3 Reimagining Consumption

3.1 Introduction

Few would doubt that consumption is central to prosperity. We need housing, food, and clothes, but also health care, childcare, education, and transport, as well as places for socialisation, such as cafes and restaurants, playgrounds, or parks, to live a good life. While these needs have remained relatively constant over the past decades at least, and in some cases over centuries, *how* we consume, *how much* we consume, and *what is considered consumption* in the first place – as a matter of law and policy – has changed fundamentally.

Thus, while we have always needed a house to live in, how we have gone about the provision of housing has changed considerably. In the not-so-distant past, many people lived in multigenerational dwellings, with complex sets of rights and duties attached to them.[1] Over the course of the twentieth century, we have seen an important shift towards nuclear family dwellings, which were in large numbers provided by the state, with tenants over time having more rights and protections.[2] This changes again with the rise of neoliberalism and financialisation, when the collectively owned housing is increasingly privatised and purchased either by individuals via mortgage deals with banks or by (financial) investors.[3]

A similar transformation of *the how* of consumption – that is from community-based to public provision to private provision – has also

[1] Kristen R. Ghodsee, *Everyday Utopia: What 2,000 Years of Wild Experiments Can Teach Us about the Good Life* (Simon & Schuster, 2023).
[2] Ibid.
[3] Manuel B. Aalbers, 'The Variegated Financialization of Housing', *International Journal of Urban and Regional Research* 41, no. 4 (2017): 542–54.

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taken place with regard to other fundamental services, such as childcare or transport. During the period of neoliberalism, a number of services that were provided collectively, be it via community or via the state, have been privatised.[4] The increasing individuation of consumption (consuming at the individual or nuclear family level) has increased not only private debt levels[5] but also the energy and material throughput of Western economies.[6] What is more, to get people to consume an ever greater number of vehicles, home appliances, clothes, holidays, etc., much had to be done in order to promote such spending – be it via a public route (e.g. law and policy) or the private (e.g. advertisement or cultural industry) route.

Since the 1980s, the European Union (EU) has become the main actor in regulating consumption, taking over much of the initiative from its member states.[7] The EU has produced a vast amount of policy and legislation that will gradually expand consumer protection from more exceptional situations (doorstep selling directive)[8] to buying offline (sale of goods)[9] and online (distance selling).[10] Two actors have played a central role in the EU consumer law and policy. On the one hand, the European Commission has shaped the horizons and agenda of law and policy in this field, setting up consumer policies and putting on the agenda legislation that the policy requires. On the other hand, the Court of Justice of the EU has been an important "corrector" of sometimes rather starkly instrumentalist EU legislation, which seemed to

[4] Frank Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (Penguin UK, 2016).

[5] Moritz Schularick, 'Public and Private Debt: The Historical Record (1870–2010)', *German Economic Review* 15, no. 1 (1 February 2014): 191–207.

[6] Jason Hickel and Giorgos Kallis, 'Is Green Growth Possible?', *New Political Economy* 25, no. 4 (2019): 469–86.

[7] Hans-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press, 2018).

[8] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

[9] Directive 2019/771/EU of the European Parliament and of the Council 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.

[10] Directive 2011/83/EU of the European Parliament and of the Council 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.

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forget parties in its zeal to promote the "well-functioning" of the internal market.[11]

In this chapter then, I explore how European institutions have imagined consumption, and consumers, within the changing imaginaries of prosperity. I do so by exploring systematically the discursive shifts behind the EU's consumer policies over the past 50 years, identifying how the background understandings of political economy have changed, including the role of the economy, government, law, politics, or nature, producing thus different imaginaries of consumers and consumption.

I rely on the Commission's consumer policies as a proxy for discerning European imaginaries. While certainly limited, as any proxy would be, the transforming consumer policies allow us to see the Commission's best guess as to what is broadly shared in European society and what would appear as appealing, credible, and necessary to the range of stakeholders it needs to convince in the process. I see the Commission's policies as good proxies for two reasons.[12] First, given the Commission's lack of formal legislative power beyond agenda-setting powers, the Commission has to tread carefully in order to convince the European legislators (Council of Ministers and the European Parliament) of what plays in society and what should be done about it. Second, by focusing on a certain type of documents produced by the same actor, for the same purpose, over a long period of time, I can also study more systematically the core changes in the conceptions of the economy, law, politics, government, and consumers in the EU, while being able to identify trends and important turning points in the institution of neoliberal imaginary of prosperity.

This chapter demonstrates several things. First, it shows that instituting a new imaginary of prosperity is both gradual and radical. Change proceeds by means of a variation in the understanding of the key elements of the social order, that is the economy, government, law, politics, and subjects behind consumer policies. These changes, or variations,

[11] Candida Leone, 'The Missing Stone in the Cathedral: Of Unfair Terms in Employment Contracts and Coexisting Rationalities in European Contract Law'. PhD thesis, University of Amsterdam (2022). https://pure.uva.nl/ws/files/48074023/Thesis_complete_.pdf.

[12] The new policies it proposes have to tap into the shared social imaginaries of the time – at least as they live in the heads of the EU's collective legislator – the Council, comprising EU member states ministers and high-level bureaucrats, the European Parliament, comprising of MPEs from all member states, as well as different 'stakeholders' who partake in the consultative process (consumer associations, business associations, the general public, etc.).

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seem to cumulate; once new understandings of all the core elements of the social order have been sufficiently articulated, a new social imaginary can settle. Now, despite being born gradually through changes in the underlying conception of the social order, this settled imaginary is at the same time radically new. For unlike the previous variations, what emerges is something qualitatively different than the previous iterations: an articulation that is confident, coherent, convincing, and, one may even say, beautiful. The 1998 consumer policy, we will see, marks such a moment – the outing of a fully formed, perfect, privatising imaginary of prosperity that is confident in its conception of the world and the role of consumers within it.

Second, the neoliberal imaginary of prosperity has gradually replaced the world where consumer law and policy were much more collective and antagonistic.[13] At the time when the welfare state imaginary of shared prosperity predominated, next to consumers and businesses, also many other groups (e.g. workers, trade unions, small as opposed to big enterprises, and civil society actors) were seen as engaging in the struggle over the shape of consumption and economy. In this world, law and politics – rather than markets – were the main vehicles to articulate what prosperity means and how to bring it about. The role of government was to make sure that the outcomes of political battles were implemented, while it was expected to act with the principles of fairness and justice, as the main grounds of governmental accountability. In consumer policy, this meant that the protection of weaker parties took the central stage, with a view to ensuring that no groups (producers, distributors, or retailers) took advantage of each other. Legal institutions, with their discourses of justice and rights, were an important vehicle for not only implementing but also reasoning about the shape of political economy.

[13] The understanding of the *collective* that I propose in this book builds on the tradition in social theory that foregrounds conflict as the main driver or social change. While I recognise that other non-individualist social theories may provide an appealing consensual conception of the collective, my empirical work suggests that the negation of conflict in the past decades has usually coincided with the privatisation of power and resources. At the same time, conflict alone does not suffice to prevent the privatisation of power and resources – especially if the conflict is staged purely along cultural lines. Thus, some degree of *socio-economic* conflict seems to be necessary to stabilise imaginaries of shared prosperity. Within these not-so-exacting boundaries, I hope that the conceptual framework proposed by this book would be still of considerable interest to those who may entertain a different conception of social change.

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The new neoliberal imaginary of privatised prosperity, which was ushered in from the 1980s onwards and became hegemonic around 1998, had a very different understanding of political economy and society. In this world, we find much more positive or naturalised conceptions of both the market and the actors that populate it. Standardised (rational) consumers and (innovative) businesses will drive economic growth forward in an economy that is mostly self-regulating, and win-win, provided that governments allow allocative efficiency to give shape to the market. The role of politics, and contestation, is limited as both businesses and consumers have an equal interest in the optimal functioning of the market. The role of law is mainly to facilitate a smooth market operation, which may require not only removing market failures but also at times chastening consumers into market-rational behaviour.[14]

This is, however, not where the story ends. After a long dominance of this privatised imaginary of prosperity in the EU consumer policy, we are witnessing a slow rearticulation of some elements of political economy that points in a new direction. This rearticulation shares some elements with the welfare state imaginaries of prosperity, while incorporating other concepts such as repair, longevity, maintenance, circularity, and sharing and embracing a more holistic concept of the consumer and their interests.

It is important to stress here that it took neoliberal imaginary almost two decades to become hegemonic. Thus, what we are seeing are only the first steps in the direction of a new imaginary, which needs both time and political will to take shape. The political will is, however, not emerging without constraint and pressure. The most important roadblock to change is the capital, which fosters the fear from shifting away from cosy neoliberal imaginary of prosperity where businesses are the "motor" of our prosperity, and which regulation or taxes will undermine. At the same time tribal imaginaries aim to compete with the emergent imaginary of prosperity by promising instead security by reaffirming old hierarchies and identities (be it national, ethnic, religious, or gender).

Two caveats are in order before we move to the empirical section. First, the chapter does not look at the other important actor in consumer law

[14] Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', *European Law Journal* 21, no. 5 (15 January 2015): 572–98.

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and policy – the Court of Justice – which has played a vital role in countering at times strongly instrumentalising moves of the European Commission. The reason is that the Court still remains constrained by the scope of its constitutional task of interpreting EU law, on the basis of cases that come before it. This means that its possibility to steer the transformation of imaginaries remains limited at best.[15]

Second, as the chapter follows the transformation of the Commission's consumer policies, it is also limited by what the Commission considers within the scope of consumer policy. Thus, for instance, the discussion on public services does not feature prominently in the Commission's documents after 1985 (with the exception of the 1995 policy), as the 'services of general economic interest' (SGEI) become a separate field of policy action. These previously monopolistic providers of public services had to be heavily regulated if the liberalisation and privatisation were not to end up in a social disaster. And still, at times the more 'voluntary' consumption that falls under consumer law and policy has provided consumers with more rights – a link recognised by the Court that extended some consumer rights to the field of SGEI.[16]

3.2 Consumption as a Matter of Contract Law

While we have always consumed, the institutional mix that ensured material reproduction of societies has transformed fundamentally. Industrialisation and the growing centrality of markets in the provision of goods and services have marked the past 150 years. It is both due to the growing importance of markets in providing goods and services for consumption, as well as a general increase in the quantities we consume ('mass consumption'), that consumption has started to resemble the patterns we are accustomed to today.[17] These transformations have been accompanied by the increasing importance of the 'law of contracts' in most European countries, where, as part of large 'civil codifications', contract formed the basic, background institutional framework against which the rise of consumption took place.

The history of contract law follows quite neatly changing social imaginaries. The ideological background of the nineteenth-century contract

[15] Leone, 'The Missing Stone in the Cathedral'.
[16] Candida Leone, 'Transparency Revisited – On the Role of Information in the Recent Case-Law of the CJEU', *European Review of Contract Law* 10, no. 2 (1 January 2014): 312–25.
[17] Leone, 'The Missing Stone in the Cathedral'.

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law was in principle progressive. Contracts freed people from the chains of 'status' and enabled them to participate in the emergent market economy freely, as equals.[18] The rich and poor, the strong and weak, all had the freedom to conclude contracts with whom they wanted, on the subjects they wanted, and on the terms they wanted.[19] Landlords and tenants, industrialists and workers, adults and minors, debtors and creditors, could all enjoy their freedom in the market. The state, in the service of the new order and its subjects, was then bound to respect private autonomy and recognise and enforce these freely concluded contracts.[20]

Before long, however, many realised that the core contract law principles of private autonomy and formal equality materially played out rather differently for the rich and the poor, for those of "better" and "worse" backgrounds, for men and for women, etc.[21] Those who had more (bargaining) power and knowledge were able to impose their own terms on those who had less power, under the threat of state enforcement. A very broad range of contracts could be concluded and enforced, such as agreements for 7-day working weeks, 16-hour workdays in mines, and/or for children under the age of 9.[22]

Given the apparently unfair effects of this newly acquired freedom, the regulation of market relations – reliant on contract law and private law more generally – became a space of political struggle in the late nineteenth and throughout the twentieth century.[23] "Freedom of contract" was to take significant hits as time passed, with new fields of law (labour law, tenancy law, and later consumer law) being carved out of the private law domain, which itself remained subject to relatively unconstrained freedom of contract.[24]

When it comes to consumption, in the course of the nineteenth-century goods that were transferred through the market fell under the background rules of classical (liberal) contract law. Yet, in those early

[18] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. 2 (University of California Press, 1978).
[19] Of course, "all" often excluded women and racialised groups.
[20] R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly* 38, no. 3 (1923): 470–94.
[21] Ibid.
[22] P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1985).
[23] In an early critique of this trend, Weber speaks of 'materialisation' of contract law. Weber, *Economy and Society* Part IV, 4.
[24] Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014).

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days, both the number and complexity of such consumer contracts were comparatively low, barely presenting an issue of larger societal concern.[25] Areas where consumers' interests found their way to court were most often related to the health and safety of consumer products, for instance, the question of the contractual relevance of advertisements for quack medicines, the so-called puffs.[26]

Consumer contracts emerge as a *problem* with the rise of adhesion contracts.[27] These so-called boilerplate contractual terms were incorporated into contracts without negotiation, under the radar so to say, shifting most rights to sellers and leaving buyers without much protection. The critique of this practice came from several different directions. Some argued that sellers used standardised contract terms to take advantage of buyers, who were in a structurally weaker position.[28] Others feared the usurpation of legislative power, whereby sellers produced quasi-legislation applicable across a broad range of contracts.[29]

While adhesion contracts clearly presented a problem for contract law and contract theory, they were also a sign of new times. Leone argues that adhesion contracts only became an issue in the first half of the twentieth century because a growing number of people gained access to a broader palette of consumer goods. Yet the rising number of transactions, which anything but resembled the arm's length business negotiations that classical contract law had in mind, took liberal contract law out of its comfort zone.[30]

It was only post-WW2 that consumers' interests, and contracts, became a matter of both broader social mobilisation and governmental action in Europe. Different countries had very different social and legal trajectories when it came to both. For instance, in France, the consumer question was first taken up by trade unions in the 1960s, with consumer bodies and associations only developing later. The particular focus of

[25] In most continental legal systems, contract law does not require a particular form.
[26] Anat Rosenberg, 'Exaggeration: Advertising, Law and Medical Quackery in Britain, c. 1840–1914', *The Journal of Legal History* 42, no. 2 (4 May 2021): 202–31; Trentmann, *Empire of Things*.
[27] Leone, 'The Missing Stone in the Cathedral'.
[28] Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts About Freedom of Contract', *Columbia Law Review* 43 (1943): 629; Roscoe Pound, 'The Role of the Will in Law', *Harvard Law Review* 68, no. 1 (1954): 19.
[29] Ludwig Raiser, *Das Recht Der Allgemeinen Geschaftsbedingungen* (Hanseat. Verlag-Anst., 1935), as cited in Leone, 'The Missing Stone in the Cathedral'.
[30] See also Trentmann, *Empire of Things.*

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governmental intervention was to regulate the prices of consumer goods, as well as ensure health and safety.[31] In the UK, the Melony Report (1960) outlined all kinds of problems faced by citizens and consumers. However, it was not until the 1970s that the first piece of legislation in the field of consumer protection was produced in the UK.[32] In the Netherlands, the social movement preceded governmental intervention by a long haul,[33] with the first legislation appearing shortly after the 1962 Kennedy's Consumer Bill of Rights.[34]

Micklitz argues that the rise of the importance of consumer protection in the 1970s coincided with the crisis of the welfare state and may be seen as one of the early signs of privatised Keynesianism, that is (debt-driven) consumption as a replacement for the diminishing public provision. This, he further argues, made the EU member states much more ready to hand over the initiative and power in the field of consumer protection to the European communities when they became interested in the field.[35]

3.3 A Hurried Decline of the Imaginary of Shared Prosperity (1975–1985+)

As the EU entered the field of consumer protection with a consumer policy in 1975,[36] most of its member states already have some substantive provisions on consumer protection in place, as well as consumer bodies taking care of collective consumer interests. However, the EU makes a new overture in that it attempts a more systematic approach to consumer protection: a comprehensive consumer *policy*. With growing complexity and juridification, a policy seems to promise more coherent or rational governance, starting from an overview of the field governed and articulating how a wide range of issues and problems are interrelated – setting thus a proper basis for any future intervention.[37]

From the 70s, each EU consumer policies starts by carefully outlining the state of (political) economy, and continues with the articulation of

[31] Peter van Dam, 'The Entangled Consumer: Rethinking the Rise of the Consumer after 1945', *Journal of Nonprofit & Public Sector Marketing* 33, no. 2 (2021): 212–38.
[32] Fair Trading Act 1973; Consumer Credit Act 1974. The Labour government also created the Department of Prices and Consumer Protection in 1974, only to be abolished by the Conservative government in 1979.
[33] van Dam, 'The Entangled Consumer'.
[34] Micklitz, *The Politics of Justice in European Private Law*, Part II, 2. [35] Ibid.
[36] Christoph U. Schmid, 'The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and Its Implications on a European Contract Law Code', *European Review of Contract Law* 1, no. 2 (July 2005): 211–27.
[37] Christoph Knill and Jale Tosun, *Public Policy: A New Introduction* (Red Globe Press, 2020).

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the subject of the intervention – the consumer – and their needs vis-à-vis other economic actors and systemic pressures. The commission also articulates what it deems to be the role of government (itself in particular), what politics has to say in the shape of consumer rights, and what the appropriate ways in which law could, and should, intervene are. Content-wise, this makes consumer policies an excellent proxy for mapping the changing imaginaries of prosperity, and the role of consumption within.

3.3.1 1975: Consumer Protection as a Collective Project

The 1975 consumer policy opens with the section '*The consumer and the economy*', in which the European Commission describes the economy in which it is to intervene. In the Commission's view, the transformation towards a consumer society is nothing but finished: '*The discovery of new materials, the introduction of new methods of manufacture, the development of means of communication, the expansion of markets, new methods of retailing* [that] *have had the effect of increasing the production, supply and demand of an immense variety of goods and services*'.[38]

As a consequence of these ongoing transformations of market conditions, '*the balance between suppliers and customers has tended to become weighted in favour of the supplier. . . . The consumer, in the past usually an individual purchaser in a small local market, has become merely* ***a unit in a mass market****, the target of* ***advertising campaigns*** *and of pressure by* ***strongly organized production and distribution groups****.*'[39] In this new constellation, producers and distributors have an upper hand, which they abundantly use in order to pursue their interests and goals. Thus, producers and distributors have '*a greater opportunity to determine market conditions than the consumer*', while at the same time mergers, cartels, and abuses of competition '***create imbalances to the detriment of consumers***'.[40]

The social whole that the Commission portrays is that of the economy as an ever more complex market offering many goods and services, but also presenting a space for conflict and abuse. The main actants, the subjects in this complex market, are the producers and distributors who, through aggressive advertising strategies, for instance, may exercise

[38] Council Resolution of 14 April 1975, on the 'Preliminary programme of the European Economic Community for a consumer protection and information policy' (the programme itself is added as the annex to the resolution), No. C 92/3.

[39] Consumer Policy 1975. All emphases in the quotes, in this and the following chapters, were added by the author of this book.

[40] Consumer Policy 1975.

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excessive power over the consumers' choice. These groups, the Commission claims, have a structural advantage in this new complex market. Consumers, in contrast, have lost much of the control they once had in their local, overseeable market.

In order to remedy this, two pathways are envisaged: on the one hand, consumers need to organise – collectively – to fight and defend their interests. On the other hand, government also needs to take responsibility for consumer *protection* – as due to structural asymmetries, the collective action of consumers will not always suffice. Thus, the role the European Communities is to safeguard consumers' interests, by taking '*full account of consumer interests in the various sectors of Community activity, and to satisfy their* ***collective and individual needs***'.[41]

As guidelines for legal and political intervention, the European Commission identifies *five basic rights* of consumers,[42] on the grounds of

Five Consumer Rights

(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,
(e) the right of representation (the right to be heard).

Five EU Policy Objectives

A. protection against hazards to consumer health and safety,
B. effective protection against damage to consumers' economic interests,
C. adequate facilities for advice, help and redress,
D. consumer information and education,
E. consultation with and representation of consumers in the framing of decisions affecting their interests.

[41] Consumer Policy 1975, No. C 92/4.
[42] Inspired by J. F. Kennedy, 'Special Message to the Congress on Protecting the Consumer Interest', www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest, last accessed 3 January 2024.

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which it develops *five policy objectives* for the EU consumer policy (those will also find their way into later consumer policies of 1981 as well as 1991).[43]

Consumers are bearers of rights, and the task of government is to ensure the fulfillment and protection of these rights. Furthermore, these consumer rights, and the policy objectives that follow from them, are not conceptualised by the European Commission as individual rights only. Rather, they are also collective rights, relevant for consumers both as individuals and as a group in the struggle against producers and distributors.

This language of protection, alongside the stress on individual and collective rights, is one of the signposts of a welfare state imaginary of shared prosperity. There is nothing natural about the ways in which the market allocates and distributes either resources or power. Instead, government is responsible for the shape the market takes as well as its distributive outcomes. If there are groups who seem consistently getting the short end of the stick – as established through the political process – they need to be protected by government. It is by means of law, and rights, that such protection takes place.

Indeed, this protection required rather far-reaching legal interventions from today's point of view: '*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***'.[44] By changing the rules of contract, that is curtailing the contractual freedom of stronger actors, the legal infrastructure of market (relations) – that is the markets themselves – is changed. The core concern of (consumer) law in this period is to remedy power asymmetries, the abuse of stronger bargaining positions, and remove any resulting unfairness from market transactions. In terms of legal imaginaries, law is seen as constitutive of markets, making clear that there is little which is natural, or apolitical, about market's distributive consequences.

Furthermore, the recognition of both government's capacity to govern and its responsibility for market outcomes is discernible when it comes to the protection of health and safety. '*Substances or preparations which may form part of or be added to foodstuffs should be defined and their use regulated, for example by endeavouring to* ***draw up in Community rules, clear and precise positive lists***'.[45] Government, in this social imaginary, has a sufficient

[43] Consumer Policy 1975, No. C 92/1 and No. C 92/4.
[44] Consumer Policy 1975, No. C 92/6. [45] Consumer Policy 1975, No. C 92/5.

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knowledge to identify such harmful substances and regulate them authoritatively by placing them on lists of prohibited substances. "Government failure" is still nowhere to be seen.[46]

The 1970s are often identified as the period when the neoliberal privatising imaginary of prosperity started taking hold across the world.[47] Yet, as the analysis of the 1975 consumer policy makes clear, the institutionalisation of neoliberalism did not actually even start in many fields of law and policy. The imaginary of the political economy that prevails here is still that of a place of struggle between different classes or groups. Government is not seen as a neutral arbiter between these different groups but instead has an obligation to intervene, remedy power asymmetries, and redress any abuses of power. Interventionist law and policy – rather than a reliance on market processes – is a crucial instrument to shape economic and social reality. The collective imaginary is, however, going to show its first cracks only a couple of years later. Starting with the destabilisation of the concept of politics, and the role of government, which characterise it.

3.3.2 *1981: First Cracks*

As a consequence of the economic downturn in previous years, the 1981 consumer policy starts with a much more gloomy picture: '*in the current difficult economic situation, a situation characterized by a* ***slowdown in incomes growth****, continuing unemployment (. . .), consumers are obliged to pay* ***more attention to the way in which they use their income*** *(. . .)*'.[48] The Commission then sees as the task of consumer policy to enable *the consumer to act with full knowledge of the facts*', while making sure that consumers are able to '***hold the balance between market forces***'.[49] Thus, unlike a couple of decades later, when the Commission sees expanding consumer demand as the main driver of economic recovery and consumers as instrumental to economic growth, during the economic crisis at the beginning of the 1980s, the task of consumer policy is still to

[46] Joseph E. Stiglitz, 'Government Failure vs. Market Failure: Principles of Regulation', in *Government and Markets: Toward a New Theory of Regulation*, , ed. Edward J. Balleisen and David A. Moss (Cambridge University Press, 2009), 13–51.

[47] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

[48] Council Resolution of 19 May 1981, on a second programme of the European Economic Community for a consumer protection and information policy (the programme itself is added as the annex to the resolution), No. C 133/2.

[49] Second Programme 1981, No. C 133/12.

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strengthen consumers as a class that holds and should hold a certain economic power in the market.

The main change from the previous consumer policy lies in the conception of politics, that is in the understanding of how the Communities are to achieve the abovementioned objectives. '*In the course of the implementation* [of the 1975 consumer policy], ***the idea gradually developed*** *that the consumer should be increasingly seen as having a part to play in the preparation of economic and social decisions concerning him*'.[50] The Commission continues: '[W]*ithout in any way ceasing to ensure that the rights listed above are complied with, the consumer policy, which has hitherto been mainly defensive, should become* ***more positive and more open to a dialogue*** *in order to establish the conditions in which the* ***consumer can become a participant*** *in the preparation and implementation of important economic decisions which concern him first and foremost as a buyer or a user, and which very largely determine his individual or collective living conditions*'.[51]

The Commission suggests that two consequences follow from this attempt to make the decision-making about consumer policy more 'open and positive'. First, the consumer movement will be expected to '*progressively* ***take into account the economic and social implications of the decisions*** *on which it might wish to be consulted*'.[52] Second, while it is still the case that the action taken '*by the individual consumer is not likely to have much effect on the mass market where he exercises his choice, the excessive growth in regulatory powers can only serve to* ***over-institutionalize*** *the relationships between the parties concerned*'.[53]

Several things are going on here. While the Commission acknowledges consumers' interests as different from those of producers, as their interests must be pursued collectively, it restricts this collective action to a kind of cooperative relationship, rather than an agonistic struggle, with suppliers. However, in contrast to full-blown privatising imaginary, the Commission still does not postulate a fully "common interest" between the different groups in the smooth market operation. Instead, it proposes a more collaborative type of politics.

The perception of the appropriate role of government is also changing. When the Commission warns against the growth of regulatory powers that could "over-institutionalise" the relationships between the parties, we see an important privatising move. Government needs to guard against being too steering and too interventionist, so as not to

[50] Second Programme 1981, No. C 133/2.
[51] Second Programme 1981, No. C 133/2.
[52] Second Programme 1981, No. C 133/3.
[53] Second Programme 1981, No. C 133/12.

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crowd out the space for private initiative. This is one of the early announcements of the "de-regulation" narrative that becomes a trademark of the new imaginary of privatised prosperity.

While these two shifts are significant, in many other aspects the 1981 consumer policy simply takes over the framings from the 1975 consumer policy, maintaining relevant aspects of the imaginary of collective prosperity. Government still has enough knowledge to act on public health and safety, putting harmful substances on blacklists or handing out *prior* authorisations for potentially hazardous products and services.[54] Equally, the document maintains the language of protection and envisages that private law rules should *protect* consumers against all kinds of abuses, such as unfair trading practices, unfair terms, misleading advertisements, or obliging sellers to supply spare parts for consumer goods.[55]

3.4 Towards the Imaginary of Privatised Prosperity (1985–1995)

3.4.1 1985: 'New Impetus' for Consumer Policy

By the mid-1980s, the private route to prosperity was becoming the more dominant imaginary across EU policy. In 1985, the Commission published one of its most influential policy papers in its history – the 'White Paper on the Completion of the Internal Market'[56] – which portrays the internal market as a matter of technical interventions and articulates some 200 measures necessary for the "completion" of this internal market. The White Paper precedes a new European Treaty – the 'Single European Act'[57] – whose main contribution was introducing majority voting in several important areas of EU policymaking, among which the single market. It is then the combined operation of the various technical measures required for completing the market, enabled by the newly established majority voting, which would also bring a 'new impetus to consumer policy'.[58]

An important epistemic shift takes place in the New Impetus to Consumer Policy. The objectives of the consumer policy change: it is *citizen welfare* (i.e. citizens should benefit from the well-functioning

[54] Second Programme 1981, No. C 133/4. [55] Second Programme 1981, No. C 133/7.
[56] European Commission, Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 0310 final.
[57] Single European Act, 1986.
[58] Commission Communication to the Council, New Impetus for Consumer Protection Policy, COM(85) 314 final.

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internal market) and *productive efficiency* (consumer confidence in the safety and quality of products increases sales) that are to become the axis of the Commission's thinking about consumer policy.[59] The Commission challenges member states who see consumer policy as a '*fair weather*' policy.[60] Claiming that when '*seen from this twin standpoint of citizens' welfare and efficiency of production, consumer protection assumes its proper dimensions as an indispensable part of the fabric of Community policy*'.[61] The internal market thus gradually becomes a justification for consumer policy, while consumer policy is understood as central for the smooth operation of the internal market. The world of the EU consumer policies hereby ceases to be constituted at the meso level of groups, with conflicting interests, and instead reveals itself as constituted at the macro level of the (well-functioning) market.

This changed perspective is linked to the new ways of delivering old objectives. Thus, when it comes to the Commission's approach to health and safety, we see a shift in the understanding of the role of government. Namely, the Commission proposes '*a programme of legislation which would set out clearly for manufacturers and suppliers the health and safety levels which their products must meet in order to ensure the protection of the consumer*'.[62] By implication, the implementation of this seems to be left to businesses themselves. This approach also strongly resembles the 'new approach to technical regulation', which starts in the same year and expects the regulator to set the standards while businesses and their associations decide on the best way to deliver them.[63] Both present a move to partially privatise formerly public competences.

The Commission's changing imaginary of the economy reveals itself in its renewed approach to the protection of consumers' economic interests. The Commission, for the first time, sees consumers' economic interests, rather than the protection of consumers, as explicitly linked to the participation in the European cross-border market: '*If the common market is to be fully effective, it must be made easier for consumers to buy goods in other countries (. . .) Consumers generally are unaware of their existing rights or the advantages to be obtained by exploiting differences in prices prevailing between Member States and on the operation of customs controls for Community citizens at Member States' frontiers within the common market*'.[64] The Commission

[59] 'New Impetus', p. 8. [60] 'New Impetus', p. 3. [61] 'New Impetus', p. 8.
[62] 'New Impetus', p 10.
[63] Jacques Pelkmans, 'The New Approach to Technical Harmonization and Standardization', *JCMS: Journal of Common Market Studies* 25, no. 3 (1987): 249–69.
[64] 'New Impetus', p. 16.

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foregrounds in this policy what will be the guiding star of the privatising imaginaries of consumption, namely that '*Better information for consumers is a prerequisite for the improved operation of competition*'.[65]

However, in terms of concrete legal measures, it is only in the upcoming "Consumer Credit Directive" where information is the central paradigm; other proposed legal measures on the basis of this policy, and the imaginary behind them, remain collective. Thus, the Commission pushes through relatively wide-ranging legislation providing substantive protection to consumers against unfair terms in consumer contracts. A measure that would endow public courts with a capacity to strike down unfair contract terms – therefore curtailing freedom of contract (of suppliers). And while the justification for this measure is the fact that consumers will often be faced with contracts in foreign languages and thus may not be able to familiarise themselves with the terms, the measure is not limited to only cross-border contracts. If anything, the unfair terms protection will be mostly invoked in a national context.[66] Unfair terms protection is a legal tool that belongs to the (welfare state) imaginary of shared prosperity, and it will prove in the future,[67] as it did in the past,[68] to be fundamental for dealing with *unequal bargaining power* in contractual relations.

In terms of the representation of consumers' interests, and thus the concept of politics behind the New Impetus, the cooperation between consumers and businesses remains central. The Commission returns to the 1981 consumer policy and contemplates the reasons for the lack of success in the dialogue between consumers and businesses (jointly 'operators') in bringing about private standards that could replace governmental intervention. As it often comes, the Commission realises that it must use public power – the law – in order to successfully privatise that same power: '*Backed up by Community law, however, codes of business practice have an analogous position to product safety standards*'.[69]

3.4.2 *1990: Breaking the Link between Consumer Rights and Policy Objectives*

After years of economic trouble, the consumer policy of 1990 clearly set out a more optimistic tone. Things are getting better, also for consumers.

[65] 'New Impetus', p. 16.
[66] Hans-Wolfgang Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *Common Market Law Review* 51, no. 3 (1 June 2014): 771–808.
[67] Ibid. [68] Leone, 'The Missing Stone in the Cathedral'. [69] 'New Impetus', p. 19.

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The previous shift to a macro perspective of the market seems to have been entrenched in the Commission's thinking, helping it to articulate a path forward: '*The construction of the internal market is expected to be greatly to the advantage of the consumer. To gain the benefits, it is necessary that consumers be sufficiently confident to use the opportunities*'.[70] Not only is the Commission confident that the internal market is good for consumers, but also that consumers are good for the internal market: '*Attention to consumer interests*', *not only for their own sakes, but also for the benefits of producers, distributors and enterprise in general.*[71] This newly found alliance between consumer protection and market objectives seems to put consumer policy on firmer ground – giving rise to new confidence on all fronts.

How then is the Commission going to advance the interests of both consumers and businesses, in this newly found alliance? '*Four main areas of focus are identified because of their importance in* ***building the consumer confidence necessary to support the implementation of the internal market****. (1) Consumer Representation*; *(2) Consumer Information*; *(3) Consumer Safety*; *(4) Consumer Transactions*'.[72] Consumer *rights,* a regular occurrence in the previous policies, are nowhere to be seen. The shift from subjective rights thinking to objective thinking in consumer policy reinforces a more "global", or macro, view of consumer policy, where rights become one of the elements of a broader internal market policy mix.

When it comes to the understanding of the role of government and of consumers, it is the *information paradigm* that becomes the main tool to "harmonise" consumer interests with those of the internal market in the emerging imaginary of privatised prosperity.[73] However, at this point of time, this subject matter is still approached rather cautiously by the European Commission. Suggesting that '*Sales promotion information is not of itself a sufficient basis for decision making for significant purchases. Consumers need access to* ***factual information and advice*** *right across the range of supply*'.[74] Therefore, the public or collective provision of information still

[70] European Commission, *Three Year Action Plan of Consumer Policy in the EEC (1990–1992),* p. 2.
[71] European Commission, *Three Year Action Plan*, p. 3.
[72] European Commission, *Three Year Action Plan*, p. 5.
[73] Note that the project is to harmonise the interests of the consumers with the logic of an abstract entity, the internal market.
[74] European Commission, *Three Year Action Plan*, p. 15.

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has an important role to play. The provision of factual information should come '***from various sources***', and purely market provision is thus insufficient.[75] This hesitance will, however, be abandoned in the course of the 1990s.

Importantly, while a withdrawal of government is announced in many different ways within this and previous policies, we can still see the role for the government in at least one way – namely the European Communities that will *make* the European internal market. For the first time, the Commission indicates that the differences in contract law between member states may present a problem for the internal market, insofar that they inhibit consumers from engaging in cross-border transactions: '*The differences in conditions of sale in contracts across the twelve Member States are such as to inhibit consumers from purchasing significant items or services away from his or her place of residence. (. . .) It is necessary to identify the elements in the existing contract laws of Member States which are likely to inhibit consumer purchasing and as far as possible eliminate them*'.[76] This framing that the Commission adopts,[77] facilitated with the move from unanimity to majority voting, will set the grounds for a battle for full harmonisation in the 2000s.[78]

When it comes to its conception of politics, the Commission continues to ponder how to facilitate cooperation between businesses and consumers. At the same time, however, it does not seem to have entirely embraced the politics of common interest. Instead, the Commission is still concerned with the creation of strong consumer groups, providing them with both technical assistance and financing, in order to set the grounds for the negotiation of relations between businesses and consumers.

By 1990, we have still seen relatively few pieces of consumer legislation. The doorstep selling directive and product liability directive both came into force in 1985, but their implementation was planned years later. In 1987, the Commission also adopted the first Consumer Credit

[75] '*Sales promotion information is not of itself a sufficient basis for decision making for significant purchases*', European Commission, *Three Year Action Plan*, p. 8.

[76] European Commission, *Three Year Action Plan*, p. 14.

[77] This trend is best articulated in the famous 'Sutherland Report', published in 1992, and available at http://aei.pitt.edu/1025/1/Market_post_1992_Sutherland_1.pdf.

[78] M. B. M. Loos, 'Full Harmonisation as a Regulatory Concept and Its Consequences for the National Legal Orders. The Example of the Consumer Rights Directive', *Centre for the Study of European Contract Law Working Paper Series*, No. 2010/03 (2010).

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Directive. These three pieces of legislation provide a blueprint for some of the most innovative legal tools that originate from the EU consumer policy: withdrawal rights, strict liability for defective products, and finally the central role of consumer information as a tool of consumer policy. Importantly, while the first two measures are still about market shaping – remaking the infrastructure of market transactions by redistributing power, rights, and obligations between different market actors – the Consumer Credit Directive is different. As an early announcement of the imaginary of prosperity to come, the Consumer Credit Directive is mainly focused on the provision of information, thereby finding a "golden balance" between pursuing consumer policy objectives and at the same time improving market functioning without the risk of "over-institutionalisation".

3.4.3 *1995: Privatising for Good Causes: Public Services and Sustainability*

In 1995, the Commission published perhaps one of the most interesting documents in the recent decades, titled 'Priorities for Consumer Policy 1996–1998'. Unlike previous and later policies – at least until the 2020 consumer agenda – this document has very different aspirations and structure. It lists a number of issues that the Commission considers of crucial importance for consumer policy, which certainly go beyond simple "completing the Internal Market"[79] considerations. '*Virtually every policy in the European Community has some significance for consumers. Faced with this situation and given the resources available for redeployment, the Commission must choose priorities from a range of options*'.[80]

This programmatic document, for the first and, until recently the only time,[81] very openly engages with a broad range of issues that touch consumers and consumer policy and will be later retired into special, siloed, policy domains and legislations.[82] These topics include, for instance, financial services, consumers' interests in the supply of public services, measures to improve consumer confidence in foodstuffs, encouragement of a practical approach to sustainable consumption,

[79] From 1992 Treaties, we officially begin to use the term 'Internal Market' to denote a new level of market integration.
[80] European Commission, Priorities for Consumer Policy, COM(95) 519 final, p. 3
[81] The 2020 Consumer Policy is a similarly wide-ranging document. See Section 3.6.2.
[82] Hans-W. Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', *Yearbook of European Law* 28, no. 1 (1 January 2009): 3–59.

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strengthening and increasing consumer representation, and international relations and development.

Perhaps the most remarkable element of the document is a discernible transformation of the imaginaries of both economy and government. The document announces a push for the *liberalisation* of *public* services – a push to introduce the principle of competition in the provision of public services. In order to do that, however, most member states have also felt it necessary to simultaneously split up and privatise many of the previously public service providers, moving the control over these fundamental services to private companies.[83] This liberalisation project is complemented with another move to relinquish public responsibility. Namely, while the Commission announces the importance and gravity of the environmental challenges that humanity faces, it at the same time shifts the responsibility to consumers to act on it.

Firstly, with regard to public services, the Commission states that it '*has made considerable efforts* ***to accelerate the liberalisation of essential services of public utility****. The introduction of competition in these services will have a positive impact for consumers*'.[84] This liberalisation of public services should ensure both affordability (qua market) and quality (qua market, with regulation for the provision to the weakest): '*While continuing to press for liberalisation to* ***increase efficiency and to reduce prices*** *to the benefit of consumers, the Commission will be concerned to ensure that the quality of service is improved and enhanced particularly for groups of consumers who are in a weak position and therefore very dependent on such services*'.[85] While from today's perspective it is obvious that neither affordability nor quality of services will be automatically delivered by the sole fact of introducing competition,[86] in the mid-1990s the trust in the market mechanism was mostly unconditional.

Secondly, regarding the environment, the Commission notes, '*The political recognition that society faces a major challenge in adjusting its habits and behaviour to the degree that they are sustainable has developed globally*'.[87] The Commission also recognises a particular responsibility of the EU with its large market. Yet immediately it also suggests that it is the '*Consumers* [who] *can exercise a considerable pressure, by their choices, toward*

[83] Christoph Hermann and Koen Verhoest, 'Varieties and Variations of Public Service: Liberalisation and Privatisation in Europe', *PIQUE Policy Paper* 1 (2008): 1–12.
[84] Consumer Policy 1995, p. 7. [85] Consumer Policy 1995, p. 8.
[86] Marija Bartl, 'The Affordability of Energy: How Much Protection for the Vulnerable Consumers?', *Journal of Consumer Policy* 33, no. 3 (2010): 225–45.
[87] Consumer Policy 1995, p. 10.

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design, production and marketing of products and services with a reduced environmental impact'.[88] This important role of consumers must be facilitated by making sure that '*information is provided covering the relevant environmental and performance aspects, and the information given is neutral and reliable*'.[89] It is quite remarkable then that in the face of major collective challenges that will require a considerable degree of global cooperation and coordination, the proper way forward was to place this task in the hands of the smallest unit: the (properly informed) individual consumer.

Finally, when it comes to the conception of politics, the Commission is committed to strengthening the consumer "movement" in the EU. It will finance the consumer movement, particularly in the European South. '*Consequently, the need for the Commission to sustain and increase support is essential in order to ensure the short and medium term development of the consumer movement in these countries*'.[90] While this move to strengthen consumers' movement may appear as part of the collective imaginary, the document leaves some ambiguity in this regard as the justification for this move is mainly to ensure that the consumers' representatives can contribute to private rule-making processes – for instance, within the different standardisation bodies such as CEN and CENELEC.[91]

3.5 The Transient Hegemony of the Privatised Prosperity (1998–2012+)

3.5.1 1998: The Birth of Common Interest and the Death of Politics

Reading the 1998 Consumer Agenda makes for a very special experience. One cannot fail to notice a particular confidence, internal coherence, and even elegance of this text. This consumer agenda marks the consolidation of the fully privatised imaginary of prosperity in consumer policy. The imaginaries of the economy, government, politics, law, or the consumer behind this policy are weaved in a confident story of prosperity, where well-functioning markets and smart consumers drive us towards a better future.

Even the table of contents, before the text has started at all, makes clear that the great future awaits us in this new world:

[88] Consumer Policy 1995, p. 10.
[89] Consumer Policy 1995, p. 10
[90] Consumer Policy 1995, p. 12.
[91] Consumer Policy 1995, p. 12.

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Image 3.1

The Commission knows exactly at this point how to give '*a **more** powerful voice*' to consumers across the EU, how to provide '*a **high** level of health and safety*', and how to ensure the '***full** respect for the economic interests of EU consumers*'. If in the previous policies there was always some doubt, hesitation, or measures that went both ways (some towards privatising power and resources and others towards collectivising power and resources), in this policy there is no doubt left – regarding both the direction and means. It can only get better from here.

However, this new future is not without demands on consumers. Within this document, an articulate new image of the consumer emerges. According to the Commission, the growing role of consumer

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law has to be '*matched by a **new maturity** on the part of consumers and their representatives. If consumers are to play their role fully as equal stakeholders in society, they need to understand the inter-linkages between their interests and those of others*'.[92] But what does this new 'new maturity' and equality require? '*Sometimes the respective interests of consumers and other groups will be mutually reinforcing, sometimes they will not and trade-offs will have to be found. **Consumers themselves can recognise and accept such trade-offs because they are not only consumers but taxpayers, employees and beneficiaries of public policies too.** (. . .) EU consumer policy should therefore ensure that consumer interests are equitably reconciled with those of other stakeholders. This reconciliation of interests **will usually be a positive-sum game***'.[93]

Political struggle and conflicting group interests recede. Instead, it is the rationality of consumers and their newly found maturity that allow them and their representatives to see that making trade-offs is part of their freshly gained responsibilities. This will ultimately result in a "positive-sum game". '*A closer, more cooperative relationship between consumers and business, acting as equal partners, is essential. The goal is a balanced partnership between successful businesses and satisfied consumers*'.[94] The birth of common interest and the death of political struggle in consumer policy.

This document also fully crystalises the conception of government as a neutral, technocratic arbiter, who helps to 'equitably reconcile' the interests of consumers with those of other stakeholders (notably businesses). If in the previous policies the EU assumed responsibility for making sure, for instance, that the products are safe and healthy, such a straightforward normative approach is off the table here. '*The aim is to promote objective, coherent decision-making in the difficult task of reconciling the consumer interest with those of other stakeholders. A more **systematic approach to the analysis of the competing interests** and the weight to be given to these will simplify the process of reaching risk management decisions and **obviate the need to have the whole debate afresh whenever a new hazard arises**. This will bring greater reassurance to both consumers and business*'.[95] Government does not provide guarantees of safety and health par tout anymore but embeds these guarantees in a technocratic decision-making process, where all interests at stake are

[92] European Commission, Consumer Policy Action Plan 1999–2001, COM(1998) 696 final, p. 1.
[93] Consumer Policy Action Plan 1999–2001, p. 4.
[94] Consumer Policy Action Plan 1999–2001, p. 4.
[95] Consumer Policy Action Plan 1999–2001, p. 11.

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balanced with the help of evidence and science. Government is a neutral arbiter, while science, rather than democratic politics, is the source of normative guidance for balancing various interests.

When it comes to the imaginary of law, the Commission commits itself to '*flexible and responsive approaches to regulation*'.[96] This includes on the one hand the limits of protection, recognising that '*consumers have a responsibility to their own interests*',[97] while at the same time recognising that consumers will still '*depend on public authorities to promote their health and safety on their behalf*', *(. . .)* or to '*establish a fair regulatory framework for the business consumer relationship, before, during and after each transaction*',[98] on the other. The need for intervention will, however, vary '*depending on the nature of the consumer, with a greater need for more vulnerable consumers*'.[99] Protection is therefore going to become a scarcer good in this legal imaginary. Consumers need to take responsibility for their interests, while protection is reserved mainly for vulnerable consumers with special needs, who seem to particularly lack in rationality or capacity to reap the benefits of the market.

When it comes to flexible and responsive regulation, the Commission starts from the premise that '*In increasingly dynamic and innovative markets, flexible approaches are key and an appropriate balance between regulatory and non-regulatory approaches needs to be found*'.[100] This has several components. First, '*Where appropriate, the Commission will aim to foster the more sophisticated dialogue that leads to* ***self-regulation*** *agreements between consumers and business, including the retail sector*'.[101] Second, the Commission commits itself to the promotion of international cooperation, including something as important as health and safety, within the framework of largely private international regulators (e.g. Codex Alimentarius[102]). Third, the Commission commits to the regular consultation of businesses and consumers in the course of the regulatory process – with at that point perhaps unforeseen consequences of enabling concentrated interests to dominate the agenda of the government.[103]

[96] Consumer Policy Action Plan, 1998, p. 6. [97] Consumer Policy Action Plan, 1998, p. 9.
[98] Consumer Policy Action Plan, 1998, p. 4. [99] Consumer Policy Action Plan, 1998, p. 7.
[100] Consumer Policy Action Plan, 1998, p. 15.
[101] Consumer Policy Action Plan, 1998, p. 9.
[102] Marija Bartl, 'Regulatory Convergence through the Back Door: TTIP's Regulatory Cooperation and the Future of Precaution in Europe', *German Law Journal* 18, no. 4 (1 July 2017): 969–92.
[103] T. Hüller and B. Kohler-Koch, 'Assessing the Democratic Value of Civil Society Engagement in the European Union', in: Beate Kohler-Koch, Dirk De Bièvre, William

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The confidence, clarity, and coherence of this policy document, in comparison with its predecessors, are hard to miss. The conceptions of the economy, law, politics, government, and consumer have all transformed, one could say, into the opposites of the 1975 policy. Long passed is the world where consumers needed protection from the Communities. Innovative and dynamic businesses and cunning and responsible consumers are the drivers of prosperity in this imaginary. The prize is a well-functioning, competitive market, which is in the benefit of all.

3.5.2 2001: Competitive Consumer Law

Just three years later, the Commission published a 'green paper' on consumer policy – a forward-looking document that aims to consult stakeholders on the future shape of the EU consumer law and policy.[104] The background for this new consumer policy are two important political documents produced in the same year: the 'Lisbon Agenda',[105] which sets out to make the EU the most competitive knowledge economy in the world, and the 'White Paper on Governance',[106] which comes with ideas about the importance of light touch regulation, self-regulation, and co-regulation as a mode of governance. These two documents embrace a privatising imaginary of both politics and law and thus lend further support to the set of ideas articulated in the previous policy.

The Green Paper starts with a picture of the (political) economy: '*The internal market's main asset is that it has the largest pool of consumer demand in the world – and this asset is not being fully exploited. Enabling businesses, especially SMEs, to access this potential, as easily as domestic markets would be a* ***powerful stimulus to competitiveness****. (. . .)*'[107] Competitive markets, and competitiveness, become a central pursuit. The sacrifices, or the "trade-offs" as euphemistically named in the previous policy, are also becoming clearer here insofar as the EU consumer policy '***achieves as high as possible a level of consumer protection whilst also keeping costs to***

A. Maloney (Hrsg.): Opening EU-Governance to Civil Society. Gains and Challenges. 2008. Mannheim [CONNEX Report Series], 145–83.

[104] European Commission, Green Paper on the European Consumer Protection, COM(2001) 531 final.

[105] Lisbon European Council Conclusions, 23 and 24 March 2000, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm, last accessed 5 January 2024.

[106] European Commission, European Governance: A White Paper, COM(2001) 428 final.

[107] Green Paper on Consumer Protection 2001, p. 9.

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business to a minimum'.[108] If we are to keep our business globally competitive, we need to make sure that consumer protection does not cost too much.

The concern with competitiveness also translates into the normative leitbild of the consumer. '*It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they* ***optimise their consumption decisions.*** *This cross-border demand increases competitive pressure within the internal market and allows for* ***a more efficient and competitively priced supply*** *of goods and services*'.[109] The consumer is thus an individually calculating actor, who advances her own purposes, as well as the internal market, by engaging smartly in cross-border shopping. Distance selling and online sales are to become one of the most important vehicles for the making of the internal market for consumers.

The Green Paper also further institutionalises the previously outlined legal imaginary; this time, however, with the additional justification by the White Paper on Governance. The Commission continues to praise the role of self-regulation as a fundamental way of regulation: '*Many problems may not be suitable for regulatory action.* ***Self-regulation can achieve some consumer protection goals*** *(. . .). Effective self-regulation that contains clear voluntarily binding commitments towards consumers and which is properly enforced can* ***reduce the need for regulation or coregulation***'.[110] Importantly, the Commission drops references to the dialogue between consumers and trader's associations in the preparation for self-regulation. It is now fully on traders to get this job done, paired only by more effective enforcement of such voluntary commitments. It is mainly in the field of enforcement in front of the courts where consumer associations retain an important role.

While it is unclear which problems cannot be solved by (public) regulation, it is clear that some powers are best exercised by private actors, and in particular by traders, who set the norms themselves. Regulation, where still necessary, needs to be '*as simple as possible and is sufficiently flexible to respond quickly to the market, and which involves stakeholders as much as possible*'[111] and importantly '*simplifying existing rules and,* ***where possible, deregulating*** *would also help reduce disproportionate burdens on business*'.[112]

[108] Green Paper on Consumer Protection 2001, p. 4.
[109] Green Paper on Consumer Protection 2001, p. 3.
[110] Green Paper on Consumer Protection 2001, p. 14.
[111] Green Paper on Consumer Protection 2001, p. 4.
[112] Green Paper on Consumer Protection 2001, p. 9.

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Ultimately, the '*virtuous circle can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross-border trade*'.[113]

3.5.3 2012: Out of the Crisis with Better Information

What seems like a ten-year gap from the previous Green Paper has been anything but calm. This period has been filled with a prolonged struggle over the initiatives that the Commission proposed in the wake of the previous consumer policies, namely, the full harmonisation of consumer law with a view to strengthen the "confidence" of consumers in cross-border shopping; the 'Optional Instrument' in the European contract law, in order to reduce obstacles in the internal market; and finally, the political fight about the ambit of the new 'Consumer Rights Directive'.

The Commission has failed, however, to fully realise any of the three projects – largely thanks to the opposition of some EU member states, who have resisted a significant competence transfer that the proposed measures implied.[114] These political dead-ends, together with the intervening great financial crisis, have exposed the limits of the Commission's neoliberal imaginary of prosperity.[115] In its 2012 policy, the Commission seems to be at a bit of a loss as to what it should make of these defeats.

The Commission clearly recognises the economic importance of consumers more so than previously: '*Consumer expenditure accounts for 56% of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth.* ***Stimulating this demand can play a major role in bringing the EU out of the crisis***'.[116] If anything, in the wake of the

[113] Green Paper on Consumer Protection 2001, p. 3.

[114] Several scholars have discussed these attempts of the European Commission to make the EU consumer and general contract law internal market proof. Norbert Reich and Hans-Wolfgang Micklitz, 'Crónica de Una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights"', *Common Market Law Review* 46 (2009): 471–519. Stephen Weatherill, 'Competence Creep and Competence Control', *Yearbook of European Law* 23, no. 1 (1 January 2004): 1–55; Loos, 'Full Harmonisation as a Regulatory Concept and Its Consequences for the National Legal Orders'; Hans-W. Micklitz, 'A "Certain" Future for the Optional Instrument', in *A European Optional Contract Law: Policy Choices,* ed. by Sanne Jansen (De Gruyter, 2011), 181–94; Martijn W. Hesselink, 'Common Frame of Reference & Social Justice', *European Review of Contract Law* 4, no. 3 (2008): 248–69.

[115] Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union'; Bartl, 'Internal Market Rationality: In the Way of Re-Imagining the Future', *European Law Journal* 24, no. 1 (2018): 99–115.

[116] European Commission, A European Consumer Agenda – Boosting confidence and growth, COM(2012) 225 final, section 1.

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economic crisis, the objective of consumer policy becomes outright economic growth, or more precisely, '*sustainable and resource-efficient growth, whilst taking account of the needs of all consumers*'.[117]

However, there is little new in the EU's playbook to exploit this rediscovered potential of the Internal Market. The Commission sees its role in stimulating economic growth mainly by doing more of the same: '*building knowledge and capacity for more effective consumer participation in the market (. . .)* ***empowered and confident consumers can drive forward the European economy***'.[118] The focus of governmental action remains to make consumers both confident and cunning. Once consumers are successfully included in the market, empowered by information, they can then themselves drive forward the European economy.

Also when it comes to the legal imaginary behind this consumer agenda, the Commission makes no new strides. The focus remains on the legal tools of market empowerment, choice, and information: '*Empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy*'. *(. . .)* '*Consumers should be empowered, assisted and encouraged to make sustainable and healthy choices which will lead to cost savings for themselves and for society as a whole*'.[119] To the extent that protection is considered at all, it is solely targeted at particularly vulnerable consumers – foremost within the context of financial services and digital economy. Interestingly, however, the general statement on vulnerable consumers and social exclusion are not translated into any concrete measures or steps.

Even more importantly, the Commission continues with its endorsement of self-regulation as central to the efforts of consumer policy, intending to encourage traders to '*move beyond mere compliance with legislation and* ***to develop self-regulatory measures, as well as corporate social responsibility initiatives,*** *thus enhancing their focus on customer service as a key competitiveness factor*'.[120] Fearing charges of over-regulation, in this rather resigned appeal to the traders, the Commission is hoping to convince private actors to take more obligations upon themselves in the light of their own economic interest – while delivering benefits to the EU as a matter of by-product.

[117] European Consumer Agenda 2012, section 1, p. 3.
[118] European Consumer Agenda 2012, p. 8.
[119] European Consumer Agenda 2012, p. 3.
[120] European Consumer Agenda 2012, p. 9.

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3.6 Towards an Imaginary of Shared Prosperity after 2018?

3.6.1 *2018: First Cracks: What Is the* Deal *in the 'New Deal for Consumers'*

The decline of high neoliberalism in the previous EU consumer policy, even if without a sense of direction, is set forth in the 2018 New Deal for Consumers. The 2018 policy does not present a truly new path, where like in Roosevelt's New Deal public and collective institutions take more responsibility for the future prosperity of consumers and citizens. Instead, the ambitions are much smaller and perhaps mostly symbolic – in the title, language, and a couple of absences in the document. However, this does not make them unimportant in the long run.

If judged by its US predecessor,[121] the reference to 'New Deal' suggests that the Commission is aware that what is needed is a public intervention for the benefit of consumers – an intervention that would fit perhaps better with an imaginary of shared prosperity. However, the Commission itself immediately tampers expectations that may follow from such a big title: '"*New Deal for Consumers*" *builds on the existing consumer policy framework and* ***takes it a step further*** *by proposing modern rules fit for today's changing markets and business practices, stronger public and private enforcement tools and better redress opportunities*'.[122]

But the policy does still make some important, if small, departures from the previous imaginaries of consumption endorsed by the EU consumer policies. Firstly, the document places the environment at the forefront of its economic imaginary: a '*healthy consumer environment is a key factor for economic growth*'.[123] The environment is becoming more integral to consumer interest and will, in the next consumer policy, become grounds for justifying a departure from the short-term interest in price to a longer-term economic interest in a sustainable economy and liveable planet.[124]

In the Commission's view, however, this still does not really require a break from the previous information paradigm as the main locus of regulatory intervention. The Commission suggests that consumers are '*increasingly interested in sustainable products*', and they '*need to be empowered to make informed purchasing choices and have easy access to products that are*

[121] Robert D. Putnam, *The Upswing: How America Came Together a Century Ago and How We Can Do It Again* (Simon & Schuster, 2020).
[122] European Commission, A New Deal for Consumers, COM(2018) 183 final, p. 3.
[123] A New Deal for Consumers 2018, p. 1. [124] See the following subsection.

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environmentally friendly'.[125] It is thus still informed choices and rational consumers, who should drive forward sustainable growth in their free time.

Second, appearing thirty-three times in the text of this policy, the word 'protection' is prominently back on the agenda. This language of 'protection' is a significant mark of the welfare state imaginary of prosperity, which had for the most part disappeared in the previous decades, remaining at most linked to 'vulnerable consumers'. But the return of the language of protection in this document is not necessarily paired with any significant protective measures.

For instance, one important issue that the New Deal raises is the platform economy (Amazon, Airbnb, Uber, and the likes). The Commission here singles out as most relevant for consumers: '*Today, when consumers visit an online marketplace, they do not always know from whom they are buying (from a professional trader or another consumer). . . . As a result, consumers may falsely think they are dealing with a professional trader (hence benefitting from consumer rights)*'.[126] But is the confusion about who the seller is truly the greatest problem for consumers – who are also '*taxpayers, employees and beneficiaries of public policies*'[127] – as the Commission reminded us in 1998?

The Commission will follow up on this plan with two measures that aim to reshape the digital market: the Digital Services Act and the Digital Markets Act. The first focuses on the obligations of due diligence of digital platforms for the content published on such platforms, taking a step away from relative lawlessness – but ultimately still letting digital platforms bear little liability or condoning the social media business model to make money out of ever more outraging content.[128] The Digital Markets Act in turn aims to deal with the market power of online platforms, with the designation of a group of 'gate keepers' that have to be mindful of not abusing their power – while being able to keep the power nonetheless.[129] Even if not strictly consumer law measures, these two interventions will certainly have an impact on the day-to-day life of consumers, fitting a slowly expanding understanding of consumer interest.

[125] European Commission, A New Deal for Consumers 2018, p. 15.
[126] A New Deal for Consumers 2018, p. 5. [127] See Section 3.4.1.
[128] Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).
[129] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act).

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The third intervention prompted by the New Deal, which has received considerable academic attention,[130] is the proposal for the expansion of a system of collective redress. In particular, the Commission '*proposes a* ***modernised system of representative actions,*** *building on the existing Injunctions Directive. This system allows non-profit making qualified entities, such as consumer organisations or independent public bodies, to defend collective consumer interests in cases of mass harm. This will help individual consumers to secure their rights. It will be especially helpful for consumers who are deterred for various reasons from individual litigation*'.[131]

The Directive on Collective Redress[132] was adopted on 25 November 2020, and it repeals the 2009 Injunction Directive. The Directive expands the type of representative actions that 'qualified entities' (including consumer associations) can bring against infringements that harm 'collective interests of consumers', adding to previous actions for injunctions the actions for redress.[133]

The Directive understands that 'collective interests of consumers' means the general interest of consumers and, in particular, for the purposes of redress measures, the interests of a group of consumers.[134] It is the Annex, which specifies various EU legislative measures that can give rise to representative actions – and these include a rather broad range of consumer measures, medical advice, food safety, or financial services measures. They do not include, however, 'environmental law measures', with the Directive mentioning that it only 'takes account' of the Aarhus Convention.[135] The collective interests of consumers thus do not go so far as to include their environmental interests.

Perhaps most significant are the absences in the New Deal for Consumers. Namely, there is no reference to self-regulation, co-regulation, or private standardisation. In terms of legal imaginary, this is symbolically highly important. From 1981, private rulemaking has been

[130] See, for instance, a Special Issue 6, Volume 27, (pp. 1219–1436) of the European Review of Private Law, edited by Anna van Duin and Candida Leone.

[131] European Commission, A New Deal for Consumers 2018, p. 6.

[132] Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers.

[133] Candida Leone and Joanna M. L. Van Duin, 'The Real (New) Deal: Levelling the Odds for Consumer-Litigants: On the Need for a Modernization, Part II', *European Review of Private Law* 27, no. 6 (1 December 2019): 1227–50.

[134] Directive (EU) 2020/1828 on representative actions, art 3(3).

[135] Directive (EU) 2020/1828 on representative actions, Recital 75.

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one of the standing imaginaries of how we should go about market regulation. Post-1998, it has been the businesses themselves that seemed to be the preferred way of governing the market in the eyes of the Commission. But in 2018, self-regulation, co-regulation, and standardisation were not mentioned a single time. To the extent that they still exist in consumer related matters – as we will see in Chapter 4 – this is not transparent from this document. Yet, on a symbolic level, it signals that the legal imaginary is changing.

3.6.2 2020: A New Consumer Agenda: A Next Step?

In January 2020, just before the outbreak of the Covid crisis, the European Commission published the European Green Deal (EGD) – an overarching political programme that at the time of writing this book was still having a large, and contested, influence on overall EU policy and action.[136] Surely, an attentive reader will not have missed the recent proliferation of the language of "deals" in the vocabulary of the European Commission. The Commission seems to realise that significant change is needed. However, while the previous New Deal for Consumers did not present an all too good deal for consumers, the EGD, and more relevantly for this chapter the New Consumer Agenda inspired by it, takes more serious steps towards reimagining prosperity.

Let us be clear; in the 2020 New Consumer Agenda, we are still far from an imaginary of shared prosperity in the EU; notable aspects of the privatised imaginary of prosperity still remain prevalent. When it comes to the legal imaginary, the information paradigm continues to be as prominent as ever,[137] as does the overwhelming focus on labelling,[138] while the economic imaginary is still dominated by the ideas of 'market failures'.[139] However, this document and the legal measures on its basis present an important step towards setting new parameters for thinking about political economy.

When it comes to problems that the Commission sets out, most of the great challenges of today – climate change and the biodiversity crisis, the

[136] European Commission, The European Green Deal, COM(2019) 640 final.
[137] European Commission, New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery, COM(2020) 696 final. 'Information' is mentioned 32 times in the document.
[138] European Commission, New Consumer Agenda, p. 8.
[139] European Commission, New Consumer Agenda, p. 12.

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Covid pandemic, indebtedness, as well as digital transformations – are included in this document. What is more, they are presented at least in part as collective problems, which in turn require collective, legislative solutions.

For the first time, after decades of narrowing down what consumer policy deals with, we enter into a world where everything seems to be on the table and is interconnected (sustainability, surveillance capitalism, vulnerability and over-indebtedness, as well as geopolitics). '*The Agenda takes a* ***holistic approach*** *covering various Union policies that are of particular relevance for consumers. It reflects the need to take account of consumer protection requirements in the formulation and implementation of other policies and activities. complements other EU initiatives, such as the European Green Deal, the Circular Economy Action Plan and the Communication on Shaping Europe's digital future. It also supports relevant international frameworks, such as the United Nations' 2030 Agenda for Sustainable Development and the UN Convention on the Rights of Persons with Disabilities*'.[140]

Consumer interest has also expanded. Price and choice are not seen as the only relevant consumers' interests. Rather, all kinds of problems, concerns, and interests need to be accounted for, while proposed solutions involve interventionist legislative proposals – alongside "wise" consumption choices by consumers. This is a consumer policy that discusses the problems of *people* living in the EU – people who are also unavoidably consumers, but people nevertheless. In fact, when reading the document, one has a sense that the term consumer could be easily replaced with the term citizen, or resident, for the document to make even more sense.

In many respects, the new consumer agenda takes things out of the invisible hands of the market and puts them onto the table (if still not in the hands) of law and government. Sustainability, durability, and quality are less private goods to be delivered by market and competition, and more public goods to be delivered by legislation. In this document, the Commission commits – and later delivers as we see below – to legislative initiatives on Sustainable Products, 'right to repair', on prolonging statutory guarantees, combating early obsolesce, and greenwashing.[141] The Commission is thus also increasingly focused on the supply side of the market, lifting some of the responsibility for sustainable consumption from however "well-informed" consumers.

[140] European Commission, New Consumer Agenda, p. 1.
[141] European Commission, New Consumer Agenda, pp. 7 and 9.

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While sustainability *information* still has a prominent role in this agenda, the Commission now aims to push for a more "painful" set of information sharing that is usually resisted by the business – such as the expected *durability* of products. Furthermore, the Commission at least mentions that more attention needs to go into '*promoting new consumption concepts and behaviours, such as the* ***sharing economy****, new business models allowing consumers* ***to buy a service rather than a good****, or support for* ***repairs through community and social economy*** *organisations actions (e.g. repair cafés) and for second-hand markets*'[142]

Two important legislative measures, at the moment of writing of the book both well advanced in the legislative process, have been delivered as indicated by the Agenda. The first measure concerns the 'Right to Repair' Directive.[143] This measure aims to prioritise repair over purchasing new products, in cases of products that do *not* fall under the legal guarantee. The Directive requests that for certain type of products – such as washing machines or televisions – the producer either provides for repair or at least makes products that are repairable.[144] When providing repair, the price is not capped, however – in order to foster competition in the SME repair sector that should both provide for good prices and reinvigorate employment.

The Right to Repair proposal has three important implications. First, both symbolically and practically it aims to prolong the life cycle of products, in order to improve their environmental footprint. Second, in terms of imaginaries of consumption, repair should be both attractive as an environmentally sustainable practice and as a cost-cutting measure for consumers – altogether lowering the consumption of new products. Third, and importantly, the Directive aims to restructure (if limitedly) the economy in the sense that it aims to create at least a partial shift from resource-intensive *manufacturing* to labour-intensive *services* of repair.

The other important legislative proposal is the 'Green Claims Directive',[145] which aims to empower consumers to make green choices by banning unsupported green claims from the market. While the language of

[142] European Commission, New Consumer Agenda, p. 8.

[143] European Commission, Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771, and (EU) 2020/1828, COM(2023) 155 final.

[144] This links also to Ecodesign and the Sustainable Products Regulation (See Chapter 4).

[145] European Commission, Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final.

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the document is about empowering consumers via better information, the measure itself has a strong interventionist dimension. To make environmental claims, providers (except for micro enterprises) have to engage in a serious degree of knowledge collection and assessment, over all *life stages* of the product, different *types of environmental impact*, and finally across the whole supply chain.[146] The responsibility that lies on those making green claims is significant.

3.7 The Contours of the New Imaginary of Prosperity

As new policy and legal documents are gradually instituting changing understandings of the economy, law, politics, government, and society, they also prefigure the 'compossible' futures. I conclude thus this chapter by outlining what the most important discursive and normative building blocks for the new imaginary of prosperity are at the present, and where the EU can be said to *not* go far or quickly enough with an eye on ushering shared and sustainable prosperity.

First, both the most recent consumer policies and legislative proposals in their wake, while hardly far-reaching, still aim to foster a less wasteful, and more *caring, attitude towards both nature and people*. Care, as intimated by these legislative proposals, is not primarily an individual attitude. Rather, it is a social, or collective, achievement, in which people are assisted (or not) by their institutional environment. Thus, moving away from a throw-away culture, towards taking better care of the products we already have and use, requires institutional enablers such as the Right to Repair proposal. And even if one has to buy a new product, one should be able to trust that any alleged green claims are not only hot air.

Second, a prominent feature of the new emergent imaginary of consumption relies on a more *steered conception of the economy*. The New Deal for Consumers, the 2020 Consumer Agenda, as well as the various legislative proposals take many issues out of the invisible hands of the market and place them in the visible hands of government and law. Namely, all the legal measures mentioned earlier are far more 'interventionist' than we have seen in the previous decades, requiring more 'market shaping' (mandatory duties and requirements

[146] Green Claims Directive 2023, p. 19.

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and (re)distributive elements) rather than focusing only on 'market optimisation' (i.e. information duties or the promotion of self-regulation).

Epistemologically and ontologically, this hints at a first step towards a more constructivist interpretation of the economy, where law and legal institutions are recognised as infrastructures that shape market (outcomes). The more one sees the economy as constructed, the more one realises that different legal and governance designs can bring about different distributive outcomes and environmental impacts. What is more, government (i.e. the EU in this case) must assume some degree of responsibility for such distributive and environmental outcomes.

However, the recent proposals still leave a considerable degree of responsibility for sustainable consumption to consumers.[147] Trusting that such a large social problem, which requires an enormous degree of coordination, can be mostly left to individual consumers makes clear that the privatising imaginaries of progress are still well and kicking. This is not without social consequences. Taking the market approach to environmental matters, which at the same time requires consumers not only to have good intentions but also deep pockets, will leave those who do not fit the bill disenfranchised – raising eventually citizens' opposition against the 'elite' environmental project.[148]

And still, third, a growing concern with the supply side of the market reveals that the Commission is realising that consumers need greater legislative support to deliver on that expectation. This includes, importantly, making public choices on the availability and characteristics of certain goods, services, innovations, and processes, and public responsibility for making sure that these goods and services are both socially and environmentally acceptable. Such responsibilities cannot be externalised entirely to the consciousness and wallets of individual consumers.

Fourth, the return of the language of 'protection', with a caring twist, is clearly discernible in the recent EU consumer policies. The protective obligations gradually encompass not only cognitive but also material limitations and constraints of consumers – or citizens – and aim to protect them against economic exploitation (the issues of contractual fairness and distribution),[149] environmental dangers (*enabling* caring attitudes towards

[147] V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law', *Journal of Consumer Policy* 43, no. 1 (2020): 227–48.

[148] Patrick Chamorel, 'Macron versus the Yellow Vests', *Journal of Democracy* 30, no. 4 (2019): 48–62.

[149] European Commission, New Consumer Agenda, p. 14.

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goods, peoples, and services, as a vehicle for sustainability),[150] and surveillance (providing safe digital infrastructures).[151]

Fifth, already from 2018 but more prominently from 2020, we see the expansion of the concept of consumer and consumer interests. Consumers are not seen solely as economic actors who care only for low prices and their own comfort, but instead increasingly also for issues beyond the narrow self, including social matters and the environment – even if that means a higher price (e.g. green claims) or less comfort (e.g. taking steps towards repair). Also, the 'collective interest of consumers' that we see in the Directive on Collective Redress seems not to be only narrowly focused on economic interests but also goes further – even if stopping short of collective environmental claims.

Finally, when it comes to the conception of politics, references to "common interest" or "maturity" of consumers are absent from recent EU consumer policies and legislative proposals. The new imaginary of collective prosperity does not try to depoliticise consumer law and policy, including various conflicting distributive choices – only to see it return as growing inequality and exclusionary radicalism.[152] Instead, EU policy documents increasingly seem to be ready to both acknowledge the earlier narrowness of framing consumer issues and recognise various distributive conflicts inherent in this policy field, which require a public response.

But, given the degree of crises that we are facing, is the EU going far enough, quickly enough? There is certainly room for improvement. In fact, many of the more transformative ideas presented in the recent policy documents are often just shortly mentioned and left to "dry" when it comes to what is finally turned into legislative proposals. Two large omissions are, first, thinking about *rationalising* consumption via sharing – that is via public, shared, and communal consumption, and second, any reflection on the global distributive conflicts when it comes to consumption. Both are left unattended to. Let me end this chapter by mentioning a couple of such *compossible futures* that rather "naturally" follow from the policy documents mentioned.

First, the EU raises here and there several transformative ideas, without engaging with the question of how those may be publicly facilitated. For

[150] European Commission, New Consumer Agenda, pp. 7 and 8.
[151] European Commission, New Consumer Agenda, pp. 10 and 11.
[152] See Chapter 2; also Chantal Mouffe, *The Return of the Political*, vol. 8 (Verso Books, 2006); Mouffe, *Agonistics: Thinking the World Politically* (Verso Books, 2013).

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instance, the 'product as a service', which is possibly a promising pathway to creating more sustainable design, improving durability, disposal, recyclability, and lowering material consumption, as well as transitioning the economy towards more labour-intensive services, is left without further engagement. Also, the question of 'shared economy', where some of the goods that we have previously consumed individually (such as cars) are shared, is not taken up – even if they, next to environmental objectives, may hold a promise to lower costs, countering thus the widespread 'cost of living crisis'. Without public facilitation, however, such developments will remain limited only to the richest European regions and cities (e.g. Amsterdam). At the same time, such experiments also require some hard thinking about the broader societal implications *before* being rolled out, including *who owns what* and *for what purpose*.

Second, the question of public services and public provision has not been mentioned by the EU consumer policies since 1995, when the Commission advocated liberalisation and privatisation. And yet, it is clear that making public services more widely accessible is an important means of delivering a high standard of living for many more Europeans, with lesser financial and environmental costs.[153] The EU needs to facilitate the provision of such services at the level of member states, including, for instance, by adjusting fiscal rules, as well as focusing on European provision. The conversation on 'European public goods' is a step in a good direction: the scope and ambition will be, however, decisive.

Third, one of the most important types of 'consumption' – housing – is not discussed by the Commission after the 2014 Mortgage Directive, which is more concerned with financial stability than the right to housing. In fact, if it was not for the Court of Justice and the Unfair Terms Directive, consumers would be even more exposed to grossly unjust contractual terms in relation to mortgage contracts, en masse thrown out of their houses with each new economic crisis.[154]

The EU could and should go further beyond unfair terms protection when it comes to contributing to access to housing, for instance, via its competences to regulate finance. One simple way may be to facilitate various forms of collaborative housing more actively, which are both environmentally (more shared spaces and fewer resources) and socially

[153] Tim Jackson, *Prosperity without Growth: Foundations for the Economy of Tomorrow* (Taylor & Francis, 2016).

[154] Chantal Mak, 'Gutiérrez Naranjo – On Limits in Law and Limits of Law', *Amsterdam Law School Research Paper*, no. 2017-38 (2017).

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(loneliness, childcare, and elderly care) beneficial.[155] The attempts to create such sustainable forms of living often hit the financing wall, as they are considered by banks both more risky and more administratively intensive.[156] Making sure that such experiments are not made excessively difficult for those who want to pursue them may be crucial in ensuring both broad availability of housing and community, in the context of ageing populations.[157]

Last but not least, why do we see so little engagement with people abroad? The interdependence and the global nature of crises, including the environmental degradation driven by the excessive consumption of people in the Global North – without sharing many benefits with the Majority world – is poised to fuel those global crises only further. Any credible new imaginary of consumption has to take global perspective seriously, both in its environmental and distributive dimensions. Failing to do so has led some consumer scholars to ask whether the perspective of 'consumers' and 'consumer law and policy' is a good starting point for thinking about consumption at all.[158]

[155] Ghodsee, *Everyday Utopia*.
[156] Within the ERC-funded project N-EXTLAW (no. 852990), we have collected evidence suggesting that this is one of the major problems with the creation of more communal forms of housing.
[157] Ghodsee, *Everyday Utopia*.
[158] Martijn W. Hesselink, 'Alienation Commodification: A Critique of the Role of EU Consumer Law', *European Law Open* 2, no. 2 (2023): 405–23.

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