



NEW HORIZONS IN LAW AND ECONOMICS



The consumer welfare hypothesis in law and econ

@consumerwelfhyp

I am a book about consumers, law, economics, politics, efficiency, distribution, and zombies

By [@espositofabriz](#) with [@elgarpublishing](#)

What can the Consumer Welfare Hypothesis do for consumer lawyers?

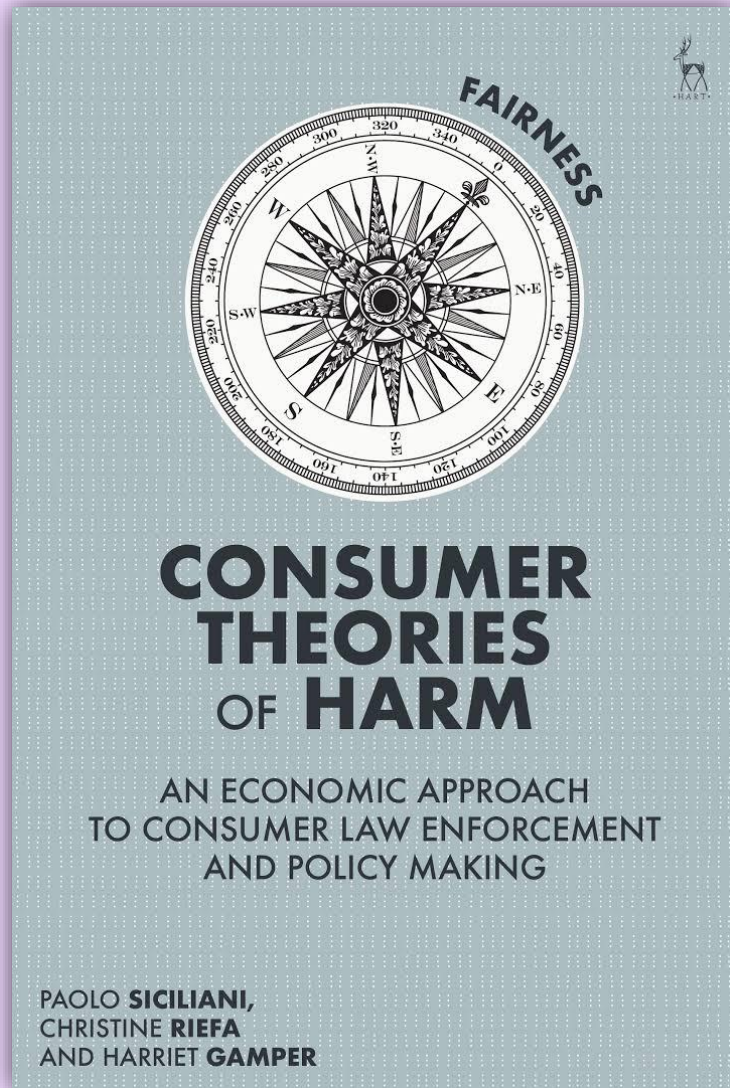
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We need more scholarship formulating theories of harm



Towards a General Theory of Harm for Consumer Law

[F. Esposito](#) 

Journal of Consumer Policy 44, 329–345 (2021) | [Cite this article](#)

The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration

[Fabrizio Esposito](#)   und [Mateusz Grochowski](#) 

Aus der Zeitschrift [European Review of Contract Law](#)

Fabrizio Esposito

The Consumer Welfare Hypothesis in Law and Economics

Towards a Synthesis for the 21st Century



NEW HORIZONS IN LAW AND ECONOMICS

'This book is a **major achievement**, based on a deep knowledge and understanding of both legal and economic theory.'

– Simon Deakin, University of Cambridge, UK

'This **much needed book** explores how consumer welfare ought to be the main beacon both lawyers and economists use when assessing some potentially unfair trading behaviours.'

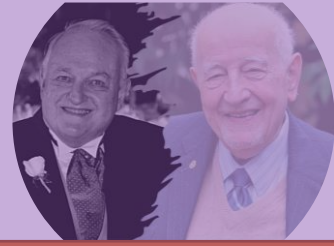
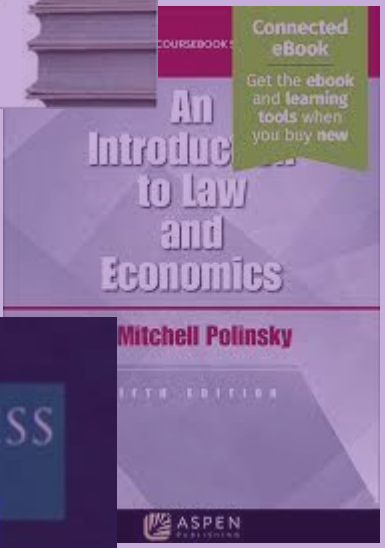
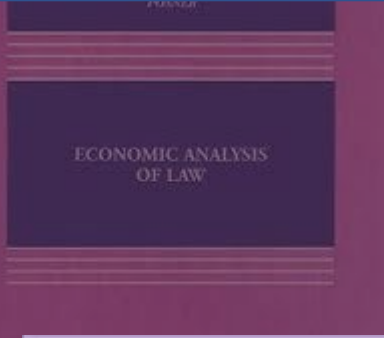
– Christine Riefa, University of Reading, UK

'This original work offers a distinctive contribution to several strands of literature and methodological debates including EU consumer law, EU competition law, Law and economics and Quantitative study of jurisprudence. I am convinced that **this will be an important and often cited book**.'

– Anne-Lise Sibony, UCLouvain School of Law, Belgium

'I have not often seen such an original, at the same time practically important and very concise and stringent work. ... It is an **outstanding addition to the literature** on law and economics.'

– Stefan Grundmann, Humboldt Universität, Germany and European University Institute, Italy



Identify the concepts that fit with both legal and economic reasoning about the legal-economic nexus



THE YALE LAW JOURNAL

JEDEDIAH BRITTON-PURDY, DAVID SINGH GREWAL, AMY KAPCZYNSKI & K. SABEEL RAHMAN

Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis





The EU legal order is better understood as meant to allocate resources efficiently when one uses the consumer welfare standard rather than the total welfare one. This is the consumer welfare hypothesis



Context: What the claim

does NOT ENTAIL

- Real markets, on their own, are efficient (**not neoliberalism**)
- Consumer welfare always trumps other values (the environment!)
- We should extract all value from producers (#nosweatshops)

ENTAILS

- Legal-economic nexus in B2‘C’ to be evaluated for its efficiency
- Consumer welfare is the **internal institutional/immanent value** and it can be trumped by external values
- Design voluntary exchanges that **minimise agency costs**



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The strategy

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- Accept as much as possible of the traditional positive economic approach to law:
 - Value monism: efficiency
 - Positive analysis first
- Use that to put the consumer interest at the core of economic analysis

Focus on reasoning: total vs consumer welfare



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Shallow reasoning

- Traders are normally free to set their prices

Deep reasoning

- Traders are normally free to set their prices because **consumers benefit from price competition**. Prohibiting price increases during promotions is **beneficial to consumers** and is, therefore, lawful.



6 Allocative efficiency in EU consumer law

- Harm: all instrumentally relevant or not?
- Defences and exceptions: internal fuzziness and external clarity or vice versa?
- Sanctions: to the deter and redress harm or to internalize social costs?

Table 6.1 Results of the analysis of EU consumer law

| | <i>Consumer empowerment</i> | | <i>Consumer protection</i> | |
|------------------|-----------------------------|-----------------|----------------------------|-----------------|
| | <i>Consumer W.</i> | <i>Total W.</i> | <i>Consumer W.</i> | <i>Total W.</i> |
| <i>Harm</i> | H | N | H | N |
| <i>Defences</i> | H | N | H | N |
| <i>Sanctions</i> | H | N | H | N |



How to use the CWH

- Dispelling the instrumentalization critique
- Reply to EAL people in ‘kind’
- Bold framework: the example of price personalization



Dispelling the instrumentalization critique

A number of authors, including notably Christoph Ulrich Schmid, is very critical of private law being used as an instrument by EU law to achieve the goal of the internal market, a process called **instrumentalization of private law**.²⁹ According to Schmid, national private law leans on a specific type of justice, namely commutative justice, i.e. justice *between the parties*, free from external considerations. ‘The party relationship must not be instrumentalized by external collective goals,’ he writes,³⁰ yet that is precisely what happens when national private law is used as an instrument to give effect to EU law aiming to establish the internal market. With the Europeanization of private law, Schmid posits, private law is instrumentalized ‘excessively’.

- But if consumer welfare maximization is immanent to exchanges...

Introduction to the handbook *Uncovering European private law*



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Reply to EAL people in ‘kind’

Economic analysis of law

- from an economic point of view, this norm is inefficient because it reduces total welfare (this second part might be implicit)

Reply

- good to know, but **I am not interested** because total welfare maximization does not fit with the relevant legal framework; does your claim hold even when this norm/institution/decision/policy is analysed in consumer welfare terms? You see, that welfare standard fits and is therefore **more legally relevant**



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Reply to EAL people in 'kind'

Economic analysis of law

- from an economic point of view, this norm is inefficient because it reduces total welfare (this second part might be implicit)

Reply

- good to know, but from another economic point of view, **this norm is actually efficient** because it increases consumer welfare; since consumer welfare maximization fits and is therefore more legally relevant, **I have a better efficiency argument**, which actually supports this norm



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Bold framework: the example of price personalization

Usual pattern in the literature

- Empirical complexity
- Normative complexity: efficient, but unfair, but ...

CWH

- Empirical complexity
- Normative simplicity: if it increases CW, good; if not, bad

Algorithmic Harm in Consumer Markets

Harvard Public Law Working Paper No. 23-05

The Cambridge Handbook of
Algorithmic Price Personalization
and the Law



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Thank you very much for your attention!



2 A triangle is not a crown

1 Introduction

2 Perfect competition and allocative efficiency

3 Allocative, efficiency, total welfare, and the deadweight loss

4 Economists can be concerned with monopoly exploiting and distorting consumers

5 Principals and shareholders, yes; but consumers, no?

6 The consumer is sovereign, the producer is servant

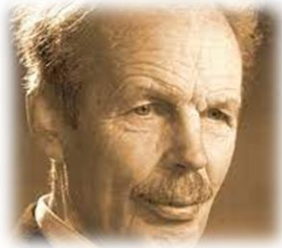
7 Market failures overthrow the sovereign consumer

8 Consumer sovereignty between welfare and independence

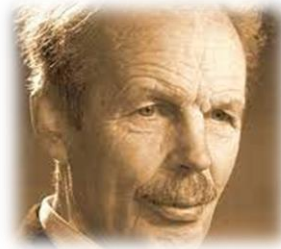
9 Beyond consumer sovereignty there can be pretty much anything



3 The giants before us



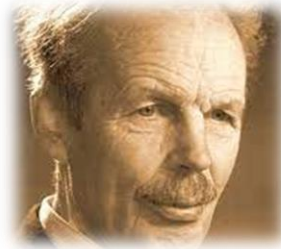
3 The giants before us



Consumption is the sole end and purpose of all production; and **the interest of the producer** ought to be attended to, only so far as it may be **necessary for promoting that of the consumer**. The **maxim is so perfectly self-evident**, that it would be absurd to attempt to prove it.



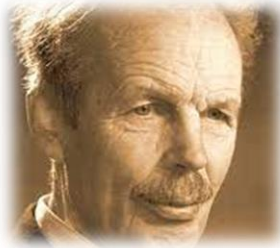
3 The giants before us



In his analysis, social welfare is the interest of the rest of society (monopolist excluded)



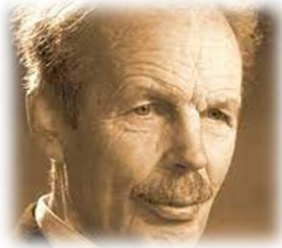
3 The giants before us



Speaks of transfers in case of monopoly as evil and as theft



3 The giants before us



Textbook total welfarist



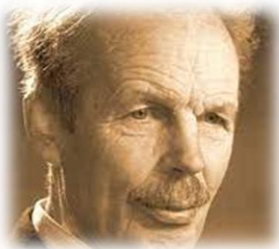
3 The giants before us



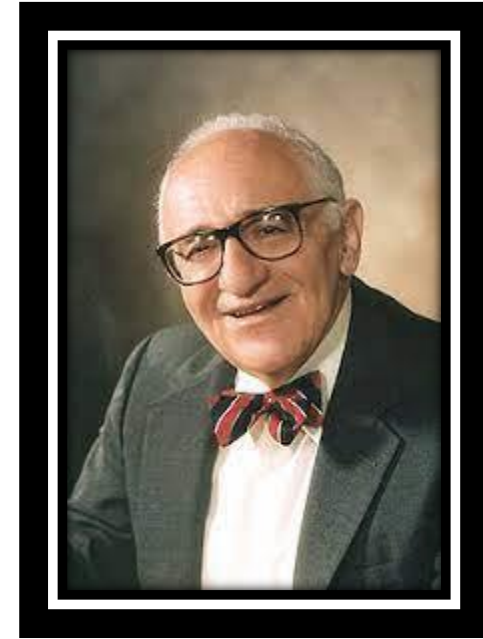
Concerned by the negative distributive effects for consumers of sub-optimal prices



3 The giants before us



3 The giants before us



4 How to search for allocative efficiency in the law

1 Back to the future: taking Posner's efficiency hypothesis seriously

2 The efficiency hypothesis revisited

3 Reverse engineering legal reasoning

3.1 Three shades of explanation

3.2 The anatomy of the dataset

4 Reasoning with total and consumer welfare

4.1 Harm: all instrumentally relevant or not?

4.2 Defences and exceptions: internal fuzziness and external clarity or vice versa?

4.3 Sanctions: to deter and redress harm or to internalize social costs?

4.4 Deadweight loss, elasticity, and productive efficiency: quantity-effects over price-effects or vice versa?

5 The dataset: overview



5 Allocative efficiency in EU antitrust law

- Harm: all instrumentally relevant or not?
- Defences and exceptions: internal fuzziness and external clarity or vice versa?
- Sanctions: to the deter and redress harm or to internal social costs?
- Deadweight loss, elasticity and productive efficiency: quantity-effects over price-effects or vice versa?

Table 5.1

Results of the analysis of EU antitrust law

| | <i>Article 101</i> | | <i>Article 102</i> | |
|-----------------------|--------------------|------------------|----------------------|-----------------|
| | <i>Consumer W.</i> | <i>Total W.</i> | <i>Consumer W.</i> | <i>Total W.</i> |
| <i>Harm</i> | H | N | H | L |
| <i>Defences</i> | H | N | H | N |
| <i>Econ. concepts</i> | H | N | H | N |
| | | <i>Pecuniary</i> | <i>Non-pecuniary</i> | |
| <i>Sanctions</i> | H | N | H | N |



5 Allocative efficiency in EU antitrust law

- Defences and exceptions:
internal fuzziness and
external clarity or vice
versa?
 - Ancillary restraint
 - Objective justification in Art. 102



5 Allocative efficiency in EU antitrust law

- Deadweight loss, elasticity, and productive efficiency: quantity-effects over price-effects or vice versa?
- *Suiker Unie*: unjustified prices are prohibited even in the absence of a deadweight loss
- *Tournier*: the monopolist's productive inefficiency is the likely cause of the excessive fees, which are abusive



6 Allocative efficiency in EU consumer law

- Harm: all instrumentally relevant or not?
- Defences and exceptions: internal fuzziness and external clarity or vice versa?
- Sanctions: to the deter and redress harm or to internalize social costs?

Table 6.1 Results of the analysis of EU consumer law

| | <i>Consumer empowerment</i> | | <i>Consumer protection</i> | |
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| | <i>Consumer W.</i> | <i>Total W.</i> | <i>Consumer W.</i> | <i>Total W.</i> |
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| <i>Defences</i> | H | N | H | N |
| <i>Sanctions</i> | H | N | H | N |



6 Allocative efficiency in EU consumer law

- Defences and exceptions:
internal fuzziness and
external clarity or vice
versa?
 - *Kásler* exception
 - *Ex officio* doctrine
 - *E. Friz*: the right to withdraw cannot be used opportunistically to the detriment of the other investors

