the Commission's narratives on consumer empowerment in consumer policy and energy policy were

constructed. Second, the latter half of the analysis in each chapter builds on these narratives by exploring the text of secondary legislation that is explicitly qualified by the Commission as having an empowerment aim. The analysis of the text of these legislative instruments aims to offer novel insights into the empowerment ends that secondary legislation is becoming reorientated towards. In summary, the central findings in these chapters offered an alternative perspective on the Commission's narratives surrounding the concept of EU consumer empowerment and a novel view on the horizontal and vertical consumer legislation that the Commission is using as a tool to empower consumers in practice.

CHAPTER 6: RETHINKING THE CONCEPT OF EU CONSUMER EMPOWERMENT

The discussion in Chapter 6 answered the primary research question on how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. In doing so, the findings in this chapter offer a rethinking of the established discipline-specific theories of the concept of EU consumer empowerment, which were outlined in Chapter 3. Through the theoretical lens of Haugaard's four-dimensional model of power and through the conceptual categories of subjective and objective disempowerment – empowerment as a subjective and objective process, and empowerment as an outcome – a more nuanced and complex framing of the EU consumer empowerment concept emerged.

Through the lens of subjective disempowerment, a hidden dimension of the consumer empowerment agenda in policy and law was revealed that is founded on the subjective causes of consumer disempowerment. Most overtly, in policy consumer disempowerment is considered to result from a consumer's lack of confidence and trust in businesses and in the market. Less visibly, it was shown that the empowerment agenda considers subjective disempowerment to also arise from consumers' internalised narratives that prevent empowerment outcomes.

Rethinking EU consumer policy through the objective dimension of consumer disempowerment resulted in three types of consumer harm that the EU empowerment agenda is focused on remedying through the regulatory framework. To achieve this, the disempowered consumer concept rather than the rational consumer offered a novel starting point and a broader perspective on the conditions that disempower consumers that moves the discussion beyond framing consumer empowerment as a response to information asymmetries. These categories of objective conditions that disempower consumers include (1) market structures and market conditions, (2) the B2C relationship and (3) the personal conditions of the consumer.

The objectives (desired outcomes) of the empowerment strategy in policy were also reframed and connected to the ends of the Green Transition, which entails

rethinking what types of consumer behaviours can be thought of as ‘empowered’. Such behaviours include consumers making the ‘green’ choice or vulnerable consumers participating in the clean transition by joining renewable energy communities.

Haugaard’s four-dimensional model of power offered a framework for the exploration of the ways in which power becomes manifest through the secondary legislation that pursues the empowerment objectives set out in policy. Through this broad lens, it was shown that in a myriad of nuanced ways, the concept of power that threads the approach of empowering consumers through law cannot be fully comprehended by a framework that defines power as agency. Instead, from the perspective of this four-dimensional model of power it was proposed that when law is used to empower consumers this is done so not only through enhancing consumer agency but also through mediating the structural biases in the market, through a complex interaction with the interpretive horizons and practical consciousness of consumers and through an equally complex interaction with the identity formation and ontological security of consumers. The process of empowering EU consumers through law is then far more complex than remedying information asymmetries that disempower consumers but is instead a multifaceted process that occurs through the structural ordering in the marketplace, through the process of consumer socialisation and through the construction of consumer identities and the maintenance of ontological security.

CHAPTERS 7: THE IMPLICATIONS OF RETHINKING THE CONCEPT OF EU CONSUMER EMPOWERMENT

In Chapter 7, the implications that arise from the rethinking of the concept of EU consumer empowerment throughout this study and more specifically the discussion in Chapter 6 were considered. The first finding suggested that the concept of EU consumer empowerment should be reframed through the lens of regulated autonomy. The second finding illustrated that the concepts of EU consumer empowerment and of consumer protection are not mutually exclusive but are rather two distinct regimes that have the potential to complement one another. The third set of findings in this chapter explored several of the implications that arise through a reconceptualising of the concept of power in EU consumer empowerment that goes beyond consumer choice and agency and the implications of using law as a tool for empowerment. It was proposed that the legislative tools that the Commission has orientated towards empowerment ends are more expansive than information duties that obligate the disclosure of information to consumers, that the cause of consumer vulnerability/disempowerment in EU consumer law can be defined more broadly than information asymmetries and that secondary legislation with an empowerment objective has the practical effect of regulating several of the 2-D structural biases in the marketplace. The fourth set of findings in this chapter illustrated that if academic debate is to fully engage with the subjective dimension of the

EU consumer empowerment agenda then a constitutive, rather than an instrumental perspective, on the role of consumer law in society is necessary. It was argued that through a constitutive perspective on the relationship between consumer law and society, the underexplored dimension of subjective consumer empowerment can be considered. This is especially the case with regards to the role of consumer law in the construction of consumer identities, which are an integral part of the subjective empowerment process. It is proposed that scholarship on EU consumer empowerment should not ignore the subjective dimension of the empowerment process and the hidden role that consumer legislation has to play in the subjective (dis)empowerment of consumers.

IMPACT PARAGRAPH

The concept of consumer empowerment developed by the Commission in EU consumer policy and the practice of empowering consumers through secondary legislation are both incredibly important yet underexplored topics in consumer law scholarship. In the years following the introduction of consumer empowerment as a primary goal of consumer policy in 2007, the EU Commission's goal of empowering all consumers through law has become deeply embedded in the fabric of consumer policy and established as a new aim of several directives in the consumer law acquis. It was predicated that the consumer empowerment agenda would quietly diminish in importance as the EU Commission shifted the focus in consumer policy towards achieving the goals of the Green Transition. This thesis has demonstrated that the opposite is true. Instead, in several key policy areas, the Commission consistently adopts an agenda of consumer empowerment as a strategic approach for driving the transformation in the EU to a circular, decarbonized economy by addressing EU citizens in their role as consumers. A primary objective of this thesis is to offer a more theoretically robust understanding of EU consumer empowerment and on the Commission's practice of empowering consumers through law. This was achieved through the development of a theoretical framework on empowerment that was subsequently used to reframe and analyse the Commission's narratives on empowerment in policy and the reorientation of consumer legislation towards empowerment ends.

The findings in this thesis make a valuable scholarly contribution to the legal academic community by offering a rethinking of the established understandings of the concept and the practice of EU consumer empowerment. This thesis has demonstrated that empowerment is a contested concept and therefore garners meaning depending on, for example, social and political contexts. EU consumer empowerment is no different. However, despite the growing significance of the EU consumer empowerment agenda in consumer policy and law, in consumer law scholarship there has been to date no systemic analysis that focuses on the question of how this concept can or should be understood in the EU context. In this regard, the theory of empowerment developed in Chapter 2 is of particular relevance for the academic community on two fronts. First, this theory offers a conceptual starting point and a common vocabulary that can be adopted (and developed) by subsequent studies on EU consumer empowerment. Second, existing understandings of the concept of empowerment in the consumer law literature tend to be flat and one-dimensional. The multi-dimensional character of the conceptual categories developed in Chapter 2 do not negate these established understandings of the concept of empowerment in EU consumer law. Instead, these categories both encompass existing understandings of empowerment and widen these narrow boundaries so that a richer and more theoretically complex view of this concept is revealed. In addition, the findings in this study also illustrate that EU consumer

empowerment is not simply a theoretical construct but is an actual practice that is pursued through the legislative framework. This demonstrates the need for future research that considers both the objective and the subjective dimensions of consumer empowerment and the role of consumer law in this process.

From a social perspective, the findings in this thesis draw attention to the relationship between the consumer empowerment agenda and the pressing social concerns that emanate from global warming and unsustainable practices of production and consumption. The EU Commission's aim of empowering consumers to become drivers of the Green Transition to a circular and decarbonized economy is not simply academic. In practice, consumer empowerment is one of the primary strategic approaches of this supranational institution in responding to the worldwide crisis of global warming and the over-extraction of natural resources. To exemplify the point, during the completion of this thesis, Europe was struck by an energy crisis with untenably high gas and electricity costs. This complex social crisis has thrown sharply into focus the disempowered status of the most vulnerable and disadvantaged persons in European society, such as tenants, low-income households and all persons who cannot afford to implement energy efficiency measures. In an agenda that aims to empower consumers for these ends there is therefore much at stake that goes beyond the traditional concerns of consumer protection in the internal market. The findings in this thesis offer a novel way for the academic community, policy makers and legislators to think about the causes of disempowerment and to reconsider what can or needs to be done to both objectively and subjectively empower consumers in the transforming marketplace.

CURRICULUM VITAE

Kate O'Reilly was born in Dublin, Ireland in 1987. Kate graduated with a double honours B.A. in Anthropology and English Literature from the National University of Ireland Maynooth in 2019, with an LL.B. in European Law *cum laude* from Maastricht University in 2015 and a MSt in Legal Research from the University of Oxford in 2018, following the viva held in 2017. In October 2016, Kate joined the Private Law department at the Faculty of Law in Maastricht University as a PhD researcher and received the approval of her PhD thesis in November 2022. While writing her thesis, Kate was involved in teaching and lecturing on comparative contract law. Since January 2023, Kate is working as an Assistant Professor of Property Law at the Faculty of Law at Maastricht University. Kate is a fellow at the Maastricht European Private Law Institute.

