



# Manual on Consumer Protection





# Manual on Consumer Protection



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## Preface

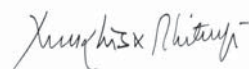
The UNCTAD Manual on Consumer Protection 2017 edition is the first comprehensive international reference in this field, aiming to support developing countries and economies in transition in their choice of policies and providing practical tools to assist policymakers in enhancing capacities while implementing the recently revised United Nations Guidelines for Consumer Protection.

UNCTAD, as the focal point for consumer protection issues within the United Nations system, is fully committed to promoting the guidelines and encouraging interested Member States to create awareness of the various ways in which they can promote consumer protection in the provision of public and private goods and services in collaboration with businesses and civil society. This is all the more important since consumer protection is not homogenous around the world. Indeed, as the General Assembly noted, “although significant progress has been achieved with respect to the protection of consumers at the normative level since the adoption of the guidelines in 1985, such progress has not been consistently translated into more effective and better-coordinated protection efforts in all countries and across all areas of commerce”. With this manual, UNCTAD is contributing to spreading good practices and enhancing the capacities of developing countries and economies in transition to step up the protection of their consumers.

The twenty-first century consumer is a global consumer. Today’s consumers have the largest choice of goods and services, while the digital revolution has propelled them to the forefront of international trade. This also comes with greater risks, such as unsafe products, unfair business practices, inadequate dispute resolution and redress, breaches to consumer data privacy and lack of coordinated action among Member States. More than ever, the welfare of any consumer is affected by the welfare of all consumers around the world and we are witnessing the eve of global consumer protection.

Consumers need to be empowered for them to play their role as agents for change in achieving the Sustainable Development Goals. This can only happen when appropriate laws, policies and institutions are in place and all stakeholders, particularly businesses and consumer groups, participate in upholding consumer protection in the marketplace.

I commend this manual as an important tool for all those seeking to increase the welfare of consumers.



Mukhisa Kituyi

Secretary-General of UNCTAD

## Acknowledgements

The Manual on Consumer Protection was revised in 2017 by Robin Simpson, lead consultant, and a team comprising Teresa Moreira, Head of Competition and Consumer Policies Branch, Arnau Izaguerri, Marisa Henderson, Graham Mott and Maria Bovey. The work was completed under the overall supervision of Guillermo Valles, Director of the Division on International Trade in Goods and Services, and Commodities.

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The cover was prepared by Nadège Hadjemian and Neema Toyb.

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## List of abbreviations

<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ADR</b>	alternative dispute resolution
<b>AICD</b>	Africa Infrastructure Country Diagnostic
<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>ASA</b>	Advertising Standards Authority of the United Kingdom of Great Britain and Northern Ireland
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>B2B</b>	business-to-business
<b>B2C</b>	business-to-consumer
<b>BASCAP</b>	Business Action to Stop Counterfeiting and Piracy
<b>BSE</b>	bovine spongiform encephalopathy
<b>C2C</b>	consumer-to-consumer
<b>CARICOM</b>	Caribbean Community
<b>CCA</b>	Chinese Consumer Association
<b>CCP</b>	Committee on Consumer Policy of the Organisation for Economic Cooperation and Development
<b>CGAP</b>	Consultative Group to Advise the Poor
<b>CI</b>	Consumers International
<b>COPOLCO</b>	Consumer Policy Committee of the International Organization for Standardization
<b>CSR</b>	Corporate social responsibility
<b>DEVCO</b>	Developing Country Committee of the International Organization for Standardization
<b>DGCCRF</b>	Direction générale de la concurrence, de la consommation et de la répression des fraudes of France
<b>EC</b>	European Commission of the European Union
<b>ECJ</b>	European Court of Justice of the European Union
<b>ECOSOC</b>	United Nations Economic and Social Council
<b>FAO</b>	United Nations Food and Agriculture Organization
<b>FIAGC</b>	Foro Iberoamericano de Agencias Gubernamentales de Protección al Consumidor
<b>FTC</b>	Federal Trade Commission of the United States of America
<b>G20</b>	Group of 20
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>HKCC</b>	Hong Kong (China) Consumer Council
<b>HLP</b>	high-level principle
<b>IBT</b>	increasing block tariff
<b>ICC</b>	International Chamber of Commerce
<b>ICPEN</b>	International Consumer Protection and Enforcement Network
<b>ICRT</b>	International Consumer Research and Testing
<b>IGE</b>	Intergovernmental Group of Experts on Consumer Protection Law and Policy
<b>INDECOPI</b>	Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual of Peru
<b>IP</b>	intellectual property

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<b>ISO</b>	International Organization for Standardization
<b>MDGs</b>	Millennium Development Goals
<b>MERCOSUR</b>	Southern Common Market
<b>MNE</b>	multinational enterprise
<b>NGO</b>	non-governmental organization
<b>OAS</b>	Organization of American States
<b>ODR</b>	online dispute resolution
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>OFCOM</b>	Office of Communication of the United Kingdom of Great Britain and Northern Ireland
<b>OFT</b>	Office of Fair Trading of the United Kingdom of Great Britain and Northern Ireland
<b>PPI</b>	payment protection insurance
<b>PPIAF</b>	Public-Private Infrastructure Advisory Facility
<b>PROFECO</b>	Procuraduría Federal del Consumidor of Mexico
<b>PTA</b>	preferential trade agreement
<b>RACE</b>	Réseau associatif des consommateurs de l'énergie of Cameroon
<b>RAPEX</b>	Rapid Exchange of Information System of the European Union
<b>RASSF</b>	Food and Feed Safety Alerts of the European Union
<b>RBT</b>	rising block tariff
<b>RTA</b>	regional trade agreement
<b>SDGs</b>	Sustainable Development Goals
<b>SENACON</b>	Secretaria Nacional do Consumidor of Brazil
<b>SGEI</b>	service of general economic interest
<b>SHG</b>	second-hand goods
<b>SIAR</b>	Inter-American Rapid Alert System of the Organization of American States
<b>SIECA</b>	Secretary of Economic Integration of Central America
<b>SSIP</b>	small-scale independent provider
<b>TPM</b>	technological protection measure
<b>TPP</b>	Trans-Pacific Partnership
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization
<b>TTIP</b>	Trans-Atlantic Trade and Investment Partnership
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UNGCP</b>	United Nations Guidelines for Consumer Protection
<b>UNICEF</b>	United Nations Children's Fund
<b>WHO</b>	World Health Organization
<b>WTO</b>	World Trade Organization

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# PART ONE

## A consumer protection system



# I. Consumer protection: An overview

## A. THE RATIONALE FOR CONSUMER PROTECTION

Consumer protection addresses intrinsic disparities found in the consumer-supplier relationship, including bargaining power, knowledge and other resources.

To help correct such imbalances, the modern-day concept of the right to consumer protection was articulated in a landmark speech by President Kennedy on 15 March 1962 in his “special message to the Congress of the United States of America on protecting the consumer interest”. In his message, he stated that:

Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized, whose views are often not heard ... We cannot afford waste in consumption any more than we can afford inefficiency in business or government. If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if consumer[s are] unable to choose on an informed basis, then [their] dollars are wasted, [their] health and safety may be threatened, and the national interest suffers.<sup>1</sup>

President Kennedy asserted that legislative and administrative actions were required if the Government was to meet its responsibility to consumers in the exercise of their rights, namely:

- a) The right to safety – to be protected against the marketing of goods which are hazardous to health or life
- b) The right to be informed – to be protected against fraudulent, deceitful or grossly misleading information, advertising, labelling or other practices, and to be given the facts one needs to make an informed choice
- c) The right to choose – to be assured, wherever possible, of access to a variety of products and services at competitive prices; and in those

industries in which competition is not workable and government regulation is substituted, an assurance of satisfactory quality and service at fair prices

- d) The right to be heard – to be assured that consumer interests will receive full and sympathetic consideration in the formulation of government policy, and fair and expeditious treatment in its administrative tribunals<sup>2</sup>

After describing his proposals for strengthening existing programmes in various areas including food and drugs, transport and finance, strengthening legislation in relation to truth in lending and packaging and introducing stronger laws for promoting competition and prohibiting monopolies, President Kennedy concluded that:

All of us are consumers. These actions and proposals in the interest of consumers are in the interest of us all. The budgetary investment required by these programmes is very modest – but they can yield rich dividends in strengthening our free competitive economy, our standard of living and health and our traditionally high ethical patterns of business conduct. Fair competition aids both business and consumer.<sup>3</sup>

The President's declaration of rights was seized upon by consumer campaigners (see chapter II). Their efforts bore fruit when, on 9 April 1985, the General Assembly of the United Nations unanimously adopted the United Nations Guidelines for Consumer Protection (UNGCP). The UNGCP are an internationally recognized set of minimum objectives for consumer protection, which have become a baseline for consumers' entitlements worldwide. The best-known section of the guidelines, which sets out the “legitimate needs” of consumers, has become a checklist which has brought about widespread recognition of consumer rights. Nations throughout the world have enacted laws, including newly drafted national constitutions, to recognize these rights, as discussed in chapter III.

Such state intervention is premised on the need to provide consumer protection on a number of grounds, including economic efficiency, individual rights, distributive justice and the right to development.

<sup>1</sup> President Kennedy, op. cit., available at [http:// www. presidency.ucsb.e-du/ws/index.php?pid=9108](http://www.presidency.ucsb.e-du/ws/index.php?pid=9108).

<sup>2</sup> President Kennedy, op. cit., available at <http:// www. presidency.ucsb.e-du/ws/index.php?pid=9108>.

<sup>3</sup> President Kennedy, op. cit., available at <http:// www. presidency.ucsb.e-du/ws/index.php?pid=9108>.

## 1. Economic efficiency

In the case of a market economy, economic efficiency is a prerequisite for ensuring that all systems are functioning optimally. In an ideal market economy, the market is in perfect equilibrium when supply and demand have equal power. Suppliers will engage in fair competition, provide consumers with full information on their products, observe all laws regarding safety and quality standards and compensate consumers if problems arise with their products or services. On the demand side, consumers will act reasonably and purchase only products of the required quality at the best price, thereby weeding out any uncompetitive suppliers. Consumers should be well-informed about a product or service before making a purchase. They should also be knowledgeable about remedies available to them so that they can actively pursue their rights.

It is impossible to envisage an economy, whether centrally planned or laissez-faire, where there is no possibility of abuse. State intervention is necessary to ensure that suppliers behave responsibly and that aggrieved consumers have access to remedies. The modern market does not only involve private economic relations between suppliers and consumers. It is characterized by a certain degree of state involvement through the enactment and enforcement of consumer protection laws dealing both with private rights and statutory obligations to ensure a safe and orderly market for consumers.

Broadly speaking, consumer protection is meant to ensure that the demand side of a market economy functions optimally so that the market system can work effectively. It is complemented by competition policy to ensure that the supply side functions optimally too. The state enacts consumer protection laws covering issues such as fair trading, information, mechanisms for redress and access to essential goods and services. Sometimes such protections are denigrated as “red tape”. Recent decades have witnessed what a 2015 article in the *International Small Business Journal* refers to as a perception of “regulation as a static and negative influence”. The authors of the article challenge this perception, putting forward a theory of “regulation as a dynamic force enabling as well as constraining performance”.<sup>4</sup> Some constraints are needed to prevent malpractice, but regulation can also help businesses, through, for example, putting in place consumer protections which individual businesses would like to adopt voluntarily but which

would put them at a disadvantage compared with rival businesses.

## 2. Individual rights

Consumer rights are part of a range of rights that individuals are entitled to claim in a modern society. Such rights, often of an aspirational nature, have been enshrined in national constitutions (see chapter III). Other rights, present in United Nations resolutions and other definitive statements such as the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs), may not be labelled “consumer rights” but nevertheless have great importance for consumer welfare.

Consumer protection measures contribute to equity and social justice through enhancing bargaining equality between consumer and producer interests and alleviating the problems of those who are particularly vulnerable in the marketplace, such as children, the poor and illiterate, and those with particular needs such as persons with disabilities.

Inequality of bargaining power exists in most areas of consumer transactions,<sup>5</sup> particularly in complex products such as financial service transactions where standard form contracts are the norm and are encouraged by the development of large enterprises involved in mass marketing.

The disadvantages of standard form contracts have been succinctly summarized as follows:<sup>6</sup>

- a) Consumers will usually not review standard contract terms which may be lodged in a chamber of commerce or company headquarters (or, as required in some countries, with a court) and which have subsequently been incorporated into the contract by reference.
- b) In any case, the length and typography of the full text of general conditions does not invite consumers to read the small print.
- c) Consumers will often not grasp the full meaning of the text of general conditions even if they are read.
- d) Even if consumers grasp the full meaning of the text of general conditions, they may believe that the event mentioned will not take place, nor will the supplier invoke the terms in particular cases.

<sup>4</sup> J Kitching et al, 2015, Burden or benefit? Regulation as a dynamic influence on small business performance, *International Small Business Journal*, 33(2):130–147.

<sup>5</sup> Recognized by guideline 1 of the *United Nations Guidelines for Consumer Protection*, 2015.

<sup>6</sup> UNCTAD, 2008, *Consumer Policy Manual*.

- e) Consumers may be under the false impression that the contract terms have been officially endorsed or are in compliance with the law.
- f) Consumers will generally not succeed in altering the contract terms nor will the agent or employee of the supplier have the authority to do so.

Although rules on the disclosure of contract terms have become tighter over the years, the development of standard “adhesion” contracts, under which the consumer is meant to be protected by the principle of “disclosure and consent”, has been accelerated by electronic commerce (e-commerce) and may lead to less effective consumer understanding of contract terms. The President’s Council of Scientific Advisers of the United States of America has openly dismissed this approach as a form of consumer protection:

When the user downloads a new app to his or her mobile device, or when he or she creates an account for a web service, a notice is displayed, to which the user must positively indicate consent before using the app or service. In some fantasy world, users actually read these notices, understand their legal implications (consulting their attorneys if necessary), negotiate with other providers of similar services to get better ... treatment, and only then click to indicate their consent. Reality is different.<sup>7</sup>

In the internet age, it is a matter of “tick, click and hope for the best”.<sup>8</sup>

### 3. Distributive justice

Many states concerned with public welfare implement policies that aim at redistribution from the wealthy to the poor and guarantee access to basic goods and services. This apparently egalitarian approach is endorsed by SDG 10, “reduce inequality within and among countries”, and guideline 1 of the UNGCP, which states that “consumers should have the right to promote just, equitable and sustainable economic and social development”.<sup>9</sup> The relevant targets for SDG 10 include the adoption of “social

protection policies” and the aim to “improve the regulation of monitoring of global financial markets and institutions and strengthen the implementation of such regulations”.

Subsidized health care, social insurance and education are features of most modern societies. Examples are given in chapter XIV on financial services. The development of rights to consumer protection, especially in the developing world, can now be seen as part of a strategy to eradicate poverty and to bring socioeconomic justice to the underprivileged. In this regard, one of the advantages of consumer protection is that it does not only focus on the income of the poor, but also on their expenditure. In addition to trying to expand the earning power of the poor through education, job training and the creation of new jobs, consumer protection takes account of how the poor spend the little income they have. For example, SDG 10 contains the highly specific aim to “reduce to 3 percent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 percent”.

Consumer protection serves to highlight the fact that the poor often receive far inferior goods and services on more onerous terms than those who are better off. It can highlight how the poor are denied the benefit of their earning power and how they are forced to live in a world of higher costs and greater scarcity than wealthier populations. This is a recurrent theme in consumer protection literature, including the famous Kennedy speech cited earlier.<sup>10</sup>

In 1968, the Federal Trade Commission of the United States of America documented the particular problems facing low-income families. Consumers purchasing from retailers that cater mainly to people with low incomes pay significantly higher prices than those charged to the rest of society for identical products. David Caplovitz’s often quoted study *The Poor Pay More* and Alan Adreasen’s *Disadvantaged Consumer* confirmed decades ago that the poor indeed pay more.<sup>11</sup> In 2008, the consumer protection body Energywatch of the United Kingdom of Great Britain and Northern Ireland published a study showing how the same patterns persisted for 40 years in that country.<sup>12</sup> Even more noteworthy are the large differences in the unit prices paid for water

<sup>7</sup> Executive Office of the President, Report to the President: Big data and privacy, a technological perspective, President’s Council of Advisors on Science and Technology, available at [https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_big\\_data\\_and\\_privacy\\_may\\_2014.pdf](https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_may_2014.pdf).

<sup>8</sup> Consumers International, 2016, *Connection and Protection in the Digital Age*.

<sup>9</sup> *United Nations Guidelines for Consumer Protection*; General Assembly resolution II A/70/470/Add.1, distributed 15 December 2015, adopted 22 December 2015, reissued as: A/RES/70/186. On the SDGs, see United Nations,

*Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1.2015.

<sup>10</sup> President Kennedy, op. cit.

<sup>11</sup> AR Adreasen, 1975, *The Disadvantaged Consumer* (The Free Press); D Caplovitz, 1963, *The Poor Pay More*.

<sup>12</sup> Energywatch, 2008, *Poor Choices: The Limits of Competitive Markets in the Provision of Essential Services to Low Income Consumers*.



and energy by poor inhabitants of slum settlements in many developing countries because of their lack of access to official network services, which are frequently subsidized.<sup>13</sup> Both of these issues are discussed in chapter XV on public utilities. These findings support the contention that consumer protection can and should be part of the legitimate methods for achieving the redistributive goals of any society.

Consumer protection is also premised on the right to participate in the process of making social and economic decisions. This right extends not only to government decisions, but also to those from other centres of power, such as large enterprises. As observed in chapters II and XV, the UNGCP recommend consumer participation in the provision of essential services such as utilities.

#### 4. Right to development

As discussed in chapter II, the MDGs and the SDGs are both referenced in the United Nations General Assembly resolution 70/186 of December 2015, which adopted the revised version of the UNGCP.<sup>14</sup> The reference to development in the opening paragraph of the UNGCP marks a unanimous acceptance that development and consumer protection are complementary.

## B. THE CONCEPT OF CONSUMER RIGHTS AND CONSUMER PROTECTION LAW

Consumer law, whether part of private or public law, is meant to apply measures that seek to:

- Impose certain rights and obligations on parties and secure their enforceability
- Equalize an essentially unequal relationship between stronger and weaker parties, whether between large and small traders or traders and consumers
- Allow state intervention to correct market failures in the public interest and to punish offending behaviour
- Enable state control over suppliers entering the market through registration and licensing

procedures, ensuring a degree of protection for consumers from unscrupulous and disreputable traders and from undesirable products and services

- Ensure that products and services offered for sale are of a minimum standard of safety and quality
- Ensure access to certain basic goods and services essential for life

Private consumer protection law confers individual legal rights on consumers, frequently through contract law. Contract law is enacted by parliament in many countries. In different jurisdictions, the scope of judicially created laws varies. In the common law tradition, judges have made contract law through interpreting statutes or applying principles based on equity and good conscience.

Private law is dependent upon the aggrieved parties claiming or enforcing their rights through the courts. Examples of such laws are Unfair Contract Terms Acts and Sale of Goods Acts. The law of tort is another branch of private law which imposes certain duties or standards on producers and distributors of goods and services. Examples of such laws are those which deal with aspects of product safety and liability. Consumers therefore hold rights conferred by contract or tort law, which they can directly assert without having to resort to state intervention. These issues are discussed in chapters III and IX.

While private law offers protection to consumers, there are challenges that may not be addressed by private enforcement of consumer rights. One such challenge is that consumers may not always pursue their legal rights. Public law may be used to protect consumers and to correct flaws in the operation of the market to protect fair and honest traders from unfair competitors, punish traders for practices such as unscrupulous sales tactics and establish mechanisms for the operation of consumer protection institutions. Public law assigns responsibilities that are enforced by the state. Examples of such laws include those relating to the regulation of competition, trade descriptions, certain aspects of product safety and liability, price control and laws that require the registration and licensing of traders and professionals. It must be noted that the distinction between private and public law can sometimes be artificial. For example, the distribution of unsafe products is a violation of both private and public law, and the consumer has remedies in both civil actions as well as in state enforcement.

<sup>13</sup> JL Baker, 2009, *Opportunities and Challenges for Small Scale Private Service Providers in Electricity and Water Supply* (World Bank/PPIAF); PPIAF, 2012, The most expensive service is that which does not exist, in *Lessons Learned; Pricing and Affordability in Essential Services*.

<sup>14</sup> United Nations General Assembly, 2015, op. cit., A/RES/70/186.

## C. WHO IS THE CONSUMER AND WHAT IS THE CONSUMER INTEREST?

Consumer protection laws are designed to protect and promote the consumer interest, but who is the consumer that the law seeks to protect and what is the consumer interest? Guideline 3 of the UNGCP sets out a conventional definition while recognizing the need for flexibility: “the term ‘consumer’ generally refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes, while recognizing that Member States may adopt differing definitions to address specific domestic needs”.

The Malaysian Consumer Protection Act of 1999 provides a typical definition of a consumer as “a person who acquires or uses goods or services of a kind ordinarily acquired for personal domestic or household purpose”. It actively rules out consumer protection law extending to sales or manufacturing. Legislation can also specify leasing or hiring, as in Fiji and Pakistan, but the phrase “acquires or uses” could also cover cases where there is no outright ownership.<sup>15</sup>

Indicators of the need for local variation are contained in the terms “primarily” and the “while recognizing” sub-clause of guideline 3. In several jurisdictions it is recognized that the distinction between use of products for work and household usage can be very difficult to draw. Mobile phones are a pertinent modern example. The separation of work from home reflects an era of mass manufacturing with factories and the development of large-scale service industries (including public services) with offices. In developing countries, notably in agricultural and village stores, this distinction was always less well-defined. In developed countries, the recent emergence of distance-working from home results in the need for a certain amount of flexibility when distinguishing business from household consumers. The Chinese Law on Protection of Consumer Rights and Interests of 1993 defined consumers widely as “peasants who purchase means of production for direct agriculture”. This clause is not included in the updated 2013 version, but the underlying concept that small producers are in a similar position to household consumers is widely applied. Other countries, including India, Nepal, Philippines, Republic of Korea and Viet Nam, have included peasant farmers, small fishermen, petty traders and even “organizations” purchasing for their own consumption in their legislation.<sup>16</sup>

<sup>15</sup> Consumer Council of Fiji Act, 1976; Consumers’ Protection Act, 1995 (Pakistan).

<sup>16</sup> Consumer Protection Act, 1986 (India); Consumer Protection Act, 1998 (Nepal); Consumer Act of the Philippines, Republic

A 2013 survey by Consumers International of some 60 jurisdictions found that “the great majority of countries clearly draw the line at household use of goods and services”.<sup>17</sup> Australia, France and the United Kingdom of Great Britain and Northern Ireland did not have single definitions. Belgium, Quebec and Uruguay explicitly excluded all professional use of products in the definition of a consumer.<sup>18</sup>

However, a degree of flexibility is demonstrated in some jurisdictions, particularly in Latin America, where the possibility of extending the concept of consumer beyond the realms of the personal is found in several countries: Chile, Panama, Peru and Guatemala.<sup>19</sup> Some Latin American jurisdictions also extend consumer protection to small artisans (Costa Rica) or micro-enterprises (Mexico).<sup>20</sup>

The most recent European Union Consumer Rights Directive (effective June 2014) defines the consumer as “any natural person who is acting for purposes which are outside his trade, business, craft or profession”. However, the directive also mentions that “where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer”.

## D. WHO IS RESPONSIBLE FOR CONSUMER PROTECTION?

The function of consumer protection falls within the purview of both public and private bodies and may be conferred by specific laws or assumed by them through virtue of their status. The following bodies play a role in consumer protection: government agencies, statutory and non-statutory standards bodies, ombudsmen, professional and industry associations, self- and co-regulation and consumer associations.

Act 7394, 1990; Consumer Protection Act, 1986 (Republic of Korea); Viet Nam Ordinance on the Protection of Consumers’ Interest, 1999.

<sup>17</sup> Consumers International, 2013, *The State of Consumer Protection Around the World*.

<sup>18</sup> Belgium, Article 2 of Law of 6 April 2010 on Market Protection and Consumer Protection; Quebec, 1978, modified 2010, Loi sur la protection du consommateur; Uruguay, 2000, Ley 17.250 de relaciones de consumidor.

<sup>19</sup> Chile, 2004 (revised 2012), Ley 19.496; Panama, Ley 45.2007; Peru, 2010, Ley 29571; Guatemala, Ley de protección al consumidor y usuario, decreto 006-2003.

<sup>20</sup> Costa Rica, Ley de promoción de la competencia y defensa efectiva del consumidor; Mexico, 1992 (latest revision 2012), Ley federal de protección al consumidor.

## 1. Government agencies

These may be Ministries or Departments of Consumer Affairs set up specifically to administer and enforce consumer protection laws. These are discussed in chapter IV. In some countries, there are also consumer advisory councils or committees, which have broad-based representation and serve as a consultative mechanism to advise the government on consumer protection policies.

## 2. Statutory and non-statutory standards bodies

Governmental and non-governmental bodies have been established to set standards for product safety and quality control, and to issue certification marks. Most countries have national standards bodies with an autonomous status, usually affiliated to the International Organization for Standardization (ISO), which negotiates standards between representatives of industry and other stakeholders, including consumers. National standards often transpose international standards, whose importance has been increasing since their recognition in the 1995 treaty establishing the World Trade Organization (WTO) (discussed in chapter III). Governments still developing consumer protection legislation may choose to adopt ISO standards in the meantime. The role of standards in safety is discussed in chapter IX and the role of business in negotiations in chapter VI.

## 3. Ombudsmen

A term of art developed in Scandinavia, the ombudsman (also known in Ibero-America as *El Defensor del Pueblo*) provides the public with information and advice on consumer rights and assists with the settlement of disputes through mediation and arbitration. Initially developed to deal with maladministration in public services, ombudsmen have spread to the private sector and may sometimes have a generic consumer protection remit in a given locality. They are discussed further in chapter XI.

## 4. Professional and industry associations

Professional and industry associations may conduct their own complaints handling and disciplinary proceedings against their members and develop codes of conduct, often in negotiation with consumer protection agencies. Aggrieved consumers may refer their problems to these mechanisms for settlement.

Alternatively, some companies have set up their own complaints handling mechanisms. These are discussed in chapters VI and XI.

## 5. Self- and co-regulation

The role of self-regulation incorporates some of the functions mentioned above and is discussed in chapter VI, along with corporate social responsibility. A process of “registration” for liberal professions has long existed, with controls limiting entry into particular professions. However, this concept has evolved as a branch of public policy as well as a form of corporate governance, no longer simply relating to the regulation of products and services or to complaints. Encompassing a wider range of stakeholders than companies themselves, governments may choose to rely on such co-regulatory schemes to enforce regulations which would otherwise be promulgated by the state. Such schemes may have the power to make voluntary codes compulsory, require industry to have codes or impose or prescribe mandatory codes, with the clarification that observance of codes is tantamount to legal compliance.

## 6. Consumer associations

A well-organized and widely representative group of individual consumers can become a strong force. The independent consumer movement is now recognized in many consumer protection regimes as a legitimate representative of the interests of consumers and consumer representatives are called upon to sit in government-recognized committees to voice the views of consumers. In more and more jurisdictions, consumer associations are being granted legal standing to bring legal cases on behalf of consumers. They can also provide consumers with independent and objective advice on products and services based on tests and surveys they have conducted. The history and evolution of consumer associations are discussed in greater detail in chapter V.

## E. A FRAMEWORK FOR CONSUMER PROTECTION

A consumer protection framework covers a range of institutional mechanisms. The state has an important role to play in ensuring that the mechanisms put in place do not unduly shackle the freedom of business to operate legitimately or stifle the freedom of consumers in exercising individual choice. The essential elements of a consumer protection framework are set out below. Some of them overlap as “terms of art”.

## 1. National consumer policy

National consumer policy sets out the state's approach to consumer protection, enumerates the rights of consumers and apportions responsibility for consumer protection to appropriate organs of the state.

## 2. Designated consumer protection agency

A designated consumer protection agency could collaborate closely with relevant ministries and consult with other stakeholders such as consumer organizations, industry, academics and the media. These bodies are discussed in chapter IV.

It should be noted that not all matters of interest to consumers are administered by the designated consumer protection agency. It is common for other government agencies to manage areas that are also of importance to consumer protection. Matters relating to food, health and nutrition may be managed by the Ministry of Health, consumer credit may come under the purview of the Ministry of Finance or a central bank, consumer education by the Ministry of Education, sustainability matters by the Ministry of Environment and utilities by local, state or federal agencies. No matter which agency has responsibility for managing areas of interest to consumers, it should be expected that there will be intergovernmental mechanisms for consultation and cooperation to ensure that consumer interests are taken into account in the policymaking process.

## 3. Consumer laws

Consumer laws must ensure that consumer rights are protected and enforceable. Some countries have provided for consumer protection at the highest legal level: in their constitution. Others have enacted a comprehensive legal framework on consumer protection followed by statutes dealing with particular areas. These different approaches are set out in chapter III. Critical areas that should be covered by consumer protection laws are:

- a) A comprehensive definition of "consumer"
- b) Rights of consumers
- c) Standards for goods and services
- d) Prohibition of business conduct which prevents consumers from enjoying their consumer rights and regulation of conduct so that it does not encroach on those rights
- e) Regulation of agreements entered into between consumers and suppliers

- f) Registration and licensing of suppliers of certain goods and services, including publicly owned providers
- g) Powers for the authorities to take pre-emptive measures to protect consumers
- h) Sanctions, compliance and enforcement mechanisms for dealing with offences
- i) Designating an agency for consumer protection and prescribed roles for it
- j) Mechanisms to receive, investigate and act upon complaints by consumers and to assist consumers in making and pursuing complaints

Examples of consumer protection framework legislation are presented in chapter III on consumer law.

## 4. Codes or soft law

Codes or soft law should be complementary to consumer protection laws and set out agreed principles for consumer protection and responsible business behaviour by particular business sectors. This is an aspect of self-regulation by the industry or co-regulation between the state and industry. Though not legally enforceable, they have the force of moral authority over businesses and form part of the corporate governance structures by which businesses are expected to operate. Furthermore, governments may delegate authority for codes or co-regulatory mechanisms while retaining the power to directly intervene in the event that codes are not honoured. The development of codes is discussed in chapter VI on business conduct.

## 5. Consumer redress mechanisms

Consumer redress mechanisms need to be affordable, accessible and independent and provide speedy redress to aggrieved consumers. Mechanisms for conciliation, mediation and arbitration are useful for ensuring that consumer problems are handled effectively. These mechanisms are discussed in chapter XI.

## 6. Systems for monitoring and surveillance

Systems for monitoring and surveillance should be in place regarding consumer problems in the marketplace. These should handle complaints, monitor prices and carry out market/household surveys in order to identify consumer problems. This can enable consumer protection authorities to take



pre-emptive measures before problems become too widespread and difficult to resolve.

## 7. Mechanisms for compliance or enforcement

Mechanisms for compliance or enforcement of consumer protection laws need to be cost-effective and to benefit the consumer. Mechanisms include enforcement units, industry undertakings, imposition of licensing and registration fees, security deposits, product recalls and price controls, with resort to the courts as needed.

## 8. Consumer education and information programmes

Consumer education and information programmes should be made available to empower consumers with the knowledge to protect themselves and become responsible consumers. Consumer education may be incorporated into the school curriculum. Information programmes may be supported by national consumer protection programmes and can be conducted through the media and other community activities, often with the assistance of consumer organizations with experience in this area. This topic is discussed further in chapter X.

## 9. International cooperation and networking

International cooperation and networking among consumer protection agencies in different countries is essential to ensure regular exchange and sharing of information, technical training and capacity building for the implementation and reciprocal enforcement of multilateral agreements on consumer protection issues. Regional and international cooperation is also necessary to develop common positions when negotiating standards and other measures. International cooperation on consumer protection is discussed in chapter VIII.

International cooperation is also needed in other related domains. While differences exist between a demand-side orientation in consumer protection work and a supply-side orientation in competition policy, the consumer interest is essential to both. There is a difference between national consumer protection agencies trying to operate with overseas colleagues on specific issues and international trade negotiators effectuating trade treaties. The latter is commonly a more adversarial process with countries putting forward their “interests”, which usually coincide with

producers’ perspectives. In such negotiations, the consumer interest may be at stake, but only as one of many interests around the table. This dimension is elaborated briefly in chapter III. Also discussed in chapter III is the emerging overlap and potential conflict between international trade rules in intellectual property and domestic consumer protection.

## F. CONCLUSION

This manual takes an extensive approach to consumer protection by considering public services such as utilities (see chapter XV) as consumer issues. In doing so, it takes a broader view than some governmental or intergovernmental bodies, which define consumer protection as restricted to shoppers’ rights. Such restrictions may gradually lead to the exclusion of the consumer dimension from sectors where it is needed. These include commercial insurance systems (see chapter XIV on financial services) and public and private pensions. The danger of applying a restrictive definition of users of public services is that this may perpetuate a perception that consumer protection is only about the freedom to spend.

This chapter has suggested that a consensus is emerging among experts on the definition of the consumer. There remains intense debate in wider circles reflecting a dislike for the term “consumer” as embracing an ideology of “consumerism”, which is thought to be rather materialistic and, in environmental terms, possibly unsustainable. It is sometimes argued that the term “citizen” confers greater dignity on the recipient of a service and encompasses the concept of rights and responsibilities. It also suggests the possibility of participation in the process of governance. However, “citizen” can also be too narrow as it could exclude migrants who are not citizens of the country and possibly does not apply to children, who are undoubtedly consumers. Furthermore, “citizen” is a term that does not describe the producer-consumer interface, the focal point of much consumer law and policy. The term “citizen” could in theory apply equally to “consumer”, “worker” or “producer”. To equate these would neutralize the meaning of “citizen”.

Consensus is also emerging around a recognition that consumers have responsibilities to society at large. This is a trend that has intensified since the 1999 guidelines were expanded to include a section on sustainable consumption. Sixteen years later, the UNGCP have further recognized the SDGs, taking a further step in that direction. This adds the notion of consumer responsibilities to consumer rights.

## II. The United Nations Guidelines for Consumer Protection

### A. INTERNATIONAL INSTRUMENTS AND CONSUMER PROTECTION

The specialized agencies of the United Nations system, the World Trade Organization (WTO), the Group of 20 (G20), the Organisation for Economic Cooperation and Development (OECD) and regional bodies such as the African Union, Asia-Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN), the European Union and the Organization of American States (OAS) are among those intergovernmental organizations that have developed agreements, resolutions, directives and guidelines that have a bearing on consumer protection. This section will focus specifically on the United Nations Guidelines for Consumer Protection (UNGCP) adopted by the United Nations General Assembly by consensus as a “valuable set of principles”<sup>21</sup> for consumer protection. There are a range of other international instruments that address the consumer interest by providing:

- Benchmarks and minimum levels of protection or standards for policies and regulations for all countries within their competences, either globally or regionally
- Mechanisms for intergovernmental cooperation in the relevant areas
- Mechanisms for implementation (including enforcement) measures that can be undertaken by governments to protect consumers and apply agreed standards and principles
- Moral authority pointing to acceptable practice and conduct, underpinned by unanimous endorsement by member states

This final point regarding moral authority has sometimes been underestimated, given the legal standing of “soft law” often encompassed by international guidelines. The argument that guidelines are weaker than “hard law” in binding international conventions sets aside the moral force of an undertaking made in the United Nations General Assembly by all Member States. In the case of the UNGCP, this has taken place three times: in 1985, 1999 and 2015. Informal evidence

of the force of the commitments encompassed by the UNGCP is found in the manner in which they are negotiated with the same seriousness of purpose as if they were binding obligations.

### B. THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The United Nations Guidelines for Consumer Protection were adopted by the United Nations General Assembly by consensus in resolution 39/248 of 16 April 1985. This followed a long campaign by consumer associations in many countries, with Consumers International (formerly known as the International Organization of Consumer Unions) having called upon the United Nations to prepare a “model code for consumer protection” at its world congress in Sydney in 1975. In 1977, the United Nations Economic and Social Council (ECOSOC) directed the Secretary-General to prepare a survey of national institutions and legislation in the area of consumer protection. In 1981, ECOSOC requested that the Secretary-General “continue consultations on consumer protection with a view to elaborating a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries”. Draft guidelines were circulated to Member States for comments in 1982 and submitted to ECOSOC in 1983. These drew on many sources including the OECD, the Consumer Bill of Rights of the United States of America<sup>22</sup> and materials from national consumer protection agencies and consumer associations. These guidelines were adopted by the General Assembly in 1985.

Fourteen years later, the UNGCP were expanded to include a new section on sustainable consumption (section H of the current version) in resolution E/1999/INF/2/Add.2 of 26 July 1999. The revised UNGCP of 2015, annexed to resolution 70/186 and an integral part thereof, make specific reference to the needs of developing countries, including the setting of the Sustainable Development Goals (SDGs) and the preceding Millennium Development Goals (MDGs). The Intergovernmental Group of Experts (IGE) on

<sup>21</sup> Resolution II A/RES/70/186 adopted by the United Nations General Assembly on 22 December 2015. The term “UNGCP” is used to apply to the full set of guidelines in this manual. Sections of the UNGCP are referred to as appropriate.

<sup>22</sup> On 15 March 1962, President Kennedy presented a speech to the United States Congress in which he set out four basic consumer rights: safety, information, choice and the right to be heard, later referred to as the “Consumer Bill of Rights”.

Consumer Protection Law and Policy was established to operate under the auspices of UNCTAD as the institutional machinery of the UNGCP.

The revised UNGCP extend their scope to state-owned enterprises (guideline 2) and introduce four new “legitimate needs” in guideline 5. Completely new sections have been inserted on “principles for good business practices” (guideline 11) and “national policies for consumer protection” (guidelines 14–15), electronic commerce (guidelines 63–65) and financial services (guidelines 66–68). The pre-existing section on measures enabling consumers to obtain redress is renamed “dispute resolution and redress” (section V.F), is expanded to reflect the rapid evolution of such mechanisms and now includes references to debt and bankruptcy. The “specific areas” section (V.K) is expanded to include energy (guideline 76), public utilities (guideline 77) and tourism (guideline 78). Finally, section VI on “international cooperation” is significantly expanded by the additions of guidelines 82–90, largely covering enforcement mechanisms at the international level, while a new section VII, “international institutional machinery”, addresses the monitoring of implementation of the UNGCP at the international level. Further to a periodic and institutionalized review of the guidelines, IGE provides an annual forum for the exchange of experiences, the production of studies and research and the provision of capacity-building at the intergovernmental level. This far-reaching revision, greater than that of 1999, reflects the input of successive ad hoc expert group meetings on consumer protection held under the auspices of UNCTAD. The French presidency<sup>23</sup> of the group provided the leadership for this ambitious process to take hold.

### 1. Objectives, scope of application and general principles

The first three sections of the UNGCP are dedicated to their objectives, scope of application and the general principles applicable to consumer protection. The objectives of the guidelines as set out in guideline 1 are reaffirmed without amendment. These are to:

- a) Assist countries in achieving or maintaining adequate protection for their population as consumers.
- b) Facilitate production and distribution patterns responsive to the needs and desires of consumers.
- c) Encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers.
- d) Assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.
- e) Facilitate the development of independent consumer groups.
- f) Further international cooperation in the field of consumer protection.
- g) Encourage the development of market conditions which provide consumers with greater choice at lower prices.
- h) Promote sustainable consumption.

It is worth noting that subparagraph c, while present in the previous UNGCP, was not matched to a relevant section until the latest revision, which became section IV, “principles for good business practices”.

Section II is dedicated to the scope of application of the guidelines. They apply to business-to-consumer transactions and to the provision by state-owned enterprises to consumers. Guideline 3 includes a flexible definition of the term “consumer”, already discussed in chapter I.

In section III on general principles, the “legitimate needs” of consumers (guideline 5) have been significantly expanded. Subparagraphs a, b, j and k are new, and g has been amended to introduce the term “dispute resolution”. The “legitimate needs” are:

- a) Access by consumers to essential goods and services.
- b) The protection of vulnerable and disadvantaged consumers.
- c) The protection of consumers from hazards to health and safety.
- d) The promotion and protection of the economic interests of consumers.
- e) Access by consumers to adequate information to enable them to make informed choices according to individual wishes and needs.
- f) Consumer education on environmental, social and economic consequences of consumer choice.
- g) Availability of effective consumer dispute resolution and redress.

<sup>23</sup> Represented by DGCCRF, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control.

- h) Freedom to form consumer and other relevant groups/organizations and the opportunity of such organizations to present their views in decision-making processes affecting them.
- i) The promotion of sustainable consumption patterns.
- j) A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce.
- k) The protection of consumer privacy and the global free flow of information.

The first two new “legitimate needs” of guideline 5a and 5b were arguably present in the pre-existing UNGCP in spirit, albeit not explicitly incorporated. Subparagraphs j and k represent new principles that are clearly signalled in the resolution. A distinctive feature of both the legitimate needs (guideline 5) and the objectives (guideline 1) is that no specific sectors are mentioned but the implied intention is horizontal, therefore applying to all sectors.

## 2. Principles for good business practice

A pertinent feature of the 2015 revision is that the UNGCP are not solely directed to governments, but also contain, in section IV, guideline 11, benchmark “principles for good business practice”. These cover:

- a) Fair and equitable treatment
- b) Commercial behaviour
- c) Disclosure and transparency
- d) Education and awareness-raising
- e) Protection of privacy
- f) Consumer complaints and disputes

These provisions have much in common with other parts of the text, both pre-and post-2015. They are listed separately in a new section, clearly suggesting that businesses will be expected to adopt good practices beyond enforcement or regulatory action. They reflect the development of social responsibility guidelines during the last decade, such as ISO 26000,<sup>24</sup> the OECD Guidelines for Multi-National Enterprises<sup>25</sup> and the continued, widespread search for effective methods of business self-regulation and co-regulation. This newly inserted dimension of business conduct is explored in chapter VI of this manual, while

<sup>24</sup> ISO 26000, 2010, *Guidance on Social Responsibility*.

<sup>25</sup> OECD, 2011, *Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*.

education and information are discussed in chapter X. Complaints and disputes are found in chapter XI and privacy is reviewed in chapter XIII.

## 3. Guidelines

The UNGCP contain a set of recommendations to Member States. Below is a summary of the core guidelines, which comprise section V, sub-sections A–K, by which Member States should be guided:

### (a) National policies for consumer protection

This section, comprising guidelines 14–15, requires Member States to encourage:

- 1) Good business practices
- 2) Clear and timely information
- 3) Fair and clear contract terms and transaction procedures
- 4) Secure payment mechanisms
- 5) Dispute resolution and redress
- 6) Privacy and data security
- 7) Consumer and business education

This section also calls upon Member States to ensure adequate resources for consumer protection agencies to promote compliance and obtain redress. Consumer protection agencies are discussed in chapter IV.

### (b) Physical safety

This section, comprising guidelines 16–19, requires that Member States ensure:

- 1) Products are safe and conform to safety standards
- 2) Consumers are provided with information on the proper use of goods and risks involved
- 3) Measures for notification and recall of unsafe or hazardous products are in place
- 4) Appropriate remedies in case of such recall

Product safety is discussed in chapter IX.

### (c) Promotion and protection of the economic interests of consumers

This section, comprising guidelines 20–32, requires Member States to encourage or ensure:

- 1) Consumers obtain optimum benefit from their economic resources, by ensuring that goods



meet satisfactory production and performance standards

- 2) Adequate distribution channels and after sales services for such goods
- 3) Fair business practices are employed
- 4) Protection against contractual abuses
- 5) Marketing practices are regulated
- 6) Information provided is adequate for consumers to make informed decisions and exercise choice

This section is wide-ranging and its components are discussed in chapter III (consumer law), chapter VII (competition) and chapter X (information and education).

#### **(d) Standards for the safety and quality of consumer goods and services**

This section, comprising guidelines 33–35, requires that Member States ensure that:

- 1) There are national standards formulated for safety and quality of goods and services
- 2) Such standards conform when possible to international standards
- 3) Facilities to test and certify goods and services are encouraged

Although this section remains unaltered since its original adoption, the importance of standards has increased in terms of the regulation of international trade. The issues surrounding standards are discussed in chapters III (consumer law) and IX (safety).

#### **(e) Distribution facilities for essential goods and services**

This section, comprising guideline 36, requires that Member States look to ensure the efficient distribution of goods and services, especially essential goods and services to consumers who are disadvantaged, for example those who reside in rural areas. This section has increased in significance for the United Nations over the years as the MDGs and SDGs make explicit reference to various goods and services. It is therefore reinforced by the new guidelines on energy (guideline 76) and public utilities (guideline 77), which are discussed in chapter XV (utilities).

#### **(f) Dispute resolution and redress**

This expanded and renamed section, comprising guidelines 37–41, requires that Member States

establish and publicize redress mechanisms that are expeditious, fair, affordable and accessible, especially taking into account the needs of low-income consumers. Member States are also required to encourage businesses to set up mechanisms to handle consumer disputes in a fair, expeditious and informal manner. Since the 1999 expansion, principles and practice in dispute resolution have evolved significantly, with increasing consensus around the above qualities and greater emphasis attached to cross-border dimensions. The revised guidelines make specific reference (in guideline 40) to “collective resolution procedures” in cases of bankruptcy and over-indebtedness, and (in guidelines 38 and 41) to the need for businesses to establish procedures, such as improved complaints handling, that would reduce the need for redress mechanisms to be triggered. This is discussed in chapter XI (dispute resolution and redress).

#### **(g) Education and information programmes**

This section, comprising guidelines 42–48, requires that Member States develop and implement consumer education and information programmes to enable consumers to be informed of their rights and responsibilities and to be selective in the exercise of their consumption choices, including taking environmental consequences into consideration. Member States are urged to involve consumer groups, business and other civil society organizations in such efforts with particular attention to vulnerable and disadvantaged consumers. Consumer education should be included in the school curriculum and Member States are expected to organize training programmes for educators, mass media professionals and consumer advisers to enable them to conduct education and information programmes. The UNGCP now include electronic commerce in the list of issues that need to be addressed. Education and information programmes are discussed in chapter X.

#### **(h) Promotion of sustainable consumption**

This section, comprising guidelines 49–62, requires that Member States develop and implement policies to promote sustainable consumption practices within government and by businesses and consumers. This should be done in partnership with civil society organizations and businesses through a combination of policies that include:

- 1) Regulation
- 2) Economic and social instruments

- 3) Sectoral policies in areas such as land use, transport, waste management, energy, housing, information and education programmes

Member States should develop indicators to measure progress towards achieving sustainable consumption. Although unamended in 2015, the prominence of this section was increased by the United Nations' adoption of the SDGs in 2015, which are specifically mentioned in the Resolution on Consumer Protection, which introduces the revised guidelines.

#### (i) Electronic commerce

This section, newly inserted in 2015 and comprising guidelines 63–65, calls for:

- 1) Equity of treatment of electronic commerce (e-commerce) with other forms of commerce in terms of consumer protection
- 2) Cross-border cooperation
- 3) The study of the OECD Guidelines on E-commerce (developed in 1999 and revised in 2016)<sup>26</sup> for guidance

E-commerce is discussed in chapter XII.

#### (j) Financial services

This section, newly inserted in 2015, comprising guidelines 66–68, points to the high-level principles developed by the OECD as mandated by the G20 and include:

- 1) Avoiding conflict of interest in remuneration of staff
- 2) Institutional responsibility for agents
- 3) Development of regulatory structures
- 4) Protection against fraud and abuse<sup>27</sup>

These principles recommend the development of responsible lending policies, bank deposit insurance and regulatory frameworks for remittance services with particular attention to transparency within those transactions. These issues are discussed in chapter XIV.

#### (k) Measures relating to specific areas

With respect to guidelines 69–78, prior to 2015 Member States were requested to prioritize areas of critical concern for consumers' health, which included food,

water and pharmaceuticals. In 2015, their scope was extended to public utilities and energy services (including community participation in regulatory oversight) as well as tourism/travel. Measures taken in these areas address quality control, adequate distribution and standardized information. Member States are required to apply accepted international standards in food and pharmaceuticals. Concerning food production, subjects such as sustainable agricultural policies and practices and conservation of biodiversity and traditional knowledge are to be promoted. National policies should be developed to improve the supply, distribution and quality of drinking water and for other purposes, taking into account the finite character of aquatic resources. Member States are also required to develop integrated national policies to ensure appropriate use of pharmaceuticals, their procurement, distribution, production, licensing arrangements, registration systems and information to consumers. The reference to licensing arrangements and to the promotion of the use of international non-proprietary names for drugs clearly envisages the possibility of compulsory licensing, agreed as permissible under WTO rules in the Doha declaration of 2001.

These issues are discussed in this manual: food in chapter XVI, water and energy in chapter XV (utilities) and tourism in chapter VIII (international cooperation).

## 4. International cooperation

The pre-2015 UNGCP proposed avenues for international cooperation in terms of policy development and implementation, joint procurement of essential goods and services and exchanges of information on defective products, especially but not only in a regional or sub-regional context. Member States were also expected to promote technology transfer and financial support to enable sustainable consumption and ensure that consumer protection measures do not become unjustifiable barriers to international trade.

In 2015, section VI, comprising guidelines 79–94, was lengthened to require improved cross-border cooperation, including designation of national contact agencies, combating fraud and deceptive commercial practices, taking into account guidelines from the OECD.<sup>28</sup> International cooperation is discussed in chapter VII.

<sup>26</sup> OECD, 2016, *Consumer Protection in E-commerce: OECD Recommendation*.

<sup>27</sup> OECD, 2011, *G20 High-level Principles on Financial Consumer Protection*.

<sup>28</sup> OECD, 2003, *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*.

## 5. International institutional machinery

One of the major innovations of the revised UNGCP of 2015 is the inclusion of section VI on “international institutional machinery”, guidelines 95–99, to monitor compliance with the UNGCP through the Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy under the auspices of UNCTAD.<sup>29</sup> As set out in guideline 97, IGE has the following functions:

- a) To provide an annual forum and modalities for multilateral consultations, discussion and exchange of views between Member States on matters related to the guidelines, in particular their implementation and the experience arising therefrom.
- b) To undertake studies and research periodically on consumer protection issues related to the guidelines based on a consensus and the interests of Member States and disseminate them with a view to increasing the exchange of experience and giving greater effectiveness to the guidelines.
- c) To conduct voluntary peer reviews of national consumer protection policies of Member States, as implemented by consumer protection authorities.
- d) To collect and disseminate information on matters relating to the overall attainment of the goals of the guidelines and to the appropriate steps Member States have taken at the national or regional levels to promote effective implementation of their objectives and principles.
- e) To provide capacity-building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and policies.
- f) To consider relevant studies, documentation and reports from relevant organizations of the United Nations system and other international organizations and networks, to exchange information on work programmes and topics for consultations, and to identify work-sharing projects and cooperation in the provision of technical assistance.
- g) To make appropriate reports and recommendations on the consumer protection

policies of Member States, including the application and implementation of these guidelines.

- h) To operate between and report to the United Nations Conferences to review all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.
- i) To conduct a periodic review of the guidelines, when mandated by the United Nations Conference to review all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.
- j) To establish such procedures and methods of work as may be necessary to carry out its mandate.

In order to evaluate the practical implementation of the newly revised UNGCP in a particular country, the following indicators are suggested for use:

- a) Allocation of specific responsibility for consumer affairs to ministries and/or government agencies; this should extend to the development of a consumer element in sectoral ministries, especially those sectors identified in sections V.J and V.K of the UNGCP, and should encompass state-owned enterprises.
- b) Adoption of national consumer policy and consumer protection laws, including those pertaining to data security and privacy.
- c) Adoption and application of competition law.
- d) Adoption and application of standards for consumer products and services.
- e) Adoption by industry of codes of good practice, either unilaterally or in cooperation with government or regulators.
- f) Organization of consumer education programmes and the dissemination of consumer protection information.
- g) Establishment of consumer dispute resolution and mediation/arbitration mechanisms, including online dispute resolution.
- h) Recognition of consumer organizations (possibly extending to financial support by governments) as participants in decision-making processes in areas of consumer protection and policy.
- i) Incorporation of consumer education studies in the school curriculum and elsewhere.

<sup>29</sup> The inaugural meeting of IGE took place in Geneva in October 2016.

- j) Establishment, or recognition, of consumer information and advice centres.
- k) Encouragement and enabling of dissemination of product testing information directly by governments or through consumer organizations;
- l) Establishment of access policies for basic goods and services.
- m) International cooperation through assistance for the development of consumer protection legislation and/or support for training of government officers.
- n) Participation in reviews of national consumer protection policy and in the periodic reviews of the UNGCP under the institutional machinery established within UNCTAD.

### C. CONCLUSION

The UNGCP have provided the basis of a framework for consumer protection laws in many countries. However, the progress achieved in the implementation of the UNGCP has not been uniform. In some parts of the world, there still remain a number of jurisdictions with no consumer protection laws, government consumer protection agencies nor independent

consumer associations. Furthermore, laws may exist but sometimes are devoid of practical impact.

It is difficult to accurately assess how well the UNGCP have been implemented since their adoption. The consensus from various sources suggests they have made an important contribution to consumer protection worldwide. Throughout 2012, UNCTAD carried out a global survey of measures taken by United Nations Member States to implement the provisions of the UNGCP. The review concluded that “since 1985, the United Nations Guidelines on Consumer Protection have been widely implemented by Member States of the United Nations. National contributions to this revision process show that all areas of the current guidelines remain valid and useful”.<sup>30</sup> Conversely, a survey by Consumers International in 2013 pointed to the “intense frustration” expressed by its members (mainly consumer associations) concerning “the non-application of consumer protection measures already in place”.<sup>31</sup>

The consumer today is operating within an enlarged international marketplace. This calls for new dynamics of interaction between consumers, businesses and regulators. The UNGCP represent significant steps in that direction and, given the right level of commitment, the 2015 revision may contribute to further progress.

<sup>30</sup> UNCTAD, 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection 1985–2013*, note by UNCTAD secretariat.

<sup>31</sup> Consumers International, 2013, *The State of Consumer Protection around the World*.

## III. Consumer law

### A. CONSUMER LAW IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

Resolution 70/186, which precedes the UNGCP, reaffirms the guidelines as “a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems, and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States”. It goes on to recognize that “consensus exists on the need for common principles that establish the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems” and that consumer protection requires a “robust legal and regulatory framework for consumer protection.”

The guidelines themselves are less explicit, pointing out that “consumer protection policies include the laws, regulations [and] rules ... that protect consumer rights and interests and promote consumer welfare” (guideline 2), that enterprises should obey the law (guideline 9) and that there need to be “legal systems” (guideline 16) or “measures” (guideline 37) in place.

### B. CONSTITUTIONAL PROVISIONS ON CONSUMER PROTECTION

Many modern constitutions explicitly confer a wide range of human rights. They specify not just civil and political rights, also known as first-generation rights, but a range of economic, social and cultural rights that are sometimes referred to as second-generation rights. To complement both sets of rights, the trend has been to include the right to development, known as a third-generation right. One theme explored here, relevant to the evolution of rights, is that much legislation relevant to consumers is not explicitly related to consumers.

Chapter IV shows how sectoral legislation and policy has become ever more cognizant of the consumer protection dimension. Chapter XV on utilities shows how this often goes beyond “shoppers’ rights” and

takes into account access issues relating to “non-shoppers” such as unserved populations.

This issue of access is the subject of numerous United Nations declarations, most comprehensively of the MDGs and the SDGs, both of which are explicitly recognized by the UNGCP. Many such access rights are expressed in national constitutional provisions.

#### 1. What aspects of consumer protection have been provided in constitutions?

In 2008, UNCTAD reported that the constitutions of at least 24 countries provided for consumer protection, often linked with competition policy, as with the Mexican Constitution, for example.<sup>32</sup> UNCTAD reported in 2013, that “in many cases, consumer protection has been constitutionally enshrined and some countries have recognized consumer rights as human rights”.<sup>33</sup> The report singled out for specific mention El Salvador, Egypt, Poland and Switzerland, and the recognition of the human rights dimension by the Mexican Supreme Court in 2012. Analysis of constitutional provisions indicates great differences in content, which can be synthesized as emphasising high-level principles such as:

- The generic consumer rights that are to be protected by law, quite often drawing upon the “legitimate needs” (guideline 5) of the UNGCP
- The freedom to form independent consumer associations and confer them with the required legal standing (*locus standi*) to represent both individual and collective consumer interests in the decision-making process and in the courts

Several jurisdictions have taken elements from the “legitimate needs” for constitutional provisions of comprehensive regional agreements, such as CARICOM (Caribbean free trade agreement) and the European Union.<sup>34</sup>

<sup>32</sup> Article 28 applies consumer protection through its anti-monopoly measures. With exceptions (such as state-provided services) monopolies are forbidden.

<sup>33</sup> UNCTAD, 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013*, note by UNCTAD secretariat. In the case of the supreme court of Mexico see [http://www.consumidor.gob.mx/wordpress/wp-content/uploads/2012/04/SENTENCIA\\_AMPARO\\_MEXICANA.pdf](http://www.consumidor.gob.mx/wordpress/wp-content/uploads/2012/04/SENTENCIA_AMPARO_MEXICANA.pdf).

<sup>34</sup> Treaty of Chaguaramas, 2001, Article 169.



The European Union's Consolidated Treaty on the Functioning of the European Union states that "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests".<sup>35</sup> Article 38 of the European Charter of Fundamental Rights sets out, under the title "solidarity", the requirement for "a high level of consumer protection". Other rights relevant to legitimate needs are set out elsewhere in the charter under "respect for privacy" (article 7), "protection of personal data" (article 8), "freedom of association" (article 12), "access to health services" (article 35) and "public utility services" (article 36). Such high-level principles are often considered more appropriate for constitutional content than detailed provisions.

As indicated above, there are vital consumer issues covered by constitutions that are not indicated as consumer-related. Typical examples are access to basic public services such as water, healthcare, education and housing as in the South African constitution, where the word "consumer" does not appear in the relevant clauses.<sup>36</sup> Article 184 of the South African Constitution mandates the South African Human Rights Commission to promote human rights. To this end it is mandated to demand that "relevant organs of state" provide it with information on the measures taken to realize rights in the Bill of Rights relating to housing, healthcare, food, water, social security, education and the environment. These are referred to as socioeconomic rights. The state must "respect, protect, promote and fulfil" these rights, based on principles specified in the constitution, which must be observed and realised.

Constitutional law can be used to establish or reinforce basic or fundamental consumer rights, as well as provide some guiding principles such as the responsibility of state or public authorities for promoting and protecting consumer rights, namely by setting up adequate, comprehensive and effective legal and institutional frameworks for consumer protection. Constitutional provisions can be a tool for leveraging much needed improvement to levels of access. Indeed, civil society groups (not necessarily consumer associations) have used constitutional

rights to campaign in favour of consumer rights.<sup>37</sup> Such provisions may put into effect other rights that are guaranteed under constitutions.

A constitution, being the supreme law of a jurisdiction, takes precedence over all other laws, thereby strengthening, legitimizing and prioritising any rights guaranteed by it. Hence, the case for consumer protection could be strengthened if anchored in constitutional provisions.

### C. FRAMEWORK CONSUMER PROTECTION LAWS

Although consumer protection law is often regarded as a modern phenomenon, many of what we regard as consumer protection laws have their origin in much earlier laws, such as those on weights and measures. The focus in the early phase of consumer protection law was very much on the buyers and sellers of particular goods and services. These laws did not distinguish between different categories of buyers, such as commercial or household buyers. Before the Second World War, there were sectoral initiatives (in relation to drugs, food, motor vehicles and transport, for example) that were mainly motivated by public health and safety and not envisaged as consumer protection measures as such. In due course, specific horizontal laws were widely adopted such as:

- Price control acts
- Sale of goods acts
- Trade descriptions acts
- Weights and measures acts
- Hire purchase acts

However, this piecemeal legislation had severe limitations. The laws focusing on specific areas were inadequate for dealing with new problems, and as legislation was enacted to address new problems, it was sometimes dismissed as a "firefighting" approach, with problems being attacked one by one as they emerged without a more strategic vision being adopted. Most fundamentally, such measures failed to reach the full range of consumer products and services.

The late twentieth century, therefore, saw many countries enacting framework laws with a view to providing adequate consumer protection across the full range of transactions, goods and services. The following are examples of framework laws on consumer protection in some large economies:

<sup>35</sup> Article 169.1 of the Consolidated version of the Treaty on the Functioning of the European Union, 26.10.2012 C 326/47.

<sup>36</sup> For discussion, see R Greenstein, 2005, *Social Rights, Essential Services and Political Mobilization in Post-Apartheid South Africa* (Johannesburg, University of the Witwatersrand).

<sup>37</sup> Greenstein, op. cit.

- Consumer Protection Fundamental Act 1968, Japan
- Consumer Protection Act Quebec 1971, Canada
- Trade Practices Act 1974, Australia (subsumed within the Competition and Consumer Act 2010)
- Consumer Protection Act 1975, the Bolivarian Republic of Venezuela
- Consumer Protection Act 1976, Mexico
- Consumer Protection Act 1984, Spain (superseded by royal decree 2007)
- Consumer Protection Act 1986, India
- Consumer Protection Code 1990, Brazil
- Consumer Protection Act 1992, the Russian Federation
- Consumer Protection Act 1993, China (revised 2014)
- Consumer Code 1992 France (recodified 2016)
- Law on Consumer Protection 1999, Indonesia
- Consumer Code 2005, Italy
- Consumer Code 2010, Peru
- Consumer Code 2011, Colombia

There is an ongoing debate on the advantages and disadvantages of having a generic consumer code on the one hand, and a variety of specific pieces of legislation (as in the United States of America) on the other. The debate has focused on the relative merits of vertical (sectoral) and horizontal (cross-cutting/principle-based) law, and the question of whether consumer protection law should be written as a single text or code. Advantages of a framework approach are as follows:

- Greater coherence of legal texts and harmonization of concepts, definitions and approaches
- Enabling of strategic planning within a clear structure
- Consolidation of the “discipline” of consumer protection among other branches of the law
- Higher visibility among judges, officials, economic operators and the public
- More effective application of the law
- Easier access to the relevant texts for consumers

Below are some of the features of framework laws on consumer protection:

- a) Some of these statutes include the rights of consumers as protected in law, such as safety, choice, information, education, fair price, representation and redress, often taking their lead from the UNGCP “legitimate needs” (guideline 5).
- b) They define the term “consumer” broadly. They may cover three categories: the purchaser, user and third parties.
- c) They frequently cover the delivery of both consumer goods and services, and sometimes include the provision of professional services, such as doctors, dentists, engineers and architects.
- d) They impose pre-contractual disclosure requirements on the products sold or services provided, covering price and tariffs, as well as contract terms.
- e) They may provide for the prohibition of unfair terms in consumer contracts.
- f) They prohibit false, misleading or confusing advertising and other dubious forms of commercial communication.
- g) They prohibit or restrict commercial practices that are considered to be misleading, aggressive or unfair to the consumer.
- h) They may create consultative bodies comprising government, industry and consumer representatives proactively addressing systemic consumer problems and recommending legislation and other consumer protection measures.
- i) They often address issues relating to product and service safety and provide for standard setting, notification of unsafe products and recall of defective products.
- j) They may facilitate compensation to consumers for defective products by introducing the principle of strict liability where products have caused material losses, personal injury or death to consumers.
- k) The statutes may vest existing or specially created agencies with rule-making power to enable a swift response to evolving malpractice. In some instances, rule-making power is vested in the executive branch of the government, but advisory committees comprising both consumer and industry representatives are

permitted to formulate recommendations of the regulations to be promulgated.

- l) They may establish special tribunals (more recently alternative dispute resolution (ADR) and online dispute resolution (ODR) systems, as discussed in chapter XI) where simplified rules of procedure and evidence are created to hear consumer complaints. Some are quite long-standing, such as the Indian Consumer Courts and the Spanish and Argentinian Consumer Arbitration courts established in 1986 and 1998.
- m) They usually facilitate access of consumers to justice by admitting collective redress procedures. In such cases, they may confer upon a public officer (such as a Director of Trade Practices or consumer ombudsman) or social action groups (such as consumer associations) the right to commence litigation on behalf of a consumer or a group of consumers.
- n) They usually provide a range of remedies, including rescission of contract, the right to damages (including punitive damages) and injunctive and declaratory relief. This may be in recognition of the absence of a full, balanced and flexible range of remedies, which may have the effect of neutralising the rights that such statutes seek to confer upon the consumer in practice.

The above framework laws have many common features, but there are some notable exceptions, such as Germany and Hong Kong (China), which do not have Consumer Protection Acts. The United States of America likewise does not have a framework Consumer Protection Act. The key legislation is the Federal Trade Commission (FTC) Act of 1914, setting out broad terms similar to those in the above framework acts and also establishing the machinery for the FTC to apply and enforce some 70 federal acts. Those acts may incorporate the term “consumer protection”, such as the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act 2005, which amends the Truth in Lending Act, a landmark act in consumer protection in the financial services area.

Care in the use of the term “consumer protection” is worth bearing in mind for states preparing consumer protection legislation. Model consumer protection laws have been prepared for several regions (e.g. Latin America, Africa and the Caribbean) incorporating the features of the framework laws seen above.<sup>38</sup> One

<sup>38</sup> Consumers International, 1996, *Model Law for Consumer Protection in Africa* and 2011, *A Guide to Developing Consumer Protection Law*.

can see the logic of this approach for regions, such as Latin America, in which there are certain continuities of language and legal tradition, or in regions with many small economies, such as the Caribbean or Pacific islands. However, there are challenges in adopting models that can override genuine differences in geographical and social conditions requiring different solutions. This is particularly true of public utility services where levels of connectivity among local populations and natural resource constraints require very different approaches, for example, to tariff and subsidy structures and how to deal with “non-consumers”<sup>39</sup>. For this reason, a “checklist” approach may be worth considering. It differs from a model law in that it does not seek to place all consumer protection provisions in one place, but to verify that all necessary protections are in place across legislative and institutional architecture, providing more flexibility than a model law.

## D. INTERFACE BETWEEN CONSUMER LAWS AND OTHER LAWS

Due to the horizontal and cross-cutting nature of consumer protection, its law interacts with many different bodies of law. The following four are particularly relevant to the welfare of consumers: sectoral laws, professional services law, intellectual property law and international trade law.

### 1. Sectoral laws

While framework laws usually focus on horizontal or institutional issues such as those mentioned above, sectoral issues are often dealt with in specific statutes, either because they are more likely to be applied that way or because there is no appropriate framework legislation. Examples of such statutes, many of which would be enforced by standalone agencies outside of the consumer protection agency, are:

- Food acts
- Medicines (advertisement and sale) acts
- Moneylenders acts
- Insurance acts
- Consumer credit acts
- Water services acts
- Telecommunications acts
- Energy acts
- Transport acts

<sup>39</sup> These issues are discussed in chapter XV.



The relationship between framework laws on consumer protection and sectoral laws has been controversial in many countries. Banks, insurance companies, air passenger companies and providers of telecommunications services in particular have argued that they are not subject to the general law on consumer protection but only to the law applicable to their sector. This interpretation has commonly been rejected by courts and the horizontal or comprehensive scope of application of the framework law on consumer protection has been confirmed. Sectoral legislation does not preclude the application of the framework law, but complements it.

## 2. Professional service legislation

Consumer protection also relates to professional services rendered to consumers. In many countries, legislation for the protection of consumers in relation to a whole range of professional services already exists. Typical examples of the professionals or institutions whose services are regulated are accountants, architects, childcare centres, dentists, lawyers, doctors, nurses, private hospitals, pharmacists and travel agencies. These services, some of them known as the “liberal professions”, may be subject to registration and licensing, codes of practice, disciplinary rules and compensation systems in the event of malpractice. Practice varies and in Latin America, for example, many professional services fall outside consumer protection legislation except with regard to the advertising of professional services, where consumer protection law provisions continue to apply. Many professional restrictions have been criticized by competition specialists as being excessively restrictive and resulting in higher prices for consumers.

## 3. Intellectual property

An emerging interface is that observed between consumer protection law and intellectual property (IP) law. Resolution 70/186 which preceded the UNGCP recognizes the importance of combating counterfeit products that pose threats to the health and safety of consumers and decrease consumer confidence in the marketplace. Counterfeit goods make false and misleading representations to consumers about the origin, quality and safety of products and circumvent systems and standards put in place by national governments to safeguard consumers. Moreover, there is a lack of consumer awareness about the risks associated with (knowingly or unknowingly) purchasing counterfeit goods. The significant health and safety risks associated with the proliferation of potentially hazardous counterfeit products, especially

the prevalence of fakes on the internet, present new challenges and additional responsibilities to governments and businesses to raise awareness of these issues.

In contrast, the revised UNGCP do not deal with emerging issues around consumer products that are governed by IP law because they incorporate copyrighted works. This includes products that operate (often invisibly to the user) through software, as well as those that incorporate text or audiovisual content. In many countries, anti-circumvention laws prevent the consumer from bypassing any technological protection measures (TPMs) that control how this copyrighted content may be accessed or copied. In light of the growth of digitally-delivered content, as well as the “internet of things”, in which embedded sensors control hardware products at a distance through the internet, this is a crucial challenge as the line between consumer protection and IP may become blurred. Indeed, one can envisage that one day, most manufactured products with operating parts will contain an IP element.

The evolution of digital and non-tangible products, such as entertainment/cultural products, has taken place under the aegis of copyright law. As a very clear example of this, under article 10.1 of the 1995 WTO Agreement on Intellectual property (TRIPS), software (or “computer programmes” in 1995 parlance) is protected in the same way as literary works: “computer programmes, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)”. It is worth noting that the TRIPS agreement, and IP law in general, traditionally allow some exceptions to copyright, such as “fair use” or “fair dealing”. Permissible exceptions are framed within limitations including limited scope, non-interference with the normal use of the product, and respect for the rights of the copyright holder as recognized under article 13 of TRIPS.<sup>40</sup> The danger for consumers in the current evolution is that IP rights holders are protected in terms of the defence of their copyright, while the defence of consumers that also exists in IP law might not be invoked.

In theory, the consumer is notified in advance of restrictions and penalties for transgression, in particular for unauthorized copying. There is convincing evidence that millions of consumers are unwittingly falling foul of digital product contracts. It is becoming ever clearer that in practice, hardly anyone reads the small print before they sign, as noted in chapter I.<sup>41</sup>

<sup>40</sup> HG Ruse-Khan, 2009, Fair use, fair dealing and other open-ended exceptions: The application of the three-step test, WIPO African-Arab Seminar on Copyright Limitations and Exceptions, Cairo.

<sup>41</sup> Executive Office of the President, Report to the President: Big data and privacy, a technological perspective, President’s

Consumers tend to believe that they own what they buy. Unfortunately, this reasonable assumption is often not legally valid with regard to digital products. The Australian consumer association, Choice, giving evidence to the Law Commission, commissioned a nationally representative survey in 2013 that found that very high proportions of users of digital products thought they had the right to transfer digital products within their own range of terminals (laptop, smartphone etc.), when in fact they would have unwittingly transgressed copyright conditions by doing so.<sup>42</sup> The survey found that while “overwhelmingly, consumers correctly identified infringing use (such as ‘selling on’ or uploading digital products online) as illegal ... just over half (52 percent) of consumers incorrectly believe that making a copy of music to listen to on more than one device is legal” and “a majority (57 percent) of consumers incorrectly believe that making a copy of a video to watch on a personally owned device is legal”.

In the event of an infraction, such as using a non-franchised repairer or failure to pay instalments for purchase of a vehicle, measures can be taken from a distance, such as disabling telephone handsets or remote disabling of vehicles by preventing ignition. Such technical measures are in effect legal sanctions applied technologically. In that sense, they are analogous to the penalties that can be applied by banks to consumers’ accounts.

Many “tangible” products, in particular those with an electronic component, are becoming digital through the software that governs their operation. The danger is that a new set of problems is likely to arise because the “contracts of adhesion” under which the goods are acquired are governed by copyright law in which the manufacturers are leasing rather than selling to consumers who, conversely, are becoming lessees rather than purchasers. The very concept of consumers’ property is changing.

#### 4. International trade law

As the world economy globalizes, another interface achieves great significance: that of consumer protection and international trade. The rise to prominence of the international trade dimension during the 1990s raised many questions regarding the extent to which states were masters of their own destiny in terms of consumer protection.

The aims of the still applicable General Agreement on Tariffs and Trade (GATT) is to reduce trade protectionism and to ensure that there is a fair and equal trading agreement between countries. As a result of the Uruguay Round (which ended in 1994), developed countries increased the number of imports whose tariff rates were “bound” (i.e. with commitments to limit tariff levels) from 78 percent to 99 percent of all product lines. For transitional economies, the increase was from 73 percent to 98 percent and for developing countries from 21 percent to 73 percent.<sup>43</sup> The spectacular reductions in tariffs that took place as a result of the GATT negotiations, reducing by 8 per cent per year during the 1950s and 1960s, were clearly of great potential benefit to consumers in terms of price and availability (and thus choice) of goods.<sup>44</sup>

In this context, it is worth noting that guideline 13 of the UNGCP stipulates that “in applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations”. There is an inbuilt tension between product standards and open trade, hence the importance of the GATT general exceptions clause. This tension is explored further in chapter IX, which also discusses the fears of developing countries that safety standards may be used against them. Apart from the issue of tariffs, it has also been the case from the outset that GATT allowed for consumer protection measures to be taken by members, even if they had the effect of acting as barriers to trade. Article 20 (the general exceptions clause) allows measures to be taken to protect “human, animal or plant life or health” or for “the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. The consensus interpretation is that a country can apply the safety standards to imports that it applies to its own products, which may result in refusal of entry. However, unilateral action cannot be taken against other countries’ internal production processes, nor can internal and imported products be treated in different ways, such as applying higher standards to imports than those applied to domestically produced products.

Perhaps the low rates of tariffs prevailing at the time of writing have been the reason for the gradual shift in focus onto areas such as product standards, in particular product safety, and to regulatory measures that have become the major means of control of international trade in services, as governed by the WTO General Agreement on Trade in Services (GATS).

Council of Advisors on Science and Technology, available at [https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_big\\_data\\_and\\_privacy\\_may\\_2014.pdf](https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_may_2014.pdf).

<sup>42</sup> See [www.alrc.gov.au/sites/default/files/subs/745\\_org\\_choice\\_submission.docx](http://www.alrc.gov.au/sites/default/files/subs/745_org_choice_submission.docx).

<sup>43</sup> WTO, Understanding the WTO, see [www.wto.org](http://www.wto.org).

<sup>44</sup> WTO, The GATT years: from Havana to Marrakech, see [www.wto.org](http://www.wto.org).

One often cited example is the “necessity test”, article 6.4 of GATS, which seeks to prevent regulatory rules from being used as spurious barriers to trade. Thus, a new debate has been sparked, one that relates to the international harmonization of standards and regulations. However, the WTO has ceased to be the sole focus of this debate. Coming to the fore at the time of writing are the provisions of the Trans-Atlantic Trade and Investment Partnership (TTIP, European Union and United States of America), the Trans-Pacific Partnership (TPP, 12 countries of the Pacific Rim) and the Trade in Services Agreement (European Union, United States of America and 21 other jurisdictions). Concerns have been expressed by civil society, including consumer organizations, regarding the confidential nature of the negotiations and the way that they enter into regulatory policy.<sup>45</sup> The new negotiations are taking the form of preferential or regional trade agreements (PTAs or RTAs) or bilateral agreements, often between rich and developing countries. By 2006, 197 PTAs with services commitments had been notified to GATT/WTO, with 106 of them having been notified since 2000. A WTO study suggested that “it may well be that negotiations of the PTAs have to some extent diverted resources and attention from the Doha services negotiations”.<sup>46</sup>

## E. CONCLUSION

The evolution of consumer protection law has been a complex process involving constitutional, framework and sectoral legislation. In turn, this synthesis will have to evolve in order to cope with the interaction between national and international law and policy, as illustrated in the cases of trade and IP law. As economies become more integrated and as national consumer protection agencies struggle to keep pace with the cross-border nature of many consumer transactions, the international dimension operates at two levels. Firstly, there is a greater need for jurisdictions to agree on mechanisms for cross-border protection of individuals or categories of consumers. Secondly, states are currently negotiating more at the regional level than at the multilateral one.

<sup>45</sup> BEUC (The European Consumer Organization), 2016, *Transatlantic Trade Deal and Consumers*; BEUC, 2016, Factsheet: Trade in Services Agreement.

<sup>46</sup> M Roy et al, 2006, *Service Liberalization in the New Generation of Preferential Trade Agreements. How Much Further Than GATS?* (WTO Economic Research and Statistics Division).

## IV. Consumer protection agencies

### A. CONSUMER PROTECTION AGENCIES IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The UNGCP are non-prescriptive regarding the organization of consumer protection agencies, for example setting out in guideline 8 that Member States should “provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies”. The term infrastructure is rather apt and the analogy with physical infrastructure continues in guideline 32, which indicates that Member States should “assess the adequacy of the machinery for ... enforcement” of weights and measures legislation (one presumes that the same applies to other legislation). Section VI on international cooperation requires improved cooperation between agencies, again without specifying structures.

### B. FUNCTIONS OF CONSUMER PROTECTION AGENCIES

When an agency is delegated with both rule-making and administrative powers, it may be mandated to:

- a) Enforce consumer protection and competition laws
- b) Register and issue licences for certain designated types of business activities
- c) Issue administrative rules to regulate conduct of business entities and ensure protection of the consumer interest
- d) Advise the government on appropriate measures for consumer protection
- e) Represent the consumer interest in other intergovernmental committees
- f) Advise consumers and businesses of their rights and obligations under the relevant consumer protection laws
- g) Conduct or commission market surveys and research into consumer protection problems
- h) Conduct or commission product testing for safety and quality and disseminate information to consumers

- i) Manage and/or monitor the performance of consumer tribunals or other mechanisms for the mediation of consumer claims
- j) Consult with relevant stakeholders to understand consumer issues and develop policy to address problem areas
- k) Organize public education and information programmes independently or in collaboration with consumer organizations or business entities
- l) Represent the national consumer interest at international negotiations on individual cases and discussions of international policy

While not all the above functions are taken on by all consumer protection agencies, by and large most of these would be within their potential ambit.

Where an agency's role is not interventionist in nature, its functions would be advisory to ensure that both businesses and consumers are informed of their rights and responsibilities through public education and information programmes. The agency would also play a representative role within government to comment and make recommendations on consumer protection laws and other related laws that would have an impact on the consumer interest. As discussed below, such a role can result in a high public profile.

While there are several models to choose from, the functions of the consumer protection agency are quite similar whether it is part of the government or an autonomous entity. Some agencies, though independent in structure, are still dependent on the government for their operating costs and are answerable to a minister as well as national parliaments or assemblies. This may result in diminution of independence as directions may come from the government as to what the emphasis, if at all, should be at any given moment. On the other hand, official recognition can give such an agency a high degree of “clout” should the agency choose to use it.

### C. ORGANIZATIONAL MODELS FOR CONSUMER PROTECTION AGENCIES

The UNGCP include a large degree of flexibility, recognizing differences in national traditions and geographies, with a focus more on results than on the specifics of structures. Accordingly, there is a

wide range of approaches to the precise location of consumer protection within the institutional architecture of government. Nevertheless, certain types of approach can be identified.

Various models have been adopted including a department within the Ministry of Commerce, a department within the Prime Minister's Office, a separate agency or sometimes a Ministry of Consumer Affairs. Consumer protection has quite often been allocated to ministers with more than one portfolio,<sup>47</sup> for example the Minister for Women's Affairs (Austria), Science and Tourism (Australia) and Children and Family Affairs (Norway). European commissioners for consumer protection have also carried a variety of accompanying portfolios including, for a short time, nuclear safety. Even where the more "conventional" choice is made, such as within the Ministry of Trade and Industry, there is a recurring complaint that responsibility for consumer protection gets subsumed within the larger role of promoting business. This can cause conflicts within the ministry, from which consumer protection sometimes emerges as the weaker partner. The same dynamic of built-in conflict has emerged from sectoral agencies too. The financial crisis brought forward calls for consumer protection to be reinforced and this could lead to clashes over jurisdiction, between consumer protection agencies on the one hand and prudential supervision on the other, within the relevant ministries or central banks.

The difference between an agency and a ministry is important from the point of view of operational autonomy and public profile. Even when acting as divisions within ministries, consumer protection agencies can still develop high profiles and there has been a steady movement towards clearer public identity.

One further model is for consumer policy to permeate all of government policy and for governmental consumer protection agencies to have a degree of jurisdiction across all the sectoral ministries, such as energy, telecommunications and agriculture. This has been achieved in Brazil and more recently in Peru (see below).<sup>48</sup> It was attempted in Egypt during the early twenty-first century, where the cross-cutting application of consumer protection law has been

overshadowed at sectoral level by sectoral ministries.<sup>49</sup> The revised European Union Treaty in 1997 provided under article 153 that henceforward "consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities".<sup>50</sup>

### 1. Examples of government agencies within ministries

In India, the Department of Consumer Affairs, set up in 1997, forms part of the Ministry of Consumer Affairs, Food and Public Distribution and is responsible for the development of the consumer protection portfolio. It formulates policies, monitors availability of essential commodities, supports the consumer movement, oversees statutory bodies such as the Bureau of Indian Standards and enforces consumer protection, such as the prevention of unfair trade practices. India has a vibrant and inventive range of consumer associations to which the department responds.

In New Zealand and South Africa, consumer protection was directly administered from the relevant ministries until relatively recently. They have developed clearly identifiable agencies, Consumer Protection of New Zealand within the Ministry of Business Innovation and Employment and the National Consumer Commission in South Africa, as "institutions outside public service" performing many of the functions associated with consumer protection throughout the world, with competition going to a separate agency.

In Latin America, national agencies in Brazil and Chile have gradually developed high public profiles, their institutions now being quite mature. In Brazil, the Secretaria Nacional do Consumidor (SENACON) is a federal government agency under the Ministry of Justice. Its functions include receiving, collecting and disseminating information and advice to consumers, promoting consumer education, mounting investigations into consumer complaints and making recommendations to other government agencies about consumer protection. Under the terms of the Consumer Protection Code, which celebrated its 25<sup>th</sup> anniversary in 2015, SENACON coordinates the National Consumer Defence System, which includes provincial consumer agencies (the PROCONs, which carry out much of the work on individual cases), public defenders and the relevant ministries.<sup>51</sup>

<sup>47</sup> Consumers International, 2000, *Guidelines for Consumer Policy in Central and Eastern Europe*.

<sup>48</sup> Secretaria Nacional do consumidor (SENACON), 2015, *Código de Proteção e Defesa do Consumidor* (Ministerio de Justicia); L Rodrigues Maia Pinto, 2002, *Consumer Protection in Brazil: A General View* (George Washington University).

<sup>49</sup> EC/SOFRECO, 2007, *Final Report: Support to the Implementation of a Consumer Protection Law and Regime in Egypt*.

<sup>50</sup> EC, 1997, Consolidated version of the treaty establishing the European Community, Article 153, available at <http://www.lexnet.dk/law/download/treaties/Ect-1997.pdf>.

<sup>51</sup> SENACON, op. cit.



In France, the Direction générale de la concurrence, la consommation et la répression des fraudes (DGCCRF) is attached to the Ministry of the Economy and Finance and has an extensive network of offices in every *département* of France: 96 outlets in all. It has responsibility for the regulation of market competition (with powers to refer cases to the competition authority), the economic protection of consumers, notably by encouraging the development of fair commercial practices, the respect of consumer rights and product safety (including the European Rapid Alert system, RAPEX and the Food and Feed Safety Alerts, RASSF). It covers particular sectors such as transport, tourism and financial services. It acts as a policymaker and enforcer. Its high public profile generated four million online contacts in 2015.

In some former Soviet republics, consumer protection remains as a department or agency within ministries (typically trade or economy) and has a low profile within government. This is the case in Uzbekistan, Moldova, Belarus and Turkmenistan. In Moldova, an agency within the Ministry of Economy was formed in 2016.

## 2. Consultation mechanisms

As consumer protection has matured as a discipline, greater acceptance of consultation mechanisms has developed. For example, in Indonesia, the Directorate of Consumer Protection, a government agency within the Ministry of Trade since 1999, has promoted consumer forums (initiated originally by NGOs) in particular sectors involving consumer associations, where consumer grievances are aired publicly and solutions put forward.

Consultations can, of course, refer down within government as well as up from consumers. Some jurisdictions have set up consultative forums at very high levels.

In Japan, the Consumer Policy Council was set up under the Prime Minister's Office under the Consumer Protection Fundamental Act 1968. It is chaired by the prime minister and is comprised of ministers, all of whom have roles in the development of the government's consumer policy. The function of the council is to plan and draft the direction of the government's consumer policy and to promote related policy measures. The linked Quality-of-Life Policy Council, also housed within the Prime Minister's Cabinet Office, comprises experts in the field of consumer protection, namely scholars, representatives of consumer organizations and representatives of major industries. It studies and deliberates issues relating to consumer protection policy. As elsewhere, an executive national consumer statutory

body funded by the government and local consumer centres in all the prefectures and major cities and towns deals with consumer complaints, product testing, consumer education and information for consumers.

In Thailand, the Consumer Protection Board was established under the Consumer Protection Act 1979. It also comes under the office of the Prime Minister, who chairs the board. This structure is unusual in that it combines the highest level of ministerial function with executive responsibility. However, the actual functions are similar to those of many other consumer protection agencies, such as handling consumer complaints, publicizing information on goods and services that may be harmful to consumers, instituting legal proceedings relating to infringements of consumer rights, recognizing consumer associations and submitting opinions on policies and measures to the Council of Ministers. This last function is of course privileged by its location in the Prime Minister's office.

## 3. Operational autonomy

In recognition of the vulnerability of consumer protection faced with broader commercial and political forces, some countries have opted for the model of a statutory body, set up by law and designated with specific powers and functions for consumer protection and with a high degree of operational autonomy, often represented by a high-profile director general. These bodies tend to have a higher public profile than equivalent offices within ministries, even though they may have a formal attachment to a parent ministry.

In Mexico, the Procuraduria Federal del Consumidor (PROFECO) is the leading government agency in charge of protecting consumers, under the aegis of the Federal Attorney's office. It has the power to mediate disputes, investigate consumer complaints, order hearings, levy fines and do price-check inspections of merchants. It has had a presence in every one of the 31 states plus the capital since 1982. Operational autonomy has often been hugely complicated in practice by the national/local dichotomy. Policy is usually national but enforcement always has a local angle.

The location of responsibility for consumer protection became a matter of urgency after the collapse of communism in the late 1980s and early 1990s in Central and Eastern Europe, where new systems had to be developed rapidly as economies shifted towards a more market-based orientation. In these transitional economies, a tension soon developed between institutions based on local market inspectorates and high-level policy bodies, which tried to push towards greater reliance on market forces.

One possible resolution of these dilemmas was to rely on a single national body for market surveillance, as in Hungary in the 1990s, where the General Inspectorate for Consumer Protection carried out local market surveillance under central direction. This resembles the approach in France, where the DGCCRF (see above) carries out local market surveillance even though it is a national body. In contrast, in the United Kingdom of Great Britain and Northern Ireland local market surveillance is, traditionally, the job of the local elected municipalities through their trading standards officers (although they are currently developing a more central function). The application of local market surveillance by national bodies tends to reflect the tradition of public administration based on a prefectural system as in France and the Russian Federation. In contrast, the local government-based tradition, already mentioned in the United Kingdom of Great Britain and Northern Ireland, has developed in Poland in the form of strong local consumer ombudsmen. It is the name “ombudsman”, with its connotation of being on the side of the ordinary person, that has given a boost to the idea of the people’s watchdog. In this context it is worth noting that in Latin America, the ombudsman for public services is known as *El Defensor del Pueblo* (the defender of the people) and in some jurisdictions, notably in Ecuador, has become a major public figure in a relatively short period of time.

The development of the ombudsman concept originated in Sweden, where the consumer agency (Konsumentverket) is a government body whose director general is also the consumer ombudsman. The Konsumentverket is empowered to represent the consumer interest under various consumer protection laws. It supports and draws upon the work of local consumer advice centres across the country and administers the National Board for Consumer Complaints, a consumer redress agency. As in Poland, the evidence base represented by the local case work feeds up into national policy. The ombudsman concept is discussed further in chapter XI.

#### 4. The link with competition

Further challenges arise in relation to the benefit of separation or conjunction of responsibility over consumer protection on the one hand, and competition policy on the other. The approach to the latter taken by Poland and by some countries in the former Soviet Union, including the Russian Federation, Kazakhstan and Georgia, after the dramatic changes in that region was to set up an autonomous state anti-monopoly committee charged

both with competition policy and consumer protection.<sup>52</sup> In 1996, the Polish anti-monopoly office evolved into the Office of Competition and Consumer Protection. In contrast, the Russian Federation’s anti-monopoly committee separated from consumer protection, which was entrusted to an autonomous agency, Rozpotrebnadzor.<sup>53</sup> Kazakhstan followed the Russian Federation’s example when setting up its Committee on Consumer Protection in 2015 within the Ministry of National Economy, with competition under a separate body.

It is interesting then to observe that the convergence that took place in Poland in the 1990s is not unlike that in Australia, where the two dimensions of consumer protection and competition have been brought together. There are then instances of convergence and of separation, but the move towards higher public profile for agencies is steady, if not always smooth. The place of competition policy is discussed in chapter VII. Examples of some autonomous consumer protection bodies (with statutory powers taking in competition and consumer protection) in selected countries are described below.

The Australian Competition and Consumer Commission (ACCC) is an independent federal statutory authority, established in 1995 to administer the Trade Practices Act 1974 (now encompassed in the Competition and Consumer Act 2010) and other legislation promoting fair trading. The ACCC is the only national agency in Australia with responsibility for anti-competitive and unfair market practices, mergers or acquisitions of companies, product safety/liability and third party access to facilities of national significance, such as the telecoms network. Its consumer protection work complements that of state and territory consumer affairs agencies. Although its local presence is limited to offices in state capitals, it accepts complaints directly from consumers and has a very high public profile.

The Federal Trade Commission (FTC) is an independent agency of the Government of the United States of America established in 1915. The FTC’s mission is to protect consumers and promote competition. It uses three main divisions to fulfil its mandate – the Bureau of Consumer Protection, Competition and Economics – and enforces over 70 federal laws and regulations. The consumer protection authority, including consumer privacy and data security, protects consumers against

<sup>52</sup> For more in-depth discussion of this period, see T Timberg, 2002, The role of anti-monopoly committees in the former Soviet Union, *Demokratizatsiya: The Journal of Post-soviet Democratization* 5(2):291–297.

<sup>53</sup> Although Rozpotrebnadzor has a high public profile at national level, regional offices are (at the time of writing) housed within the agency responsible for food safety and public health.

unfair and deceptive or fraudulent business practices. The FTC's consumer protection actions include individual company and industry-wide investigations, administrative and federal court litigation, as well as rule-making proceedings. The FTC also takes complaints from the public, gives advice to consumers and to businesses and often obtains redress and/or refunds as a result of its actions. The agency also enforces federal antitrust (or competition) laws that prohibit anti-competitive mergers and other business practices that restrict competition and harm consumers. The Bureau of Economics provides economic analysis and support for consumer protection and anti-trust matters. The FTC has seven regional offices and an Office of Technological Research and Investigation, which provides technical expertise and researches the implications of technology and technical change for consumers.

Peru's Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual (INDECOPI) oversees a wide range of issues, including consumer protection, competition, the elimination of bureaucratic barrier measures (with a view to simplification), anti-dumping (applying the relevant WTO code) and intellectual property. It has the status of a "specialized public agency" attached to the office of the Prime Minister with "independent status of internal public law". It enjoys "functional, technical, economic, budgetary and administrative autonomy". Its independence in managing its resources gives it great possibilities for outreach. Since its establishment in 1992, it has developed a high public profile and is currently one of the best regarded state institutions in the country.<sup>54</sup>

The Chinese Consumer Association (CCA) is a generic quasi-governmental organization, with no individual consumer members, performing a public interest function. In 2014, under the terms of an amendment to the Chinese Consumer Protection Law (originally adopted in 1993), several significant modifications came into effect. The amendment characterizes the CCA as a "social organization" rather than an association. With this new legal status, the CCA is, for the first time, authorized by statute to be both funded by the Government and to be an active participant in the legislative process. Beside the dispute resolution functions stipulated by the former law, the CCA and its provincial branches have the power to bring class action litigation against behaviour considered detrimental to the public as consumers. The CCA is effectively a department of the State Administration for Industry and Commerce (SAIC). It carries responsibility for anti-monopoly enforcement, although its most public actions tend to be around enforcement of product safety.

## 5. Non-statutory public bodies

As described above, many ministerial agencies have managed to incorporate consumer feedback and consultation. As consumer protection has moved away from weights and measures and basic market surveillance to wider economic and social policy, a more flexible discourse has developed, one which has encompassed a wider range of public stakeholders and encouraged discussion in the media. Some such bodies have managed to achieve a high public profile and an outspoken style while being publicly funded. Such autonomous public bodies do not have statutory powers, but have the power to make policy recommendations, generally based on research often derived from complaints from the public.

Fiji's Consumer Council was established under the Consumer Council of Fiji Act 1976 as a statutory body funded by the Government. It has an advisory role and no enforcement powers. Among its functions are advising ministers, making recommendations to ministers, making representations to the Government or giving evidence at any investigation or inquiry, collecting, collating and disseminating information, advising and assisting consumers and supporting and maintaining legal proceedings contemplated or initiated by consumers. It has a very prominent public profile and campaigns on financial services and nutrition, for example. Its negotiations with banks regarding the development of codes of practice for consumer protection were particularly public.<sup>55</sup>

The Consumer Council of Hong Kong (China) (HKCC) was set up as a statutory body in 1974. It does not have enforcement powers. Its functions include collecting, receiving and disseminating information on goods, services and housing. It handles complaints through its network of local advice centres and gives advice to consumers including special services to visitors from mainland China. The council advises the Government of Hong Kong (China) or any relevant public office, for example the ministry responsible for energy policy, on which the Government of Hong Kong (China) carried out a major review in 2014–15, to which HKCC gave extensive evidence with high profile publicity in the press and on television.<sup>56</sup> The council encourages business and professional associations to establish codes of practice, which is especially important in Hong Kong (China) because of the absence of a Consumer Protection Act. It performed

<sup>54</sup> See <http://www.greatplacetowork.com.pe/storage/documents/suplemento-gptwperu-2014baja.pdf>.

<sup>55</sup> P Kumar, 2013, The case of Fiji: Irresponsible lending practices in consumer credit markets, in Consumers International, *Responsible Lending: An International Landscape*.

<sup>56</sup> HKCC, 2014, *Searching for New Directions; a Study of Hong Kong Electricity Market*.



a particularly important role during the financial crisis of 2008, giving advice to thousands of consumers. The sale of minibonds, for example, gave rise to some 20,000 consumer complaints and HKCC sponsored a legal action through its Consumer Legal Action Fund.<sup>57</sup>

## D. THE CHANGING SCOPE OF CONSUMER PROTECTION

Since around the turn of the millennium, sectoral regulators in the services area in particular, as opposed to consumer protection agencies, have taken on responsibility for the protection of consumers in their respective domains. The clearest examples are to be found in utility services such as water and energy, especially where ownership is in flux and regulators have powers to regulate private operators.

Two areas have seen particularly visible changes. First, in telecommunications, the erosion of the fixed line monopoly by the growth of mobile telephony has increasingly led to regulation by competition offices as the service becomes less and less a natural monopoly. Second, since the onset of the financial crisis, financial service regulators have been given greater powers and a stronger consumer focus as regulatory functions are divided up, separating prudential regulation from conduct regulation, notably in the United States of America and the United Kingdom of Great Britain and Northern Ireland.

However, there have been further evolutions driven by rapid changes in technology and attempts by governments to keep up. As telecoms becomes a multi-functional bundle of information and communication services rather than a simple communication device, offices of communication, such as OFCOM in the United Kingdom of Great Britain and Northern Ireland, are bringing telecommunications and other services such as broadband together. Furthermore, particularly in developing countries, financial services and telecommunications are also converging, due to the rapid development of mobile banking. This presents a dilemma for national policy as to whether regulation should be part of financial or communication regulation. In India and South Africa, mobile money is seen as part of the Central Bank functions. In Kenya it has largely operated under self-regulation. Concerns are now emerging in Kenya about the dominance of joint telecommunications/financial service providers, a concern which is even more pronounced in neighbouring Somalia

where mobile telephony is one of the few vectors of communication that functions in commercial terms.

Such changes pose huge challenges for national agencies and bodies such as the G20 and the Financial Stability Board that have been attempting to develop international guidelines. There have been attempts to approach the need for consumer protection by appealing directly to companies through international guidelines such as the OECD Guidelines for Multi-National Enterprises and ISO 26000 on Social Responsibility, as discussed in chapter VI on business conduct.

## E. CONCLUSION

There is no single best model for consumer protection agencies, as history and geography are legitimate influences on structures. Nevertheless, certain trends can be discerned. One is that the autonomous functioning of a consumer protection agency allows it to develop a high public profile which brings consumers into contact and allows their experience to bear directly on policy. In this regard, a local presence of some kind is a big advantage, as many markets remain local, especially for the poor, despite the sophistication of modern electronic commercial relations. It is interesting to note that many of the agencies located within ministries have high public profiles, as do others that are described above which have a more autonomous position in formal or legal terms. The precise form of the institutional architecture does not seem to be the determining factor in public recognition; what matters is that such recognition is possible.

The second trend is that while the partnering of competition and consumer protection is variable, the long-term logic of technological change and commercial development suggests that consumer protection is likely to move upstream to structural matters and not focus only on retail transactions. The development of sectoral regulation suggests an implicit recognition of the structural dimension of consumer protection on an industry-by-industry basis. As the vectors of communication (e-commerce, mobile commerce) become ever more powerful, a converged approach incorporating competition and structure will become indispensable.

One source of encouragement is the willingness of consumer protection agencies to experiment with a rich variety of methods of communication with consumers, aided by technological development, and to receive feedback from consumers both individually and collectively.

<sup>57</sup> Connie Lau, 2013, presentation to International Forum on Justice and Consumer Rights (Wuhan, China).

## V. Consumer associations

### A. CONSUMER ASSOCIATIONS IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The UNGCP make repeated reference to the role of consumer associations, including the facilitation of their development by governments, as set out in objective 1e: “to facilitate the development of independent consumer groups” (which could be deemed to include financial support). Guideline 5h clearly sets out as a legitimate need the “freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them”. There is specific reference to their work in monitoring “adverse practices” (guideline 21), “misleading environmental claims” (guideline 30), their involvement in consumer education (guideline 42), in particular environmental education (guideline 45) and development of industry codes (guideline 31). The reference in guideline 35 includes the need for governments to “encourage and ensure the availability of facilities to test and certify quality and performance of essential goods and services”, implying the possible inclusion of consumer testing bodies, although this is not spelt out.

As a result of the 2015 revision, the UNGCP now refer to the role of consumer associations in dispute resolution and redress mechanisms (guideline 41), and extend the reference to “community participation” in utilities to the energy sector (guideline 76). In short, the UNGCP confirm the appropriateness of participation of civil society participants in consumer protection.

### B. CONSUMER ASSOCIATIONS IN THE MODERN ECONOMY

As seen in chapter III, the involvement of consumer associations in consumer protection is now widely accepted. They have been given the mandate to represent the consumer interest in:

- National constitutions
- Consumer protection statutes
- National consumer policy documents
- Consumer redress mechanisms such as consumer courts and alternative dispute resolution mechanisms
- Industry mediation bodies
- Industry regulatory processes
- Codes of practice
- National-level government-sponsored committees

Such recognition has not always been forthcoming from authorities, although historically, consumer movements were promoted by states when faced with the need to regulate rationing of food and other resources. For example, the First World War saw consumer associations develop across Central Europe in response to the vicissitudes of that period.

State sponsorship continues today in different forms, sometimes as financial support to autonomous bodies, some of which are discussed below, but sometimes through a more direct form of promotion, as in China, where consumers have been encouraged to bring complaints forward and have been offered financial inducements to do so through compensation awards. The Chinese Consumer Association thus acts as what Frank Trentmann describes as “the Government’s watchdog, ... local whistle blower and people’s lawyer”.<sup>58</sup>

Throughout history there have been spontaneous consumer protests around food in particular. Such protests provided the sparks for both the French and Russian revolutions, for example.<sup>59</sup> The more distinct notion of consumer rights could be said to have followed on from industrialization with its associated specialization separating producers from consumers. In the early years, the movement took the form of consumer cooperative shops in such varied locations as industrial Great Britain in the mid-nineteenth century, and Germany, France and Italy a little later. Japan too had its adherents to the cooperative model, there having been instances of cooperative financial institutions as early as the thirteenth century.<sup>60</sup>

In the United States of America and Argentina, another model developed based on consumer and farmer

<sup>58</sup> F Trentmann, 2016, *Empire of Things: How We Became a World of Consumers From the Fifteenth Century to the Twenty-First* (Allen Lane).

<sup>59</sup> S Schama, 1989, *Citizens* (Penguin) in P Bushkovitch, 2012, *A Concise History of Russia* (Cambridge).

<sup>60</sup> F Trentmann, op. cit.

cooperatives for the development of public utilities such as water and electricity (some of which are still in operation).<sup>61</sup> Evoking such history perhaps, guideline 36b asks Member States, with regard to “distribution facilities for essential goods and services”, to “consider encouraging the establishment of consumer co-operatives and related trading activities, ... especially in rural areas”. More recently, similar public service cooperatives have developed in rural Bangladesh, the Philippines and Sri Lanka, and some consumer associations have mounted consumer cooperatives, for example in Mumbai.<sup>62</sup>

Consumers Union of the United States of America was established during the 1930s.<sup>63</sup> Its consumer reports and associated newsletter are read by around 7 million subscribers in total. Professor Robert Mayer has pointed to the robust health of the consumer movement in the United States of America, noting that in 2012 there were eight associations with annual revenues in excess of US\$ 2 million.<sup>64</sup> Consumers Union had revenues of US\$ 250 million and three others had budgets in excess of US\$ 8 million. This model of independently published, detailed technical assessment of consumer products is a highly successful North American export to the rest of the world. Consumers Association of the United Kingdom of Great Britain and Northern Ireland, with initial financial assistance from their North American colleagues, grew during the 1950s to develop a mass membership based on its product testing. Its magazine *Which* reached one million members at its peak. The highest level of market penetration in the world was reached in Belgium and the Netherlands, which have experienced the highest percentages of households taking product testing magazines. In due course, the associations publishing product testing magazines were financed by subscriptions to their publications, which operated on commercial lines, albeit with a non-profit making status. Some product testing magazines were launched by governments in Norway, Sweden and Austria and receive both subscriptions and public subsidies. Some consumer associations were built up with the active participation of labour unions and

tenants associations, France being an example in this respect.

Testing products is intrinsically expensive, and so where products are available in international markets it makes sense for consumer associations to pool resources. Following a period of informal and bilateral cooperation between associations, some of the larger-budget testing organizations came together in 1990 to form International Consumer Research and Testing (ICRT), a global consortium of 35 consumer organizations in 33 countries dedicated to carrying out joint research and testing in the consumer interest.<sup>65</sup> ICRT runs more than 50 large-scale joint tests and numerous smaller joint tests each year and can reduce significantly the costs to smaller organizations as a result of resource pooling.

In the transitional economies of Central and Eastern Europe, the expense involved in testing and the more volatile conditions have made it very difficult to establish and sustain product-testing magazines on a stable basis, even in large markets such as the Russian Federation. Consumer associations in this region have often drawn their historic legitimacy from local “clubs”, sometimes based around home economics associations, giving the associations a direct contact with the general public which preceded the arrival of the market economy. The same link with local associations is to be found in the Chinese Consumers Association, where by 2010, over 3,250 consumer associations at county level, plus 156,000 local associations, accepted some 12.5 million consumer complaints.<sup>66</sup>

The development of a consumer “movement” worldwide can be traced by observing the spread of membership of Consumers International (CI). The initiators of CI in 1960 were five associations from market economies: the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia, Belgium and the Netherlands. The first membership consisted of 16 countries. By the 1980s, over 50 countries were represented in the membership. During the late twentieth century, consumer associations took off in Asia, Africa and Latin America and membership reached 225 associations from 115 countries by the year 2000, a level at which it has remained approximately ever since.

Recent years have seen a critique of the development of “consumerism” associated with “globalization”, and the idea of ethical consumption has been seen by

<sup>61</sup> F Ruiz-Mier and M van Ginneken, 2006, *Consumer Cooperatives: An Alternative Institutional Model for Delivery of Urban Water Supply and Sanitation Services?* Water Supply and Sanitation Working Note No. 5 (Washington DC, World Bank).

<sup>62</sup> S Ochieng, 2008, *Enhancing Access to Sustainable Energy in Developing Countries* (Seoul, ISO/COPOLCO).

<sup>63</sup> For a more detailed history and analysis of the consumer movement in the United States of America, see R Mayer and R Herrmann, 1997, *Encyclopaedia of the Consumer Movement* and L Cohen, 2010, Colston E. Warne lecture: Is it time for another round of consumer protection? The lessons of twentieth century, *Journal of Consumer Affairs*, 44(1):234–246.

<sup>64</sup> R Mayer, 2012, The US consumer movement: A new era amid old challenges, Colston Warne lecture.

<sup>65</sup> ICRT, 2016, *International Organizations*.

<sup>66</sup> Y Yu and R Simpson, 2013, International Forum on Justice and Consumer Rights (University of Wuhan, China).

many as a way to harness consumer power to ethical ends, such as fair environmental and labour standards. In fact, ethical consumer debates have a long history being associated, for example, with the boycotts of “slave sugar” during the nineteenth century. Today the global debates continue, but expressions of concern by developed countries about working and environmental conditions in developing countries are viewed with great ambivalence by the latter, especially when raised in the context of trade disputes and trade negotiations about market access. Associations could have an important role to play here. Ethical issues may be raised by non-governmental organizations (NGOs) and considered to be in good faith, while raising the same issues may be seen as thinly disguised protectionism when put forward by trade negotiators.

### C. THE FUNCTIONS OF CONSUMER ASSOCIATIONS

Drawing on the above histories, the idea that consumer associations have a role in consumer protection is premised on the following principles:

- There is a need for an independent actor which is non-party political and non-commercial to give voice to the issues that impact on consumers
- There is a need for the views of the under-represented, including the inarticulate and disadvantaged, to be heard in order to address the disparity in bargaining power, knowledge and resources between consumers and business
- There is a need for associations to have a wide membership base and command popular support to represent the specific interests of consumers<sup>67</sup>
- There is a need for participatory decision-making, consultation and consumer associations which can form a part of the democratic process

Depending on their origin and the environment in which they operate, as discussed above, consumer associations have played a variety of roles in serving the consumer interest. These could be summed up as:

- a) Providing independent information (including test or survey results) on products and services as well as educational activities, to enable

consumers to make informed choices and to consume responsibly.

- b) Organizing campaigns on specific issues to enable consumers collectively to voice their views and demonstrate their strength. This varies from organizing lobbies of parliament and coordinated press campaigns, to signature/letter-writing campaigns, even boycotts and rallies.<sup>68</sup>
- c) Advising and acting on individual consumer complaints, providing advice and obtaining redress; this may extend from participation in dispute resolution bodies to engaging in public interest litigation on behalf of consumers.
- d) Engaging in dialogue with government and business to inform, persuade or negotiate on behalf of consumers. This may include, for example, organizing workshops and seminars on particular issues to highlight alternative views on these issues to policymakers, business and the media.
- e) Representing consumer views to official committees such as those organized by utility regulators and enquiries around the crisis in financial services.
- f) Conducting surveys and research to study problems faced by consumers including the impact of government policies on consumers and highlighting the findings to consumers, policymakers and the media.

There are vast differences in the ways consumer associations operate, often depending on the economic status of the country. In economies where the consuming public is relatively well-educated and well-resourced, comparative testing and providing sound information to consumers has been their main role. Millions of consumers subscribe to their magazines and to the online services that are now overtaking them. In developing countries, consumer associations have taken a more “basic needs approach” and may be involved at the local level in educating and empowering consumers regarding their rights while advocating and representing consumer issues at the national level. Interestingly, there is a convergence of basic needs and richer consumers as choice websites proliferate for energy services, which are becoming a major service provided by associations in Europe to their members. There

<sup>67</sup> Although care needs to be taken not to dismiss new associations embarking on their development. This issue is discussed below.

<sup>68</sup> Twenty-four hour telephone boycotts have been notably successful in gaining attention in locations as varied as Peru, Lebanon and Portugal.



are echoes of past consumer cooperatives in this concept of pooling resources to provide a service, although one of the historic problems of cooperatives for public policy is how to help non-members who often include the poorest.

#### D. THE INDEPENDENCE OF CONSUMER ASSOCIATIONS

A key factor to ensuring the credibility of consumer associations is independence, both from businesses and party-political causes.<sup>69</sup>

The financial viability of consumer organizations may pose difficulties when it comes to retaining their independent stance. While many consumer associations in developed countries have a reasonably strong financial footing through sales of their magazines, which proved to be remarkably resilient during the financial crisis,<sup>70</sup> that is not the case in developing countries where consumer associations do not have as large a subscription base to depend on. The bulk of their funding is frequently from external sources and they are therefore vulnerable to restrictions applied by donor agencies (which may include their own governments). This is a balancing exercise that consumer associations constantly have to face.

#### E. THE REPRESENTATIVENESS OF CONSUMER ASSOCIATIONS

Across most of the world, consumer associations no longer have to fight for recognition to represent consumers. It is now a right that is legally recognized and protected in many countries, though not all, as well as by UNGCP guidelines 1e and 5h. This mandate must, however, be exercised with responsibility. The credibility of the whole organization is at stake when a consumer association is called upon to represent the consumer interest. A number of points need to be taken into account when acting in a representative capacity.

##### 1. Representative base

Consultation is an essential feature of true and effective representation. The absence of a significant membership and of established consultation

mechanisms can compromise the representative role of consumer associations. Can consumer organizations with limited membership truly claim to represent the consumer interest? Can consumer associations be more successful in setting priorities, identifying regulatory targets and implementing strategies than public agencies? Many strive to be representative. To be so, it helps to have a broad membership base and consultation mechanisms with the membership, but some caution is needed when it comes to recognition. Small organizations will have difficulty in securing a representative role when starting out, especially when articulating a response to an issue which may have developed rapidly, for example in response to a public health emergency.

##### 2. Competing organizations

In some countries, there are many consumer associations competing and claiming to be the legitimate representatives of the consumer movement. Who decides who will represent the consumer interest? In some countries, regulators decide which one they will recognize and fund, thereby conferring legitimacy. Consequently, there is the risk of “capture” of the association, which then feels bound to ensure that the consumer view is “acceptable” to the regulatory authorities that have selected them. The fear is that these groups alter their operational mode to remain “legitimate” in the eyes of their governments. Conversely, groups that are critical of, or distrusted by, government agencies often have difficulty in gaining access to information and in being included in the consultation process. Such exclusion narrows the policymaking process and denies the expression of a diversity of views.

##### 3. Competing interests

Consumer groups attempt to represent the interests of consumers, but any individual action rarely, if ever, represents the interest of all consumers. Indeed, the conflicting interests of various categories of consumers (be they distinguished by nationality, ethnicity, locality, employment, gender, age or income) may mean choosing between, or at least prioritizing, the interests to be represented. A growing division relates to educational attainment. As ever more complex products, for example financial services, are sold online, including by mobile phone, the risks to consumers with limited literacy or numeracy increase accordingly. Choice-enhancing remedies and actions that make information more readily available to consumers are likely to benefit middle- and upper-income consumers more than others. Indeed, the risk is that they may even act to the detriment of lower-

<sup>69</sup> Article 12.1 of the Constitution of Consumers International indicates the independent role expected of consumer associations.

<sup>70</sup> The use of many consumer association services rose during the financial crisis for obvious reasons, but the extent to which this translated into membership has not been systematically researched.

income consumers. This issue is explored further in chapter XV on public utilities.

The key point to bear in mind is that the consumer interest is not monolithic. The conflicts may be quite sharp as, for example, between households that are already connected to electricity and water grids (who may benefit from keeping tariffs down) and those who are not yet connected (for whom the key issue is connection charges). In this context, the interests of non-consumers (i.e. the non-connected) will be ignored if only the interests of the existing customers of the services are taken into account.

#### 4. Quality and competence

The range and complexity of consumer issues have increased over the years and consumer representatives have to marshal the relevant expertise if they are to adequately represent the consumer interest.

The problem is especially acute for consumer groups that lack the resources to undertake or commission research or have limited access to information, as is often the case with consumer groups in poorer countries. However, that should not be taken to mean that consumers cannot form associations until they have substantial financial resources. Some very effective and courageous consumer NGOs have formed as a result of frustration about specific and pressing issues that did not require (at least not initially) fully worked out scientific dossiers to address. Cases in point have arisen from lack of access to essential services or worries about safety, for example, the work of MAMA '86, the association of Ukrainian women protesting against the lack of transparency of information after the Chernobyl disaster in 1988 and their concerns for safety of the water supply.<sup>71</sup> In 2006–2007, the Association of Energy Consumers in Cameroon, Réseau associatif des consommateurs de l'énergie (RACE), protested against the lack of access to electricity supply despite reassurances that were given when a concession was granted to supply power to the aluminium smelting industry.<sup>72</sup> It is worth noting that such movements often arise in response to single issues and associations cannot be expected to cope immediately with the full breadth of the consumer horizon, a scope which even the best resourced organizations have difficulty in covering.

<sup>71</sup> See M Muller, M van Ginneken and R Simpson, 2008, *Ways to Improve Water Services by Making Utilities More Accountable to Their Users* (World Bank).

<sup>72</sup> RACE, 2008, *Energie Info, bulletin bimestriel d'information et de liaison des consommateurs de l'énergie*.

#### 5. Conflicts of interest and finance

A complex issue regarding the representative role of consumer organizations is whether consumer representatives should accept payment for their representation. Financing from either industry or government poses obvious problems of independence. There are various ways in which these dilemmas have been addressed since the last revision of this manual. As discussed in chapter IV, some publicly funded consumer bodies have managed to maintain a high profile and autonomy in policymaking. One example of a system that could help resolve the issue of independence is the development of industry-financed mediation and representation services, possibly incorporating the above-mentioned representatives, financed through a general levy paid into a standing fund, so that there is not a direct link between a specific company and a specific consumer body. This can be funded by a small fraction of consumer utility bills, as has been customary in the cases of state regulatory commissions for energy in the United States of America and in Canadian provinces to fund consumer representation during rate hearings.<sup>73</sup> Another approach in the former Soviet Union is for NGOs to be financed from fines against businesses found to be in violation of consumer protection law.<sup>74</sup>

Such procedures could be strengthened by the recognition, sometimes in statute, of the right of consumer associations to be represented when important regulatory decisions are to be reached and maybe to impose a duty to consult on regulators, but stopping short of making the consumer representatives members of the regulatory board. When board membership implies participation in decisions while bound by confidentiality, this prevents consumer representatives from sharing information with the people they are representing.

Case-by-case individual representation has also been enabled by a variety of sources. These have included a proportion of fines being used to fund consumer associations. While the award of such funds may be independent of the protagonists, one problem could be that it reduces incentives for the association to adapt to and embrace alternative dispute resolution mechanisms. At the very least, consumer associations would expect court expenses to be met if they are to represent consumers. In several jurisdictions, this has been a longstanding practice, such as in Eastern and Central Europe.

<sup>73</sup> M Lazzarini, 2004, *Improving utilities*, guest address to the World Bank.

<sup>74</sup> At the time of writing in Uzbekistan, Moldova and Belarus.



## F. CONCLUSION

Chapter III drew attention to the breaking down of barriers between consumer protection agencies and associations, as the former have become more consultation-based and open to consumer opinion. In some cases this is enshrined in treaties, such as the CARICOM treaty recognising the Caribbean Consumer Council.<sup>75</sup> In turn, consumer associations are undergoing an equivalent shift towards assuming responsibilities in the public arena. They have increasingly been granted locus standi (legal standing) in the courts. In the European Union, they have for some time been able to seek injunctions in the general consumer interest to prevent actions by traders which are illegal under relevant consumer protection directives.<sup>76</sup> Professor Fernandez Arroyo reported in 2012 that in the European Union, the German, Spanish, French, Greek, Italian and Slovenian systems allowed for consumer interests to be represented before the courts by a consumer association “distinct from the consumers themselves”, and that the same was also true of Brazil.<sup>77</sup> In some European Union member states, consumer associations play a role in the enforcement of consumer protection law alongside public bodies. For example, the German Verbraucherzentralen (consumer advice centres) can act alongside business associations. The United Kingdom of Great Britain and Northern Ireland’s “super-complaint” mechanism has been used by designated consumer associations to trigger official investigations, to considerable effect. The longer-term trend has thus been for consensus to emerge around the input of consumer associations.

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<sup>75</sup> Treaty of Chaguaramas, 2001. See also P McClaren, 2011, presentation to Ecole d’été en droit de la consommation, Université du Québec à Montréal.

<sup>76</sup> European Union Directive 98/27, articles 1-3, for example.

<sup>77</sup> D Fernandez Arroyo, 2012, Consumer protection in international private relations: General report, in C Lima Marques et al, *The Global Financial Crisis and the Need for Consumer Regulation* (International Law Association).

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## VI. Business conduct

### A. BUSINESS CONDUCT IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The objectives of the UNGCP include “encourag[ing] high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers” (guideline 1c), thus addressing the essence of producer-consumer relations.

The revised UNGCP contain a substantial new section IV on “principles for good business practices” (guideline 11). It sets out principles as “benchmarks” for good practice online and offline. Most of the content of this section is also dealt with elsewhere in the UNGCP and there is overlap of substance with section V.A, “national policies for consumer protection”, which is directed at governments and whose first subparagraph advocates the encouragement of good business practices

#### Box 1: UNGCP section IV principles for good business practices

11. The principles that establish benchmarks for good business practice for conducting online and offline commercial activities with consumers are as follows:

##### a) Fair and equitable treatment

Businesses should deal fairly and honestly with consumers at all stages of their relationship, so that it is an integral part of the business culture. Businesses should avoid practices that harm consumers, particularly with respect to vulnerable and disadvantaged consumers.

(see UNGCP: section V.B on physical safety; UNCTAD manual: chapter IX on product safety and liability)

##### b) Commercial behaviour

Businesses should not subject consumers to illegal, unethical, discriminatory or deceptive practices, such as abusive marketing tactics, abusive debt collection or other improper behaviour that may pose unnecessary risks or harm consumers. Businesses and their authorized agents should have due regard for the interests of consumers and responsibility for upholding consumer protection as an objective.

(see UNGCP: section V.J on financial services; UNCTAD manual: chapter XIV on financial services).

##### c) Disclosure and transparency

Businesses should provide complete, accurate and not misleading information regarding goods and services, terms, conditions, applicable fees and final costs to enable consumers to take informed decisions. Business should ensure easy access to this information, especially to the key terms and conditions, regardless of the means of technology used. (see UNGCP: section V.C on promotion and protection of consumers’ economic interests and section V.J on financial services; UNCTAD manual: chapter X on consumer information and education).

##### d) Education and raising awareness

Businesses should, as appropriate, develop programmes and mechanisms to assist consumers to develop the knowledge and skills necessary to understand risks, including financial risks, to take informed decisions and to access competent and professional advice and assistance, preferably from an independent third party, when needed.

(see UNGCP: section G on education and information programmes, especially guideline 46; UNCTAD manual: chapter X on consumer information and education).

##### e) Protection of privacy

Businesses should protect consumers’ privacy through a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of their personal data.

(see UNGCP: Guidelines 5k and 66g; UNCTAD manual: chapter XIII on privacy and data protection).

##### f) Consumer complaints and disputes

Businesses should make available complaints handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution without unnecessary cost or burden. Businesses should consider subscribing to domestic and international standards, pertaining to internal complaints handling, alternative dispute resolution services, and customer satisfaction codes.

(see UNGCP: section V.F on dispute resolution and redress; UNCTAD manual: chapter XI on consumer dispute resolution and redress).

Source: UNCTAD.

(guideline 14a). The significance of the new section IV lies in the fact that it is explicitly addressed towards business rather than government, as in previous versions of the UNGCP. The application of the UNGCP to state-owned enterprises under guideline 2 is also significant, as it explicitly binds states' commercial activities to consumer protection principles.

The text is set out in full in box 1 and the relevant associated sections of the UNGCP and of the manual are indicated.

With the notable exception of privacy, many of the new principles in guideline 11 were covered, or at least touched upon, in the preceding version of the UNGCP, albeit scattered in different sections, in particular section V.C on the "promotion and protection of consumers' economic interests". Apart from the above new section, business conduct is also addressed in guideline 9, which restates that "all enterprises should obey the relevant laws and regulations of the countries in which they do business". There are other relevant guidelines: a) guideline 18 refers to the obligation for hazard notification; b) guideline 25 deals with spare parts and after sales service; c) guidelines 26 and 27 go into greater detail on the principles set out in section IV; d) section V.F on dispute resolution and redress fleshes out the content of guideline 11f reproduced in box 1; e) guideline 46 encourages business to take part in consumer education and information programs; f) guideline 50 states that "business has a responsibility for promoting sustainable consumption through the design, production and distribution of goods and services"; and finally g) business is encouraged throughout section H to take part in the general promotion of sustainable consumption.

The UNGCP broach issues of self-regulation in guideline 31: "Member States should, within their own national context, encourage the formulation and implementation by business, in cooperation with consumer organizations, of codes of marketing and other business practices to ensure adequate consumer protection. Voluntary agreements may also be established jointly by business, consumer organizations and other interested parties. These codes should receive adequate publicity." This issue is discussed later in this chapter.

The UNCTAD 2013 survey on the implementation of the UNGCP reports briefly on self-regulation codes and agreements, noting that they have been promoted by consumer protection agencies and adopted by the private sector. These include self-regulation of advertising in Colombia and of marketing of cosmetics, food and drink to children in Mexico. As chapter X discusses, the United Kingdom of Great Britain and Northern Ireland

relies heavily on self-regulation for advertising, including sales promotion and direct marketing.

In Switzerland, self-regulation has been entirely privately initiated and is reported by UNCTAD as yielding very satisfactory results.<sup>78</sup> Although Swiss law does not mandate private codes of marketing or other business practices, the marketing sector has formulated its own, which is based on the Federal Act against Unfair Competition. If a business violates this code, a consumer can file a complaint at a private commission, which will decide whether the code has been violated. This commission is the executive body of the Swiss foundation for fair business practices whose members are the principal private organizations and associations in the Swiss marketing sector.<sup>79</sup>

## B. CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility (CSR) is about good corporate citizenship. It covers a range of issues such as human rights and environmental matters that go beyond transactions between consumers and business. Interest in CSR has intensified since the publication of the last revision of this manual, resulting in important publications such as ISO 26000 Guidance Standard on Social Responsibility<sup>80</sup> and the OECD guidelines for multinational enterprises.<sup>81</sup>

However, the notion of CSR is not new. There were "model employers" in nineteenth century Europe, which were preceded by the New Lanark model village factories of Robert Owen in Scotland, a utopian project later transplanted to United States of America. The 1920s saw the development of the concept of socially responsible investment, which has also experienced a renaissance in recent years. Chapter V already mentioned how the consumer cooperative movement developed in Europe during the nineteenth century.<sup>82</sup> Industrial cooperatives are still widespread in the Basque country, to take a well-known example, and to this day, cooperatives are recognized by the European Union as speaking for consumers.

<sup>78</sup> UNCTAD, 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection 1985–2013*, note by UNCTAD secretariat.

<sup>79</sup> See <http://www.lauterkeit.chapter/komm1F.htm>.

<sup>80</sup> ISO 26000, 2010, *Guidance on Social Responsibility* (reviewed and confirmed in 2014). ISO 26000 is not limited to corporations but is also aimed at "organizations" including governments.

<sup>81</sup> OECD, 2011, *Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*.

<sup>82</sup> F Trentmann, 2016, *Empire of Things* (Allen Lane).

The notion of CSR taps deeper roots than modern Western business concepts. The 2016 *tour d'horizon* by Christopher Hodges draws upon Rousseau's social contract and John Rawls' corporate citizenship.<sup>83</sup> The concept of CSR is spreading in India, taking in elements of Gandhian philosophy and its principle of "trusteeship", the idea that citizens enjoy "delegated ownership" of the world. Laxmitant Sharma argues that the duty of philanthropy "correlates to the concept of CSR" while still acting as a driver for growth and development of new markets.<sup>84</sup>

## 1. European Union definitions of corporate social responsibility

In its 2011 Communication, the European Commission put forward a simplified definition of CSR as "the responsibility of enterprises for their impacts on society" and outlined what an enterprise should do to meet that responsibility "over and above their legal obligations".<sup>85</sup> Its previous definition was "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".<sup>86</sup> Some express disappointment at the apparent shift of emphasis away from the voluntary nature of CSR under the new definition, but the more succinct later definition is consistent with internationally recognized CSR principles and guidelines, such as OECD<sup>87</sup> and ISO documents. CSR was not envisaged by the European Union as limited to goods acquired through retail purchases, but as extending to services including public services.<sup>88</sup>

## 2. ISO 26000 guidance on social responsibility

In 2002, ISO's Consumer Policy Committee put forward a proposal for a ground-breaking standard on CSR. The negotiation process attracted enormous interest:

one meeting had 400 participants. 70 countries were involved, some 80 consumer experts (including national delegations), 30 liaison organizations and six stakeholder groups. ISO 26000 was published in November 2010.<sup>89</sup>

This was the first time that consumer issues were recognized by ISO as a "core issue" in social responsibility terms, but it is important to recognize that ISO 26000 covers a wider canvas. The following are the core issues:

- Organizational governance
- Human rights
- Labour
- Environment
- Fair operating practices
- Consumer issues
- Community involvement and development

ISO 26000 is not a "certifiable" standard. That is to say it does not have precise quantifiable standards that can be measured and against which enterprises can be "passed" or "failed". It is a guidance standard, developed by consensus in the committee. Since it does not contain precise targets (in contrast to food standards, for example) it cannot amount to a barrier to trade: no government can ban imports of a product if the enterprise does not follow ISO 26000 in its production processes.<sup>90</sup> ISO, anticipating potential misunderstandings on the nature of the new standard, is quite explicit about this:

ISO 26000 is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offer to certify, or claims to be certified, to ISO 26000 would be a misrepresentation of the intent and purpose and a misuse of this international standard. As ISO 26000 does not contain requirements, any such certification would not be a demonstration of conformity with this international standard.<sup>91</sup>

Turning to the chapter that deals with consumer issues, ISO 26000 drew upon the UNGCP as a

<sup>83</sup> C Hodges, 2016, *Law and Corporate Behaviour* (Hart); J Rawls, 1971, *A Theory of Justice* (Harvard); A Sen, 2009, *The Idea of Justice* (Allen Lane).

<sup>84</sup> L Sharma, 2015, Relevance of Gandhian Ideology: Philanthropy to CSR, *International Research Journal of Humanities, Language and Literature* 2(3). See also AV Joseph, 2009, Successful Examples of CSR, *Indian Journal of Industrial Relations* 44(3).

<sup>85</sup> EC, 2011, *A Renewed European Union Strategy 2011-14 for Corporate Social Responsibility*, communication from the Commission (October 25).

<sup>86</sup> EC, 2011, *Corporate Social Responsibility: A New Definition, A New Agenda for Action*, Memo/11/730 (October 25).

<sup>87</sup> OECD, 2011, *Guidelines for Multinational Enterprises*.

<sup>88</sup> J Knopf et al., 2011, *CSR Compendium: Public Policies in the European Union* (Adelphi).

<sup>89</sup> J Vitt, 2011, Consumers care: Access to information for more sustainable markets, *ISO Focus* (March 3); S Homer, 2007, ISO WG social responsibility, presentation to ISO COPOCLCO/DEVCO training workshop on social responsibility (Vienna).

<sup>90</sup> Nevertheless, several national standards bodies have developed certifiable standards for their jurisdictions, for example Denmark and the Netherlands.

<sup>91</sup> ISO, 2010, *Discovering ISO 26000*.

framework. In addition to drawing upon the “legitimate needs” guideline of the UNGCP, four principles were put forward in the standard. These are:

- Respect for the right to privacy (drawn from the universal declaration of human rights; discussed in chapter XII of this manual)
- The precautionary approach, drawn from the Rio declaration on Environment and Development (discussed in chapter IX)
- Promotion of gender equality and the empowerment of women, drawn from United Nations Universal Declaration of Human Rights
- Promotion of universal design, intended to enable usage of products by all, especially for disabled people

Building on the totality of the principles listed above, the specific issues identified by the consumer chapter are:

- Fair marketing, factual and unbiased information and fair contractual practices
- Protecting consumers' health and safety
- Sustainable consumption
- Consumer service, support and complaint and dispute resolution
- Consumer data protection and privacy
- Access to essential services
- Education and awareness

These are clearly congruent with the UNGCP but at the time, the UNGCP did not include privacy or access to essential goods and services, and so in that sense, ISO 26000 was ahead of the curve, and vindicated by the inclusion of these two elements in the revised UNGCP.

### 3. OECD Guidelines for Multinational Enterprises

The OECD's revised Guidelines for Multinational Enterprises were agreed in 2011, but did not include reference to ISO 26000. They provide guidance on human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, consumer interests, science and technology, competition and taxation. Consumer issues are common to both guidelines, as are human rights, environment and employment matters. One might say that broadly speaking, OECD describes principles and policies, while ISO offers detailed guidance on practices.

### 4. Is corporate social responsibility making progress?

There is no doubt that CSR activity has expanded. Among multinational enterprises (MNEs), annual global reporting output increased from close to zero in 1992, to around 4,000 in 2010.<sup>92</sup> Some 600 European Union enterprises had signed the United Nations Global Compact (on human rights, environment and labour) by 2006, some 1,900 by 2011. By 2006, 270 MNEs had issued sustainability reports; 850 by 2011.<sup>93</sup> However, there is still a long way to go as there are approximately 82,000 MNEs in existence today.

National initiatives in the European Union, reported by the CSR Compendium, have included a Danish action plan, Spanish legislation establishing transparency requirements and performance indicators in cooperation with the state council on CSR. In Scandinavia and the Netherlands, heavy emphasis has been placed on the supply chain, thus connecting with retail consumers. The Dutch Social and Economic Council launched the International CSR Initiative, calling on Dutch trade and industry to actively pursue responsible supply chain practices, based on ILO, OECD and International Chambers of Commerce (ICC) recommendations. Similar countries may take different approaches. A national prize for quality in the Czech Republic was amended to include the criterion of responsible supply chain selection; in Slovakia the Via Bona awards were made by the Pontis Foundation for projects promoting business transparency beyond legal requirements.<sup>94</sup>

There is a recurrent criticism of the slow pace at which states expose their own services or state-owned enterprises to CSR concepts, although Spain has moved in that direction. There has been widespread discussion on introducing mandatory requirements for CSR reporting and the European consumer federation, the Bureau Européen des Unions de Consommateurs (BEUC), has urged the European Union to move in this direction.<sup>95</sup>

A 2012 report on a survey of Fortune 500 companies in the United States of America

<sup>92</sup> Knopf et al, op. cit.

<sup>93</sup> EC COM 681 final, op. cit.; United Nations Global Compact derives from *Universal Declaration on Human Rights*; *ILO Declaration on Fundamental Principles and Rights at Work*; *Rio Declaration on Environment and Development* and *United Nations Convention Against Corruption*.

<sup>94</sup> Knopf et al, op. cit.

<sup>95</sup> J Vitt and U Pachi, 2010, Towards a European CSR framework, reflection paper for the multi-stakeholder forum on CSR.



recorded that, around the turn of the millennium, only about a dozen issued a CSR or sustainability report. By 2012, a majority were doing so.<sup>96</sup> The United Nations has made its own contribution through the adoption by the Human Rights Council of the Guiding Principles on Business and Human Rights of 2011 with their “three pillars” known as the “Ruggie principles”:

- Protect: the state’s duty to protect human rights
- Respect: corporate responsibility to respect human rights
- Remedy: access to remedies for victims of business-related activities

These principles are relevant to the increasing emphasis by consumer associations and individual consumers on ethical purchasing and information about products.

Some commentators from opposite ends of the spectrum take the view that CSR is a contradiction in terms: some business journalists, on the one hand, and NGOs, on the other, take the view that businesses are single-minded in the pursuit of profit, and indeed legally constrained from being otherwise. While some regard the concept of CSR as a kind of corporate public relations,<sup>97</sup> others, perhaps most notoriously Milton Friedman, regard it as a subversion of business objectives.

<sup>96</sup> *Time*, 2012, Why companies can no longer afford to ignore their social responsibilities (May 28).

<sup>97</sup> Corporate Watch, 2006, *What’s Wrong with CSR?* (Oxford).

There are potential pitfalls that are safeguarded against by the principle set out by the European Union that CSR should go above and beyond legal obligations. This is particularly important in the context of consumers, as so much consumer protection is already subject to extensive legal obligations. Nevertheless, there has been a shift: CSR has evolved from philanthropy to a core activity for an increasing number of businesses, progressing “from how business spread their money to how they earn it”.<sup>98</sup>

## 5. Is it possible to do well by doing good?

One central question for all business is “does having a better corporate consumer protection policy yield better economic results?” There is an extensive literature on the subject but little synthesis until recently. A literature review of 167 studies undertaken by Harvard Business School and the Universities of California and Michigan concluded that “after 35 years of research, the preponderance of scholarly evidence suggests a mildly positive relationship between corporate social performance and corporate financial performance and finds no indication that corporate social investment systematically decreases shareholder value”.<sup>99</sup>

<sup>98</sup> United Kingdom of Great Britain and Northern Ireland, Department for Business Innovation and Skills, 2014, *Corporate Responsibility: Good for Business and Society*; EC, 2012, *Consultation About A Code For Effective Open Voluntarism* (EC DG INFSO).

<sup>99</sup> F Whaley, 2013, *Is CSR Profitable for Companies?* (USAID Partnership).

### Box 2: Peru’s promotion of good business practices

Since 2014, INDECOPI, the national authority for consumer protection of Peru, has organized the contest *Primero los Clientes* (Customers First) as a national recognition of private and public companies that succeed in implementing good practices in prevention and management of consumer complaints.

The contest aims to recognize good business practices for the benefit of consumers and has received nearly one hundred applications in just three contests. Such practices are expected to inspire replication by peers and encourage others to develop their own internal policies.

The three categories are:

- Information mechanisms, including communication channels to provide information or receive feedback from consumers
- Complaints management, including experiences aimed at the resolution of customer problems
- Execution of warranty, including practices focused on the execution of warranties without the need for consumers to file a complaint

Successful practices should have a positive impact on customer satisfaction, be original, go beyond the legal obligations and be replicable by other businesses. For example, in 2016 the successful candidate on information mechanisms presented the initiative of an electric company operating in remote parts of the country to train teachers on the sustainable use of electricity through workshops and information campaigns.

Source: INDECOPI, 2016.



### C. SELF- AND CO-REGULATION

As with CSR, some consumer advocates see self-regulation as a poor alternative to statute. Some academic economists see self-regulation as a recipe for legalized cartels. Yet, as we have seen, it is envisaged and encouraged under United Nations guidelines. There seem to be three broad sets of circumstances for which self-regulation is designed. One is where the task of protecting consumers has been delegated by government to the professions and reinforced by legislation and licensing arrangements. One could call this “delegated self-regulation” as commonly used for lawyers and doctors. The emphasis is increasingly on stakeholder verification.

The second kind of self-regulation is where a group of businesses choose to regulate themselves, making voluntary commitments to behave in a certain way. This could be described as “voluntary self-regulation”. In plain words, businesses say “it’s up to us”. Commitments should go beyond any legal requirements and set standards in areas where there are none set by law.

A frequent weakness of such schemes is the limited extent of the market that is covered by the members of the code. When the OECD’s Committee on Consumer Policy (CCP) investigated self-regulation, it noted the contrasting examples of the Direct Sales Association of the United Kingdom of Great Britain and Northern Ireland, which had about 53 per cent of the direct sales market, while the membership of the equivalent body in New Zealand accounted for 90 per cent. New Zealand’s high figure was thought to be due to the fact that the code did little more than restate the law.<sup>100</sup> This illustrates a problem with the voluntary approach. The further the code goes beyond the law, the less inclined a trader may be to join, unless all their rivals do so as well – also known as the “first mover” dilemma.

There is also a third “hybrid” route. Under this category, criteria can be set by government for schemes to describe themselves as self-regulation, to safeguard the integrity of the description. Such criteria include:

- Benefits to consumers which go beyond the law
- The organization that sets up a code having a significant influence in the sector
- Independent organizations (such as consumer or advisory bodies) having influence on the preparation of the code

- Adequate complaints mechanisms and redress for breaches of the code
- Review and monitoring of the scheme
- Sanctions against failure to comply
- Adequate publicity

Under the hybrid model, the state has a legitimate interest in protecting the self-regulation “brand”, especially where it vests its own authority in the existence of a scheme through a badge of approval. Crucially, the state has to hold the reserve power to legislate should the self-regulation mechanisms prove too weak.

Indeed, there are dilemmas associated with self-regulation. If self-regulation is too weak the concept is devalued. On the other hand, if it is too far-reaching, self-regulation could impose barriers to entry into a trade and thus act in an anti-competitive way. Delegated self-regulation tends to have the most comprehensive level of coverage (indeed, membership may become almost a license condition) and voluntary self-regulation the least. Voluntary self-regulation sometimes has an excessive number of small schemes. There are over 100 Japanese schemes, covering very narrow product areas such as soybean paste, soy sauce, biscuits, eyeglasses and pianos, as well as major product sectors such as home electronics and banking. Such diversity of scale and specialization may complicate consumer information efforts.<sup>101</sup>

With the emergence of the hybrid, the language of self-regulation began to change and the twin but distinct concepts of self- and co-regulation emerged. For example, a United Kingdom of Great Britain and Northern Ireland government white paper<sup>102</sup> defined the two concepts as follows:

Self-regulation refers to processes whereby stakeholders (predominantly the industry) take the initiative to set standards for the benefit of consumers. The Government (or regulator) need not have any formal involvement.

Co-regulation refers to the situation where the regulator and industry stakeholders work together with, typically, the regulator setting the framework to work within. It may be left to industry stakeholders to draft detailed rules within this framework and to take

<sup>100</sup> Information provided to OECD Consumer Policy Committee Working Group on Industry-Led Regulation, 2009.

<sup>101</sup> R Simpson, 2008, *Harnessing Business and Consumer Interests: Is Statute the Only Way?*, Fair Trading Commission of Barbados 4<sup>th</sup> Annual FTC Lecture (Bridgetown).

<sup>102</sup> Department of Trade and Industry, 1999, *Modern Markets, Competent Consumers: The Government’s Consumer White Paper*.

responsibility for implementation and enforcement. Incentives for cooperation are often in the form of strong fallback powers for the regulator.

The trend has been towards co-regulation in particular because the Government's reserve powers allow it to keep the scheme up to standard and to point out to the (sometimes sceptical) public that it is not abandoning its responsibilities. This was the basis of the establishment of the Consumer Codes Approval Scheme by the Office of Fair Trading (OFT) to validate the integrity of self-regulatory consumer codes. When codes did not meet certain criteria, OFT approval was withdrawn.<sup>103</sup> The scheme continues in a slightly different form under the Consumer Codes Approval Board, operated by the Trading Standards Institute (which works with the local trading standards departments). In this way, the integrity of the self-regulation "brand" is safeguarded.

A World Bank study on the reform of financial services in the transitional economies recommends that:

A code of conduct for sector-specific financial institutions is developed by the sector-specific associations (in consultation with the financial supervisory agency and consumer associations if possible). Monitored by a statutory agency or an effective self-regulatory agency, this code is formally adhered to by all sector-specific institutions. The code may be augmented by voluntary codes of conduct devised by individual financial institutions for their own operations. These codes are widely publicized.<sup>104</sup>

## 1. Cross-border codes

One argument in favour of self-regulation is that its flexibility makes it easier to operate across borders. Chapter VII reviews some of the challenges around the legal enforceability of cross-border regulation arising from jurisdictional issues. Such disputes may be avoided by cross-border codes precisely because they are not laws. Clearly, within a given multinational company the scheme should be relatively easy to establish with common criteria being agreed upon. However, sectoral codes may also be established at the global level. The concept of a public commitment to standards of conduct by companies to respect certain codes of conduct wherever they operate is a core element.

<sup>103</sup> OFT, 2004, *Consumer Codes Approval Scheme: Core Criteria and Guidance*.

<sup>104</sup> World Bank, 2012, *Good Practices for Financial Consumer Protection*.

In the field of advertising, for example, the International Chamber of Commerce (ICC) developed a Consolidated ICC Code of Advertising and Marketing Communication Practice that is designed, on the business side, to provide ethical guidelines that create a level playing field and minimize the need for legislative or regulatory restrictions. On the consumer side, it is designed to build trust with the consumer by assuring them of advertising that is honest, legal, decent and truthful, with quick and easy redress when transgressions occur.<sup>105</sup> Related work has been developed in a number of areas including behavioural advertising, food and beverage marketing, environmental marketing and direct selling practices.<sup>106</sup>

## 2. Criteria for self-regulation

Drawing on the above discussion, box 3 contains some schematic criteria for the consideration of self-regulation schemes.

### Box 3. Criteria for self-regulation

Codes for self-regulation broadly divide into three types: voluntary, delegated and hybrid.

#### Voluntary

Sanctions are set by the trade association, membership is voluntary, standards may be more than legal requirements and accreditation will usually be validated by a trade association badge.

#### Delegated

Legal regulation is delegated by the state to the self-regulatory body, as is commonly the case for legal services and medicine. Membership is compulsory and similar to a license to practise. Standard-setting will usually be delegated to such bodies.

#### Hybrid

Membership is not compulsory by law but recognition of the title of "approved code" is awarded by government and the observance of standards by practitioners may be equivalent to meeting legal requirements. Standard-setting may be delegated to a national standards body by the industry body alongside consumer bodies.

*Source: OECD, 2015, Industry Self-regulation: Role and Use in Supporting Consumer Interests.*

Of course, there is no perfect system, and potential strengths and weaknesses need to be considered. These are summarized in box 4.

<sup>105</sup> See [www.iccwbo.org/Data/Policies/2011/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English/](http://www.iccwbo.org/Data/Policies/2011/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English/)

<sup>106</sup> OECD, 2015, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests*, OECD Digital Economy Papers no. 247.

**Box 4. Strengths and weaknesses of self-regulatory systems and legislation****Self-regulation****Strengths:**

- a) Voluntary codes are flexible, easier to change than laws, and can fill regulatory gaps
- b) Codes can promote good practice not just prevent bad practice
- c) An industry may identify more closely with a code it has drafted itself and therefore more readily comply
- d) A code can deal intuitively with cultural matters, such as taste or decency, which are very difficult to legislate for
- e) A code is expected to go beyond simple legal compliance and so may be more innovative
- f) Redress may be cheaper and faster
- g) The cost of implementing a code is borne by industry itself
- h) Technical expertise can easily be brought to bear from the industry

**Weaknesses:**

- a) A voluntary scheme only covers those who sign up to it
- b) A comprehensive scheme may lead to anti-competitive behaviour
- c) Non-members may undercut standards
- d) Requirements may not be taken seriously if not statutory
- e) A variety of codes may confuse consumers
- f) Sanctions may be too weak (reluctance to discipline peers) or too strong (expulsion)
- g) Consumers might be sceptical about the force of codes
- h) Conflict of interest may arise within trade association between representing members and upholding standards
- i) Codes may become barriers to necessary legislation
- j) Codes may be inadequately monitored

**Legislation****Strengths:**

- a) Authority of government
- b) Coercive effect where compliance is mandatory
- c) Comprehensive coverage throughout sectors
- d) Adaptable in terms of content and no veto from industry
- e) Credibility with consumers

**Weaknesses:**

- a) Difficult to obtain legislative time; may be overtaken by developments in the market
- b) Negative approach rather than positive
- c) General legislation is usually vague, while specific legislation is complex
- d) Criminal law is unwieldy and inflexible
- e) Unintended consequences not foreseen by legislators
- f) Built-in obsolescence

Source: OECD, 2015, *Industry Self-regulation: Role and Use in Supporting Consumer Interests*.

There are various cases of governments failing to secure adequate statutory regulation, sometimes due to political lobbying by the industry concerned. In consequence, many states have promoted self-regulation as a fallback option, sometimes under pressure from consumer lobbies. Indeed, consumer groups usually prefer regulation over self-regulation, but prefer self-regulation over no framework at all. There are also cases where governments have been slow to act and businesses have taken the initiative to develop codes of practice themselves. M-Pesa in Kenya is a case in point, having taken the strategic

decision, during its early growth phase, to develop its own regulations and to behave as if it were a regulated entity.<sup>107</sup>

In another case, client protection principles were developed as a code of ethics by Accion and other microfinance industry investors who established the Smart Campaign following widespread criticism of the US\$150 million profit made by Compartamos of

<sup>107</sup> O Morawczynski and M Pickens, 2009, Poor people using mobile financial services: Observations on customer usage and impact, Focus Note CGAP Brief.

**Box 5. Checklist for self-regulation and corporate social responsibility**

1. Does the scheme command public confidence?
2. Is there external involvement?
3. Are there non-industry members in the governing body? If so, how powerful are they?
4. Is the scheme autonomous from the rest of the industry?
5. Are there clear objectives and measurable standards?
6. Are there clear complaints procedures when the code is breached?
7. Are there clear sanctions for non-observance of the code?
8. How is compliance monitored?
9. Are there performance indicators for effectiveness of scheme?
10. Is there a public reporting mechanism?
11. Is the scheme well publicized?
12. Does the scheme have adequate resources?
13. Is the dispute resolution system independent in its decision-making?
14. Is the scheme capable of being updated as industry and consumer needs evolve?

Source: UNCTAD.

Mexico.<sup>108</sup> Microfinance Transparency guidelines have been developed and endorsed by various NGOs, development agencies and service providers working to raise standards. In Uganda, the Association of Microfinance Institutions has developed a code of practice for consumer protection with a focus on disclosure and financial education. It has been adopted by over 40 microfinance institutions and it is a condition of entry to the association, thus providing a “badge” of conduct to reassure consumers.<sup>109</sup>

## D. DOES COLLABORATION WORK?

Professor Christopher Hodges mounts an eloquent plea for a collaborative approach to consumer protection and regulation: “the basic idea is one of a collaborative approach between businesses, their stakeholders and public officials, based on a shared

ethical approach”.<sup>110</sup> He argues that findings from behavioural psychology suggest that the regulatory system will be most effective in affecting the behaviour of individuals where it supports ethical and fair behaviour. He finds that individuals will not volunteer information if they fear attracting criticism or blame, and that a “blame culture” will inhibit learning and the development of an ethical culture, so businesses and regulators should support an essentially open collaborative culture in which complaints are treated as gifts. This may sound fanciful to some, but some private sector companies have indeed adopted this model and sought out complaints. Nevertheless, he acknowledges that “where people break rules or behave immorally, people expect to see a proportionate response”.

Bearing this in mind, one could apply many criteria to both CSR and self-regulation. Box 5 contains a checklist for self-regulation and CSR.

<sup>108</sup> See <http://www.smartcampaign.org/about-the-campaign/campaign-sponsors>.

<sup>109</sup> D Baguma, 2009, *Concept Note: Consumer Code of Practice for Micro-Finance Institutions* (Accra, Association of Microfinance Institutions in Uganda, AMFIU).

<sup>110</sup> C Hodges, 2016, *Regulatory Collaboration: Empirical Evidence on Ethical Behaviour* (Oxford).

## E. CONCLUSION

CSR and self-regulation codes commonly provoke two rather simplistic reactions. One is that they are too weak and need to be backed by legislation at some point. The other, and opposite, reaction is that statutory regulation always fails or produces perverse effects and that therefore the answer lies with self-regulation codes. It is worth noting that during the years preceding the financial crisis, many dubious practices were perfectly legal, a situation that reflects the scope for legislators to be outflanked or even captured and the risks therefore of waiting for legislation.

In any case, the weaknesses of self-regulation and CSR are commonly exaggerated; they can have quasi-legal and even fully legal effects. For example, FTC of the United States of America has put forward a policy that a company that publicly claims to follow the principles set out in a code and which then fails to do so can be found to be guilty of deceptive practices.<sup>111</sup> This is a very simple step and one which seems to be a good bridge between statute and codes. In any case, it needs to be restated that codes have to be far more than a restatement of the law. A code that simply commits to obeying the law could be worse than useless as it implies, subtly, that companies have an alternative. We should not underestimate the potential for embarrassment arising from a public commitment to a standard in the event of its being violated. In the final analysis, self-regulation does not prevent a statute from being put into place; the two routes are not incompatible but mutually reinforcing.

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<sup>111</sup> Federal Trade Commission of the United States of America, 2012, Enforceable codes of conduct: Protecting consumers across borders seminar (Washington DC, 29 November).

## VII. Competition law and the consumer interest

Maintaining, encouraging and supporting a fair, efficient, and competitive marketplace is a cornerstone of the American economy. Consumers and workers need both competitive markets and information to make informed choices.<sup>112</sup>

President Obama

### A. COMPETITION IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The UNGCP contain relatively few direct references to competition policy, although the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (known informally as the “United Nations Set”) is explicitly referred to in the body of the General Assembly resolution and again in guideline 22. The resolution clearly restates UNCTAD’s mandate to “formulate and implement” competition alongside consumer protection policy.

Guideline 22 uses a strong form of words by UNGCP standards in calling on Member States to “develop, strengthen or maintain, as the case may be, measures relating to the control of restrictive and other abusive business practices which may be harmful to consumers, including means for the enforcement of such measures” guided by their commitment to the United Nations Set.<sup>113</sup>

### B. NATURE AND CHARACTERISTICS OF COMPETITION LAW AND POLICY

Competition can bring benefits to market efficiency, such as encouraging firms to improve productivity, reduce prices and innovate, while rewarding producers with profits and consumers with lower prices, higher quality and wider choice than would be the case in a less competitive market. When markets fail, competition laws and policies are among the tools

that can be used to bring about efficient workings of markets and to alleviate market failures.

Competition policy encompasses all government policies intended to influence competition in markets and provides the legal framework to give effect to those policies. It is estimated that 122 countries, including developing economies, have implemented or put in place competition policy and law.<sup>114</sup> These laws have a number of characteristics:

- Competition law has tended to exist only at the national level, except in the case of regional single markets such as the Andean Community, CARICOM, the European Union, MERCOSUR, SIECA and the West African Monetary Union.
- The criteria for determining anti-competitive behaviour is applied in the national market only and welfare considerations are assessed only as they affect local jurisdictions.
- Anti-competitive behaviour that affects consumers in other countries is not within the domain of national competition laws.
- As national competition laws seek to protect competition in the national market, its benefits accrue directly to consumers at the national level and indirectly abroad.
- There is currently no mandatory multilateral regulatory framework for competition policy.

#### 1. The United Nations Set on competition

The United Nations Set on competition has considerable authority in practice, especially in the context of countries that are setting up their competition structures. The United Nations Set pays particular attention to developing countries and international trade (or rather its distortion by anti-competitive practices). In particular, the danger that transnational corporations may pursue “restrictive business practices” to the disadvantage of developing countries is repeatedly mentioned. In effect, this now forms an accompaniment to the new section IV, “principles of good business practices” (see chapter VI) as the text of the United Nations Set is equally

<sup>112</sup> Executive Order, 2016, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (15 April).

<sup>113</sup> UNCTAD, 2000, *The UN Set of Principles and Rules on Competition*, TD/RBP/CONF/10/Rev.2.

<sup>114</sup> UNCTAD, 2015, *Assessment of the Application and Implementation of the Set*, TD/RBP/CONF.8/2, note by secretariat.



addressed to businesses as well as to governments. In this spirit, renewed importance can be attached to paragraphs D3 and D4 of the United Nations Set. D3 sets out that “enterprises ... should refrain from practices such as the following:

- a) Agreements fixing prices, including as to exports and imports
- b) Collusive tendering
- c) Market or customer allocation arrangements
- d) Allocation by quota as to sales and production
- e) Collective action to enforce arrangements, e.g. by concerted refusals to deal
- f) Concerted refusal of supplies to potential importers
- g) Collective denial of access to an arrangement, or association, which is crucial to competition.”

The above list applies largely to measures of collusion between companies with direct effects against consumers. D4 addresses measures that take the form of abuse of dominant position, stating that: “enterprises should refrain from:

- a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors
- b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services ...
- c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature (NB: mergers are not ruled out a priori)
- d) Fixing the prices at which goods exported can be resold in importing countries.”

The set goes on to discourage other measures such as arbitrary restrictions of supply, unjustified refusal to deal and conditional supply dependant on purchase of other goods.

## C. COMPETITION LAW CONCEPTS

Anti-competitive practices refer to a wide range of business practices that firms or groups of firms may engage in.<sup>115</sup> The types of practices that are considered anti-competitive and in violation of competition law vary from one jurisdiction to another and on a case-by-case

basis. Certain practices may be prohibited outright (or declared illegal), while others may be subject to the rule of reason. In practice, illegality may not be a reason for competition authorities to intervene, as they increasingly tend to look for a demonstrable market effect before proceeding to formal interventions.<sup>116</sup>

Generally, competition-restricting practices such as those referred to in paragraphs D3 and D4 of the United Nations Set, listed above, can be said to fall into two categories: horizontal and vertical restraints on competition. Horizontal restraints entail collusive conduct with other competitors in the market and include practices such as cartels and conspiracy and pricing behaviour such as predatory pricing, price discrimination and price fixing. Vertical restraints relate to supplier-distributor relationships and include practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling.

Typologies and descriptions of anti-competitive behaviour are well-documented. The next section deals with particular concepts in common use.

### 1. Abuse of dominance

The primary characteristic of a firm in a dominant position in a market is its significant ability to act independently of its competitive rivals and its customers (whether consumers or intermediate industry participants) and thereby exert pressures that distort a competitive market. This independence generally manifests itself as the ability to fix prices independently and extends to the ability to fix levels or quality of output with similar disregard for the responses of rivals and customers in the market.

Being a dominant firm in any given industry is increasingly perceived as not sufficient to provoke the attention of competition authorities. Specifically, it is not by itself a sufficient condition to assume that there is a competition policy violation. Dominance within a market can represent a reward for technical innovation and entrepreneurial risk-taking, which are important elements of economic progress. Most competition authorities are at pains to avoid providing a disincentive to investment.

A famous case in this context is that of European Union vs. Microsoft. The company undertook research and development spending to develop their range of operating systems, most notably Windows. Its success was rewarded by dominance in the market. After a long-running series of complaints,

<sup>115</sup> UNCTAD, 2000, *Manual on Formulation and Enforcement of Competition Law and Policy*, UNCTAD/DITC/CLP.

<sup>116</sup> Footnote to United Nations Set paragraph D4.

the European Union ordered Microsoft to provide information for competing software to be able to interact with Windows desktops and servers. Specifically, Microsoft was obliged to offer Windows without Windows Media Player, which was thus disintegrated from the Windows offer. Furthermore, the European Union imposed its largest fine ever in 2004. Microsoft appealed, only to lose in 2007. In 2009, bundling of services was further investigated, the outcome of which was the acceptance by Microsoft of consumer choice of browsers. Failure to comply with this agreement resulted in a further fine in 2013.

While market dominance is not a satisfactory condition for assuming abuse, it is a necessary prerequisite. Market share is the usual basis for measuring dominance. The percentage share that will lead to investigation varies from country to country, but as a general rule, it is very unlikely that a firm with less than 35 percent of market share either could or would be found guilty of abuse of dominance. The only exception to this is in special circumstances where, for whatever reason, all firms in the market are found to have particularly high levels of market power.

If market dominance is assumed then it must be shown that the firm in question is abusing that dominance if action is to be taken. Abuse of a dominant position can take the following forms:

- Directly or indirectly imposing unfair purchase and sale prices or other unfair trading conditions
- Limiting markets, production or technical development to the prejudice of consumers
- Applying dissimilar conditions to equivalent transactions with different trading parties, thereby placing some at a competitive disadvantage
- Making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the main contracts

Examples of abuse of dominance include excessively high pricing of products in relation to the costs incurred in their production, or conversely, excessively low pricing when it is used as a way to undermine rivals. Similarly, firms are not allowed to refuse to deal with other firms if by doing so they are able to decrease competition for the product in which they are dominant. Dominance can also be abused by changes to the structure of the dominant firm, such as by takeover or merger.

As already mentioned, action has to be triggered by some evidence of consumer detriment attributable to the anti-competitive practice. The OECD Consumer Policy Toolkit<sup>117</sup> sets out its interpretation of consumer detriment with regard to the decision to intervene.

“The decision whether to intervene should consider:

- What is the scale of consumer detriment? An intervention may be warranted if the detriment is small, but felt by a large number of consumers, or alternatively, if the detriment experienced even by a small group of consumers is very large ...
- Who is experiencing the consumer detriment? Are there disproportionate impacts on certain groups ... such as children, the elderly or other socially disadvantaged groups?
- What is the anticipated duration of the consumer detriment? Is detriment is likely to increase?
- What are the likely consequences of taking no policy action? The political, social and economic consequences of taking no policy action should be considered.
- Are there other substantial costs to the economy? Is the consumer problem creating detriment for other stakeholders? Is it, for example, distorting competition among firms?”

Clearly, a judgment has to balance the large number of factors set out above and inevitably such judgments will be fallible. It is understandable then that competition authorities can be cautious before launching any action. The calculation of the detriment and its attribution to corporate practice is an argument for coordination between competition and consumer protection agencies, and possibly for their being housed in the same establishment.

The ambiguities surrounding the definition of an abuse of dominance illustrate the importance of including macro-level socioeconomic criteria in the process of defining competitive infringements. In relation to developing countries, the dominance of a domestic firm must be considered along with its other roles within the domestic context. Relevant in the decision-making process is the social role that the firm fulfils, especially in the case of public utilities, and the cost to the national interest that is inherent when the only alternative to domestic dominance is foreign competition. Many (though not only) from the developing world would

<sup>117</sup> OECD, 2010, *Consumer Policy Toolkit*.

argue that these considerations should be of as equal importance to regulators as considerations of geographic and product markets. A similar broadening of the remit is discernible in the evolution of the European Union's competition policy, in which anti-competitive behaviour is prohibited but policy objectives are not set out in the legislation. It is clear that despite the intention of defence of the consumer, the notion of "public interest" still remains. For example, in the *Telia Sonera* case (C-52/09), the function of competition rules was found by the European Court of Justice (ECJ) to be "to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union". This very general definition accords with the widely discussed tendency in consumer law for the development of an internal market to be seen as a legitimate objective in itself, one which could potentially compete with the interests of individual consumers.

## 2. Cartels and collusive behaviour

A cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies and the division of profits, or a combination of these. Cartels are formed for the mutual benefit of member firms. The theory of "cooperative" oligopoly provides the basis for analysing the formation and economic effects of cartels. Generally, a cartel attempts to emulate a monopoly by restricting industry output, or raising or fixing prices in order to earn higher profits. The term collusion is used to refer to informal combinations, conspiracies or agreements that seek to establish a cartel or related outcomes. As the economic effects of cartels and collusive behaviour are the same, these terms tend to be used interchangeably.

A distinction needs to be drawn between public and private cartels. In the case of public cartels, governments may establish and enforce the rules, sometimes known as "orderly marketing arrangements", relating to such matters as prices and output. Export cartels and shipping conferences are examples of public cartels. In many countries, "depression cartels" have been permitted in industries deemed to be requiring price and production stability and/or to permit rationalization of the industry structure and excess capacity. In Japan for instance, such arrangements have been permitted in the steel, aluminium-smelting, shipbuilding and various chemical industries. International commodity agreements covering products such as coffee, sugar, bauxite, tin, rubber, palm and petroleum are examples of international cartels that have entailed agreements between different national

governments. Crisis cartels have also been organized by governments in different countries for various industries or products in order to fix prices and to ration production and distribution in periods of acute shortage. In this way, governments may exercise a sponsoring role towards international cartels that they would not allow for cartels organized between private proponents. This is similar to what has in effect been a "carve out" for the agricultural sector from the provisions of the normal WTO anti-dumping provisions (which are intended to prevent predatory pricing).

In contrast, private cartels involve an agreement on terms and conditions from which members derive mutual advantage but which are not known by outside parties.

For cartels to be successful there must be "coordination" and "compliance" among members. This means that cartel members need to be able to detect when violations of an agreement take place and to enforce sanctions against violators. These conditions are not always easily met, therefore cartels can break down over time. However, they can be stable and endure for very long periods.

Collusive conduct does not necessarily have to involve an explicit agreement or communication between firms. In oligopolistic industries, firms tend to be interdependent in their pricing and output decisions so that the actions of each firm impact on and result in a counter-response by the other firm(s). In such situations, oligopolistic firms may take their rivals' actions into account and coordinate their actions as if they were a cartel without an explicit or overt agreement. However, it needs to be stressed that there are oligopolistic markets without collusion and non-oligopolistic markets with collusion.

Factors that facilitate the formation of price-fixing agreements include:

- The ability to raise and maintain industry prices. However, if entry barriers are low or substitute products exist, collusion may not be successful and firms will not have any incentive to join the agreement. This means of course that states, by increasing barriers to entry such as quotas and duties, may increase the tendency towards oligopoly.
- Firms do not expect collusion to be easily detected or severely punished. If the sanction is lower than the profits gained from entering into collusive arrangements, the latter may still prevail.

- Organizational costs are low. If negotiations between firms are protracted and enforcement/monitoring costs are high, it may be difficult to form agreements.
- The products produced are homogenous or very similar. Uniform price agreements are not easily reached if the products differ in attributes such as quality and durability. It becomes difficult for firms in such circumstances to detect whether variations in sale prices are due to, say, changes in buyer preferences or cheating by firms in the form of secret price cuts.
- The industry is highly concentrated or a few large firms provide the bulk of the product. When the number of firms is low, the costs of organizing collusion will also tend to be low. Also, the probability of detecting firms that do not respect the fixed prices will be correspondingly higher. However, while it is generally easier to collude when the number of sellers is low and the product is homogenous, price-fixing agreements can also happen in the sale of complex products.
- The existence of an industry or trade association. Associations tend to provide a basis for coordinating economic activities and exchange of information, which may facilitate collusion. A vigilant consumer association could theoretically intervene, usually by urging action from the competition authority, but such intervention requires a degree of technical and legal resources that may be hard for associations to muster.

Similarly, there are factors in a given market that may limit collusion. These include product heterogeneity, inter-firm cost differences, cyclical business conditions, the degree of sophistication among customers, technological change, infrequent product purchases, differing expectations of firms and incentives to apply secret price cuts to increase market share.

By virtue of its conspiratorial nature, collusion between firms to raise or fix prices and reduce output is typically viewed by most authorities as the most serious violation of competition laws. Yet even here exemptions and exceptions apply. In almost all countries, associations of the learned professions (medicine, law, etc.) have affected “social contracts” that require them to supervise compliance by their members via professional codes. In exchange, the associations are permitted to determine entry and exit terms and

even limited rights to fix prices. There are also, in some countries, exemptions for agricultural cartels and those that involve cooperatives or small- and medium-sized enterprises. In many countries export cartels are not only tolerated but also encouraged. Indeed, the EC and the United States of America have operated export subsidy mechanisms that have been fiercely criticized by other countries because of their disruptive effects. This had been a major sticking point in the WTO negotiations until agreement in late 2015. In several countries, import cartels operate with impunity. Crucially, when comparing competition authority actions with regard to cartels and to abuse of dominance, it should be noted that there is frequently a presumption of illegality in the case of cartels that does not exist in the case of a dominant position.<sup>118</sup>

### 3. Mergers and acquisitions

A merger is an amalgamation or joining of two or more firms into an existing firm or to form a new firm. It is a method by which firms can increase their size and expand into existing or new economic activities and markets. An acquisition differs slightly from this. Generally it is the purchase of one company by another business entity. Here, the acquired company does not retain its own identity. The motive for merging or acquiring another company may be to increase economic efficiency, to acquire market power, to diversify, to expand into different geographic markets or to pursue financial and other synergies.

Mergers and acquisitions are obviously not objectionable per se. In many developing countries, governments encourage or even force mergers because it is considered that firms in a particular area are too numerous and inefficient (the “efficiency defence”). This is considered particularly urgent given the liberalization of markets and the impending entry of foreign players, something which can have different effects in different markets. The financial sector (banking, insurance, etc.), the non-fixed line telecommunications sector and shipping have been of special focus, with governments even specifying the number of firms that would be permitted to operate after specified time periods.

Competition regulators have to contend with an array of considerations in arriving at decisions. In many instances, the final decisions may not, in practice, be theirs to make. Governments see

<sup>118</sup> A Jones and A Albors-Llorens, 2014, A landscape of diversity: The consumer in competition law, paper for “The Images of the Consumer” conference (University of Oxford, March).



competition regulation as part of the policy mix for economic management. Changes in government therefore often result in changes in policies and can lead to competition policy being followed with less vigour.

## D. INSTITUTIONAL ARCHITECTURE FOR COMPETITION

The competition-consumer protection interface is now very much emphasized. A number of developments have provided for this impetus. One relates to the entrenchment of the concept of the “free market”. In the 1980s and particularly the 1990s, many developing countries underwent far-reaching market-oriented reforms, leading to a considerable whittling down of the role of the state in economic activity through widespread privatization, deregulation and internal and external financial liberalization. However, privatization in practice often meant replacing a public monopoly with a private one. Competition policy and law have thus come to be seen as an additional tool for consumer protection, notably in the emerging market economies of Central and Eastern Europe, for example, where consumer protection was often entrusted to “anti-monopoly” offices, as outlined in chapter IV.

The OECD Best Practice Roundtable in 2015 noted a gradual change in institutional architecture for competition authorities and a tendency for competition, sectoral regulation and public procurement to move together.<sup>119</sup> For example,

<sup>119</sup> OECD Secretariat, 2015, *Institutional Design*, DAF/COMP/M(2014)3/ANN4/Final.

the Republic of Korea’s Fair Trade Commission took over consumer protection from its Ministry of Finance in 2008. The tendency has been particularly pronounced in Northern Europe in recent years. Finland (where the Director General for consumer protection is also the consumer ombudsman), Ireland, Denmark and the Netherlands have all moved in this direction. The Federal Trade Commission (FTC) of the United States of America has long housed consumer protection and competition directorates under the same roof, but with different departments taking responsibility for each. For example, in the recent instance of Facebook purchasing WhatsApp, the two parts of the commission conducted separate investigations, the Consumer Protection Bureau looking primarily at safeguards for consumer privacy rather than competition issues, which were obviously the domain of the Competition Bureau. In the United Kingdom of Great Britain and Northern Ireland, the Office of Fair Trading and the Competition Authority have merged to become the Competition and Markets Authority, its powers concurrent with sectoral regulators. Policing the market is the job of the Trading Standards service, which operates locally as departments of local authorities. There are, however, exceptions. Iceland and Japan have moved the other way and in the Russian Federation, the Anti-Monopoly service remains separate from the consumer protection agency, Rospotrebnadzor. The South African Department of Trade and Industry is responsible for consumer protection, while the Competition Commission, a statutory body, handles competition regulation and enforcement.

Another factor affecting the institutional architecture is that an ever increasing number of international, as well as regional, agencies have made an explicit

### Box 6. International organizations and networks on competition policy

#### United Nations Conference on Trade and Development (UNCTAD)

[www.unctad.org](http://www.unctad.org)

Established in 1964, the United Nations Conference on Trade and Development (UNCTAD) aims at the development-friendly integration of developing countries into the world economy. UNCTAD is the focal point within the United Nations for the integrated treatment of trade and development and interrelated issues in the areas of trade, finance, technology, investment and sustainable development. It is also the focal point for competition and for consumer protection. UNCTAD is a forum for intergovernmental discussions and deliberations, supported by discussions with experts and exchanges of experience, aimed at consensus-building. UNCTAD undertakes research, policy analysis and data collection in order to provide substantive inputs for the discussions of experts and government representatives. UNCTAD, in cooperation with other organizations and donor countries, provides technical assistance tailored to the needs of developing countries, with special attention paid to the needs of least developed countries and countries with economies in transition. UNCTAD hosts an annual meeting of competition experts, including agencies and independent experts, namely the Intergovernmental Group of Experts on Competition Law and Policy. These meetings take place back-to-back with those of the Intergovernmental Group of Experts on Consumer Protection Law and Policy.

### Organisation for Economic Cooperation and Development (OECD)

[www.oecd.org](http://www.oecd.org)

OECD is an intergovernmental organization helping governments tackle the economic, social and governance challenges of a global economy. The OECD is formed of 34 member countries that share a commitment to democratic government and the market economy. With active relationships with many other countries (notably the BRICS), NGOs and civil society, it has a global reach. Best known for its publications and its statistics, its work covers economic and social issues from macroeconomics to trade, education, development and science and innovation. The OECD plays a prominent role in fostering good governance in public service and in corporate activity. It helps governments ensure the responsiveness of key economic areas through sectoral monitoring. By deciphering emerging issues and identifying policies that work, it helps policymakers adopt strategic orientations. It is well known for its individual country surveys and reviews. The OECD produces internationally agreed instruments, decisions and recommendations to promote good practice in areas where multilateral agreement is necessary for individual countries to make progress in a global economy. Sharing the benefits of growth is also crucial as shown in activities related to emerging economies, sustainable development, territorial economy and aid. Dialogue, consensus and peer review are at the heart of the OECD. The principle of consensus means that national governments can and do block provisions in draft policy advice to which they object. Its governing body, the Council, is made up of representatives of member countries.

### The International Competition Network (ICN)

[www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)

ICN is a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that addresses antitrust enforcement and policy issues of common interest and formulates proposals for procedural and substantive convergence through a results-oriented agenda and structure. ICN encourages the dissemination of antitrust experience and best practices, promotes the advocacy role of antitrust agencies and seeks to facilitate international cooperation. ICN's activities take place on a voluntary basis and rely on the high level of goodwill and cooperation among jurisdictions involved. It builds on the many contacts that already exist among the organizations concerned. The work of ICN is project-driven and is not intended to replace or coordinate the work of other organizations, nor does it exercise any rule-making function. ICN provides the opportunity for its members to maintain regular contacts, in particular by means of annual conferences and progress meetings. Where ICN reaches consensus on recommendations arising from the projects, it is left to individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate. The membership of ICN consists of 138 national or multinational competition agencies entrusted with the enforcement of antitrust laws. 119 jurisdictions are represented.

commitment to competition policy and law and, to this end, have emphasized the role these can play in consumer protection. Consumer issues have thereby come to the forefront. Examples of these organizations are UNCTAD, the OECD and the International Competition Network (ICN). Box 6 elaborates.

## E. A CHALLENGE FOR COMPETITION POLICY COHERENCE: CONSUMER RESISTANCE TO SWITCHING

Consumer choice is the premise for and the goal of competition. For consumers to exercise that choice the options must be known to the consumer, who must be able to exercise choice. However, even if a substitute or a lower price is available, consumers do not always exercise their choice. This is seen by classical economists as a paradox and a problem. Recent interest has arisen in applying

behavioural economics to consumers, in particular their search behaviour (i.e. how much consumers search and how many players they search amongst) and switching behaviour (i.e. how they respond to differences in prices between players in the industry). The sometimes unspoken conclusion is that consumers stubbornly refuse to perceive their own interests.

Yet what if consumers are right to be cautious? The reliance on disclosure for consumer protection rather than upstream regulation may entail a transferred risk to consumers, as demonstrated by the financial crisis. This is a considerable challenge for policymakers, for one should not swing to the other extreme of denying the advantages of switching. Policymakers therefore need to look at other measures, such as regulating the behaviour of providers, while making pricing behaviour more transparent, as was imposed on the French banking sector in 2010, for example. There is thus an important role for policy



measures to strengthen consumer protection, in particular by improving the information made available and rooting out prohibitive switching costs. The latter calls for an examination of the terms and conditions in consumer contracts, or reassessment of their use because they have become “custom and practice” (for instance in banking and insurance). Relying solely on disclosure and transparency to unleash competition and choice has sometimes proved to be ineffective.

## F. CONCLUSION

Competition and consumer protection will probably always have a complex relationship. In most cases, consumers have not campaigned for competition law and policy. Once in place, however, consumers and their representative organizations have come to see competition law and policy as a means of greater consumer protection. The traditional approach is, roughly speaking, for competition regulators to focus on the supply side and consumer regulators to focus on the demand side. Such a dichotomous approach has led to narrow conceptions of what constitutes anti-competitive behaviour and limited approaches to address such behaviour.

As Professor Alan Fels expressed to an OECD roundtable in 2015,<sup>120</sup> competition tends to be unpopular with the public, while consumer protection tends to be popular (a “watchdog for the underdog”); competition authorities proscribe (you must not), while consumer protection authorities prescribe (you must); competition tends to be *ex post*, while regulation tends to be *ex ante*. Although his juxtapositions are deliberately simplistic, and one could find exceptions to them all, they do show the complementarity between the two spheres of policy.

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<sup>120</sup> OECD, 2015, Best Practice Roundtable on Competition Policy; see also A Fels and H Ergas, 2014, *Institutional Design of Competition Authorities* (OECD).

## VIII. International cooperation

### A. INTERNATIONAL COOPERATION IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

General Assembly resolution 70/186 on consumer protection of 22 December 2015 recognizes the value of “coordination and partnership with established multilateral organizations”.<sup>121</sup> Guideline 1 lists among the objectives of the UNGCP the aim “to further international cooperation in the field of consumer protection”. Indeed, international cooperation is at the heart of the revised guidelines.

The section of the UNGCP on international cooperation, section VI, was significantly expanded as a result of the revision process. Guideline 79 exhorts Member States to cooperate in exchanging information on policy and measures taken on testing, consumer information and education. Guideline 80 calls for strengthened information links regarding banned, withdrawn or restricted products, a vital matter for consumer safety. Guideline 81 asks for work towards quality differences not to become detrimental, a difficult matter of judgment. Guideline 82 calls for cooperation on cross-border fraud, while entering the caveat also made in Guideline 83, that national consumer protection agencies retain authority and that Member States may need to “avoid interference” in the work of consumer protection agencies in other jurisdictions. Guideline 85 envisages bilateral and multilateral arrangements; guidelines 86 and 87 envisage a “leading role” for designated agencies on particular enforcement issues. Guideline 88 states that national authority to investigate and share information should extend to cooperation on judicial and inter-agency enforcement with foreign counterparts.

Guidelines 91 and 92 refer to sustainable consumption with regard to technology transfer and capacity-building. Guideline 93 promotes programmes relating to consumer education and information.

In other sections, the need for collaboration between Member States in cross-border cases is specifically mentioned: in the new sections on e-commerce (guideline 65), financial services (guideline 68) and tourism (guideline 78).

The UNCTAD Implementation Report (2013) points to a wide variety of cooperation initiatives between Member States.<sup>122</sup> It lists several bilateral cooperation agreements, such as Chile–Peru, Chile–European Union, the Dominican Republic–Panama and Mexico–United States of America, usually comprising exchanges of information and capacity-building activities.

At the regional level, there are many initiatives: the Committee on Consumer Protection of the Association of Southeast Asian Nations (ASEAN), the Organization of American States and its Inter-American Rapid Alert System (SIAR), the Andean Community, the Competition and Consumer Protection Programme for Latin America (COMPAL) of UNCTAD, the Central American Council on Consumer Protection, the Ibero-American Forum of Government Consumer Protection Agencies (FIAGC), the Alianza del Pacífico, the Southern Common Market (MERCOSUR), the Union of South American Nations (UNASUR), The UNCTAD–MENA Programme for Middle East and North Africa, Africomp of UNCTAD, African Consumer Dialogue, the Southern African Customs Union, the Southern African Development Community, the European Union Council on Consumer Protection Cooperation and European Commission initiatives, among others.

On a multilateral level, some United Nations Member States are part of the Asia-Pacific Economic Cooperation forum, the International Consumer Protection and Enforcement Network (ICPEN, see below) and OECD, in whose Committee on Consumer Policy observers from non-OECD economies (such as Colombia and Egypt) actively and regularly participate.

UNCTAD is the focal point within the United Nations family and the global intergovernmental forum for consumer protection matters. The guidelines have mandated it to carry out various cooperation activities, including: a) exploring the interface between competition and consumer protection issues; b) reviewing and advising Member States on consumer protection laws and policies; c) conducting training and capacity-building activities on consumer protection issues for Member States; and d) supporting regional and multilateral initiatives. These are elaborated further later in this chapter.

<sup>121</sup> A/RES/70/186.

<sup>122</sup> UNCTAD, 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection 1985–2013*, note by UNCTAD secretariat.

There is clearly then a great deal of exchange of information on policy and implementation of consumer protection measures, and many members can reasonably claim to have implemented those provisions of the UNGCP already. However, one particular challenge remains: the applicable law and jurisdiction.

## B. APPLICABLE LAW AND JURISDICTION

The detail in which matters of international cooperation are set out in the UNGCP suggests an interest in overcoming the challenges to inter-agency cooperation. Resolution 70/186 (mentioned above) refers explicitly to this issue when it declares that “certain consumer protection issues, such as applicable law and jurisdiction, may be addressed most effectively through international consultation and cooperation”. The term “applicable law and jurisdiction” does not appear in the body of the UNGCP, although guideline 39 calls for access to justice and mechanisms for redress, particularly in cross-border disputes, to be enhanced. The OECD Guidelines on E-commerce paragraph 54vi, to which the UNGCP make reference, asks governments to “consider the role of applicable law and jurisdiction in enhancing consumer trust in e-commerce”.<sup>123</sup>

Guideline 90 of the UNGCP refers to the OECD guidelines for protecting consumers from fraudulent and deceptive commercial practices across borders which deal, in paragraph III.A, with the possibility of jurisdictional conflict:

Member countries should improve their ability to cooperate in combating cross-border fraudulent and deceptive commercial practices recognizing that cooperation on particular investigations or cases remains within the discretion of the consumer protection enforcement agency being asked to cooperate. This agency may decline to cooperate on particular investigations or proceedings or limit or condition such cooperation, on the ground that it considers compliance with a request for cooperation to be inconsistent with its laws, interests or priorities, or resource constraints, or based on the absence of a mutual interest in the investigation or proceeding in question.<sup>124</sup>

A first reaction might be to ask whether the interest of foreign consumers is adequately taken into consideration by national authorities in the midst of such loose obligations. Although it might seem a good point of debate, the claim may not be entirely fair. What if the gravity or number of domestic fraudulent and deceptive practices far exceeds that of those at an international level? Consumer protection agencies are constantly forced to make judgments about priority where there is no international dimension, so it is not surprising that the judgments are even more difficult when there are cross-border elements which may diminish the chances of success. In regard to international private law, several – but not all – Member States have introduced special conflict of law rules to protect consumers (European Union member states, Argentina, China, Japan and the Russian Federation for example). Many countries have introduced rules on special jurisdiction for cross-border cases involving consumers into national laws, often using the judicial forum in the consumer’s country of domicile.

Attempts have been made to establish a general principle regarding which national law should take precedence. For example, the International Law Association has developed the “most favourable protection” principle, according to which “it is desirable to develop standards and to apply rules of private international law that entitle consumers to take advantage of the most favourable consumer protection”.<sup>125</sup>

### 1. The example of tourism

An obvious area for international cooperation is tourism, especially as the country of domicile will often not be where the alleged infringement takes place. The revised UNGCP break new ground in dealing with the needs of tourists and travellers for the first time. Guideline 78 states that:

Member States should ensure that their consumer protection policies are adequate to address the marketing and provision of goods and services related to tourism, including, but not limited to, travel, traveller accommodation and timeshares. Member States should, in particular, address the cross-border challenges raised by such activity,

<sup>123</sup> OECD, 2016, *Consumer Protection in E-commerce*, OECD recommendation.

<sup>124</sup> OECD, 2003, *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*, recommendation of the council.

<sup>125</sup> ILA, 2012, *Statement on the Development of International Principles on Consumer Protection*, resolution no. 4 (Sofia). For further elaboration see ILA resolution 1/2016, including *Guidelines on Best Practice on the Law Applicable to International Protection of Consumers* (Johannesburg, seventy-seventh ILA conference).

including enforcement cooperation and information-sharing with other Member States, and should also cooperate with the relevant stakeholders in the tourism-travel sector.

Tourism is one of the two largest sectors in the world on some criteria, second only to agriculture. Yet it has been somewhat ignored in consumer policy discussions. There are obvious vulnerabilities, which may require international cooperation, and it should be noted that the guidelines apply to travel as well as to the tourism sector. Thus, the protections envisaged could stretch to include migrant workers.

In some respects the work involved in protecting tourists has become more difficult for two main reasons. The first is scale: the one billion mark was passed for arrivals in 2012 for the first time. Secondly, as online reservations have become more prevalent and tourist agencies have gone into decline, often there is no responsible service provider incorporated in the home country. For example, two thirds of foreign tourists to Brazil have no travel agency in their home country.<sup>126</sup>

Two countries in particular, Brazil and China, have pressed for greater protections for tourists: Brazil partly because of the prospect of two global sporting events, the 2014 soccer World Cup and the 2016 Olympic Games; and China because of the sheer scale and sharp increase of both outward and inward tourism.<sup>127</sup> The Government of Brazil is promoting the adoption of the draft International Convention on the Protection of Tourists and Visitors through the annual Hague Conference on Private International Law.<sup>128</sup> Professor Claudia Lima Marques, an advocate of reform in the sector, has indicated that there is a need for *ex ante* rather than *ex post* measures. In this context that means arrangements being made in the country of destination rather than the country of domicile so that, as far as possible, cross-border litigation can be avoided. The draft convention accordingly envisages a nominated authority in the contracting state which has the remit of providing advice, assistance and mediation services as well as small claims facilities if

<sup>126</sup> C Lima Marques, 2013, The need for a global cooperation network to protect foreign tourists/consumers and the comeback of private international law.

<sup>127</sup> According to OECD, Chinese tourists spent \$102 billion in 2012, a 37 percent increase compared to the previous year and more than any other country (L Thompson, 2013, *Tourism's Changing Profile*, OECD Observer no. 297).

<sup>128</sup> Hague Conference on Private International Law, 2013, *Draft International Convention on the Protection of Tourists and Visitors*.

needed. This is essentially an institutional arrangement and what Professor Lima Marques describes as a “pragmatic comeback to private international law”.<sup>129</sup>

It is far from clear, then, that there is a definitive answer to the questions of jurisdiction raised in section VI of the UNGCP. The example of tourism shows how institutional arrangements, namely the presence of someone for tourists to turn to for help, may prove to be the most effective solution.

### C. PRACTICAL INTERNATIONAL COOPERATION

Despite the above difficulties, agencies do cooperate internationally, as shown in the 2013 survey by UNCTAD,<sup>130</sup> and there are professional associations to promote that cooperation. For example, the International Consumer Protection and Enforcement Network (ICPEN) is composed of organizations from over 50 countries, aiming to:

- Protect consumers' economic interests around the world
- Share information about cross-border commercial activities that may affect consumer welfare
- Encourage global cooperation among law enforcement agencies

While the membership is predominantly from OECD countries, it spreads further afield to a wide range of countries in all regions, varying from small island states, like Barbados and Dominican Republic, to large major exporters, like China, sub-Saharan African countries, including Nigeria and Kenya, and emerging economies in transition like Viet Nam.

ICPEN runs education campaigns, such as the annual Fraud Prevention Month, and carries out the annual Internet Sweep, which searches for websites that may be defrauding consumers. The sweep is described by the UNCTAD Implementation Report as “parallel and coordinated law enforcement actions”. Such actions signal the existence of a global law enforcement network, and enable proactive enforcement. ICPEN aims to enable cross-border e-commerce complaints “through means other than formal legal action” and distributes incoming complaints to national consumer protection agencies.<sup>131</sup>

<sup>129</sup> C Lima Marques, op. cit.

<sup>130</sup> UNCTAD, 2013, Implementation report on the United Nations Guidelines on Consumer Protection 1985–2013, note by UNCTAD secretariat.

<sup>131</sup> www.icpen.org.

Another regional example of inter-agency cooperation is the European Commission's rapid alert system for dangerous non-food products, RAPEX. The commission publishes a weekly overview of alerts on products reported by national authorities. They include information on the dangerous products found, the identified risks and the measures taken in the notifying country in order to prevent or restrict their marketing or use. Measures can be ordered by national authorities ("compulsory measures") or be taken directly by producers and distributors ("voluntary measures"). Each alert also includes information on the countries where the same product was found and if further measures were taken. Such alerts are not specific to individual cases (although information is gleaned from them) and so do not raise issues of jurisdiction.<sup>132</sup> The Organization of American States has created a similar system to RAPEX, the SIAR (Inter-American Rapid Alert System), a new network to monitor safety problems in products and services in the Americas, effective since December 2014.

The European Commission has also developed the network of European Consumer Centres with a presence in all 28 EU member states (plus Norway and Iceland), which deal with individual consumers. The centres assist consumers with a free service offering cross-border mediation and advice (including on judicial procedures and dispute resolution) and have the capacity to produce policy reports. Although often seen as a service for tourists, the remit of the centres applies to a far wider public, encompassing all cross-border disputes between consumers and service providers. Over 10 years of operation as a network, they have received 650,000 direct contacts and by 2015 were running at 100,000 direct contacts per annum, including 40,000 complaints and with far more (3 million) referred to national consumer protection agencies. Again, practical action, not necessarily requiring litigation, follows the institutional arrangements.<sup>133</sup>

#### D. INTERNATIONAL INSTITUTIONAL MACHINERY

The second context in which international cooperation is raised in the UNGCP is section VII on international institutional machinery, an entirely new and substantial addition. The text sets out arrangements for the Intergovernmental Group of Experts (IGE) on consumer protection law and policy, which meets

under the auspices of UNCTAD. Guideline 97 sets out the functions of the IGE:

- a) To provide an annual forum and modalities for multilateral consultations, discussion and exchange of views between Member States on matters related to the guidelines, in particular their implementation and the experience arising therefrom;
- b) To undertake studies and research periodically on consumer protection issues related to the guidelines based on a consensus and the interests of Member States and disseminate them with a view to increasing the exchange of experience and giving greater effectiveness to the guidelines;
- c) To conduct voluntary peer reviews of national consumer protection policies of Member States, as implemented by consumer protection authorities;
- d) To collect and disseminate information on matters relating to the overall attainment of the goals of the guidelines and to the appropriate steps Member States have taken at the national or regional levels to promote effective implementation of their objectives and principles;
- e) To provide capacity-building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and policies;
- f) To consider relevant studies, documentation and reports from relevant organizations of the United Nations system and other international organizations and networks, to exchange information on work programmes and topics for consultations, and to identify work-sharing projects and cooperation in the provision of technical assistance;
- g) To make appropriate reports and recommendations on the consumer protection policies of Member States, including the application and implementation of these guidelines;
- h) To operate between and report to the United Nations Conferences to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;
- i) To conduct a periodic review of the guidelines, when mandated by the United Nations

<sup>132</sup> [http://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/alerts/main/?event=main.listNotifications](http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/main/?event=main.listNotifications).

<sup>133</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A32048> and [www.ec.europa.eu/consumers/ecc/](http://www.ec.europa.eu/consumers/ecc/).



Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; and

- (j) To establish such procedures and methods of work as may be necessary to carry out its mandate.

Guideline 98 spells out that the IGE will not “pass judgment” on individual states or companies in connection with specific transactions.

In particular, voluntary peer reviews have a long and generally positive history in international institutions such as UNCTAD, with has over ten years of experience in the field of competition. This is useful not only for the country reviewed but also for those reviewing institutions faced with the practical realities of policy implementation and can serve as a counterpoint to the often rather vague provisions of international guidelines. Such “reality checks” can be very useful internally for the country being reviewed where a reforming government may need an outside eye to assist in the process of internal policy reform.

The provision in guideline 97a on the exchange of views and experiences between Member States will also be significant, particularly in relation to implementation, especially given the widening of the UNGCP. While Member States might be reluctant to be judged on their performance in implementation, there is bound to be an element of comparison arising from these exchanges, which is likely to generate an upward momentum.

One of the major innovations of the revised UNGCP is their dynamic update. Whereas in previous versions there was no institutionalized revision process foreseen, guideline 97i asks the IGE to conduct a periodic review of the guidelines, when mandated by the review conference. This will allow new issues and developments to be duly discussed at the intergovernmental level and, if and when consensus arises, to be included in the guidelines. This will serve to periodically update the UNGCP, ensuring their continued relevance. Indeed, the newly established IGE is set to become a very important forum for enhancing cooperation and pushing consumer protection issues forward in the global agenda.

## E. CONCLUSION

This brief survey of international cooperation very strongly suggests that the current route to international consumer protection for individuals passes by way of institutional, rather than judicial, solutions. This is not only because of the intrinsic difficulty of filing judicial cases across borders, but also because there are no definitive inter-agency cooperation agreements of a judicial nature. In the case of tourism and international visits there is a choice between, on the one hand, quick and basic dispute resolution in the country of destination that may involve some relatively non-judicial procedures such as alternative dispute resolution, and on the other hand, protracted long distance litigation with little guarantee of success. The former route seems to be prevailing and the existence of practical arrangements between consumer protection agencies represents a great improvement in this regard.

However, the problems are more fundamental for consumers who are not physically located in the domicile of businesses. The growth of transactions by internet has undermined traditional frontier controls that have always applied to physical imports. Increasingly, international controls are regulatory rather than physical for both goods and services. Where a consumer orders a physical product from a foreign website, the goods may be delivered from a depot in the country of the consumer's domicile or despatched from where they were manufactured. Alternatively, a digital product produced in country A may be downloaded from a website in country B by a consumer in country C.

Given such complexities, it is important that effective international legal instruments are designed to achieve effective cross-border consumer redress. Currently, companies may gain market advantages by making public commitments to standards of conduct reinforced by certain codes of behaviour wherever they operate. That leads to increased focus on matters of business conduct, as discussed in chapter VI.



# PART TWO

## Consumer protection in the marketplace



## IX. Product Safety and Liability

### A. PRODUCT SAFETY IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

Of all the issues covered by the UNGCP, section V.B on physical safety is perhaps the one that has changed the least over time, there being little variation since the initial 1985 version. This suggests the text has aged well and indeed it could even be said that the original drafters were ahead of their time, for example in making reference to the use of international standards before they were fully incorporated into the GATT/WTO agreement on international trade in 1995. Apart from the specific sections set out below, it should also be noted that the “legitimate needs” include, in guideline 5c, “the protection of consumers from hazards to their health and safety”. Section V.B (guidelines 16–19) is set out below:

- 16. Member States should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.
  - 17. Appropriate policies should ensure that goods produced by manufacturers are safe for either intended or normally foreseeable use. Those responsible for bringing goods to the market, in particular suppliers, exporters, importers, retailers and the like (hereinafter referred to as “distributors”), should ensure that while in their care these goods are not rendered unsafe through improper handling or storage. Consumers should be instructed in the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers by internationally understandable symbols wherever possible.
  - 18. Appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities and, as appropriate, the public without delay. Member States should also consider ways of ensuring that consumers are properly informed of such hazards.
  - 19. Member States should, where appropriate, adopt policies under which, if a product is found to be seriously defective and/or to constitute a substantial and severe hazard even when properly used, manufacturers and/or distributors should recall it and replace or modify it, or substitute another product for it; if it is not possible to do this within a reasonable period of time, the consumer should be adequately compensated.
- The other main treatment of safety comes in Section V.D, guidelines 33–35 on “standards for the safety and quality of consumer goods and services”:
- 33. Member States should, as appropriate, formulate or promote the elaboration and implementation of standards, voluntary and otherwise, at the national and international levels for the safety and quality of goods and services and give them appropriate publicity. National standards and regulations should be reviewed from time to time, in order that they conform, where possible, to generally accepted international standards.
  - 34. Where a standard lower than the generally accepted international standard is being applied because of local economic conditions, every effort should be made to raise that standard as soon as possible.
  - 35. Member States should encourage and ensure the availability of facilities to test and certify the safety, quality and performance of essential consumer goods and services.
  - The wording of guideline 35 is notable in that it clearly allows for independent testing and verification.
- Section V.K on “measures relating to specific areas” refers to safety as “product quality control” in relation to food, water and pharmaceuticals, with reference to relevant international bodies including *Codex Alimentarius* and WHO. The new wording on “universal access” to public utility services in guideline 77 should have considerable significance for safety, as the lack of safe drinking water and sanitation and clean energy sources are major threats to public health.
- It should also be noted that Resolution 70/186 which precedes the UNGCP recognizes “the importance of combating substandard, falsely labelled and counterfeit products which pose threats to the health

and safety of consumers”. This is not followed up in the text of the guidelines themselves.

## B. PRODUCT SAFETY LAWS

Product safety laws relate to loss or damage caused by products. The “right to safety” is widely viewed as one of the basic rights of the consumer, partly as a result of safety being listed as a legitimate need.

### 1. The rationale for product safety laws

There are a number of reasons why product safety laws need to be in place:

- Consumers need to be protected against unreasonable, unnecessary and preventable risks of injury from the foreseeable use of consumer products.
- Consumer products in the marketplace are increasing in complexity and sophistication. Reasonable examination of the product will not reveal the inherent defects or hazards in many products, including those which are substandard falsely labelled or counterfeit. The maxim *caveat emptor* (let the buyer beware) is particularly inadequate in the face of complex products.
- Consumers are often unable to foresee risks and protect themselves. This is particularly true with new products of which consumers had no previous experience, or products that contain components such as chemicals, which may not be apparent.
- There is a need to establish minimum and harmonized safety standards for products being sold to ensure that developing countries do not become dumping grounds for substandard products that would not meet the standards in the country of origin, or other potential importing countries (the problems raised by second-hand goods are discussed later).
- It is beneficial both for business and for consumers to have products that comply with international standards, as this will improve access to international markets, thus allowing greater consumer choice and raising the baseline for safety on a global basis.

Comprehensive consumer protection statutes need therefore to extend to all consumer products, especially those that might become unsafe with age or use, be it normal or abusive. At the same time,

attention needs to be paid to the upstream stages of the production process where intervention may be more effective in terms of scale, cutting out the need for large numbers of individual redress procedures.

### 2. Components of a comprehensive product safety policy

There are six basic components that may be identified as crucial in establishing a coherent and effective product safety policy. These are as follows:

- Pre-market design
- Preparatory action
- Regulatory action and standards setting
- Monitoring action
- Corrective action
- Compensatory action

#### (a) Pre-market design

Businesses should be encouraged to integrate safety into design and to meet any applicable standards during the design and production of a product, with third party certification to assure safety before going to market. Many retailers require this before they will market a product in any case. In the United States of America, the Consumer Product Safety Commission also offers a service to industry to help with pre-market compliance.<sup>134</sup> It also holds a public register of product safety issues. As suggested above, this may reduce the need for downstream redress by incorporating good practice further up the production chain.

#### (b) Preparatory action

Regular and systematic surveillance of consumer products available in the market is necessary to identify product-related injuries and to analyse the risks faced by consumers. For this, data has to be collected from both local and foreign sources. The designated agency must have the authority to require the submission of relevant data to all parties concerned.

There are numerous international and regional initiatives that provide valuable information on the safety of consumer products and the action taken by governments throughout the world. Among the most significant of these is the “Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Withdrawn, Severely Restricted, or Not Approved by Governments” issued by the Department of International Economic and Social Affairs of the

<sup>134</sup> <http://www.cpsc.gov/en/Business--Manufacturing/Business-Education/>

United Nations. The list enables government agencies that review applications for product registration to easily ascertain the nature of regulatory decisions made in other countries and apply the permissible measures locally. The list also complements and consolidates other information produced within the United Nations system and its networks. In the European Union, RAPEX<sup>135</sup> is a rapid alert system for product safety between European Union governments – a practice which is spreading to other regions of the world – while PROSAFE<sup>136</sup> links and advises market surveillance authorities and carries out training activities funded by the European Union.

The OECD hosts the Global Recalls Portal, an online tool which contains regularly updated information on consumer product recalls issued by jurisdictions across the world. Consumers and businesses have access to the portal.<sup>137</sup>

### (c) Regulatory action and standards setting

The development of product safety standards is a prerequisite for a sound product safety policy. Standards of product safety form part of the statutory machinery for regulating industry performance and so must be published. They may be enforced through a variety of sanctions such as those under criminal law, civil liability and extending to withdrawal of license. The purpose of specifying standards is to make a clear statement of what society deems desirable and acceptable. Taking the example of international trade law, one option is for legislation to refer to standards rather than directly integrating them into legislation, as they need to be able to change with innovation.

The standards developed need to recognize a host of factors, such as local cultural context and climatic conditions and international developments such as dumping. An effective national regulatory agency must be mandated to perform this function. Governments may be advised by the WTO Code of Good Practice, which lays out the core requirements of the process.<sup>138</sup>

Regulatory action comprises at least the following:

- Standards setting as necessary to safeguard the interest of consumers and involving the testing and certification of products to enable consumers to identify those that have been

certified as conforming. There should be representation of the consumer interest in the development of standards. Governments do not usually produce standards. They may ask national standards bodies to develop standards which can then be referenced as mandatory or put into regulations.

- Information on product characteristics, use and warnings directed at both suppliers and consumers.
- Restrictions on use including bans where the risks are exceptionally high.

### (d) Monitoring action

Monitoring may involve intervention at both the pre-marketing and post-marketing stage. Pre-marketing controls involve the introduction of quality control and supervision of manufacturing. Post-marketing controls involve ascertaining adherence to safety standards by authorized officers. There has to be independent testing undertaken on behalf of the government or provision for testing by independent consumer organizations. In some countries, the national standard bodies may offer a testing service or certification, but many developing countries have limited test facilities in terms of laboratories, test equipment and expertise.

### (e) Corrective action

Pre-marketing controls minimize the likelihood of unsafe products entering the market. Unfortunately even the most stringent of such controls cannot ensure that all products will be safe. Manufacturing flaws may still occur or design flaws may subsequently manifest. A comprehensive product safety policy provides scope for regulating certain products after they have entered the market, and for the possibility of prohibiting certain types of products in extreme cases. With this comes the task of immediate intervention when hazards arise, regardless of whether the commodities involved are specifically regulated. The relevant authorities must be empowered to take urgent action when an unsafe product is on the market. Steps range from warning notices, product recalls and required modification of products as a condition of sale to prohibition of further sales and ultimately destruction of stocks (as happened in the case of the “mad cow disease” outbreak in cattle in the United Kingdom of Great Britain and Northern Ireland during the 1990s, see box 7).

### (f) Compensatory action

Compensation for damages caused by dangerous goods can be realized in two ways:

<sup>135</sup> [http://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/alerts/main/?event=main.listNotifications](http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/main/?event=main.listNotifications)

<sup>136</sup> <http://www.prosafe.org/>

<sup>137</sup> [www.globalrecalls.oecd.org](http://www.globalrecalls.oecd.org)

<sup>138</sup> World Trade Organization Agreement on Technical Barriers to Trade Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards.

- An administrative scheme providing for persons who have suffered loss or damage from defective products to claim from a centrally administered fund. It could be paid from taxation revenue and be deemed the collective responsibility of all taxpayers and/or, by way of a premium paid by persons engaged in the manufacture and distribution of goods.
- Private arrangements providing for the payment of compensation to the person who has suffered the loss or damage by those involved in the production and/or supply of the defective product. The usual causes of action for such a scheme would be pursuant to the law of contract, law of negligence or strict liability provisions in consumer protection laws.
- Compensation schemes serve not only to mitigate the loss of the injured party but also to provide incentives or deterrents to producers.
- Government departments and bodies dealing with specific product areas such as the Food and Drug Administration of the United States of America. In the European Union, many members have national food agencies with a high public profile, and the European Food Safety Authority has designated competent partners in all 28 jurisdictions.<sup>140</sup> In both of the above models (generic and sectoral), the agencies do not necessarily carry out detailed investigation and analysis themselves. For example, the competent partners listed in the European Union may be public health, nutrition or veterinary institutes often linked to universities. The OECD Working Party on Consumer Product Safety summarizes that “third parties may be engaged to assist in performing product risk assessments. This can vary, from a simple outsourcing arrangement to acquire appropriate expertise and specialist knowledge in risk assessment, through to engaging an accredited test laboratory, conformity assessment body or certification body to assess the product.”<sup>141</sup>

#### (g) Legal and institutional framework for product safety

The following approaches may be taken:

##### (i) Legal

- General framework laws with general clauses forbidding the supply of unsafe products and providing for safety regulations with regard to specific products
- Regulations relating to specific product groups, e.g. drugs, food, motor vehicles, pesticides, etc.
- Safety requirements and technical specifications introduced in national laws as mandatory standards, including referencing of standards as mentioned above

##### (ii) Institutional

- Institutions with overall responsibility for the safety of consumer products, for example a single government body with broad responsibility for the safety of consumer products. There are institutional variants of the model. A general consumer protection agency may have a product safety division such as Product Safety Australia within the Australian Competition and Consumer Commission (ACCC). An alternative model is the free-standing United States Consumer Product Safety Commission.<sup>139</sup>

#### (h) Essential elements of product safety laws

Safety laws must extend to the full range of consumer goods and not be restricted to those sectors covered by specific legislation.

Goods must meet mandatory standards of safety, failing which they could be prohibited from entering the market. Safety requirements should be based on sound risk assessment criteria. These can vary according to national policy. Jurisdictions may adopt good practices from each other. For example, ACCC has updated the model of risk assessment by adopting the European Union RAPEX injury severity levels, applied to a model developed in New Zealand.<sup>142</sup>

Authorities should have the following powers:

- Power to require that adequate information on the safe use of goods is provided along with the goods
- Power to require the suppliers to publish warning notices if unsafe products are found to be available on the market

<sup>139</sup> United States Consumer Product Safety Commission, *Strategic Plan 2011-2016*.

<sup>140</sup> Article 36 of Regulation EC 178/2002 and Article 1 of Regulation EC 2230/2004.

<sup>141</sup> OECD, 2016, *Product Risk Assessment Practices of Regulatory Agencies: Summary of Discussions at Workshops and Meetings of the OECD Working Party on Consumer Product Safety*.

<sup>142</sup> OECD, op. cit.



- Power to require suppliers to recall hazardous products already sold to consumers
- Power to ban or suspend the supply and sale of unsafe products and services

#### (i) Data collection

In determining priorities for developing safety standards, it is desirable that data collection systems are established for home accidents and injury reporting in relation to consumer products and services. The data will show the most commonly used products and the physical features and manners of use that cause the most injuries or even deaths. Such information is particularly important for countries that are yet to develop standards on all consumer products available in the market. Other sources of such information include consumer organizations, standards organizations, insurance statistics, schools and private industry.

## C. PRODUCT LIABILITY

Product liability is concerned with how to compensate consumers who have suffered from defective products. A consumer who has suffered damage, loss or injury as a result of a defective product may seek remedies in the following ways.

### 1. Contractual liability

Parties entering into a contract may have their rights determined by the terms of the contract. A plaintiff suffering loss or damage as a result of goods supplied under a contract must prove that the goods failed to meet the standard required by the contract. However, legal recourse based on contractual rights may be limited in some situations. This may be due to certain “realities” of the marketplace and legal doctrines such as:

- Standard form contracts. In most cases, these are weighted to one side and consumers are faced with “take it or leave it” options.
- Privity of contract. This doctrine precludes third parties from suing under the contract. Members of the purchaser’s family, guests of the purchaser and bystanders may be excluded and thus have to seek their remedy under the tort of negligence.
- Evidentiary rules. Rules of evidence may also limit consumers from claiming under a contract. As a general rule, oral evidence is not allowed to derogate from the terms of a written contract.

Although all kinds of oral representations are made in most sales transactions, not all of these may form part of the written contract.

### 2. Tortious liability

Tort law offers legal protection beyond the contractual framework. The tort of negligence allows consumers to seek compensation for loss suffered as a result of the supply of unsafe products. In countries that have inherited English common law, the landmark decision of the House of Lords in *Donoghue v Stevenson* (1932) has become the most famous breakthrough in favour of the consumer. In this landmark case, a “new” tortious liability of manufacturers was established, i.e. a consumer could sue a manufacturer with whom he or she had no contractual relationship. In this case, it was decided that a manufacturer owes a duty of care to the ultimate consumer or user. This decision paved the way for claims to be made directly against the manufacturer for defects in goods.

The claimant (i.e. consumer) has to prove:

- A duty was owed by the producer to the consumer
- The duty was breached
- There was physical and/or mental injury to person or damage to property as a result of the breach

Although the tort of negligence is available to all persons injured by defective goods, it is nevertheless not easy to prove. To prove that the defendant breached the duty of care, the plaintiff must be fully informed about the defendant’s manufacturing processes. The task is complex and involves considerable expense. Since this is a fault-based liability, the plaintiff also has to sue every possible person whose acts or omissions may have contributed to the “defect” that resulted in loss or damage, for example the manufacturer, designer of the goods, the component manufacturer or supplier of raw materials, the distributor and the retailer. The plaintiff also runs the risk of having to pay the costs of any party not found to be negligent.

### 3. Strict liability

Strict liability refers to liability of any or all parties along the manufacturing chain (manufacturer of component parts, manufacturer who assembles the parts, wholesaler and retailer) for the whole damage caused by the product, without prejudice to the recovery action among responsible parties. Strict liability standards emerged in the second half of the twentieth century and make a party legally responsible for damages, regardless of culpability and without



need to prove fault, negligence or intention. Strict liability was introduced into the European Union's *acquis communautaire* (body of law) in 1985 through the Product Liability Directive. Although the term "strict liability" is used, it does not suggest absolute liability. It evolved largely to avoid the privity restriction and other restrictions imposed by warranty standards. The concept of strict liability for defective products is now a widely accepted part of the legal regime for consumer protection and covers a range of liability systems with different degrees of strictness. The practical application of strict liability can be limited by the "state of the art defence" (see below).

Generally, a defendant will be liable under the doctrine of strict liability, regardless of fault, if it can be established that:

- The product is defective
- There was a causal link between that defect and the injuries
- There are no defences available to the defendant (see below)
- It is irrelevant that the manufacturer or supplier exercised sufficient care. Liability will arise if the defect in the product causes harm to the user. Some characteristics of strict liability are as follows:
  - Most strict liability tests are based upon a standard of defectiveness that places some of the risks on the user of the product
  - The objective criteria are usually based on consumer expectation
  - Strict liability regimes tend to channel liability towards the person best placed to control the product and insure the risk involved

#### 4. Rationale for strict liability

The rationale for strict liability is:

- It is a means for spreading the risks attached to the use of a product across all those responsible for bringing goods and services to the market, rather than letting the risk be assumed by the unfortunate victims. In certain sectors, this may be done through a compulsory insurance, with the premium being borne by the producer.
- It reflects an assumption that the producer should be able to reflect the cost of liability, actual or potential (including the cost of insurance), in the price of the product. Even in the absence of fault, this places responsibility where it can be more readily assumed.

- The producer is the person best placed to obtain insurance. Few individuals are likely voluntarily to take out first-party insurance.

#### 5. What is a defect?

Generally, a product is defective if it does not provide the level of suitability that the consumer is entitled to expect. Liability is imposed against a supplier of a product if the product is supplied in a defective condition and results in injuries. Determining defectiveness is one of the more difficult problems in product liability litigation.

Generally, there are a number of factors that the courts will take into account when deciding on the issue of "defectiveness". These include the following:

- The manner in which, and the purposes for which, the product was marketed
- The packaging of the product
- The use of any mark in relation to the product
- Instructions or warnings in respect of the keeping, use or consumption of the product

There are many possible types of defects, eight of which are listed below (in some cases there may be overlaps between these categories):

- A **manufacturing defect** is caused by an error in the manufacturing process or by the use of defective raw material. This type of defect occurs when a product is designed well but because of a flaw in the manufacturing process, or a sampling error in the testing process, it does not meet the specifications included in the design of the product. If the finished product is substandard by comparison to identical products in that product line, the producer may be held liable for causing the irregularity and failing to discover the defect before it was sold to the consumer. In such cases the definition of "producer" of the defective product would also extend along the production chain from the manufacturer to the supplier of the product even when not directly involved in the manufacturing process.
- A **design defect** occurs when a whole product line or every product of a particular model is dangerously deficient. A product is defectively designed if the product is more dangerous than an ordinary consumer would expect or if the benefits of the product's design do not outweigh its risks. A manufacturer may be held liable if it fails to take reasonable care to ensure that a product is designed

to perform safely. Manufacturers must not only ensure that their products are safe when they are used in the intended way, but also in unintended, though foreseeable, ways. In determining product liability, the courts apply the “unreasonably dangerous” test or a combination of the consumer expectations and “risk-benefit” test to determine if the design is defective.

- **Warning defect.** A manufacturer has a duty to provide adequate instructions concerning the safe use of its product and must warn buyers of any dangers associated with the product. While the product design itself may not be inherently defective, the product can be rendered defective by the lack of such a warning. If such warnings are not present, the manufacturer may be liable for injuries caused by the product. Manufacturers have a duty to perform safety tests to determine what warning labels need to be put on a product. These tests should simulate conditions under which the products would ordinarily (or even plausibly) be used. The warning given must not only cover the likely uses and misuses of products but must also be clear and capable of being easily understood, through use of symbols, pictures or multilingual warnings.
- An **instruction defect** is similar to a warning defect as it concerns the information provided to the consumer. However, it differs from a warning defect in that the defect is not a failure to warn of an inherent danger in the product. Here the defect involves the creation of danger by the failure to warn the consumer of how to use the product safely. What is required of the manufacturer is to provide instructions on how to use the product and a warning of the dangers involved if instructions are not strictly complied with.
- A **development risk defect** is one that only comes to light after the product has been marketed. The risks associated with this category of defect were not known at the time of marketing but if they had been known they would have prevented the product from being marketed according to the standards of safety current at the time of marketing. This category overlaps with that of “state of the art” defects (below).
- **State of the art defects** are “accepted” (in retrospective legal terms) when products are placed on the market because the defects were unknown at the time within the given sector. However, the defects subsequently become less acceptable as general industry

practice improves. Such products are therefore termed “defective” as safer alternatives or replacements have subsequently emerged.

- A **post-marketing defect** concerns the failure to warn of dangers, to recall products or to take other remedial action after a danger has been detected. Manufacturers must seriously consider the nature and extent of warnings that must be issued when they become aware of dangers in the product after it has been sold. These involve hazards that are discovered after a sale which the manufacturer did not know of or would not have reasonably been expected to know of before it sold the product.

## 6. Standards for determining defectiveness

There are several standards for determining defectiveness. These are as follows:

- **Consumer expectations.** This standard requires that the element of danger in a product must not extend beyond that which is contemplated by the ordinary consumer who purchases, uses or comes into contact with the product (including children, for example). It is crucial that the product must be fit for the ordinary purposes for which it is used.
- **Presumed seller knowledge.** This raises the question of whether sellers would be negligent in placing a product on the market if they had knowledge of its harmful or dangerous condition. This standard imputes general knowledge, rather than specific knowledge about each product. UNGCP guidelines 17 and 18 are relevant here in terms of ensuring continuing safety while goods are in storage, and notification of any hazards.
- **Risk-benefit balancing** (or risk-utility). This involves the issue of whether the cost of making a safer product is greater or less than the risk or danger from the product in its present condition. In cases where the cost of making the change is deemed to be greater than the risk created by not making the change, then the benefit or utility of keeping the product outweighs the risk and the product is not defective. However, if the cost is deemed to be less than the risk, then the benefit or utility of not making the change is outweighed by the risk and the product is deemed defective in its unchanged condition.

In determining risk-benefit the following factors are taken into account:

- a) The usefulness and desirability of the product
- b) The likelihood and probable seriousness of injury from the product
- c) The availability of a substitute product that would meet the same need and not be as unsafe
- d) The manufacturer's ability to eliminate the danger without impairing usefulness or making the product too expensive
- e) The user's ability to avoid the danger
- f) The user's anticipated awareness of the danger
- g) The feasibility on the part of the manufacturer of spreading the risk of loss by pricing or insurance

The theory of risk-benefit can be very academic. The practice inevitably requires finer judgment than is suggested by the theoretical balancing of cost and risk, for there is not a "common currency" by which to measure this. This is the case particularly when the effects of preventive measures are discussed at the policymaking level. This is discussed in the section below.

- **Unavoidably unsafe products.** This operates on the grounds that there are certain products which, due to the current state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. This standard is generally used in the field of medicine where, due to the lack of opportunity for sufficient medical experience, the absolute assurance of safety is lacking but the marketing and use of drugs is considered to be justified notwithstanding a medically recognizable risk.

## 7. Defences against product liability

In theory, the doctrine of strict liability does not permit defences. However, in practice, there are several recognized defences available to the product manufacturer. Some of these are as follows:

- **State of the art.** This may be defined as the level of pertinent scientific and technological knowledge existing at the time the injury-producing product was designed and/or manufactured. It may therefore exclude injuries from older goods from liability. It relies on the argument that the manufacturer complied with the standard that was operative at the date of the manufacture. The defence was made available in the European Union under the 1985

Product Liability Directive,<sup>143</sup> which allowed a defendant to be absolved of liability if he or she could prove that "the state of technical and scientific knowledge, at the time when he put the product into circulation, was not such as to enable the existence of the defect to be discovered". The directive allowed European Union member states to derogate from the "state of the art" defence, but in practice few chose to do so. One significant exception to the possibility of derogation followed the outbreak of bovine spongiform encephalopathy (BSE, also known as "mad cow disease") in the United Kingdom of Great Britain and Northern Ireland (see box 7). The directive did not previously apply to agricultural produce but that exemption was repealed in 1993.<sup>144</sup>

- **Disclaimer of liability.** This is not available to manufacturers. Either there is a clear prohibition included in the product liability itself or such disclaimers are held as unfair contract terms in consumer contracts. In attempting to limit liability, a producer may provide for warnings, notices for use and instructions on labels but this will not automatically allow avoidance of liability. As a result, the consumer might be found to have been negligent (see "contributory negligence" below) and the producer's liability could be shared or even eventually excluded. However, this defence will not be valid in situations where the manufacturer attaches a broad standard disclaimer with the intention of limiting legal responsibility for defects in the products. This is particularly so as courts recognize that this may amount to a violation of public policy as the buyer of the product would not have a choice to negotiate such terms in an ordinary retail sale. In such cases, the disclaimer will be declared null and void.
- **Statutes of limitations.** Old claims may be eliminated with the use of a statute of limitations. This will benefit a manufacturer of products who may find it difficult to track old records and mount a defence. An injured person is thus required to commence an action within a certain number of years after a personal injury. However, in some cases, this defence may pose a problem as to when the personal injury occurred, that is the date of exposure and the manifestation of the injury. This is so in situations where there is a

<sup>143</sup> Council Directive 85/374/EEC of 25 July 1985, *Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, Article 7e.

<sup>144</sup> 1993/34/EC.

lapse of time between the victim's exposure to the product and the manifestation of the injury. For example, very long lapses of time occur in cases of asbestosis.

- **Product recall.** This should occur where a product appears unreasonably dangerous or involves unexpected dangers or had an inadequate warning label. In simple terms, a defect would warrant a recall if there was a lack of something that is considered essential to the completeness of the product. The defect may involve a physical characteristic or a functional matter and can arise from design, faulty manufacture or assembly or inadequate or improper maintenance and repair. There may be a voluntary withdrawal of the allegedly defective product from the marketplace. However, product recalls, whether voluntary or mandatory, cannot, in law, lead to a disclaimer of liability. They may limit liability in the long term if the product manufacturer takes the right steps to prevent further risk, but liability for defects existing at the time of placing the product on the market remains full.
- **Assumption of risk, contributory negligence and misuse.** Generally, strict liability does not permit the legal defence of assumption of risk by the consumer together with contributory negligence. Under the doctrine of strict liability, fault is irrelevant. However, in certain situations, defences based upon the consumer's conduct are recognized. These are as follows:
  - h) Negligent failure on the part of the consumer to discover the defective condition
  - i) Continued use of the product after discovery of the defect
  - j) Use of the product in a manner that could not reasonably have been foreseen by the producer, for example using a metal fork to extract toast from an electric toaster

## D. SERVICES AS DANGEROUS PRODUCTS

The UNGCP deal with safety in terms of physical safety and this chapter has accordingly concentrated on this. Many services, such as medical services, electricians, gas-fitting and taxis, have an element of physical danger, which is frequently dealt with at the level of licensing and insurance, self-regulation and private litigation, rather than through product liability law. It should, however, be noted that in terms of regulatory intervention, the onset of the financial crisis saw much

discussion on whether the concept of dangerous products and their regulation should be applied to services in terms of a wider range of dangers. Certain financial products were routinely described as "toxic" and EC Commissioner Meglena Kuneva called for a product safety approach to be applied, drawing an explicit parallel with the trade in physical goods: "we do not rely on the good faith of traders and the alleged vigilance of consumers but require that a regulator guarantees a satisfactory degree of safety. Doesn't the regulator have similar responsibilities in the market of retail financial services? I believe we must limit the risk in retail financial markets and exclude certain 'toxic' credit products from its retail shelves".<sup>145</sup> For similar reasons, Elizabeth Warren, then acting Head of the Consumer Finance Protection Bureau of the United States of America, called for a financial product safety commission.<sup>146</sup> The main consequence of this debate would therefore seem to be a tilt back towards regulatory intervention rather than inter-party litigation.

## E. PRODUCT SAFETY IN INTERNATIONAL LAW AND POLICY

Chapter V outlined that consumer protection legislation should not be in conflict with international trade law, as is sometimes alleged on the grounds that consumer protection measures taken against imports are disallowed as barriers to trade. The "exceptions clause" (article 20 of GATT) stipulates that, in the event of a product posing a risk to human animal or plant health, import restrictions or barriers are allowable, "provided they are not used as a means of arbitrary or unjustifiable discrimination between countries or as disguised restrictions on international trade".

Furthermore, the Sanitary and Phytosanitary (SPS) Agreement, whose status was upgraded by the World Trade Organization treaty in 1995 having previously been a code, recognizes in article 5.7 that the state of scientific knowledge may be insufficient to make a definitive judgment on whether or not to block a product, but that a precautionary approach can be taken in the meantime. The article states that "in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information ... [but] ... shall seek to obtain the additional information necessary for a more objective assessment of risk and review the

<sup>145</sup> M Kuneva, 2009, Restoring consumer trust in retail financial services (Lisbon, 27 April).

<sup>146</sup> E Warren, 2008, Product safety regulation as a model for financial services regulation, *Journal of Consumer Affairs* 42, quoted in OECD, 2009, *Financial Consumer Protection: Progress Report*, DAF/CMF (11 April).



**Box 7. The case of BSE (“mad cow disease”) in the United Kingdom of Great Britain and Northern Ireland**

Bovine spongiform encephalopathy (BSE), commonly known as “mad cow disease”, was found among the British beef herd during the 1980s. Initially there was uncertainty about the risk that the disease posed to humans but in March 1996 a ban on British beef exports was imposed by the European Union following diagnoses that indicated that the disease had probably been transmitted to human beings by eating food contaminated by unsafe bovine materials. By June 2014 the human variant was estimated to have killed 177 people in the United Kingdom of Great Britain and Northern Ireland, and 52 elsewhere, although the rate of infection appears to have slowed and is around five per year at the time of writing.

An official British and Irish inquiry into BSE concluded that the outbreak was caused by cattle, which are normally herbivores, being fed the remains of other cattle in the form of meat and bone meal (MBM), which caused the infectious agent to spread. The origin of the disease itself remains unknown.

**Lessons learnt**

One finding reached by the official enquiry was that gathering of data about the extent of the spread of BSE was impeded in the first half of 1987 (i.e. early during the outbreak) by “an embargo within the State Veterinary Service on making information about the new disease public”. The report concluded that “this should not have occurred”. If information is withheld, then that becomes a further cause for concern upon eventual exposure.

Such episodes easily become trade disputes and can spread beyond the original “theatre”, in this case beyond the United Kingdom of Great Britain and Northern Ireland and the European Union. For example, after the discovery of the first case of BSE in the United States of America in 2003, Japan halted beef imports from the United States of America. In 2005, Japan once again allowed imports of beef from the United States of America, but reinstated its ban in January 2006 after a violation of the technical terms of the beef import agreement.

Faced with such uncertainties, the “precautionary principle” (that it is better to take preventative measures even before precise causality is established) was widely invoked, even though it was not challenged by the Government of the United Kingdom of Great Britain and Northern Ireland in legal terms (although some challenges were discussed at the time).

**Legacy**

The episode left a legacy of suspicion, both of regulatory bodies and the meat supply industry itself. This resurfaced in the case of adulteration of meat products by horsemeat in several European Union countries in 2014, which was not primarily a food safety scare, but a matter of labelling and traceability. It also raised cultural issues with some practices involving pork. Strong testing measures were taken by the European Union, which prepared recommendations on labelling of processed meat.

*Source: Robin Simpson, responsible for the BSE dossier while working at the National Consumer Council of the United Kingdom of Great Britain and Northern Ireland during the crisis of the 1990s.*

sanitary or phytosanitary measure accordingly”. This has come to be known as the “precautionary principle” in some jurisdictions and the “precautionary approach” in others. Either way, the wording suggests that one should not be precautionary forever in a particular case. Efforts have to be made for the risk level to be clarified.

Can the recognition of international standards provide a way forward? The difficulties in obtaining agreement about the intentions of a trade measure are in principle eased by the WTO’s promotion of the recognition of international standards which would thus be safe from challenge as “disguised barriers to trade”. The Technical Barriers to Trade Agreement sets out the principle of adopting the standards of a “recognized body” (certainly including ISO for example), while the SPS Agreement clearly identifies in Annex A the three organizations that are considered to write international standards for the purposes of the agreement. These are the *Codex Alimentarius* Commission, the International Office of Epizootics and the International Plant Protection Convention.

Governments can choose to go beyond international standards when they can argue that a valid public policy objective can be served. In practice this is extremely difficult to determine as illustrated by the trade dispute regarding the introduction of the European Union aflatoxin standard in the early years of the present century.<sup>147</sup> Aflatoxins are especially prevalent in stored agricultural crops and can cause liver cancer. International standards to raise and maintain the standard of storage conditions and other standards were already applied, borrowing from *Codex Alimentarius* or national standards.

An analysis by the World Bank of trade and regulatory data for 15 European Union member states and nine African countries suggested that the implementation

<sup>147</sup> T Otsuki et al, 2001, *Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports* (World Bank Development Research Group, DECRG); see also Oxfam, 2004, Supplementary Memorandum to United Kingdom Parliamentary Select Committee on International Development.

of the new standard in the European Union, instead of the existing international standards, would reduce health risks by 1.4 deaths per billion people per year, a margin so small as to be almost impossible to verify. However, the effect was to decrease African exports of cereals, dried fruit and nuts by 64 percent. The debate spilled over into, and disrupted, the negotiations over market access.

#### Box 8. Are the highest standards always the best?

The question seems astonishing and the answer self-evident. The assumption that the strictest standards are always the best is assumed by guideline 34, but high standards can be a very blunt instrument and may have a perverse effect, not including the trade effects mentioned above. Standards may cost a lot to implement and this “opportunity cost” may be at the expense of other goals. For example, the EC Water Directives (which are generally considered to have been a success) set very high standards for drinking water. The standard on trace pesticides in drinking water was referred to by the United Kingdom of Great Britain and Northern Ireland’s Director General of the Office of Water Services (OFWAT) as “rather like dropping an aspirin into an Olympic swimming pool”, and he pointed out that the standard was thousands of times more stringent than for pesticides for vegetables. The point was not only the cost to consumers but also that the cost of implementing to such a high level was such as to detract from other expensive operations that also had an impact on human health, such as leakage repair (as much contamination results from leakage). To take an example from the same sector in a developing country, the Philippines had standards for water distribution that insisted on rigid metal pipes of fixed diameter. In practice this was almost physically impossible to operate in the slums of Manila, where flexible thin rubber pipes were in general use. The illegal rubber pipes allowed for water distribution to people who did not have any, while strict application of the legal standard made such progress impossible.

Source: UNCTAD.

This is emphatically not to say that safety standards are not urgent. For example, the WHO status report on Road Safety for 2015 found that only 46 countries (the majority of which are high income countries) adhere to the United Nations regulations on electronic stability control.<sup>148</sup> Major efforts are needed to raise car safety standards to reduce the 1.2 million deaths (and more injuries) sustained every year.<sup>149</sup> The point is rather that, in a world in which “absolute safety” is not possible,

there needs to be a probability of demonstrably positive net effects arising from such interventions.

## F. SECOND-HAND GOODS

During the last generation, the issue of second-hand goods has come to the fore, demonstrating the possibility that major principles of public policy may conflict. As the ISO standard on second-hand goods indicates, “the cross-border movement of second-hand goods (SHG) has been in practice for many years and trade activity has increased exponentially. Most (traded) second-hand goods are sold or donated by developed countries to developing ones and the value of this market is estimated at billions of dollars. Consumers welcome having the choice of purchasing low-cost, durable and safe SHG as an alternative to higher priced new goods, and the demand for these products is robust”.<sup>150</sup> Reuse can reduce resort to landfill or other forms of disposal in the countries of export,<sup>151</sup> but there are also dangers that products might be dangerous for consumers in use and safety standards may clash. One form of sustainability (reuse) can conflict with another (safety or even pollution in the country of destination) and even relatively non-toxic goods, such as clothing, raise issues. A majority of clothing imports are second-hand in several African countries and this raises questions about the development of a domestic clothing industry and diminished customs revenue. In response, many African countries have introduced restrictions on second-hand imports, such as bans on vehicles over three years old in Algeria and Tunisia, undergarments and mattresses in Ghana, all clothes in South Africa save for humanitarian interventions and tyres in Kenya and Mozambique.<sup>152</sup>

The ISO standard was established as a result of surveys of ISO’s Consumer Policy Committee (COPOLCO) and Developing Country Committee (DEVCO) members, which revealed significant concerns about trade in second-hand goods. It attempts to respond to the above concerns by providing a basis for in-transit and port-of-entry screening and establishes measurable criteria against which second-hand goods can be evaluated with the objective of protecting consumers and the environment. The standard may be used by importing or exporting parties or governments as a means to establish confidence in the goods that are being traded or donated.

<sup>150</sup> ISO standard for cross-border trade of second-hand goods, Technical Standard 20245 (2014), possibly under way to full ISO standard.

<sup>151</sup> ISO standard for cross-border trade of second-hand goods, Technical Standard 20245 (2014), possibly under way to full ISO standard.

<sup>152</sup> J Lukaz, 2012, Second-hand goods, Contribution to ISO COPOLCO workshop on Consumer Issues in Standardization in Ghana (Accra).

<sup>148</sup> United Nations regulation 13h. The United Nations World Forum for Harmonization of Vehicle Regulations is the primary global body for development of car safety standards.

<sup>149</sup> WHO, 2015, *Global Status Report on Road Safety*; see also Global NCAP, 2015, *Democratizing Car Safety: Road Map for Safer Cars 2020*.



## G. CONCLUSION

The underlying legal framework on product safety is one of the more constant elements of consumer protection, yet, as noted above, certain new issues have emerged during the period since the 1999 revision of the UNGCP.

Public agencies are needed to protect consumers, as judicial redress for consumers in such cases is handicapped by the cost of litigation (time and money), which is usually (not always) disproportionate to the cost of the item and to most costs associated with harm. In other areas of consumer protection this dilemma lies behind the development of alternative dispute resolution (ADR) systems, but ADR is more difficult in relation to product safety because of the need for technical assessments. Furthermore, given the nature of “batches” of products carrying the same defect and the consequent risk of multiple harms, the need for a public policy input is clear. By the same token, relying on legal protections only at the level of the final consumer is a less efficient mechanism than also incorporating the development of good production practices with built-in supervisions in place before products are released onto the markets.

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## X. Consumer information and education

### A. CONSUMER INFORMATION AND EDUCATION

In this chapter information and education are studied together, as they form a continuum in the panoply of devices for consumer protection. The two terms are often confused or even used synonymously. In fact, they have quite different meanings. Consumer education refers to the process of gaining the knowledge and skills to manage consumer resources and taking steps to increase the competence of consumer decision-making. It focuses on the development of understanding and skills and the gaining of knowledge. Consumer information, on the other hand, refers to the provision of data relating to particular products or transactions so as to enable decision-making in relation to a purchase. It can further relate to data about applicable law or the agency charged with regulating a particular industry. Consumer information is thus “situation-bound” while consumer education is a prerequisite for the effective use of consumer information.

In analysing the twin concepts and their application, we are fortunate in having to hand two relatively recent worldwide surveys of consumer protection, both of which took place in 2012–13 and show results from similar numbers of countries. The 2013 UNCTAD survey was designed to feed into the UNGCP revision and received 58 sets of results, mainly from governments.<sup>153</sup> Simultaneously, Consumers International surveyed its members worldwide and received responses from 72 consumer associations in 60 countries.<sup>154</sup> Each survey has its own natural tendency: government responses tend to be optimistic in terms of application of the UNGCP, while CI member responses tend to be more critical.

### B. CONSUMER INFORMATION AND EDUCATION IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

In the revised UNGCP, as in the previous version, “education and information programmes” form a

single section (V.G). Information appears under the “legitimate needs” guideline (5e), where it is linked to “choice”, in section IV, “principles for good business practices” under “disclosure and transparency” (guideline 11c), in section V.A on “national policies for consumer protection” (guidelines 14b and 14c) as “clear and timely information”, guideline 27 under “promotional marketing and sales practice” and guideline 28 on “the free flow of accurate information on all aspects of consumer products”. Guidelines 29 and 30 deal with environmental information. It is also mentioned in related to specific sectors: under section V.J on financial services (guideline 66e) relating to disclosure of potential conflicts of interest, guideline 66h relating to remittances and guideline 77 on public utilities.

For education, references are largely the same, appearing under “legitimate needs” (guideline 5f), sections IV.G (guideline 11d), V (guideline 14i), new section V.J on financial services in rather greater detail than for information, covering financial literacy (guideline 66d), financial education (guideline 67) and section V.K, guideline 69 covering a range of specific sectors.

Information and education are thus major features of the UNGCP and their prominence was reinforced during the 2015 revision. This reflects their underlying importance and also the importance attached during the course of the last decade to matters of disclosure and consumer interpretation of disclosed information.

### C. THE TRANSFER OF RISK

In devising an appropriate consumer information policy, one needs to consider consumer information needs, consumer information-seeking behaviour and the competence of consumers to assess the information in the context of purchasing decisions. The appropriate course of action to address these aspects varies depending on consumer characteristics (for example, relating to income, education, age, sex and culture) and even among individuals within these categories.

No matter what information or how much information is made available, there is no guarantee that the consumer will ultimately make a choice that is based on a full and rational assessment of it. Consumer education is often thought to increase consumer ability

<sup>153</sup> UNCTAD, 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection 1985–2013*, TD/B/C.I/CLP 23, note by UNCTAD secretariat.

<sup>154</sup> Consumers International, 2013, *The State of Consumer Protection Around the World*.

to obtain and assess information about goods and services.<sup>155</sup> However, product variety is increasing not just as incomes have risen, but also as markets have come to embrace domains previously characterized by state-directed provision such as telecommunications, electricity, insurance and pensions. In parallel with the increasing extent of the market, information is migrating from that provided face-to-face to that which is made available online. As discussed in chapter III on consumer law, the response of many states has been to try to build consumer expertise so that the market is balanced by the competence of the “empowered consumer”.

The OECD Toolkit on Consumer Policy sets out a range of interventions by governments and stakeholders to improve decision-making by consumers.<sup>156</sup> These include Australian telephone charges, Chilean internet and TV services, French fuel bills and credit card information in the United Kingdom of Great Britain and Northern Ireland, which in turn borrows the “summary box” idea from the Truth in Lending legislation in the United States of America. The more examples that are given, the more the question arises: can all consumers be experts on all of these domains, all of the time? The tentative answer which is reached below is “no”, although many can become reasonably familiar when they need to be. However, such familiarity is likely to be of limited duration and, for some products, unlikely ever to be sufficient.

The policy of reliance on disclosure as a consumer protection principle has come under heavy criticism during the last decade, partly as a result of the financial crisis, when it became clear that consumers had little understanding of the often significant financial commitments they had entered into when purchasing financial products. In the words of an OECD paper in 2009, “the growing complexity of financial products over the past decade, coupled with financial innovations and the increasing transfer of financial risk to households have put enormous pressure and responsibilities on the shoulders of financial consumers in recent decades”.<sup>157</sup> The same study concluded that “financial literacy ... does not substitute for financial consumer protection and regulatory frameworks. In particular the importance

of ‘market conduct’ supervision has been further exposed in light of the recent financial crisis, where uninformed consumers became easy targets for mis-selling and purchased credit products that were clearly inappropriate for them”.

## D. CONSUMER INFORMATION

Consumer information is meant to provide objective and impartial information to consumers at the point of purchase, in order for them to decide which of the many branded products and services available will best suit their needs. As more and more purchases take place online with less personal interaction, and even less scope to examine physical goods, the quality of information provided becomes more important.

The following are some of the forms in which information is made available to consumers:

- Personal experience with products and services or word of mouth from family and friends.
- Reports in the media (as opposed to paid advertising). Some of this information may be planted by public relations efforts of commercial companies and in consequence there is an ambiguity in distinguishing marketing from education or information. Some information will be independently generated by government reports, consumer groups, journalists, specialist consumer broadcasts and other non-commercial entities.
- Labels that are mandatory requirements such as those on food products, pesticides, tobacco products, therapeutic drugs and, more recently, energy efficiency labels.
- Voluntary labelling schemes devised by independent bodies for particular products or for particular purposes such as eco-labelling schemes.
- Advertisements and promotional campaigns that may or may not be regulated by laws or voluntary codes of practice.
- Information provided on the internet by companies engaged in e-commerce.
- Comparative information provided by independent consumer associations in publications for their members (this has become far more prevalent during the last decade as areas of consumer choice have been expanded, for example to the retail energy sector and financial services). To command confidence, such information and advice should be independent and objective

<sup>155</sup> To illustrate, research conducted by the International Chamber of Commerce’s initiative against counterfeiting shows that consumers refrain from purchasing counterfeit goods when they are better informed and aware of the related risks to their health and safety (ICC/ BASCAP, 2009, *Consumer Attitudes and Perceptions on Counterfeiting and Piracy*, available at <http://www.iccwbo.org/advocacy-codes-and-rules/bascap/consumer-awareness/consumer-perceptions/>).

<sup>156</sup> OECD, 2010, *Consumer Policy Toolkit*.

<sup>157</sup> OECD, 2009, *Financial Literacy and Consumer Protection: Overlooked Aspects of the Crisis*.

and should be presented in the consumer interest.

- Peer-to-peer reviews, comparison sites and customer reviews, all of which have expanded recently due to ease of access through the internet.

Consumer information is especially needed where:

- The products take up a relatively high proportion of consumer expenditure
- The products are technically complex
- There is no basis for consumer assessment at the point of sale
- There is little advance consumer knowledge of required performance
- Consumers seek to exercise ethical choices relating, for example, to environmental or social dimensions of production

With the expansion of international trade and e-commerce, an issue of growing importance is the consistency of applicable law with respect to information attached to physically imported products and information provided electronically over the internet. The differing sources of information are not treated consistently within and between states. This illustrates the importance of the newly inserted “legitimate need” in guideline 5j which lists “a level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce”. Generally, mandatory labelling laws are applicable to imported and domestically produced goods alike.

While efforts to improve disclosure have taken effect, there has emerged what the French call “*le paradoxe du formalisme*” whereby excessive provision of information is made to abide by legal requirements, but “blinds” the consumer. A South African study reports how demand for financial products can decrease with menu size: “large menus can demotivate choice by creating feelings of conflict and indecision that lead to procrastination or total inaction”.<sup>158</sup> For reasons such as this, it is increasingly recognized that reliance on bare disclosure and education alone does not suffice. The result in policy terms is that responsibility to advise is being re-emphasized in sectors selling complex products and this in turn raises the question of remuneration systems and incentives to give objective advice.<sup>159</sup>

<sup>158</sup> M Bertrand et al, 2010, What’s advertising content worth? Evidence from a consumer credit marketing field experiment, *Quarterly Journal of Economics* 125(1):263–306.

<sup>159</sup> G20/OECD, 2011, *High-Level Principles for Consumer Protection in Financial Services*

In some respects, the problems are becoming more intractable not only because the provision of information online does not lend itself to questions and explanation but also because the element of time renders much information ineffective. We note elsewhere the surveys that show that faced with pressures of electronic “timeout”, consumers do not read terms and conditions.<sup>160</sup>

## E. CRITICAL ISSUES WITH RESPECT TO LABELLING

### 1. Mandatory labelling

Labelling is now a matter for mandatory legal requirements in most countries. Labelling laws set out the kind of information that should be provided and in what forms it should be provided. Sometimes specifications are given for the size of the label and specific warnings, for example health warnings for tobacco products or for people with specific food allergies on food labels. Labelling is increasingly used to help achieve public policy goals, whether promotional, such as improved energy use or nutrition, or negative such as “smoking kills” labels on cigarette packets.

Food labelling is one of the priority areas where mandatory legal regulation is applicable. Apart from the usual requirements for date of manufacture, expiry date, name and address of manufacturer, weight, quantity and ingredients used, many countries have now moved to the next stage of requiring compulsory “front of pack” nutrition labelling, based on the notion of recommended daily dietary intakes. “Traffic light” schemes (red, amber and green labels or flags) are increasingly under consideration. They have been developed in Ecuador and are in use in the United States of America, where information on food labels has been reduced in order to simplify and provide focus.<sup>161</sup>

### 2. Voluntary labelling

Many governments are beginning to incorporate private standards into policy and legislation and to recognize them in a number of different ways. Although, as already noted, the World Trade Organization recognizes the validity of international standards in matters of labelling, the scope of standards applicable under WTO rules is limited by the scope of WTO jurisdiction, which in this case is limited to product

<sup>160</sup> Citizens Advice, 2015, *Personal Data Empowerment: Time for a Fairer Data Deal?*, available at <https://www.citizensadvice.org.uk/personal-data-empowerment-time-for-a-fairer-deal/>.

<sup>161</sup> USFTC, 2008, *Marketing Food to Children and Adolescents*.

characteristics and does not cover process and production methods. If labelling is to deal with process and production methods, as is increasingly the case, the focus then shifts to voluntary measures, such as those forming part of corporate social responsibility policy and the adoption of international standards, in particular those of ISO.<sup>162</sup>

Voluntary labelling schemes provide information on both product characteristics and production methods. These schemes are often operated by an independent labelling body with the cooperation of the traders concerned and, at times, consumer associations. A good example of this is found in voluntary eco-labelling schemes. They have become a popular strategy to inform consumers of the environmental friendliness of the products they purchase, use and dispose of including issues relating to recycling and end of life.

Early voluntary informative labelling schemes included the Swedish “VDN” system, created in 1951 and adopted first by the Nordic countries, the Japan Industrial Standards (JIS) mark for consumer products and the German “Blaue Engel” (Blue Angel) mark which was assigned to products that were low in emissions and produced less waste than comparable products. A wide array of eco-label schemes has since developed with a gradual shift away from simple product characteristics towards production methods. For example, ISEAL is an alliance of multi-stakeholder standard-setters and accreditation bodies assessing sustainability using codes of good practice based on the ISEAL Credibility Principles.<sup>163</sup> The principles include sustainability, improvement, impartiality, transparency and accessibility. Despite the limitation on trade measures being applied against foreign exporters in relation to PPMs, governments remain free to adopt standards for their own internal uses. China, for example, has recently adopted the ISEAL principles. The development of such principles is in line with UNGCP guideline 30, which states that “the development of appropriate advertising codes and standards for the regulation and verification of environmental claims should be encouraged” and that governments “should take measures regarding misleading environmental claims or information in advertising and other marketing activities”.

<sup>162</sup> One of the best known is ISO 26000 Guidance on Social Responsibility (2012). It covers environment, labour conditions, human rights and consumer issues. The latter section refers to the UNGCP, referencing “the legitimate needs of consumers”, of which it says that “these principles of consumer protection are elaborated and detailed throughout the text of the *UN Guidelines*, and are commonly referred to as ‘consumer rights’”.

<sup>163</sup> <http://www.isealliance.org/our-work/defining-credibility/credibility-principles>

UNCTAD reports that a number of countries still lack provisions on information regarding environmental impact (thus not meeting the requirements of guideline 30 above), while in the survey cited above, Consumers International reported that only 53 percent of the responding countries required disclosure of energy consumption of domestic appliances. A clear majority of low income countries relied on a voluntary approach but this stance was not peculiar to developing countries as 27 percent of high income countries also did not require energy consumption disclosure, although 90 percent had provided guidelines. Sporadic initiatives and campaigns were reported on the matter (Fiji and the Dominican Republic are named by CI), but practical results seemed to fall short of what one might expect given formal governmental recognition of the issue.

### 3. Product information criteria

In theory, disclosure of information should be more feasible in 2016 than was the case in 1985 when the UNGCP were first adopted, as detailed information can be provided on websites. While it might be argued that online information might discriminate against consumers without access to the internet, the fact that such details are available online should help regulatory authorities and indirectly protect consumers. Product information can thus be disclosed at greater length, although care may be needed to ensure that this does not produce a new version of the *paradoxe du formalisme* mentioned above. In other words, the release of detailed information on to a website should not absolve distributors from the obligation to render it comprehensible.

The following are some criteria to assess whether information presented on labels and packaging is acceptable:

- Information should comply with national and international codes of practice and laws. It should be noted that international standards on information and packaging (such as those set by *Codex Alimentarius* and ISO) are recognized by UNGCP guideline 70 and by the WTO Sanitary and Phytosanitary and the Technical Barriers to Trade Agreements as a legitimate basis of product standards and thus of trade measures to protect consumers.
- Package and label disclosures should be clear, simple and to the point. This means avoiding information overload and confusing presentation.



- Information that identifies the producer and supplier must be provided. This means stating the accurate identity of the product by its common or usual name and the form the product takes.
- The net quantity of the contents must be disclosed.
- Information about the ingredients in the product should be disclosed. This means following applicable laws for disclosures on pre-packaged food products. This can extend to stating nutrient value, including salt and sugar content, calories, minimum daily recommended inputs on which nutrient value is calculated, disclosing chemical contents of non-food products and providing warnings and instructions for proper use and handling.
- Price information should be displayed conspicuously and in an understandable form to facilitate product comparisons. This means affixing price information on packages and providing unit pricing information on shelves or display areas when appropriate and feasible and providing adequate price information to facilitate consumer purchasing decisions. Successful campaigns have been mounted by consumer associations in Malaysia, Australia, Germany and the United Kingdom of Great Britain and Northern Ireland on these issues and there is an ISO standard on unit pricing.
- All product claims on packages and labels must be substantiated in advance. All such claims must be truthful, clear and accurate. This is especially so for health claims on food or drug products. Terms like “natural” or “organic” should not be used to imply the product is of superior quality or nutritional value unless this can be substantiated.<sup>164</sup>

## F. CRITICAL ISSUES WITH RESPECT TO ADVERTISING

With globalization integrating consumer markets, the competition to sell to consumers worldwide has become increasingly aggressive. As a consequence, advertising expenditure has increased significantly.<sup>165</sup> According to the Chief Marketing Officer journal, *Facts & Stats*, global spending on media promotion

is forecast to rise at over 5 percent per year from the end of 2015. The overall total is expected to reach \$2.1 trillion by 2019. Furthermore, advertising has penetrated ever deeper into developing country societies with global brand recognition becoming almost universal in some cases, such as Coca Cola. This process may be intensified by the spread of handheld devices and targeted with ever greater accuracy by the use of cookies.

In this context it is noteworthy that digital advertising shows the fastest increase (16 percent in 2014) and that emerging markets are showing particularly high rates of increase. According to one marketing source, Brazil is expected to overtake the United Kingdom of Great Britain and Northern Ireland and Germany by 2018 to become the world’s fourth largest global advertising market and Indonesia is forecast to have the largest digital advertising spending growth of any country in the world.<sup>166</sup> At the time of writing, North America accounted for over 35 percent of total global spend, with Asia-Pacific not far behind on 28 percent.<sup>167</sup>

In most countries, most advertising product lines are not specifically regulated by statute with the exception of certain specific products such as alcohol, tobacco and firearms, in addition to therapeutic drugs, pesticides and professional services such as doctors and lawyers. The more usual restraint is self-regulation by the advertising industry and the media organizations through codes of practice. There are, however, generic national polices about advertising in the mass media regarding use of indecent and culturally and religiously unacceptable images in advertisements.

There is a long tradition of self-regulation in the advertising industry. The International Chamber of Commerce (ICC) Code of Advertising and Marketing Communication Practice was developed in 1937 and is now in its ninth version having been consolidated in 2006. As a self-regulatory code it applies to all advertisements for goods, services and facilities. It outlines broad principles for advertisements to be “legal, decent, honest and truthful” (article 1) and has a special section on advertising directed at children.<sup>168</sup> This international code forms the basis of self-regulation practices by advertising standards authorities in many countries and regulates “all advertising and other marketing communication for the promotion of any kinds of goods and services, corporate and institutional promotion included”. It applies to advertisers, advertising agencies and the media who provide platforms for advertisements. Most individual

<sup>164</sup> The meaning of “organic” is regulated in the European Union and United States of America, so it implies a set of defined characteristics. “Natural”, on the other hand, does not carry much meaning at all.

<sup>165</sup> [www.cmocouncil.org/facts-stats-categories.php?view=all&category...spend](http://www.cmocouncil.org/facts-stats-categories.php?view=all&category...spend).

<sup>166</sup> eMarketer.com, 10 December 2014.

<sup>167</sup> [www.statistica.com](http://www.statistica.com).

<sup>168</sup> ICC, 2011, *Consolidated Code of Advertising and Marketing Communication Practice*.

complaints (and appropriate sanctions and enforcement) are dealt with at national level but there is also scope for cross-border complaints through, for example, the European Advertising Standards Alliance whose charter was created in 1992 based on the ICC code.

There may be a threat of governmental intervention to ensure that self-regulation maintains standards and guards against its own failures. For example, the Office of Communication (Ofcom) of the United Kingdom of Great Britain and Northern Ireland is the regulatory body responsible for advertising and broadcast media but has delegated the responsibility for enforcing broadcast advertising codes to the Advertising Standards Authority (ASA). Broadcasters are obliged by the condition of their Ofcom licences to comply with ASA rulings. If ASA refers a broadcaster to Ofcom, the broadcaster can be fined or lose its licence. In 2013–14 ASA considered 37,000 complaints about 17,000 cases. This led to 3,384 advertisements being changed or withdrawn. 71 percent of the cases were about misleading advertising and 36 percent of the cases were about internet advertising which overtook TV advertisements for the first time in 2014, showing a year-on-year increase of 35 percent.<sup>169</sup>

One argument for self-regulation is that it allows enforcement agencies to turn their attention to issues that the self-regulation scheme is not competent to judge such as mass scams and door-to-door abuses. At its best the system means that advertisers are judged promptly by expert peers and government agencies are not left in the slipstream of events playing catch-up and are free to concentrate their resources elsewhere, while the courts are not overloaded and consumers have somewhere to go.

However, as concerns about the power of advertising to promote consumption increase, where that consumption comes into clearer conflict with the aim of a particular public policy (such as health) there are inevitably calls for control of advertising to be exercised by people who do not have vested interests in the industry. Where there are public policy objectives around particular products, the issues at stake are not about the advertisements themselves but about the products being advertised. Current examples include the marketing of food to children, the promotion of pharmaceutical products and repeated calls for partial or total bans on tobacco advertising. The implementation of such a ban has progressed somewhat in the European Union and, more recently, in the Russian Federation, which banned all tobacco advertising with effect from 2014. Many consumer associations have taken part in campaigns, most recently in Mexico on sugary drinks, to

restrict advertising for certain products that are considered to be intrinsically harmful.<sup>170</sup>

Such moves mark a step beyond the activity of self-regulation in evaluating individual advertisements. One can conceive of “correct” product information about a product for which promotional advertising is banned (e.g. “smoking kills” on cigarette packets) in contrast with misleading advertising of an innocuous product. Self-regulation would apply to the latter, whereas advertising in defiance of an advertising ban on that particular product would be a matter for regulatory enforcement.

Consumer associations have been involved in advocacy regarding such measures. For example, health warnings clearly apply to advertisements for products proven to be addictive and unsafe, such as cigarettes and alcohol. It is increasingly accepted that there is a role for measures around aggressive advertisements targeting children at a vulnerable age to consume foods high in fat, sugar and salt and there is a WHO code to that effect.<sup>171</sup>

Other campaigns involve judgments that are more context-based. They include:

- Advertisements for breastmilk substitutes that mislead women in locations where they cannot use the product as intended (because of poor water supply, for example).
- Advertisements that target consumers at particularly vulnerable moments such as default and debt, such as pay day loans. The existence of abuse is proved beyond doubt, but to what extent it is a matter of banning advertising or ensuring that it is not misleading or regulating the actual product, is a more complex matter.
- Advertisements for products that contain toxic chemicals for which there is as yet no consensus or conclusive scientific proof of safety levels, such as pesticides, monosodium glutamate and aspartame.

The history of such campaigns has tended to be that consumer concerns have been raised at the international level at intergovernmental organizations such as the *Codex Alimentarius* Commission, World Health Organization and Food and Agriculture Organization. Consumer organizations have usually

<sup>170</sup> See also chapter XIV for further discussion.

<sup>171</sup> WHO, 2010, Set of recommendations on the marketing of food and non-alcoholic beverages to children, endorsed by WHO member states at the sixty-third World Health Assembly (resolution WHA63.14). <http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/>.

<sup>169</sup> ASA, 2014, *Having More Input, Being More Proactive*.

### Box 9. The WHO/UNICEF International Code of Marketing of Breastmilk Substitutes

According to UNICEF, “optimal breastfeeding of infants under two years of age has the greatest potential impact on child survival of all preventive interventions, with the potential to prevent over 800,000 deaths (13 percent of all deaths) in children under five in the developing world.

Breastfed children have an at least six times greater chance of survival in the early months than non-breastfed children. An exclusively breastfed child is 14 times less likely to die in the first six months than a non-breastfed child, and breastfeeding drastically reduces deaths from acute respiratory infection and diarrhoea, two major child killers. The potential impact of optimal breastfeeding practices is especially important in developing country situations with a high burden of disease and low access to clean water and sanitation. But non-breastfed children in industrialized countries are also at greater risk of dying ... In the United Kingdom Millennium Cohort Survey, six months of exclusive breastfeeding was associated with a 53 percent decrease in hospital admissions for diarrhoea and a 27 percent decrease in respiratory tract infections.”

The WHO/UNICEF International Code of Marketing of Breastmilk Substitutes was drafted to deal with advertising of breastmilk substitutes, which was judged to discourage women from breastfeeding by presenting the marketed alternative as safer, promoting it as equally or more nutritious than, or even “equivalent” to, breastmilk. The evidence is clear that it is not, and this is made clear in the code and subsequent guidelines.

The code was adopted at the World Health Assembly in May 1981 and remains very relevant. Since 1981, many countries have enacted legislation implementing all or many of its provisions. The scope of the code extends to breastmilk substitutes including infant formula, other milk products, foods and beverages, including complementary foods that are marketed as a partial or total replacement of breastmilk and feeding bottles and teats. The main provisions of the code relate to the protection and promotion of breastfeeding and the appropriate marketing and distribution of breastmilk substitutes. For example, the code prohibits advertising of these products to the public, free samples to mothers, promotion of these products in healthcare facilities, nurses advising mothers, gifts or personal samples to health workers and words or pictures idealising artificial feeding.

The effects of codes are always difficult to assess precisely, and the fact of high profile controversy around them can contribute to raising the profile of the issue. Recent trends have significance for both pessimists and optimists. For while breastfeeding rates are no longer declining at the global level (indeed, many countries experienced significant increases in the last decade), only 39 percent of children less than six months of age in the developing world are exclusively breastfed and just 58 percent of 20–23 month olds benefit from the practice of continued breastfeeding.<sup>172</sup>

Source: UNCTAD drawing upon UNICEF.

supported the advice of the international bodies, opposition coming rather from governments and from corporate lobbies.

## 1. Criteria for advertising<sup>172</sup>

The following are criteria to assess whether advertisements are socially and legally responsible:

- Advertising should comply with national and international codes of practice and laws.
- Advertisements should be truthful and accurate and be neither deceptive nor misleading.
- All advertising claims (verbal and visual) should refrain from using vague statements, superlatives, exaggerations or comparisons which may be misunderstood or misconstrued, especially if the audience are less sophisticated consumers.
- All factual claims relating to the safety, performance, effectiveness and quality of the products and services should be substantiated in advance of their use, using expert testimonials and endorsements only when they are based on actual and normal use of the product or service and on the endorser’s knowledge in the field.
- In comparative advertising, product comparisons which are meaningful to consumer expectations and product use should be portrayed accurately and clearly and be capable of substantiation.
- Advertisements should depict safe use of products and not suggest product uses which present unreasonable safety risk for the consumer in foreseeable use or misuse situations.
- Accepted community standards of good taste in both illustrations and text should be respected, not offending, downgrading

<sup>172</sup> UNICEF, op. cit.

or exploiting groups or discriminating against gender, age, religion, race, or sexual orientation, which means avoiding belittling any social group.

- Claims that relate to meeting current public objectives such as energy conservation, environmental protection or public health should be substantiated, or at least substantiatable and verifiable.

## G. CONSUMER EDUCATION AND ITS IMPLEMENTATION

Earlier conceptions of consumer education emphasized its role in training consumers to act effectively (i.e. safeguarding their own interest and that of their families). The paradigm was essentially “value for money” and the focus primarily the household. The curriculum approach was to include it as a part of home economics. Other models of consumer education include incorporating its concepts into existing subjects, that is “permeating the curriculum”, or teaching specific subjects or courses on consumer protection. By and large, at the primary and secondary level, the “permeation” approach has been applied to subjects such as living skills or commerce. In tertiary institutions, consumer protection modules have been introduced as specific subjects for example in law, social sciences or business schools. Additionally, apart from the formal curriculum, consumer education has been incorporated as a co-curricular activity, for example through consumer clubs. The link with home economics is at the origin of many consumer associations particularly in Eastern Europe, as noted in chapter V.

With hindsight, some of the teaching materials developed during the 1990s now seem to be very ambitious. The “six fields of content of consumer education” suggested by the Nordic Council of Ministers during the 1990s sets out an admirably clear structure organized around personal finance, consumers’ rights and obligations, commercial persuasion (advertising in particular), consumption, environment and ethics and food safety.<sup>173</sup> But the detailed objectives under “rights and obligations of the consumer” such as “know the content of the most important laws and other statutory provisions dealing with consumer rights and obligations” and “know how an increasingly unhindered free trade will affect their rights as consumers” are

matters which exercise the finest academic and legal minds. Conversely, the objectives under commercial persuasion now seem far-sighted given the propensity for youngsters to adapt to new technologies and their fascination with social media and with advertising (also a source of vulnerability). They are as follows:

- Learn to identify advertising and to understand the difference between information and advertising and be able to analyse, interpret and critically examine the content of commercial images, communications and their use of language
- Be familiar with the use of electronic media such as TV, video, computers, modems, CD-ROM and other important consumer technology for communicating information and entertainment
- Understand the importance of advertising from a commercial and social perspective
- Be able as a consumer to use electronic information services in a critical and discriminating way
- Learn to understand how the media creates lifestyles that are reflected, inter alia, in particular gender roles and physical ideals

Box 10 contains a body of contents for consumer education and sets out a broad consumer education agenda.

Consumer education has also been taught informally through specific events for target groups such as rural women, members of consumer organizations, school consumer clubs, consumer cooperatives and residents’ associations, among others. These initiatives have been undertaken by government consumer protection agencies, consumer associations and business entities as part of a drive to educate consumers who would not otherwise have the opportunity to learn these skills.

The efforts put into consumer education have thus been considerable and not just from governmental education ministries. Nevertheless, there are conflicting visions of who is responsible for consumer education. The UNCTAD Implementation Report<sup>174</sup> found that:

<sup>173</sup> G Hellman-Tuiter, 1999, *Promoting Consumer Education in Schools*.

<sup>174</sup> UNCTAD, 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection 1985–2013*, TD/B/C.I/CLP 23, note by UNCTAD secretariat.

### Box 10. A body of contents for consumer education

#### 1. Living in a household

Family and household, functions and structures, values and behaviour, needs and wants, lifestyles and cycles of life, resources and constraints, problem-solving and decision making, goods and services production.

#### 2. Seeking information and advice

Mass-media and commercials, advertisements and independent consumer information, supply of tests and advice, information and communication technologies, assessing and judging, using information and institutions.

#### 3. Managing money

Money and currency, planning and budgeting, spending and saving, credits and debts, taxes and social contributions, private insurances and formation of wealth, banks and financial services.

#### 4. Buying goods and services

Price and quality, supply and demand, market competition and power, shops and stores, selling and marketing.

#### 5. Communicating satisfaction and dissatisfaction

Criticism and complaints, protests and boycotts, consumers' rights and duties, access to law and court, consumer protection.

#### 6. Housing and dwelling

Buying and renting, owning and sharing, size and furniture, costs and responsibilities contracts and tenant protection.

#### 7. Caring for health

Nutrition and eating, national and private healthcare, payments and repayments, sports and physical activities, diet and drugs, body images and self-reliance.

#### 8. Coping with problems

Poverty and unemployment, over-indebtedness and insolvency, separation and divorce, illness and disabilities, sex- and race-discrimination.

#### 9. Influencing and participating

Involvement with voluntary, official and community bodies and political parties concerned with consumer affairs.

#### 10. Caring for the future

Impacts of consumption on natural resources and the environment, sustainable consumption and the ecological commodity basket, eco-balances and product-line analysis, eco-labels and other information systems, costs and benefits.

Source: Professor Heiko Steffens, Technische Universität Berlin.

Conducting educational and information consumer programmes is a core responsibility of consumer protection agencies. Most UNCTAD Member States have adopted such programmes with the aim of creating discerning consumers. There is a multitude of interesting initiatives comprising information websites, online courses, online counselling (United Kingdom), workshops (Dominican Republic, El Salvador) and even consumer education in the curricula of ministries of education (guidelines 36–43). Notably, the United States has an extensive educational programme covering all mentioned areas, especially active across social media (Facebook, Twitter, Youtube and blogging). Some countries have

specialized units to carry out these roles. Each country has set different priorities, most of which are found among recommendations in guideline 44.

The report goes on to say that “there are few examples of education and information campaigns undertaken by consumer organizations, businesses and media”. In contrast, the CI survey concludes that:

An interesting picture emerges when figures [on government integration of consumer education into the school curriculum] are viewed in conjunction with the prevalence of government funding for consumer education (58 percent) and education carried out by consumer groups (94 percent). It would appear



that despite the fact that consumer education is seen by many governments as the key component ... governments actually sponsor these activities in barely half of the countries surveyed ... falling short of the efforts of consumer organizations.<sup>175</sup>

## 1. Consumer education and the financial crisis

Despite the above evolution, which is generally positive as regards the recognition of consumer education, as time has passed new pressures on the consumer education model have arisen, most notably from the global financial crisis.

This has led to ever more searching questions about the role of consumer education during the deregulatory phase that preceded the crisis. How could it be that despite the growing recognition of consumer education, the catastrophic events that took place during the middle of the first decade of the twenty-first century could have such devastating effects for individual households? According to the “empowered consumer” thesis, this was not meant to happen.

Indeed, the financial crisis exposed to scrutiny the notion of reliance on consumer education as a means to ensure consumer protection and illustrated the limits of education and the need for realism. For it became clear that many financial products were so complex that regulators and, at times, even the sales forces that sold the products did not understand them. Worst of all, some products were virtually incomprehensible, having been designed for short-term gain and to evade regulatory constraints. A study conducted on banking services commissioned by the EC found that in two thirds of cases, an expert panel was unable to disentangle the structure of bank tariffs in order to ascertain the true cost of a service. As the then European Union Consumer Affairs Commissioner Meglena Kuneva said in 2009, “if experts are unable to understand the fee structure, what chance is there for ordinary consumers?”<sup>176</sup>

In some respects this is not new or surprising. Is it reasonable to expect ordinary consumers to become financial experts? After all one does not have to be an engineer to buy or to drive a car. Some academic studies have concluded that consumer education can even make things worse by creating an illusion of understanding. The “conventional wisdom” under

challenge by this finding was eloquently described by Professor Lauren Willis, who referred to a vision of “responsible and empowered market players, motivated and competent to make financial decisions that increase their own welfare. The vision is of educated consumers handling their own credit, insurance and retirement planning matters by confidently navigating the bountiful unrestricted marketplace”. The professor went on to warn that “the belief is implausible, given the velocity of change in the financial marketplace, the gulf between current consumer skills and those needed to understand today’s complex non-standardized financial products, the persistence of biases in financial decision-making and the disparity in resources with which to reach consumers between educators and financial services firms”.<sup>177</sup>

The above is reinforced by a meta-analysis by Daniel Fernandes, John Lynch and Richard Netemeyer published in 2014, which tracked the relationship of financial education to financial behaviours in 168 papers covering 201 prior studies. The authors found that interventions to improve financial literacy explained only 0.1 percent of the variance in financial behaviours studied, with even weaker effects in low-income samples. They concluded that “like other education, financial education decays over time; even large interventions with many hours of instruction have negligible effects on behaviour 20 months or more from the time of intervention”.<sup>178</sup>

In fairness, few financial experts have argued that consumer education would have avoided the financial crisis, although individual officials and bankers have been known to make such statements. There have always been balanced views. The 2005 OECD Recommendations on Principles and Good Practices for Financial Education and Awareness warned that “the promotion of financial education should not be substituted for financial regulation, which is essential to protect consumers (for instance against fraud) and which financial education is expected to complement”.<sup>179</sup> A World Bank study reinforced that view in 2010, especially in the context of transitional economies, “financial education cannot substitute for adequate financial regulation”.<sup>180</sup>

<sup>175</sup> Consumers International, 2013, op. cit.

<sup>176</sup> M Kuneva, 2009, Restoring consumer trust in retail financial services, DECO 35th Anniversary Seminar on Financial Services and the Consumer Interest (Lisbon, 27 April).

<sup>177</sup> L E Willis, Against Financial Literacy Education, Public Law and Legal Theory Research Paper Series 8/10.

<sup>178</sup> D Fernandes et al, 2014, Financial literacy, financial education and downstream financial behaviours, *Management Science* 60(8): 1861–1883. The cases came predominantly though not entirely from OECD member countries.

<sup>179</sup> OECD, 2005, Recommendations on Principles and Good Practices for Financial Education and Awareness, C(2005)55/REV1).

<sup>180</sup> S Rutledge et al, 2010, *Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A Diagnostic Tool* (World Bank).

More recently, the OECD reached the following conclusion in its study on financial education and the crisis: “the lack of financial literacy has certainly contributed, together with other factors, to the onset of the crisis and to the worsening of its consequences. Yet financial education is not a panacea and cannot by itself prevent the occurrence of major crises such as the one we are going through. As far as this crisis is concerned, on the one hand, its genuine causes are still difficult to delineate and weight, and, on the other hand, the lack of financial literacy is only one of the contributing factors and not the main one”.<sup>181</sup> These two passages may seem contradictory yet both can be correct as neither is an absolute statement.

In fact the meta-analysis cited above provides a partial reconciliation of the different emphases, as it suggests “a real but narrower role for ‘just in time’ financial education tied to specific behaviours it intends to help”. The consumer’s attention is more easily focused when there is a specific activity under consideration. This in turn goes against the assumption that education in advance equips consumers for future challenges, but it does point to a more focused approach to be taken by consumer education.

## H. CONCLUSION

The complex debate about information, education and decision-making has often been framed by theorists of “rational utility maximization” with behavioural economists recently pointing out that what people actually do may not accord with their “objective” interests. The debate can even become patronizing in regretting the failure of consumers to invest their time in money-saving activities such as switching fuel suppliers or perusing price comparison sites. This indicates a very narrow view of real consumer behaviour for several reasons.

The high error rate that has been found among consumers switching (for example) may actually mean that consumer conservatism is the more “rational” course of action (this is discussed in chapters VII and XV). Furthermore, the apparently regrettable failure of consumers to peruse in this way may mask a very healthy preference for activities that may bring no obvious short-term financial benefit, while being in fact highly meritorious and a form of long-term investment, like helping children with their homework. The

rejoinder is doubtless that such a range of activities are not incompatible with each other. However, in reality not all consumers are equipped with access to internet technology *and* price comparison sites *and* sufficient education *and* confidence to choose. It is important to bear in mind that consumer choice is now expected in far more areas than was the case hitherto. In aggregate, exercising such choices amounts to significant allocation of time, especially where the “right” choice is not evident. Indeed “economic” choices may clash with “ethical” choices.

For example, where there are a number of labelling and certification schemes that can apply to the same product, for example tea with no labels, with own brand labels or “natural”, rainforest, fair trade or organic labels, great consumer confusion can arise. These categories are quite different in substance and some do not mean very much. As the social, environmental and health costs are not often reflected in the price of commodities, there is little scope for the consumer to make a rational assessment for each purchase when it comes to judging such impacts. So, many consumers may inadvertently spend their money on a product of whose production methods they disapprove. Alternatively, in the face of confusion they may simply go for the cheapest.

What amount of information can make a developed country consumer understand the link between seemingly mundane choices of cheaper energy or the weekly shopping basket and increased risk of flooding in regions halfway across the planet? Given the scale of the global challenge posed by climate change, expecting the consumer to be able to make “full and rational” assessments of this extremely complex market environment is not just unlikely, it could amount to a transfer of responsibility.

Consumers have many competing activities calling for attention apart from informing themselves to make choices. Consumer information and education have important roles to play, but their limits should also be recognized.

<sup>181</sup> OECD, 2009, *Financial Education and the Crisis*, DAF/CMF(2009)10.

# XI. Consumer dispute resolution and redress

## A. CONSUMER DISPUTE RESOLUTION AND REDRESS IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The principal references to “dispute resolution and redress” (DRR) are to be found in section V.F and the “legitimate needs” guideline (5g).

The revised UNGCP entail a notable shift in this domain. There is a proliferation of references to dispute resolution (absent in the previous version), which now appears in the resolution itself, in the new section IV on good business practices (guideline 11f) and in section V.A on national policies for consumer protection (guideline 14g), as well as in the expanded section V.F already mentioned. This suggests an intention to place greater emphasis on the development of alternative methods of resolving issues to “redress”, which generally implies greater use of judicially obtained compensation. Even sections with little legal content, such as section V.G on “education and information programmes” (guideline 44d) and new guideline 77 on public utilities, now mention dispute resolution. Such change of emphasis follows the OECD’s terminology<sup>182</sup> and matches the evolution and proliferation, since the 1999 guidelines, of a great variety of dispute resolution systems.

## B. THE NEED FOR CONSUMER DISPUTE RESOLUTION AND REDRESS

There are various strong reasons why mechanisms are needed that effectively deliver redress where consumers suffer detriment. First, a need for redress arises as a consequence of the supply of non-compliant or unfair goods or services, where there is a breach of contract or injury. Second, such a breach constitutes unfair trading that will diminish consumers’ confidence in individual traders, the market and enforcers and hence chill economic activity. Third, if it represents illegal trading by suppliers, the accumulation of illicit gains by them should not be retained. Fourth, unless the position is redressed, it represents an unfair, uneven and uncompetitive market place. Fifth, the damage suffered by consumers typically arises from individual incidents that are minor in significance

<sup>182</sup> OECD, 2007, *Recommendation on Consumer Dispute Resolution and Redress*, (C (2007) 74).

and value<sup>183</sup> and which constitute a challenge for individuals to obtain redress, but which can collectively aggregate into significant market problems that need to be addressed.

The more the world evolves towards transaction-based economic relations, the more dispute resolution systems become necessary. This is partly the result of the sheer volume of transactions but also the trend for many areas, previously considered to be the domain of the state and provided through public services, to become the domain of consumer transactions. It is noteworthy in this context that the European Union Directive on Alternative Dispute Resolution excludes from its terms “non-economic services of general interest” (in effect those public services for which no direct payment is made).<sup>184</sup>

## C. PATHWAYS FOR DELIVERING CONSUMER DISPUTE RESOLUTION AND REDRESS

In recent years there has been significant innovation in the means by which consumers may achieve redress against traders, and a widened choice of such means. This section describes the main options, taking note of the tripartite division between individual dispute resolution and redress, collective dispute resolution and redress and statutory enforcement on behalf of consumers.<sup>185</sup>

### 1. Courts

The “traditional” means of upholding rights is for an individual to bring a private claim before the civil courts. However, this pathway usually presents significant barriers for consumers, in view of the cost, potential

<sup>183</sup> Office of Fair Trading, 2008, *Consumer Detriment: Assessing the Frequency and Impact of Consumer Problems with Goods and Services*; Consumer Focus, 2012, *Consumer Detriment 2012*; European Consumer Centres Network, 2012, *Help and Advice on your Purchases Abroad*; EC, 2011, *Special Eurobarometer 342: Consumer Empowerment*, available at [http://ec.europa.eu/consumers/consumer\\_empowerment/docs/report\\_eurobarometer\\_342\\_en.pdf](http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf) 175; EC, 2013, *The Consumer Conditions Scoreboard*, available at [http://ec.europa.eu/consumers/consumer\\_research/editions/docs/9th\\_edition\\_scoreboard\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf).

<sup>184</sup> European Union, 2013, *Alternative Dispute Resolution for Consumer Disputes L/165/63*, directive 2013/11/EU (21 May).

<sup>185</sup> For further elaboration see OECD, 2014, *Implementation of the Recommendation of the Council on Consumer Dispute Resolution and Redress*, C (2014) 29.

exposure to adverse costs if the consumer loses, lengthy duration of the procedure, inaccessibility of the process and of the court, complexity of the law or legal procedure, possible need for expert legal or other advice, problems over enforcement of a judgment and, above all, disproportionality between the value of the dispute and the cost or time needed and general non-user-friendliness of the system. Legal systems in most countries have not been able to cope adequately with the task of enforcement and consequently consumers have not been able to obtain justice.

Some countries, such as Germany, have predictable litigation costs and widely available insurance for legal claims, but these might still not respond to small-value consumer problems. The provision of legal aid is another option and exists in various forms under which the services of a lawyer might be paid by the state or provided pro bono. Publicly funded legal aid is, however, coming under strain as many countries face fiscal tightening.

Many countries have introduced small claims procedures and courts, which may have low and fixed costs and may set aside the “loser pays” rule, but they still tend to remain non-user friendly to consumers and so not popular.

## 2. Collective redress

Where multiple similar claims exist, aggregation into a class or collective action might provide a solution. The theoretical advantages of aggregation are achieving economies of scale and hence reducing individual and overall costs, whilst increasing bargaining power. Class actions have been used widely in the United States of America, spreading in recent decades particularly to Canada and Australia. Disadvantages have also been identified, not least in relation to consumer claims, in view of the commercial unattractiveness to funders (lawyers or investors) inherent in administering a mass of claims of small individual value (for example obtaining proof, verifying individual losses or distributing damages).<sup>186</sup> Some other countries, notably in Europe, are less inclined to allow collective damages actions to enforce individuals’ rights without their consent (hence requiring an opt-in approach) and concern over potential conflicts of interest and abuse by intermediaries. This has prompted requirements for detailed safeguards against potential abuse,<sup>187</sup>

which especially limit the financial incentives for intermediaries and impose various barriers that make collective actions generally unattractive to lawyers.

A major obstacle to public interest litigation is the requirement that the plaintiff must have “standing” (locus) to sue, which usually relates to having a direct and personal interest in the matter to be litigated. However, in an increasing number of countries, the law on standing has been substantially modified. Consumer associations have been given the required standing and are permitted to bring public interest litigation, or even attempt substituted actions on behalf of a consumer. The Consumer Protection Acts of Thailand and India may be cited as early examples. The United Kingdom of Great Britain and Northern Ireland Enterprise Act provision that standing be extended to consumer associations to bring “super-complaints” has had the effect of bringing widespread consumer complaints to the attention of the relevant regulatory bodies that have then been required to take legal action.

While many countries permit representative claims by consumer associations for injunctions to protect consumers’ collective interests, the use of collective damages claims by associations is less widespread. Chapter V notes how several European Union members and Brazil allow for the generic consumer interest to be represented in court as distinct from the individual consumers concerned.<sup>188</sup> Most recently, France has adopted legislation allowing consumers to obtain collective redress for the first time, accrediting several named consumer associations with standing to bring cases forward.<sup>189</sup> A similar accreditation system has been adopted in Peru where associations can file complaints with the national consumer protection authority, INDECOPI.<sup>190</sup> The Chinese Consumer Association (closely linked to the State Administration for Industry and Commerce, as discussed in chapter IV) has a similar accreditation before the courts.<sup>191</sup> Such accreditation builds a bridge not only between associations and consumer protection agencies but also between collective redress by consumers (or their representatives) and enforcement agencies. Guideline 40 addresses this issue quite accurately: “Member States should ensure that collective resolution procedures are expeditious,

<sup>186</sup> J Coffee, 2015, *Entrepreneurial Litigation: Its Rise, Fall and Future* (Harvard University Press).

<sup>187</sup> See the commission recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violations of rights granted under union law.

<sup>188</sup> D Fernandez Arroyo, 2012, Consumer protection in international private relations: General report, in C Lima Marques et al, *The Global Financial Crisis and the Need for Consumer Regulation* (International Law Association).

<sup>189</sup> Law 2014-443 of 17 March 2014.

<sup>190</sup> Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual (National Agency for the Defence of Competition and Intellectual Property).

<sup>191</sup> OECD, op. cit.



transparent, fair, inexpensive and accessible to both consumers and businesses". Indeed, one could say that the original 1985 UNGCP were ahead of their time in referring to enabling "consumers, or, as appropriate, relevant organizations, to obtain redress".<sup>192</sup>

### 3. Public regulatory and enforcement action

A technique that has proved to be highly effective, swift and efficient in delivering consumer redress in both individual and collective cases is "regulatory redress".<sup>193</sup> Here, the public enforcement authority possesses as part of the enforcement toolbox the power to order, or seek a court order for, a trader to make redress to one or more consumers. The Danish consumer ombudsman has used this power successfully (in the form of an opt-out class action that only she is able to initiate) since 2008, as have various regulatory authorities in the United Kingdom of Great Britain and Northern Ireland (financial services and energy consumer redress schemes).

A similar approach can be taken by the use, after criminal prosecutions, of compensation orders or follow-on civil damages actions (notably used in Belgium, where a requirement on courts to facilitate damages claims has been effective). The advantage of all these mechanisms is that costs are borne by the public authorities, but the disadvantage of using the criminal system is that redress requires there to be a criminal conviction of the target trader.

### 4. Alternative dispute resolution

The dissatisfaction with court procedures noted above has led in many countries to the spread of "alternative dispute resolution" (ADR) techniques and systems. The principal ADR techniques are arbitration, mediation and conciliation. All of them use third party intermediaries other than judges, namely arbitrators, mediators or conciliators. In brief the distinction between them is that in arbitration the arbitrator decides, in mediation the parties decide on the basis of a settlement put forward by the mediator acting as go-between, and in conciliation, the conciliator guides the parties to a settlement.

Arbitration is generally a process in which the disputants agree to submit their dispute to an arbitration tribunal and to be bound by the result found

by the arbitrator(s). In other words, the arrangement for resolving the dispute is a contract between the parties and the third party decider is an arbitrator rather than a judge. For commercial disputes, well-known arbitration "courts" exist, but for consumer disputes a variety of systems exist. There can be permanent consumer dispute boards (either state-sponsored or funded by sectoral trade associations or even individual companies: strong examples of both of these exist in all Nordic states and the Netherlands, among many other countries) or far less formal and nebulous arrangements. Some leading examples are the Swedish National Board for Consumer Complaints (which operates alongside private sector boards for some regulated industries), the Tribunal for Consumer Complaints of Malaysia, the hierarchy of adjudicating bodies in India established under the Consumer Protection Act 1986 and the multisectoral matrix of Geschillencommissie operated by a single foundation in the Netherlands.<sup>194</sup> Arbitration schemes vary on whether they are free to consumers (usually funded by business, but sometimes with state contributions) or require an access fee, which might or might not be refunded if the consumer wins. The Lisbon Arbitration Centre for Consumer Conflicts is an example of an autonomous non-profit private association, founded by the Municipality of Lisbon, the Portuguese Association for the Defence of Consumers (DECO) and the Union of Associations of Traders of the District of Lisbon. The national network of state-endorsed arbitration centres was established for the whole of Portugal in 2011.

The 1991 Consumer Act of the Philippines introduced a permutation of statutory ombudsman incorporating aspects of arbitration. Consumer arbitration officers are empowered to mediate, conciliate, hear and adjudicate all consumer complaints. The consumer arbitration officers are required first to try to ensure that the contending parties come to a settlement of the case. In the event that a settlement has not been effected the officer may proceed to formally investigate and decide the case. Their powers include cease and desist orders, directions to recall, replace, repair or refund the money value of products and/or services, restitution or rescission of the contract and the imposition of fines depending on the gravity of the offence.

The Supreme Court of the United States of America has upheld the use of arbitration clauses in standard consumer contracts, which has led to their wide use by traders and driven individual and class consumer claims out of courts and into arbitration schemes, which are unregulated and some of which have been said to have been of uncertain reliability.

<sup>192</sup> *United Nations Guidelines for Consumer Protection*, 1999 edition, guideline 32.

<sup>193</sup> C Hodges, Mass collective redress: Consumer ADR and regulatory techniques, *European Review of Private Law* 23: 829–874.

<sup>194</sup> C Hodges et al, 2012, *Consumer ADR in Europe* (Hart Publishing).



## 5. Ombudsmen

ADR systems have developed into a more formal architecture of consumer or sectoral ombudsmen in some states. The ombudsman concept is of Nordic origin. Sweden set up such a post in 1809, although there were analogous bodies even further back in history such as the Chinese Qin Dynasty.<sup>195</sup> Originally, it was a public office to which people could bring grievances connected with services provided by the government: the ombudsman stood between and represented the citizen before the government. The ombudsman's findings were not necessarily on points of law; the most common task was to identify instances of "maladministration", partly because in those days, public services often had ill-defined legal powers. This concept was transplanted in this original form to Latin America during the 1990s, under the name of *El Defensor del Pueblo* who dealt with complaints by consumers against public services, notably in Argentina and Peru.

In the 1970s, the institution of the consumer ombudsman was established in the Nordic countries (Denmark, Finland, Norway and Sweden). The consumer ombudsman is a development of the existing concept beyond the public sector, a supervisory body with the task of ensuring that methods used by a business when selling goods or providing services conform to the law. Ombudsmen can be statutory, underpinned by law (official recognition in return for meeting certain criteria) or voluntary.

The statutory ombudsman does not act in a judicial capacity and usually has wide powers not only to weigh the merits of each party's case but also to investigate the matter. The decision arrived at is not purely on legal points but also on "good industry practice" (echoes of maladministration in public services) and the need for change. Proceedings are usually informal and can include oral as well as written submissions. Legal representation is not usual, and the service is often free to consumers. The consumer is not required to refer the case to the ombudsman and awards are not binding on the consumer though they often are on the other party.

As shown above, ombudsmen are widely known for resolving complaints of maladministration by citizens against public bodies and officials. However, for complaints on financial services, energy, communications or any consumer-trader complaint, ombudsmen are increasingly being developed in

European states, not least because they can be designed to provide functions of consumer advice and feeding back aggregated data on consumer issues to regulators, markets and consumers, and hence assist in a quasi-regulatory capacity. Current examples are the (statutory) Financial Ombudsman Service and the private not-for-profit Ombudsman Services (which services energy, communications, property, general consumer and other dispute) in the United Kingdom of Great Britain and Northern Ireland and the Insurance Ombudsman and Transport Ombudsman in Germany. Regulatory bodies can also provide customer complaint and dispute resolution functions (Banca d'Italia is an example) although the trend appears to be that such functions are being outsourced to independent ombudsmen. As models develop and schemes seek recognition and official endorsement, the lines are becoming blurred.

In light of the evolution of many different schemes and indeed concern that the "brand name" of the ombudsman was in danger of becoming devalued, in 2015 the European Union established a regulatory system for any type of consumer ADR (or ombudsman) scheme, and required every member state to have a system that can handle any type of consumer-trader dispute.<sup>196</sup> In 2016 it established an online portal for cross-border disputes, clearly an appropriate role for the European Union in the context of the single market. Traders are required to provide information on which, if any, ADR scheme they belong to, and the system can in future be expected to extend by requiring traders to belong to ADR or ombudsmen schemes. Consumer ADR in the European Union is required to be free to consumers (which many schemes already are) or to involve minimal cost. This system has considerable potential and is clearly congruent with the relevant section of the UNGCP (section V.F, "dispute resolution and redress", guidelines 37–41). The specific criteria are discussed below.

## 6. Business customer care and complaint functions

It should always be a requirement on traders to respond fairly, quickly and openly to customer feedback, queries and complaints, in line with guideline 11f. Many businesses have customer care departments that respond well in seeking customer satisfaction, especially where a competitive market requires them to maintain a high reputation. International standards (such as ISO) support customer care and complaint systems. Very many consumer contacts are enquiries that can be resolved in a few minutes – they may

<sup>195</sup> D Thomas, 2013, The role of ombudsmen in consumer protection, including in financial services, conference paper for International Forum on Justice and Consumer Rights (Wuhan, China).

<sup>196</sup> Directive 2013/11/European Union, op. cit.

even not be disputes at all, but can turn into disputes if they are not handled sensitively and promptly. In-house care and complaint systems should not, however, be represented as being independent ADR or ombudsman schemes. The advantage of having effective independent complaint systems such as boards and ombudsmen is that their presence and activities provide an incentive for traders to operate effective in-house consumer complaint functions. Having such functions is increasingly a regulatory requirement. Virtually all consumer ADR schemes require a consumer to contact the trader first before being able to access the ADR scheme, sometimes with a specific period for the trader to be able to resolve the issue.

## 7. Online dispute resolution

Many online traders have built-in “online dispute resolution” (ODR) arrangements, which can vary between using panels of legally-qualified and verifiable individuals on an arbitration model, to algorithmic generation of automated proposals based on the statistically most likely sum that both parties would be likely to accept, to crowd-based “jury” decisions.<sup>197</sup> With the growth of e-commerce, it was natural that dispute resolution and redress would also move online. The United Nations Commission on International Trade Law (UNCITRAL) extended its earlier work on commercial arbitration and e-commerce to help enable ODR systems for cross-border e-commerce.<sup>198</sup> This raises the question as to whether ODR should be restricted to online transactions. While it is understandable that consumers who make online purchases might have an aptitude for ODR there is no a priori reason for such a restriction, providing the parties can communicate electronically.

One relatively early ODR platform was based on transactions through eBay and PayPal. The latter’s ODR director, Colin Rule, reports that having started from zero in 2003, by 2012 the platform was dealing with 60 million disputes per annum, compared with under 300,000 in the court system of the United States of America.<sup>199</sup> Faced with doubts about the cost-effectiveness for business of investing in ADR, a research team using large data sets generated by the system analysed ODR results and found, counter-

intuitively, that “users who reported a transaction and went through the ODR process increased their usage of the marketplace regardless of outcome”. The biggest subsequent increase in market participation by consumers came from those consumers who settled their case amicably, slightly greater in fact than those whose cases were upheld. It is interesting to note that even those who lost registered increased subsequent involvement. The only group whose participation in the market decreased were those whose resolution process took a very long time – a result that echoes the long standing complaints about the “hassle factor” of court proceedings. This confirms the familiar pattern that the worst possible response to discontented consumers is to ignore them.

Other ODR platforms are not restricted to online transactions. One early version was established by the Mexican consumer protection agency PROFECO (see chapter IV) whose *Concilianet* service opened for business in 2008. This followed amendment of the Federal Consumer Protection Law in 2004, enabling accepting and filing of cases electronically and electronic (and telephonic) conduct of hearings. The service is open to the public, can be accessed from the PROFECO website and is free of charge. In reviewing the history of *Concilianet*, Gonzales-Martin makes the point that “one avenue to be explored is whether the principles of functional equivalence used to accept e-documents when the law requires them in writing might also be valid in allowing virtual presence to substitute the physical presence of parties”.<sup>200</sup> Recent experience suggests that this stage is being rapidly arrived at.

In early 2016, the European Commission set up a new ODR platform. It was not restricted to online transactions and around 117 alternative dispute resolution bodies from 17 member states were connected from day one. The European Commissioner for Consumers reported that “one in three consumers experienced a problem when buying online in the past year. But a quarter of these consumers did not complain – mainly because they thought the procedure was too long or they were unlikely to get a solution”.<sup>201</sup> The legal basis of the ODR platform builds on the ADR directive already referred to. The initial complaint is sent to the trader by the platform, which may prove to be an improvement on the more traditional ADRs which often stipulate that the initial complaint is taken directly to the trader. Time will tell

<sup>197</sup> [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm)  
<http://www.colinrule.com/writing/UALR2012.pdf>

<sup>198</sup> Review of the guide for the incorporation of domestic law: New version of UNCITRAL model law (New York, 25 June–July 7).

<sup>199</sup> C Rule, 2012, Quantifying the economic benefits of effective redress: Large e-commerce data sets and the cost-benefit case for investing in dispute resolution, *University of Arkansas at Little Rock Law Review* 34(4):6.

<sup>200</sup> N Gonzales-Martin, 2015, in C Esplugues Mota and L Marquis (eds.), *New Developments in Civil and Commercial Mediation*.

<sup>201</sup> European Commission Daily News, press release 8 January 2016 and 15 February 2016.

if the new system is an improvement. According to the Commission, traders may also find the system an improvement as many (60 percent, it is estimated) do not sell online to other countries because of difficulties in problem-solving.

#### D. CRITERIA FOR ASSESSING CONSUMER DISPUTE RESOLUTION AND REDRESS SYSTEMS

The diversification and spread of consumer ADR schemes has been accompanied in some countries by a demand for quality criteria against which ADR, ombudsmen or other consumer-trader dispute resolution schemes can be evaluated and regulated. The criteria in Directive 2013/11/EU, which were based on earlier and widely accepted recommendations from 1998 and 2001, are as follows (with summaries of some of the more detailed requirements in brackets):

- Access
- Expertise, independence and impartiality (independent governance and individuals)
- Transparency (including rules of procedure)
- Effectiveness (online accessibility, facility for a consumer to operate without a lawyer, free of charge or nominal cost to the consumer, prompt notification of the parties by the ADR entity, outcome within 90 days)
- Fairness (reasonable possibility for parties to express their views, opportunity to withdraw)
- Liberty (an agreement to submit to ADR is not binding if concluded before the dispute has arisen (in contrast to practice in the United States of America), schemes that impose a solution may only be binding if the parties were informed of that fact in advance)
- Legality (application of the law in cases of imposed solutions, rules on conflict of laws)

A further requirement of a well-designed consumer redress system is that it should be able to identify and address systemic problems, providing aggregated data that supports improvements in performance. This indeed is the growing trend in ombudsmen systems and has been particularly noticeable in the financial services sector.

The emergence of a strong consensus can be gauged by the fact that the above criteria are broadly consistent with those set out by the OECD in its Recommendation on Consumer Dispute Resolution

and Redress in 2007.<sup>202</sup> That recommendation, while less detailed than the European Union criteria, nevertheless dealt with matters of access, cost and transparency. UNGCP guidelines 37–41 include most of the above with less emphasis on the two legality principles (a major jurisdictional issue in Europe) and reference to impartiality rather than independence. They place more emphasis on the protection of vulnerable and disadvantaged consumers, as does the OECD recommendation. All three sets of criteria emphasize the need for cross-border cooperation, particularly as this remains a constant challenge.

#### E. CONCLUSION

The period of development and innovation in methods of delivering consumer redress is far from over. The arrival of new technologies and architectures has opened up competition between options in place of the previous single court-based series of options. It is important to continue evaluating all options against criteria of cost, cost-proportionality, speed, number and quality of outcomes and user-friendliness. The current empirical evidence appears to indicate that combinations of consumer ombudsmen and regulators using redress powers, but usually resolving problems by negotiation, can satisfy the criteria well.

And yet, the success of the ombudsman/ADR model in numeric terms raises the question as to whether too many cases are now going to these institutions, cases which might be better settled upstream. Indeed should the cases exist at all? A case in point is the Financial Services Ombudsman of the United Kingdom of Great Britain and Northern Ireland (which is mentioned in chapter XIV on financial services), where a vast number of remarkably similar cases concerning mis-selling of one particular financial product (payment protection insurance) were eventually resolved by regulatory intervention (at huge cost to the financial institutions).<sup>203</sup> The analogous institution from another jurisdiction, the Financial System Mediator of Armenia, was established in 2008 but by 2013 it was still recording a year-on-year doubling of case numbers, after several years of increases in excess of 50 percent.<sup>204</sup> The Armenian Financial Services Ombudsman's response has been to engage in a programme of consumer and industry

<sup>202</sup> OECD, 2007, op. cit.

<sup>203</sup> <http://www.thisismoney.co.uk/money/news/article-3181723/PPI-bill-soars-27bn-scandal-costs-banks-1-000-family-Britain.html>; D Lindley, 2014, *Risky Business: The Case for Reform of Sales Incentives Schemes in Banks*.

<sup>204</sup> Financial System Mediator, *Annual Report 2013* (Yerevan, Armenia).

education. Many cases that go to ombudsmen would be more simply resolved by better internal management of enquiries. Guideline 41 makes appropriate, if tangential, reference to this issue in stating that “Member States should cooperate with businesses and consumer groups in furthering consumer and business understanding of how to avoid disputes, of

dispute resolution and redress mechanisms available to consumers, and of where consumers can file complaints”. The scale of cases in the financial services sector and doubtless elsewhere gives rise to at least consideration of a twin-track approach: upstream reform of internal procedures on the one hand and external conduct regulation on the other.

## XII. Electronic commerce

### A. ELECTRONIC COMMERCE IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

From the start of the revision process, there was never much doubt that electronic commerce (e-commerce) would be included, and there was no opposition to its inclusion. Nevertheless, it now seems hard to believe that one searches in vain for any reference to e-commerce in the 1999 version of the UNGCP. That forms a very simple illustration of the way in which the consumer protection landscape has been transformed during the 16 year gap, for e-commerce is now the subject of an entire section (V.I) as well as two paragraphs in the resolution and a new “legitimate need” (guideline 5j). It features in guideline 44g under education and information and in the new section IV “principles for good business practices” which are clearly stated as applying to online and offline transactions and which also cover protection of privacy. Similarly, section V.A, “national policies for consumer protection”, refers to websites, email and “consumer privacy and data security”.

Section V.I on e-commerce (guidelines 63–65) is the most substantive. Guideline 63 in effect restates the “legitimate need” from guideline 5j which reads: “a level of protection for consumers using e-commerce that is not less than that afforded in other forms of commerce”.<sup>205</sup> Guideline 64 requests Member States “to accommodate the special features of electronic commerce”, and emphasizes awareness of rights and obligations; in effect, a statement of the disclosure principle. Guideline 65 calls for collaboration across borders and suggests that Member States scrutinize the OECD e-commerce guidelines, which having first been produced in 1999, were revised and reissued in 2016.<sup>206</sup>

### B. THE SCOPE AND EXTENT OF E-COMMERCE

E-commerce originally referred to transactions for sale and purchase of goods and services via the internet,

via “classical” computers.<sup>207</sup> It now has a wider context, covering transactions effected via mobile phones (m-commerce) and other devices such as tablets. It includes purchases using applications (apps) and platforms. It also should include the purchase of digital content, which is not easily categorized as either goods or services. E-commerce and the use of the internet have implications for the entire spectrum of consumer protection. Goods that are not safe may be bought online, and unfair or criminal commercial practices can take place via the use of distance communications (e.g. phishing emails).<sup>208</sup> The section of the UNGCP that deals with e-commerce should therefore not be read in isolation.

E-commerce is normally thought of in consumer protection terms in relation to “business-to-consumer” (B2C) transactions, but it is important to note that the internet has facilitated the emergence of the “sharing economy” where many paying transactions now occur between two consumers (C2C). E-commerce online auction giant eBay<sup>209</sup> was a precursor in this area but platforms such as Airbnb and Uber are making notable progress in recent years alongside platforms such as the Google App store or the Apple App store.<sup>210</sup> Platforms also facilitate business-to-business (B2B) as well as B2C transactions, blurring the lines between all forms of e-commerce. Peer-to-peer loans are also developing online and regulation is under development under several jurisdictions.

<sup>207</sup> The OECD defines e-commerce transactions as “the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments and other public or private organizations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail” (OECD, 2011, *Guide to measuring the Information Society*, available at <https://stats.oecd.org/glossary/detail.asp?ID=4721>).

<sup>208</sup> Phishing emails typically direct the user to visit a website where they are asked to update personal information, such as passwords, credit card details and bank account numbers, in effect impersonating a legitimate organization that already has such data.

<sup>209</sup> For more on the regulation of this form of commerce, see C Riefa, 2015, *Consumer Protection and Online Auction Platforms: Towards a Safer Legal Framework* (Ashgate/Routledge).

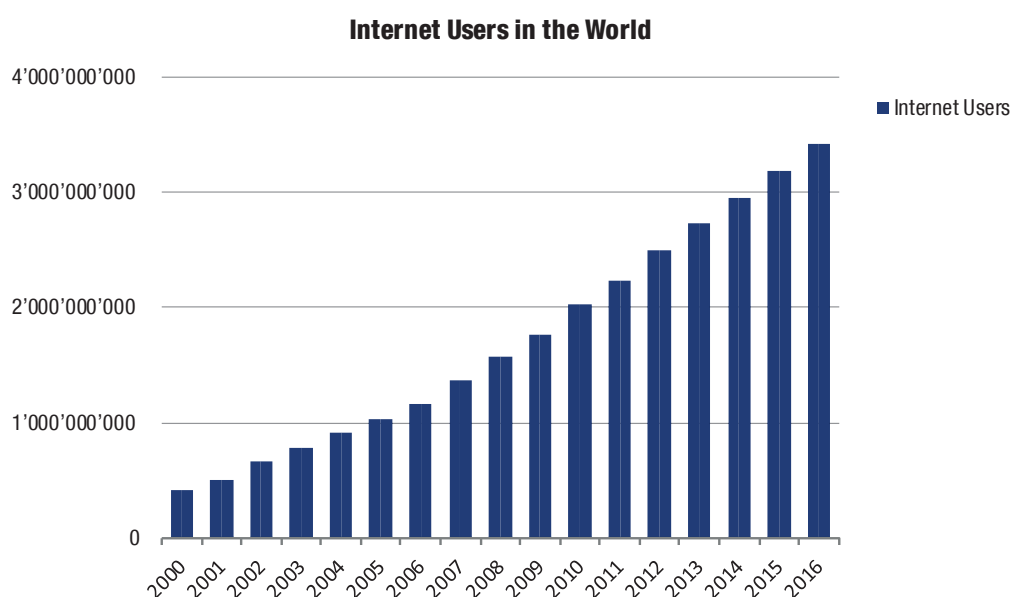
<sup>210</sup> For more on the role of platforms in e-commerce and the latest trends, see special issue on “The Rise of the Platform Economy”, *Journal of European Consumer and Market Law*, 5(1):1–72.

<sup>205</sup> Strictly speaking this is not “a principle of equivalence”, as in both guidelines the wording only requires that consumer protection as enjoyed by e-commerce consumers should be “not less than that afforded in other forms of commerce” and does not specify the converse. Whether this is used to justify discrimination against other forms of commerce in future years is too early to tell.

<sup>206</sup> OECD, 2016, *Consumer Protection in E-commerce: OECD Recommendation*.



Chart 1. Internet users in the world



Source: *Internet live stats*: <http://www.internetlivestats.com/internet-users/>

Precise estimates vary, but the percentage of the world's population with access to the internet has grown from 1 percent in 1995 to over 40 percent by 2015. The number of Internet users increased tenfold from 1999 to 2013. The first billion was reached in 2005, the second billion in 2010 and the third billion in 2014. Chart 1 shows the number of global internet users per year since 1993.<sup>211</sup>

Such increases in the number of people being able to access the internet has contributed to the development of e-commerce, although the two of course are not identical. According to UNCTAD's Information Economy Report 2015,<sup>212</sup> B2C e-commerce is forecast to double from US\$ 1.2 trillion in 2013 to US\$ 2.4 trillion in 2018. The fastest growth is expected in the Asia and Oceania region, the market share of which is set to grow from 28 percent to 37 percent. The only other region that is forecast to increase its share of the global market is the Middle East and Africa, from 2.2 percent to 2.5 percent. Conversely, the combined share of Western Europe and North America is expected to fall from 61 percent to 53 percent. It is reported that 40 percent of worldwide internet users (over 1 billion people) have bought goods or services online via a variety

of platforms and devices.<sup>213</sup> These figures are set to continue to grow as mobile commerce develops and reliable digital payment systems become more accessible.

Table 1 suggests that the annual rate of increase is starting to diminish. In other words, while volumes continue to rise, the rate at which they are doing so is moderating, in the same way as the rate of uptake of mobile phones is now approaching a plateau. Nevertheless, there is still plenty of upward trends left in this market. For example, only 32 percent of customers place a second order in their first year as a customer. Familiarity is expected to generate further business.<sup>214</sup>

According to the International Telecommunications Union (ITU), between 2000 and 2015 internet penetration increased almost sevenfold from 6.5 percent to 43 percent of the global population.<sup>215</sup> However, ITU figures also indicate that four billion people in the developing world remain offline. Out of the nearly one billion people living in Least Developed Countries (LDCs), 851 million do not use the internet. In Africa, 28.6 percent of the population now has access to the internet, an increase of over 7,000 percent in the period 2000–2015. Asia's penetration rate

<sup>211</sup> <http://www.internetlivestats.com/internet-users/>

<sup>212</sup> UNCTAD, 2015, *Information Economy Report: Unlocking the Potential of E-commerce for Developing Countries*.

<sup>213</sup> <http://www.statista.com/markets/413/e-commerce/>.

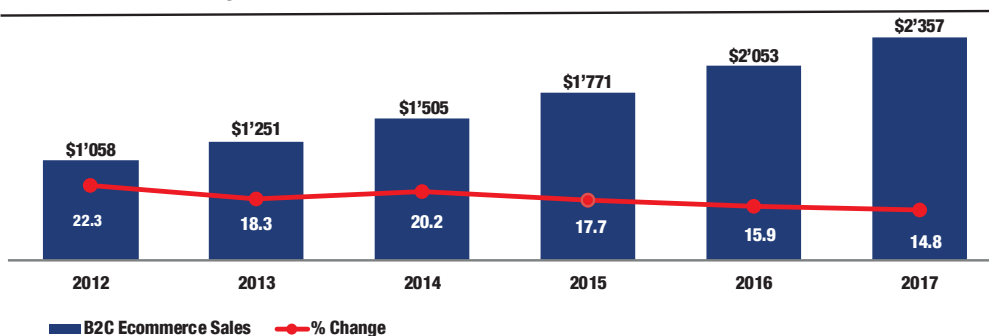
<sup>214</sup> [https://rjmetrics.com/resources/reports/ecommerce-buyer-behavior/?utm\\_source=pardot&utm\\_medium=email&utm\\_campaign=adr+content](https://rjmetrics.com/resources/reports/ecommerce-buyer-behavior/?utm_source=pardot&utm_medium=email&utm_campaign=adr+content)

<sup>215</sup> UNCTAD, 2015, op. cit.

Table 1. B2C Economic sales worldwide, 2012-2017

**B2C Ecommerce Sales Worldwide, 2012-2017**

trillions and % change



Note: CARG (2012-2017)=17.4%; includes products and services ordered and leisure and unmanaged business travel sales booked using the internet via any device, regardless of the method of payment or fulfillment

Source: eMarketer, Jan 2014

167671

www.eMarketer.com

Source: eMarketer.com

increased by over 1,000 percent over the same period and Asian users now represent nearly half of the worldwide population with access to the internet. Other regions have also witnessed exponential growth in penetration rates.<sup>216</sup> For example, in one year alone (2010–2011), Brazil saw an increase of 26 percent in the value of online sales, while China saw an increase of 500 percent between 2008 and 2011.<sup>217</sup>

Clearly, such spectacular trends invite assessment. In 2015 UNCTAD launched a B2C e-commerce index that explains the variations between countries. It is not just a matter of access to the internet, but a matter of all-round readiness, setting the preconditions for the development of e-commerce.<sup>218</sup>

The two largest populations in the world both make an important contribution to the growth trends. India is reported by *The Economist* to be the world's fastest-growing e-commerce market at the time of writing, with three more Indians experiencing the internet for the first time every second and one billion consumers expected to be online by 2030.<sup>219</sup> Its online retail market has been estimated as being about to grow sevenfold between 2015 and 2020.

<sup>216</sup> <http://www.internetworldstats.com/stats.htm>

<sup>217</sup> OECD, 2014, *Empowering and Protecting Consumers in The Internet Economy on the Rise*, chapter 4.

<sup>218</sup> UNCTAD, 2016, *B2C E-commerce Index*.

<sup>219</sup> <http://www.economist.com/news/leaders/21693925-battle-indias-e-commerce-market-about-much-more-retailing-india-online>.

But while India has 32 percent of its population online as of 2015, the figure for China is 52 percent. Of the US\$ 1.3 million spent online every 30 seconds, one fifth of that goes through the world's biggest e-retailer, the Chinese company Alibaba.<sup>220</sup> The story of Alibaba is of global importance not only because of its size but because of what it tells us about consumer behaviour in taking up e-commerce. The cornerstone of Alibaba's success is the third party guarantee system, Alipay which accounts for half of all online payment transactions in China.<sup>221</sup> Yu and Shen observe that "it is ironic that Alipay, which represents the height of modernity, is achieving its prominence by use of the escrow system, a third party guarantee system that has been used for centuries in common law systems". Launched at the end of 2003, it accounted for 84 percent of third party online platform use by 2013 (40 percent of Chinese internet users are frequent users of third party payment systems).

By any account, this is a remarkable increase but the reason is far deeper than simply the rise of "consumerism" in China. It relates to consumer trust. Yu and Sheng conclude that "the lack of effective consumer protection law and the unwillingness of China's banks to offer any payment protection of online transactions, has led to Alipay's dominance of the online payment industry". Chinese banks do not

<sup>220</sup> <http://growwithtrellis.com/blog/top-10-ecommerce-markets-by-country/>.

<sup>221</sup> Y Yu and M Shen, 2015, Consumer protection as the "Open Sesame" that allows Alibaba to crush the forty thieves, *Journal of Antitrust Enforcement* 3(issue suppl\_1): i228–i241.

**Box 11. Readiness for e-commerce**

The UNCTAD B2C E-commerce Index is composed of four indicators: a) internet use penetration, b) secure servers per million inhabitants, c) credit card penetration and d) a postal reliability score. The 2016 index is based on a survey of 137 economies accounting for 96 percent of the world's population and 99 percent of world GDP. The 2016 index follows on from that first introduced by UNCTAD in its "Information Economy Report 2015: Unlocking the Potential of Ecommerce for Developing Countries".

The index measures the readiness of countries to engage in online commerce. Among the top ten economies in that regard, six are European, three are from the Asia-Pacific region and one is from North America. Among developing economies, three high-income economies – Republic of Korea, Hong Kong (China) and Singapore – rank the highest, followed by several Gulf states. Uruguay is the top performer in Latin America and the Caribbean. At 61st place in the index, South Africa is the front-runner in e-commerce readiness on the African continent.

The report accompanying the index shows e-commerce readiness variation by region. For example, just over a fifth of the population in Africa uses the internet compared to two thirds in Western Asia. While Western Asia and transition economies fare well on most indicators, credit card availability is thought to be holding back further development of e-commerce. Asia as a whole needs to boost internet penetration, which currently stands at just over a third of the population, as well as the number of secure servers. In Latin America and the Caribbean, the main barriers appear to be low credit card penetration and relatively poor postal reliability. This last factor tends to be overlooked, but of course if physical products are ordered online they need to be delivered. Africa ranks the lowest in all the indicators and the report concludes that "unless there is improvement in the underlying transaction and logistics processes, African online shopping is likely to remain confined to wealthier populations in urban areas". It is interesting to bear this finding in mind in the light of the rapid take-up of mobile payment systems in Africa, to be discussed later.

Some countries reach "take off" in specific domains. Uruguay and the Russian Federation have seen sizable improvements in their share of individuals with credit cards, which jumped in one year by 13 percentage points in Uruguay (from 27 percent to 40 percent) and by 11 percentage points in the Russian Federation (from 10 percent to 21 percent). While improvements in secure internet servers per million people are slower to take place, this indicator moved up especially for Guinea, Lesotho and Liberia. But none of these three countries improved their overall ranking and Guinea's improvement was accompanied by a significant fall in the overall rankings from 126 to 136, the penultimate position. As readiness is multifactorial, progress has to be maintained on several fronts.

*Source: UNCTAD, 2016, B2C E-commerce Index.*

make chargeback protection available to Chinese consumers, but Alipay guarantees the transaction. Furthermore, unlike Paypal, which forwards the consumer payment to the seller before the product is delivered, Alipay holds the payment by the consumer until goods purchased online have been delivered. By withholding payment until delivery of the goods, it provides greater security than that provided by chargeback mechanisms to credit card-holders outside of China. It also provides an online dispute resolution service available to both parties financed by the revenue generated by the funds held in escrow. It is appropriate then that one of the amendments to the newly issued OECD Guidelines on E-commerce is the recognition of escrow services.<sup>222</sup>

## C. CONSUMER TRUST IN THE DIGITAL MARKET

E-commerce has flourished due to a number of factors, including a wider range of products to choose from, easier access to more complete

product information than is typically available offline, round-the-clock opening hours and the convenience of shopping from home. E-commerce also enables consumers to experience individually tailored and personalized treatment from businesses. But increasingly targeted advertising and buying experiences are not without their dangers and drawbacks, some of which may hamper consumer confidence. Mixed up orders, problems with refunds, unanswered complaints and internet scams are just some of the problems associated with online shopping. A European Commission survey found that consumer confidence in cross-border internet purchases within the European Union dropped between 2008 and 2011.<sup>223</sup> Despite the common body of law, there is notably less confidence among consumers about e-shopping across borders (38 percent felt confident in 2014) than about shopping within their state (61 percent).<sup>224</sup>

<sup>222</sup> OECD, 2016, op. cit., paragraph 41.

<sup>223</sup> EC, 2012, *Consumers' Attitude Towards Cross-Border Trade and Consumer Protection*, available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_en.pdf).

<sup>224</sup> EC, 2015, *Consumer Conditions Scorecard 2015*, available at <http://bit.ly/1V7oDK5>.

### Box 12. Mobile banking

The UNGCP pay tribute to the benefits of innovation in the resolution, which also specifies that “electronic commerce should be understood to include mobile commerce”. The G20 high-level principles on financial consumer protection (discussed in chapter XIV) also warn of the dangers of mobile commerce while making the point that regulation needs to be “responsive to new products, designs, technologies and delivery mechanisms”. Legislation must allow for innovation in the design of financial services products to ensure that service providers respond constructively to the changing needs of consumers. But while raising some issues, it is also clear that even basic services such as SMS money transfer have brought benefits to the large number of poor consumers in developing countries who do not have bank accounts but who do have mobile phones (a figure that had already reached one billion in 2010).

Africa has led this technological revolution. Three quarters of the countries that use mobile money most frequently are in Africa. The Kenyan example illustrates the potential of mobile phone technology to support the extension of access to financial services. The mobile phone money transfer service M-Pesa operated by Safaricom was launched in 2007 and by 2009, had over eight million registered users or 40 percent of the adult population. In contrast, access to formal banks in Kenya only rose from 18.9 percent to 22.6 percent of adults between 2006 and 2009. The G20 Financial Inclusion Expert Group attributes the increase in non-bank financial access to M-Pesa. This chain reaction indicates that mobile telephony and mobile transfer of money is a catalyst for other financial services. Further benefits downstream are showing up in East Africa, where payment by mobile phone is being introduced for public utilities such as water and electricity. For example, Kenya Power has introduced a system of payment through M-Pesa (the use of such payment systems for utilities is cross-referenced in ISO standard 14452 on network services billing). Such systems can help to avoid transitional problems such as those when poor consumers are connected to such services for the first time. For low-cost payments by mobile phone at short intervals, this may not only save consumers the time and expense associated with old-fashioned queuing systems, but can also improve payment levels and reduce arrears. This improved payment technology brings potential benefits to sectors far removed from financial services.

Mobile payments are still only expected to represent 3 percent of e-commerce payments by 2017. However, according to UNCTAD, it is already important in countries “characterized by limited internet use but well-functioning mobile money systems. In several African countries mobile solutions represent the most viable infrastructure for e-services”. The UNCTAD Information Economy Report 2015 states that in Kenya, online purchase payments from mobile phones accounted for 19 percent of total e-commerce transaction value in 2012. This was less than cash-on-delivery but more than credit cards. The aptitude and enthusiasm of Kenyans for payment using household devices suggest that it will continue to grow.

Source: UNCTAD, 2015, *Information Economy Report op. cit.*; OECD/G20, 2011, *op. cit.*; G20, 2010, *op. cit.*

Even basic “delivery issues” matter. According to a European Union study, consumers reported problems in Bulgaria, Poland, Romania and the United Kingdom of Great Britain and Northern Ireland in terms of long delivery times for online shopping from other European Union countries. This concern featured in 40–50 percent of responses to the 2012 survey mentioned above.<sup>225</sup> As discussed in box 11, UNCTAD lists postal reliability as one of four indicators of internet-readiness and it reports that international postal deliveries of small packets have seen rapid growth, which it attributes mainly to e-commerce, the volume having risen by 48 percent between 2011 and 2014.<sup>226</sup> The growth of e-commerce, while

undoubtedly having an impact on letter post may well bring new in revenue into the postal delivery service.

As the Chinese experience shows, the trust-building imperative is as compelling today as it was in the early days of e-commerce. Nevertheless, it is worth noting that, even in the rich European market, 50 percent of households use the internet every day, while 30 percent have never used it at all; a stark reminder of the “digital divide”.<sup>227</sup>

Mindful of its growing importance, the G20, under the German presidency, held the first G20 Consumer Protection Summit on 15 March 2017 on “building a digital world that consumers can trust”.<sup>228</sup> It addressed issues such as fair contract terms, secure payments, clear, accessible information, data security and data protection.

<sup>225</sup> Civic Consulting Consumer, 2011, *Market Study on the Functioning of E-commerce and Internet Marketing and Selling Techniques in the Retail of Goods*, available at [http://ec.europa.eu.consumers/consumer\\_research/market\\_studies/docs/study\\_ecommerce\\_goods\\_en.pdf](http://ec.europa.eu.consumers/consumer_research/market_studies/docs/study_ecommerce_goods_en.pdf).

<sup>226</sup> UNCTAD, 2015, *Information Economy Report 2015: Unlocking the Potential of Ecommerce for Developing Countries*.

<sup>227</sup> C Riefa, 2014, *Study on Electronic Commerce and the Protection of the Digital Consumers in Serbia*, *EuropAid/129680/C/SER/RS* (Belgrade).

<sup>228</sup> [http://www.bmjv.de/G20/EN/ConsumerSummit/G20\\_node.html](http://www.bmjv.de/G20/EN/ConsumerSummit/G20_node.html).

## D. GUIDELINES FROM THE ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

Among international organizations, the Organisation for Economic Cooperation and Development (OECD) has been engaged since the early days of e-commerce in promoting policies aimed at helping to build trust. The guidelines created by the OECD in 1999 reflected existing legal protection available to consumers in more traditional forms of commerce, encouraged private sector initiatives including participation by consumer representatives and emphasized the need for cooperation among governments, businesses and consumers.<sup>229</sup> They aimed to encourage:

- Fair business advertising and marketing practices
- Clear information about online business identity
- Information about the goods or services on offer and the terms and conditions of any transaction
- Transparent processes for the confirmation of transactions
- Secure payment mechanisms
- Fair, timely and affordable dispute resolution and redress
- Privacy protection
- Consumer and business education

These guidelines have carried weight, which will doubtless have been increased by the expansion of the OECD's membership since 1999 and the participation of non-OECD countries in the revision process that ended in 2016.<sup>230</sup>

The reference to the OECD guidelines in the UNGCP is a reference to more than the guidelines themselves. In turn the e-commerce guidelines refer to a set of other OECD documents concerned with fraud, dispute resolution, privacy, risk management and internet policymaking.<sup>231</sup>

<sup>229</sup> OECD, 1999, *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce*.

<sup>230</sup> OECD, 2016, op. cit.

<sup>231</sup> *Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders* (C92003)116); *Recommendation of the Council on Consumer Dispute Resolution and Redress* (C(2007)76); *Declaration for the Future of the Internet Economy (The Seoul Declaration)* (C(2008)99); *Recommendation of the Council on Principles for Internet Policy Making* (C(2011)154); *Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data ("Privacy Guidelines")* (C(80)58/final as amended); *Recommendation of the Council on Digital Security Risk Management for Economic and Social Prosperity ("Security Risk Recommendation")* (C(2015)115).

### 1. Applicable law for cross-border redress

As suggested above, the lack of effective consumer redress when parties are in different countries remains a major barrier to consumer confidence and the problems of consumer redress in the event of cross-border disputes, which thus need to be resolved. But the problem of applicable law and its enforcement in the context of an increasing number of cross-border transactions is proving to be intractable.

While both appeal to governments to cooperate, neither the OECD nor United Nations guidelines have come up with a definitive solution in jurisdictional terms. The OECD guidelines in paragraph 54.vi ask governments to "consider the role of applicable law and jurisdiction in enhancing consumer trust in e-commerce." The same phrase, "applicable law and jurisdiction", is used in the resolution part of the UNGCP with a similar plea for "special attention". This lack of clarity is likely to increase the salience of such mechanisms as Alipay and chargeback which are "proprietary" rather than jurisdiction-based.

### 2. Identification of the provider

Consumers can be faced with the difficulty of establishing the identity and location of the provider with whom they are dealing, although this may be the most important issue that contributes to establishing confidence in the consumer's mind. Paragraphs 28–30 of the OECD guidelines set out detailed requirements for "information about the business" including "appropriate domain name registration information for websites that are promoting or engaging in commercial transactions with consumers". Paragraph 30 makes the link to self-regulation schemes and the need for consumers to be able to verify membership. This provision is backed up by UNGCP guideline 14b under national policies for consumer protection (except for the mention of domain name registration).

### 3. Authentication of the consumer

Faced with growing awareness of the risk of identity theft, the European Union's Payment Services Directive defines "strong customer identification". Article 4(30) PSD2 states that "an authentication based on the use of two or more elements categorized as knowledge (something only the user knows), possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data".



The OECD guidelines are silent on the specifics of authentication, although it might be argued that the issue is present in spirit in paragraph 40 under payment mechanisms and section G on privacy and security. It does however have a specific meaning as the European Union text indicates. The UNGCP are then by extension equally indirect, the section on financial services (V.J) calling in guideline 66g on Member States to “establish or encourage as appropriate ... controls to protect consumer financial data, including from fraud and abuse”.

#### 4. Privacy issues

The growth of e-commerce and the rapid development of networking technologies have revolutionized the way in which data can be stored, accessed and processed. Consumers are not likely to participate in the global marketplace without assurances that the personal data exchanged during a transaction will be protected. However, the development of “data mining” in recent years has led to concerns about the sheer volume of data collected and a strengthening of the requirements for consent. The OECD first drew up privacy guidelines in 1980; these were revised in 2013.<sup>232</sup> Paragraph 48 of the 2016 OECD e-commerce guidelines provides a rough summary of these principles without actually referring to them specifically. Businesses are enjoined to ensure that their practices are “lawful, transparent and fair, enable consumer participation and choice and provide reasonable security safeguards”. These issues are discussed in chapter XIII on data protection and privacy.

#### 5. Security issues

Security concerns emerge at two stages of transactions: first, during transfer of the payment information over the network; second, in storage of payment data, where data transmitted should not be accessible to unauthorized third parties. Such concerns are recognized for example by Recital 7 of the European Union Payment Services Directive 2, which notes that “in recent years, the security risks relating to electronic payments have increased. This is due to the growing technical complexity of electronic payments, the continuously growing volumes of electronic payments worldwide and emerging types of payment services”. In addition to concerns about security in transactions (involving credit card numbers, expiry dates, etc.) is the danger of post-transaction

data breaches, such as those associated with phishing (see footnote to chapter XII, section B).

In the OECD guidelines, paragraph 49 is the most relevant to security and it is extremely brief: “businesses should manage digital security risk and implement security measures for reducing or mitigating adverse effects relating to consumer participation in e-commerce”. Much more substantive is the reference to security in section E on payment which refers in paragraph 40 to “security measures ... commensurate with payment related risks, including those resulting from unauthorized access or use of personal data, fraud and identity theft”. Paragraph 41 goes on to restate the pre-existing (i.e. 1999) reference to chargeback and to repeat the endorsement of limitation of liability for consumers: “governments and stakeholders should work together to develop minimum levels of consumer protection for e-commerce payments, regardless of the payment mechanism used. Such protection should include regulatory or industry-led limitations on consumer liability for unauthorized or fraudulent charges, as well as chargeback mechanisms, when appropriate”. As a practical example of the measures envisaged, the European Union Payment Services Directive reduces consumer liability for non-authorized payments to €50 (from the previous €150 threshold).<sup>233</sup> The directive also tightens the security measures that need to be applied to all electronic payment requiring in particular the use of strong customer identification.<sup>234</sup>

The OECD guidelines go on to widen the scope of guarantee beyond chargeback: “the development of other payment arrangements that may enhance consumer confidence in e-commerce, such as escrow services, should also be encouraged”. The reference to escrow is significant in the context of the Chinese experience, although it is worth noting that escrow is also used in other jurisdictions including Argentina and California. But the issue is not which particular method is used. Escrow in China (which was unknown when introduced and may even not have been legal)<sup>235</sup> was a response to entirely understandable consumer concerns which were not being met by the existing banking regime. Indeed, this is being taken even further by systems which only require email and delivery addresses, thus involving lower levels of electronic risk.<sup>236</sup> This issue is rapidly evolving.

<sup>233</sup> European Union Payment Services Directive 2, Article 74.

<sup>234</sup> C Riefa, 2015, *The Control of Electronic Payments in the EU: Payment Services Directives and Electronic Money Directive 2009/110/EC*.

<sup>235</sup> Yu and Shen, op. cit.

<sup>236</sup> *The Economist*, 2016, Klarna: getting more ambitious (6 February).

<sup>232</sup> OECD, 2013, *Revised Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data*, available at [www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf](http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf).

## 6. Electronic contracting

Different legal and private sector rules may apply to B2C transactions. The global nature of e-commerce poses questions about what requirements are necessary for writing, carrying out and enforcing contracts and jurisdiction. The development of “cloud computing” raises new issues about contracts. Cloud computing uses a network of remote servers hosted on the internet to store, manage and process data, rather than a local server or a personal computer. It offers great economies of scale, allowing users to store and process data in third party data centres using a “pay as you go” metered charging structure using otherwise redundant server time and network storage in response to user demand. Computing capabilities can be flexibly commissioned and released. Cloud computing may be used to store and lease copyright products to consumers for a certain period of time. The ephemeral nature of such digital “products” and the periods during which they “belong” to consumers could well turn out to be a source of contractual confusion, while the varying levels of security around public or private clouds can also be an issue.

The OECD guidelines open by restating, in slightly different language, the principle set out in the UNGCP “legitimate needs” guideline 5j, namely “consumers who participate in e-commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce” (paragraph A.1). This strong statement of principle is not, however, followed up by consideration of the enforcement issues which are peculiar to e-commerce, namely the potential for contractual issues to be dealt with electronically and company sanctions against consumers to be applied directly without passing through judicial processes, as described in chapter III.

The provisions of part B relating to fair business, advertising and marketing practices are in many ways the same fair trading principles that have long applied to offline transactions. For example, unfair contracts are mentioned in paragraph 7: “if contract terms stipulate monetary remedies in the case of consumer’s breach of contract, such remedies should be proportionate to the damage likely to be caused”. This principle of proportionality is important, for example, in the financial services domain where it can apply to the disproportionate bank charges which can be executed directly through electronic means as happens for example with payday loans, or conventional current account charges (see chapter XIV). The stipulation of “monetary remedies” (for example, financial penalties against consumers) means that non-financial penalties such as “technical protection measures” which might

damage the functionality of consumers’ computers are not dealt with and are not constrained by any principle of proportionality. The only envisaged safeguard for consumers is the requirement of advance disclosure of such measures (which unfortunately many consumers may find hard to understand).

## 7. Other issues

Other issues covered by the OECD guidelines include dispute resolution and redress (dealt with in chapter XI), pricing transparency, dealt with in the OECD/G20 High-Level Principles for Consumer Protection in Financial Services (and by extension in chapter XIV) and consumer education dealt with in chapter X. In all these cases, the OECD guidelines are entirely consistent with the UNGCP.<sup>237</sup>

## E. OTHER INTERNATIONAL GUIDELINES FOR THE REGULATION OF E-COMMERCE

As explained in UNCTAD’s Global Cyberlaw Tracker, there are four main areas of regulation in e-commerce: e-transaction laws, data protection and privacy laws, cyber-crime laws and consumer protection laws.<sup>238</sup> In order to enhance cross-border e-commerce, and consumers’ trust therein, there needs to be compatibility of e-transaction laws. Two organizations have done extensive work in this regard.

### 1. The United Nations Commission on International Trade Law

In 1996, the United Nations Commission on International Trade Law (UNCITRAL) developed a Model Law on Electronic Commerce, which was superseded by the 2005 United Nations Convention on Electronic Communications in International Contracts,<sup>239</sup> establishing:

- Rules and accepted practices that define the characteristics of a valid electronic contract
- Guidelines for the acceptable use of digital signatures for legal and commercial purposes
- Supporting the use of computer evidence in legal disputes over the validity of a contract

<sup>237</sup> OECD/G20, 2011, *High-Level Principles for Consumer Protection in Financial Services*.

<sup>238</sup> UNCTAD, *Global Cyberlaw Tracker*, available at [http://unctad.org/en/Pages/DTL/STI\\_and ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx](http://unctad.org/en/Pages/DTL/STI_and ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx).

<sup>239</sup> [http://www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf).

In addition, the convention defines the default rules for contract formation and the governance of contract performance. Many countries have already used the model law to update their commercial laws to accommodate the electronic medium and at the time of writing, UNICTRAL reports that legislation based on or influenced by the model law has been adopted in 66 states (and more individual jurisdictions) at various levels of development.

## 2. UNCTAD's e-commerce and law reform project

Since 2002 UNCTAD has been running a capacity-building programme on e-commerce and law reform. The programme assists developing countries in Africa, Asia and Latin America in the development of e-commerce legislation at both regional and national levels.<sup>240</sup> Relevant laws should ensure trust in online transactions, ease the conduct of domestic and international trade online and offer legal protection for users and providers of e-commerce and e-government services. Assistance includes capacity-building workshops, reviews of draft or existing legislation, drafting of legislation harmonized with regional and international legal frameworks and comparative reviews of e-commerce legislation harmonization such as those undertaken in cooperation with the Association of South East Nations (ASEAN) published in 2013, the Community of West African States (2015) and for Latin America (2016).<sup>241</sup>

Under the programme, the East African Community established a Task Force on Cyberlaws in 2007, which prepared and endorsed two cyberlaw frameworks.

In 2015, UNCTAD launched its Cyberlaw Tracker, a global mapping of e-commerce laws in the area of e-transactions, the protection of consumers online, cybercrime and data protection.<sup>242</sup> While legislation covering those areas is already in place in developed countries, developing ones are lagging behind. The share of countries that have adopted a law is generally highest for e-transactions and lowest for the protection of consumers online. For example, in Central America seven out of ten countries have consumer protection laws in place but more than half do not have a law on data protection and cybercrime. In Central Africa, out of nine countries, only two have

laws relating to e-transactions, consumer protection and data protection and only one has adopted cyber-legislation.

## 3. Access for consumers with disabilities

One potential advantage of e-commerce is the access it can provide for people suffering from physical disabilities, including visual handicaps. The World Health Organization estimated in 2011 that 15.3 percent of the world's population has a "moderate or severe disability".<sup>243</sup> These consumers are excluded to some extent from around 80 percent of retail websites.<sup>244</sup> The United Nations Convention on the Rights of Persons with Disabilities upholds the rights of people with disabilities to access information and services online. We note that the European Commission has raised the possibility of a European Accessibility Act, which would set common accessibility requirements for e-commerce websites.<sup>245</sup> Legal obligations aside, it makes business sense to have an accessible website to avoid turning away approaching one billion potential customers.

## 4. Best practice recommendations from International Chamber of Commerce

The International Chamber of Commerce (ICC) campaign, Business Action to Stop Counterfeiting and Piracy (BASCAP), warns that:

Alongside the billions of legitimate online transactions, e-commerce platforms have become vulnerable to misuse and the infiltration of fake and potentially unsafe products. As in the physical world, criminal actors have seized opportunities to gain further profits from distributing counterfeit goods in the online supply chain. In blurring the distinction between genuine products and fakes, they succeed in selling staggering quantities of infringing items. There is an urgent need to address the prevalence of counterfeits available to online consumers and to put in place protections to safeguard them from a variety of new online risks.<sup>246</sup>

<sup>240</sup> UNCTAD, 2015, *Information Economy Report*, op. cit.

<sup>241</sup> ASEAN review available at [http://unctad.org/en/PublicationsLibrary/dtlstict2013d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2013d1_en.pdf); ECOWAS review available at [http://unctad.org/en/PublicationsLibrary/dtlstict2015d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2015d2_en.pdf).

<sup>242</sup> UNCTAD, 2015, *Information Economy Report 2015: Unlocking the Potential of E-commerce for Developing Countries*.

<sup>243</sup> [http://www.who.int/disabilities/world\\_report/2011/report.pdf](http://www.who.int/disabilities/world_report/2011/report.pdf).

<sup>244</sup> The United Kingdom of Great Britain and Northern Ireland's Disability Rights Commission investigation in 2004 into 1,000 websites found over 80 percent were next to impossible for disabled people to use. Similar findings of poor compliance were found in a 2006 UN and 2009 European Union 2009 study.

<sup>245</sup> <http://goo.gl/W8JREa>.

<sup>246</sup> ICC/BASCAP, 2016, *BASCAP's Input to the UNCTAD Manual on Consumer Protection*.

The suggested best practices for business that ICC puts forward include:

- Development of programmes and mechanisms to assist consumers to understand the risks of using e-commerce platforms and to take informed decisions.
- Encouragement of online shopping platforms to adopt and adhere to comprehensive, robust and recognisable due-diligence systems across all platforms and services including checks by platform owners to ensure a basic understanding of who is trading on their platform, such as 'Know Your Supplier' and 'Know Your Consumer' protocols.
- Development of automated tools to prevent high risk offers being presented to consumers.
- Encouragement of e-commerce platforms to take appropriate steps to address advertisements that lead consumers to sites that sell illicit goods.

## F. CONCLUSION

E-commerce shows staggering growth rates, yet the electronic environment continues to pose new challenges for the consumer and new strategies are needed to protect consumers shopping online and to foster consumer confidence in e-commerce, especially cross-border e-commerce. Many of the issues are common to all forms of commerce; e-commerce simply provides a new context, particularly in relation to data security and cross-border electronic trade.

Christine Riefa sets out a clear definition of the legal framework needed for e-commerce, composed of two sets of provisions:<sup>247</sup>

- a) Vertical legislation focusing on the particularities of the medium. This includes legislation creating a framework for electronic transactions (enabling electronic contracts and signatures, framing intermediaries' liability) and specific consumer rights for distance sales (including information and the right to withdraw). These would form the backbone of an efficient e-commerce legal framework.
- b) Horizontal legislation applicable regardless of the medium used and typically including provisions on unfair contract terms, unfair commercial practices, misleading and comparative advertising, payment protection,

data protection, market surveillance and enforcement, dispute resolution and conflicts of laws and jurisdiction, criminal sanctions. These are largely traditional measures, many predating e-commerce.

Seen from this point of view, the OECD guidelines have focused on the more traditional horizontal dimensions. Even the innovatory introduction of escrow draws upon a device which has existed quite independently of e-commerce for centuries.

Certain consumers are always vulnerable but e-commerce risks exposing that vulnerability in new ways:

- a) The access of children to computers is an issue, especially as the latter have become more miniaturized and personalized. This poses additional concerns regarding irresponsible advertisement or sales to minors without parental control.
- b) Miniaturization and increased access has been accompanied by introduction of mobile devices and mobile apps which are now accessible to vulnerable populations that may be unfamiliar with commercial transactions, may have limited literacy and may be less able to identify potential hidden costs or fraud.

The impersonality of e-commerce can be a problem. On the other hand, it can also be seen as an improvement from high pressure face-to-face sales. But new forms of pressure have emerged:

- a) Speed of transaction in the face of computer time-outs is one reason why consumers may hasten to accept a transaction because they have spent so long on the computer which keeps timing out.
- b) Additional pressures to make a purchase online comes from the price changing during the course of a consumer inquiry, for example "last two or three tickets available at this price".

These pressures increase the importance of the now well-established concept of the "cooling off period". This is a good example of a "traditional" consumer protection measure (originally introduced to deal with high pressure sales in person) which has increased in salience as a result of the new pressures brought about by e-commerce. However, it is suggested here that the issue of cross-border jurisdiction has shown such lack of progress (and both sets of OECD guidelines in 1999 and 2016 in effect record an inability to resolve the issue) that the obstacle of consumer mistrust requires innovative action outside of government.

<sup>247</sup> C Riefa, 2014, op. cit.

Liability for breach of security is proving to be a major commercial consideration as the Alipay story demonstrates. It is also demonstrated by the history of chargeback under which the consumer has the right to pursue a claim against the card issuer as well as the internet trader. This means, for example, that if goods do not arrive, a claim for a refund of the cost can be lodged against the card issuer in the event of no response from the internet trader. When this was initiated under consumer credit legislation during the 1970s and 1980s, it was strongly resisted as a regulatory imposition. As cross-border purchases have taken off, it has come to be seen as market advantage, providing an incentive for the consumer to use credit cards.

Limiting consumer liability could thus prove to be a business opportunity, despite having been seen as an imposition. When negotiations have taken place around mobile payments, as has been the case within ISO for example in the five years up to 2015, industry has pushed back against the “limited liability” concept endorsed, for example, for the second time in article 41 of the OECD E-commerce Guidelines 2016.<sup>248</sup> The problem that industry faces is that arguing that the burden of limited consumer liability would be too great might suggest that the risks to consumers are high as

well. Were businesses to accept liability they would send a signal to consumers about their confidence. They would also have strong incentives to maximize security.

As noted earlier, there are already innovative adaptations to escrow available in the marketplace under which shoppers do not have to share credit card details or remember a new password. Instead, consumers can simply give an email and a delivery address, and leave the payment to be sorted out later.<sup>249</sup> Customers who have previously used such escrow checkouts can be electronically recognized when they visit another online business, further reducing the need to fill out online forms. This not only allows the firm to bear the risk that customers fail to pay when invoiced, but also to offer them extended payment plans for a fee. While these loans have higher margins than the competitive online payment business and may thus present a new regulatory challenge to governments, the paradox here is that consumers who seem nervous about buying across borders, as noted above, are prepared to entrust their money to multinational third party intermediaries. The resort to trusted intermediaries is the flip side of the fear of direct trading across borders. The third party bears the risk and is well placed to prevent “accidents”.

<sup>248</sup> OECD, 1999 and 2016, op. cit.

<sup>249</sup> <http://www.economist.com/news/finance-and-economics/21690106-payments-unicorn-seeks-become-dray-horse-bank-getting-more-ambitious>



## XIII. Privacy and data protection

### A. PRIVACY IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The revised UNGCP incorporate matters of privacy for the first time. General Assembly Resolution 70/186 recognizes that “Member States have a common interest in promoting and protecting consumer privacy and the global free flow of information”, while the substantive guidelines establish both a new “legitimate need” (Guideline 5k) around “the protection of consumer privacy and the global free flow of information”, and a new section IV on “principles for good business practice” that seek to require business to protect privacy through “a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of their personal data”. While the term of art “data protection” does not appear in the UNGCP, new section V.A on “national policies for consumer protection” contains in guideline 14h an exhortation to members to establish policies that envisage “consumer privacy and data security”.

New section I on e-commerce does not mention data protection or privacy but does suggest that

Member States study the OECD guidelines on e-commerce (described in chapter XII). These in turn contain two very brief paragraphs on privacy and security (paragraphs 48 and 49) but also refer to the OECD’s revised privacy guidelines, which is quite a long chain of referral.<sup>250</sup>

### B. IS PRIVACY A RIGHT?

The following list is collated by Privacy International, but also corresponds with the relevant content of UNCTAD’s 2016 publication “Data protection regulation and international data flows: Implications for trade and development”, on which this chapter draws.<sup>251</sup>

<sup>250</sup> OECD, 2013, *Revised Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, available at [www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf](http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf).

<sup>251</sup> UNCTAD, 2016, *Data Protection Regulation and International Data Flows: Implications for Trade and Development*, available at [unctad.org/Data-Protection-Study](http://unctad.org/Data-Protection-Study).

<sup>252</sup> [unctad.org/cyberlawtracker](http://unctad.org/cyberlawtracker).

<sup>253</sup> <https://www.privacyinternational.org/privacy-101>.

#### Box 13. Privacy as a human right

Privacy is a qualified, fundamental human right. The right to privacy is articulated in all the major international and regional human rights instruments, including:

- United Nations Declaration of Human Rights (UDHR) 1948, article 12, which states: “no one shall be subjected to arbitrary interference with his [or her] privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.
- International Covenant on Civil and Political Rights (ICCPR) 1966, article 17, which states: “1. No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. 2. Everyone has the right to the protection of the law against such interference or attacks”.

The right to privacy is also included in:

- Article 14 of the United Nations Convention on Migrant Workers
- Article 16 of the United Nations Convention on the Rights of the Child
- Article 10 of the African Charter on the Rights and Welfare of the Child
- Article 4 of the African Union Principles on Freedom of Expression (the right of access to information)
- Article 11 of the American Convention on Human Rights
- Article 5 of the American Declaration of the Rights and Duties of Man
- Articles 16 and 21 of the Arab Charter on Human Rights
- Article 21 of the ASEAN Human Rights Declaration
- Article 8 of the European Convention on Human Rights

Sources: UNCTAD *Cyber-law Tracker*;<sup>252</sup> *Privacy International*.<sup>253</sup>

### C. UNDERSTANDING THE DATA DIMENSION FROM A CONSUMER PERSPECTIVE

Data is as critical to facilitating an online transaction as making a payment; indeed, in some cases (for example social media platforms) it replaces financial payment. Sensitive information such as delivery address and payment details is provided by consumers, but the extent to which wider data is gathered by the vendor is often unclear. Search habits, purchase history, location and internet service provider address are collected in ways that can be difficult for consumers to understand or prevent. When this is aggregated with other data, companies and third parties can develop an in-depth picture of people's preferences and likely purchasing intentions.

A significant proportion of this user-generated information consists of the data trail that consumers leave or that is observed by machines as consumers make their way across the internet: what they search for, their preferences, the sites they visit, the locations and devices they visit them from, the friends they interact with, the causes they support and, of course, the purchases they make and the apps they use. The volume of data is increasing as more people mediate more of their affairs through the internet and the increasing number of "things" it connects through the internet of things.

The data brokerage sector is an emerging multibillion dollar industry that has grown to meet the ever-growing demand for data, harvesting multiple data points about consumers from multiple sources online (and offline) and combining them into rich, if incomplete, profiles of individuals, segmented to meet the needs of their clients. For example, according to the MIT Technology Review, Axciom,<sup>254</sup> one of the world's largest data brokers, "holds an average of 1,500 pieces of information on more than 500 million consumers around the world ... can analyse its data to predict 3,000 different propensities, such as how a person may respond to one brand over another. And through its partnership with Facebook, Axciom can ... [link] real-world activities to those on the web [and link its data] to 90 percent of United States social profiles".<sup>255</sup>

Research shows that concerns around personal data use and/or misuse are a central driver of trust

in online markets as also discussed in chapter XII. Of course, personal data gathering is not limited to e-commerce; it is part of a much bigger digital experience of constant data collection. Through social media, personalized apps, wearable technology, sharing platforms, search and targeted products, people are continually exposed to the effects of data collection, aggregation and onward sharing. Concern about these effects varies between different countries but is consistently high, and rising – with an annual tracker of consumer online attitudes putting consumer worries about online privacy in the United States of America up 42 percent<sup>256</sup> and those in the United Kingdom of Great Britain and Northern Ireland up by a third since 2014.<sup>257</sup> According to the 2016 CIGI-Ipsos Global Survey on Internet Security and Trust, 57 percent of global citizens were more concerned about their online privacy compared to one year previously. Eight in ten are concerned that their information may be bought or sold. 83 percent of global citizens appear to have changed their online behaviour in an effort to control the amount of personal information that is being shared online.<sup>258</sup>

A 2014 global survey of 16,000 online consumers across 20 countries<sup>259</sup> found that 74 percent were concerned about how companies use information about them collected online. Worldwide, 72 percent of respondents did not know what information is known about them by companies and 63 percent did not know what rights they have over companies handling their information. In terms of financial information, in Europe 55 percent fear becoming a victim of fraud via online transactions<sup>260</sup> and 58 percent abandon a purchase because of fears over payment security.<sup>261</sup> These fears appear well founded, with a 2015 report claiming data breaches globally were up by 40 percent on the previous year.<sup>262</sup>

These levels of concern are in part due to consumers' sense that they have lost control over how data is collected and how companies utilize

<sup>254</sup> <https://www.technologyreview.com/business-report/big-data-gets-personal/download/?redirectTo=%2Fs%2F514351%2Fhas-big-data-made-anonymity-impossible%2F#/join/>.

<sup>255</sup> [www.technologyreview.com/news/514351/has-big-data-made-anonymity-impossible](http://www.technologyreview.com/news/514351/has-big-data-made-anonymity-impossible).

<sup>256</sup> TRUSTe, 2015 *United States Consumer Confidence Index*, see: <http://bit.ly/1NIETKt>.

<sup>257</sup> TRUSTe, 2015 *United Kingdom Consumer Confidence Index*, see: <http://bit.ly/1e51fJX>.

<sup>258</sup> <https://www.cigionline.org/internet-survey-2016>.

<sup>259</sup> Ipsos Mori, 2014, *Global Trends Survey*, see: <http://bit.ly/1RGHLvG>.

<sup>260</sup> EC, 2011, *Attitudes on Data Protection and Electronic Identity in the European Union*, Eurobarometer 359, see <http://bit.ly/1TjkP5t>.

<sup>261</sup> Econsultancy, 2011, *Why Do Consumers Abandon Online Purchases?*, see <http://bit.ly/1QOoSSE>.

<sup>262</sup> Symantec, 2015, *Internet Security Threat Report*, see <http://symc.ly/1Klmlm7>.

it once in their possession. Terms of use which purportedly detail company practices are opaque, long and complex<sup>263</sup> – they are geared towards organizational compliance and liability limitation, not consumer comprehension.<sup>264</sup> Consumers are faced with a “take it or leave it” choice when considering whether to use an online service, with limited opportunities to assert their own preferences. While it may be in the interests of many companies to interpret ongoing participation within the current set up as satisfaction or acceptance, research suggests consumer resignation to having lost control,<sup>265</sup> which adds to the loss of trust. Global research reflects a similar sense, with 72 percent agreeing it is inevitable that privacy will be lost because of new technology.<sup>266</sup> A report for the World Economic Forum found that there has been “a decline in trust among all stakeholders. Individuals are beginning to lose trust in how organizations and governments are using data about them, organizations are losing trust in their ability to secure data and leverage it to create value.”<sup>267</sup> This mistrust, recognized by consumer advocates and businesses alike, is what national and international regulators are now contending with.

## D. REGULATING THE DIGITAL AGE

The creation of effective regulation and policy to enable more trust in the digital economy is a pressing challenge. Networked platforms such as Facebook, Uber or AirBnB have shown how online services can achieve huge scale in a short space of time, showing how innovation can now outpace institutions responsible for consumer protection. Furthermore, these disruptive services have a transnational reach, hence requiring a response that is coordinated at the international

level, something that adds further lag. Member associations of Consumers International have voiced their concern, with 80 percent feeling that legislation, regulation and standards relating to redress are ineffective at keeping pace with the digital economy, and 76 percent doubting the efficacy of enforcement.<sup>268</sup>

To take data protection law as an example, prior to the recent spate of revisions, consumer privacy and data protection had scarcely been considered by the European Union, the United Nations or the OECD since the last century. As recently as 2016, members of the European Union were still working to overhaul rules adopted before google.com was even registered as a domain name. In the intervening period, an unprecedented shift has taken place, not just in the amount of data collected at an individual level, but in the ways in which it is used by companies and public organizations to identify large-scale patterns in consumer and citizen behaviour, or to identify, tailor or target individuals.

In the context of the perpetual changes and challenges brought by technology and global data flows, consumer protection mechanisms need to be not just principled, but responsive and adaptable. It remains to be seen whether advances such as the UNCGP or the European Union’s General Data Protection Regulation will be able to respond effectively if the pace of change over the next 20 years corresponds with that of the last two decades. The United States of America has already shifted from basing its privacy protection policies on its “Fair Information Practice Principles” towards a “harm-based approach” designed to target harmful uses of information, in particular “those presenting risks to physical security or economic injury, or causing unwarranted intrusions in our daily lives, rather than imposing costly notice and choice for all uses of information”.<sup>269</sup> Such shifts reflect the conundrums for enforcement agencies faced by ever increasing volumes of business.

Box 14 sets out how UNCTAD drew up a “recognized set of core data protection principles” drawing from various agreements to provide a common set of principles and enable international cooperation.

<sup>263</sup> AM MacDonald and L. Cranor, 2008, The cost of reading privacy policies, *I/S: A Journal of Law and Policy for the Information Society*, see <http://www.is-journal.org>. The analysis calculated that it would take 76 working days to read every privacy policy an internet user encounters in the course of a year.

<sup>264</sup> Analysis in the United Kingdom of Great Britain and Northern Ireland found 43 percent of the adult English population would not be able to understand Google’s 2013 terms and conditions. See E Luger et al, 2013, Consent for all: Revealing the hidden complexity of terms and conditions, proceedings of the SIGCHI Conference on Human Factors in Computing Systems, see: <http://bit.ly/1QhHv0C>.

<sup>265</sup> J Turow et al, 2015, *The Trade-Off Fallacy* (Annenberg School for Communication, University of Pennsylvania), see <http://bit.ly/1F4S958>.

<sup>266</sup> Ipsos Mori, 2014, *Global Trends Survey 2014*, see: <http://bit.ly/1RGHLvG>.

<sup>267</sup> World Economic Forum, 2012, *Rethinking Personal Data: Strengthening Trust*, see: <http://bit.ly/1XEMyMQ>.

<sup>268</sup> Consumers International, 2015, *State of Consumer Protection Survey 2014-15*.

<sup>269</sup> M Panzera, 2013, Talking points regarding data security, International Forum on Justice and Consumer Rights (Wuhan, China). The principles are: notice/awareness, choice/consent, access/participation, integrity/security and enforcement/redress.

### Box 14. Core data protection principles

The core principles are:

1. **Openness:** organizations must be open about their personal data practices
2. **Collection limitation:** collection of personal data must be limited, lawful and fair, usually with knowledge and/or consent
3. **Purpose specification:** the purpose of collection and disclosure must be specified at the time of collection
4. **Use limitation:** use or disclosure must be limited to specific, or closely related, purposes
5. **Security:** personal data must be subject to appropriate security safeguards
6. **Data quality:** personal data must be relevant, accurate and up-to-date
7. **Access and correction:** data subjects must have appropriate rights to access and correct their personal data
8. **Accountability:** data controllers must take responsibility for ensuring compliance with the data protection principles

UNCTAD find that these eight principles appear in some form in all key international and regional agreements and guidelines regarding data protection.<sup>270</sup> They point to an additional principle – data minimization – which only appears in the European Union Data Protection Directive, but which they see as carrying considerable global influence.

Source: UNCTAD, 2016, *Study on Data Protection and International Data Flows*.<sup>271</sup>

## E. INTERNATIONAL REGULATION

Differing data protection laws in different jurisdictions have the capacity to inhibit international trade online. For example, a recent development is the emergence of data localization requirements, which are considered to have potentially significant trade implications. These require personal data to be retained within their original jurisdiction, either through a direct legal restriction or through other prescriptive requirements (such as local business registration requirements) that have the same result. Data localization requirements are common in some specific sectors (notably the health sector and the financial services sector) but they are less common for generic data.

There are several drivers for data localization requirements: a) concerns over the potential exposure of local data to increased security risks or surveillance in overseas jurisdictions; b) concerns about the dominance of foreign countries when it comes to services delivered via the internet; and c) government surveillance.

Two often cited examples of data localization requirements are Indonesia and the Russian Federation, which have adopted restrictions on the transfer of data abroad. Businesses face significant

compliance requirements in both countries. Other countries considered imposing similar localization requirements (notably Brazil and the Republic of Korea), but after wide stakeholder consultation, they embraced a mixture of alternative approaches as discussed above.

In considering such policy divergences, it should be remembered that privacy and data protection are key consumer and human rights as set out in chapter XII, section B above and recognized (without using the word “rights”) in the UNGCP. Measures to protect them may become trade barriers. However, article XIV.c of the General Agreement on Trade and Services (GATS) clearly permits trade restrictions that are necessary for “the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts”, specifying that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services”. The Trans-Pacific Partnership (TPP) negotiations transposed some wording from GATS that is considered by UNCTAD to be a “disguised restriction on trade” and therefore the “most interesting rule” in the TPP. The TPP generally is reported to “not really impose any significant positive requirements for data protection, but it does address the issue of balancing data protection laws against trade considerations. Specifically, it imposes limits on the extent of data protection regulation that signatories can provide in their national laws”.<sup>272</sup>

<sup>270</sup> UNCTAD, 2016, op. cit. The principles are chiefly drawn from the European Union Data Protection Directive, the OECD Privacy Guidelines and the Council of Europe Convention 108. The “order” and “terminology” is a modified version of the work on this issue by Graham Greenleaf. See for example “Standards by which to assess data privacy laws” in G. Greenleaf, 2014, *Asian Data Privacy Laws* (Oxford).

<sup>271</sup> [http://unctad.org/en/PublicationsLibrary/dtlstict2016d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf).

<sup>272</sup> UNCTAD, 2016, op. cit.

UNCTAD's interpretation is that that any business affected by a cross-border transfer restriction can challenge the law as a "disguised restriction on trade", although it considers that this would be a difficult task for anything other than the most extreme restriction. This clause appears to establish a new balance between privacy protection and trade restrictions, and in the future this wording may become a common part of international agreements.

Box 15 sets out how the European Union-United States of America "Safe Harbour" Agreement was an

attempt to avoid differences in data protection regimes from becoming a trade barrier.

## F. CAN TECHNOLOGY RESPOND TO THE CHALLENGES THAT TECHNOLOGY CREATES?

Given the limitations that are becoming apparent in conventional approaches, it may be that new innovations will provide solutions to some of the

### Box 15. From Safe Harbour to Privacy Shield

Among the 34 OECD member countries, 32 had implemented comprehensive data protection laws as of early 2016. At the time of writing, the Turkish parliament has passed a data protection bill that is meant to harmonize the Turkish regime with that of the European Union. That will leave the United States of America as the only exception (it uses a sectoral approach to data protection rather than a single law).

The European Commission's Directive 95/46 on Data Protection, which took effect in 1998, prohibits the transfer of personal data to non-European Union countries that do not meet the European Union's "adequacy" standard for privacy protection. The European Union requires other receiving countries to create independent government data protection agencies and to register databases with those agencies. In order to bridge the gap between their respective jurisdictions, in 2000 the United States of America and the European Union agreed the "Safe Harbour" framework, that certified businesses in the United States of America as meeting European Union requirements. Breach of the rules could trigger intervention by the United States of America's FTC, which could in turn result in companies being struck off the approved list held by the United States of America's Department of Commerce.

After a complaint from a European Union citizen that his data was not protected to European Union standards upon transfer to the United States of America, the European Court of Justice (ECJ) found in October 2015 that the presumption of adequacy under Safe Harbour principles did not prevent European Union citizens from challenging the initial 2000 Decision 520 on the basis of enforcing their personal rights and freedoms. Furthermore, the court actually invalidated the Safe Harbour adequacy decision which was found to have been adopted without sufficient limits to the access to personal data by governmental authorities. The court found that Safe Harbour did not ensure processing that was "strictly necessary" and "proportionate" as demanded by the European Union Data Protection Directive. As a result, Safe Harbour members no longer enjoy a presumption of adequacy that allowed for the movement of data from the European Union to the United States of America.

One important result of the case was the renegotiation of the Safe Harbour agreement, to be known henceforward as the European Union-United States Privacy Shield in February 2016. The new arrangement included a commitment to stronger enforcement and monitoring, including a new ombudsman and new limitations and conditions on surveillance. In April 2016, however, the grouping of European Data Protection authorities pointed to several deficiencies in the newly negotiated Privacy Shield despite it being seen as an improvement over the preceding Safe Harbour framework. The European Union's advisory "Article 29 Working Party" asked for the European Commission to resolve their concerns in order to ensure that "the protection offered by the Privacy Shield is indeed essentially equivalent to that of the European Union".<sup>6</sup> Finally, following an "adequacy decision" by the European Commission regarding protection in the United States of America, the new Privacy Shield took effect on 1 August 2016. The Transatlantic Consumer Dialogue, whose members are consumer organizations from the United States of America and the European Union and have been persistent critics of Safe Harbour and the new Privacy Shield, has urged a relatively simple move which is that the United States of America could "become a full party, without undue reservations, to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108) and its Additional Protocol regarding supervisory authorities and trans-border data flows (CETS No. 181), which are both open to non-European states and provide the widest internationally-agreed data protection standards".<sup>7</sup>

Sources: UNCTAD Study on Data Protection and International Data Flows (2016);<sup>8</sup> Trans-Atlantic Consumer Dialogue, Resolution on the European-Union Privacy shield proposal 7 April 2016; Susan Aaronson, *The digital trade imbalance and its implications for internet governance*; Global Commission on Internet Governance, Chatham House, paper 25, 2016; EC Press Release FAQs 12 July 2016.



challenges that prior innovation has created. E-commerce has a history of developing innovative solutions; the emergence of new personal data empowerment tools and services which return some direct control over data to consumers suggests a response to data concerns that could build on regulation and legislation.

Traditional protection remedies concentrate on controlling how businesses collect, store and use personal data, and are reliant on regulators and business making the system work, leaving the consumer as a passive “data subject” with little room for manoeuvre. This classic conception of legislation and regulation may not be able to provide full reassurance. In the European Union, for example, with one of the strictest data protection regimes in the world, consumer confidence in data handling remains low.<sup>273</sup>

The possibility of low-cost, personalized technology to deliver consumers’ individual privacy and data sharing preferences is resulting in the emergence of new tools and services that help individuals assert more control over how their data is collected and used, by whom and for what purposes.<sup>274</sup> These emerging personal data empowerment tools put individual consumer preferences back into the equation in a way that traditional regulation does not, and move beyond informed consent tick boxes and onerous terms and conditions. Examples are apps on a smartphone that can alert users when their data is being accessed outside of a persons’ set preferences, and tools that give a “behind the scenes” view of what data is being collected by whom. Such services effectively take on the role of data intermediary between suppliers and customers, working on behalf of the consumer to ensure their sharing and usage preferences are met.

Personal data empowerment tools and services demonstrate a new, additional way of responding to risks and concerns around data and privacy – one that can build on regulation, whilst not negating the need for it. This is a nascent market, but one which could potentially achieve higher levels of trust and confidence by involving consumers and empowering them to regulate the way companies

<sup>273</sup> The European Commission’s Special Eurobarometer 431 on Data Protection (2015), found that Europeans have widespread concerns about the consequences of their data being misused. More than two thirds of respondents who feel that they do not have complete control over their personal data say they are concerned about this lack of control. See <http://bit.ly/1HjvAil>.

<sup>274</sup> For more examples, see Citizens Advice, 2015, *Personal Data Empowerment: Time for a Fairer Data Deal?* See <http://bit.ly/1XtrlBG>.

#### Box 16. Examples of personal data empowerment tools and systems

- **Personal data stores:** secure storage of data, with authorization to transact and share data with chosen businesses or state services according to terms set by consumers. Stores would also audit use and alert or fix when not meeting criteria.
- **Person-centred permissions:** dashboards where consumers can set and change data-sharing privileges, invoke time stamped permissions which expire when consumers choose and view what data is going where.
- **Trust networks:** simplifying sharing choices through the creation of a network of accredited, trusted providers who commit to using consumer data on individual consumers’ terms.<sup>9</sup>

Source: UNCTAD.

use their personal data. However, in much the same way that shared information obligations or common returns policies help underpin confidence in cross-border e-commerce, there is a role for coordinated international regulatory systems to support their development and enable them to flourish in the following areas:

- **Upholding protections and rights:** agreed and enforced protocols on data breach notifications and remedies would give consumers more clarity on how their rights would be upheld. If things went wrong, dispute resolution protocols that can operate at a global scale could be developed.
- **Establishing minimum standards:** agreed standards on privacy by design could see a higher level of privacy as a default setting for services. Encryption requirements could be used to increase security of data.
- **Incentivising good practice:** operators of personal data stores or trust frameworks would be held to high standards of transparency and audit, with easily recognisable credentials to help consumers choose between providers
- **Creating a competitive market** for services that offer consumers a way to easily control and manage their privacy and sharing preferences. Crucial to this will be establishing rights to data portability and agreed specifications on interoperability between platforms, so that individual privacy and sharing preferences could be aggregated around a person and easily transported between services. This has the potential to give consumers a share in the

utility value of their data and increase their leverage in the marketplace.<sup>275</sup>

Other elements of elective flexibility such as “cookies” and “ad-blockers” are developing, allowing individual consumer choice, both negative and positive. Yet reliance on individual initiatives or choices can be a fragile underpinning. Elsewhere in this manual the principle of consumer consent has been discussed and found to be weak in practice (chapter XIV on financial services, for example). Despite moves towards increasing use of customer mandates as outlined above, the danger is that consent mechanisms may prove too taxing for

all but the most assiduous consumers. For UNCTAD, a “consent” approach relates to whether individual consumers are able to consent to the transfer of their data to a foreign country. This approach is available in the European Union and some other jurisdictions, but is subject to further conditions regarding the nature of the consent. UNCTAD concludes that “consent can be hard to demonstrate and cumbersome for both businesses and consumers, and often gives no guarantee of protection”.<sup>276</sup>

There is still much progress to be made. UNCTAD has set out what it summarizes as seven key challenges towards achieving balanced and internationally compatible legal frameworks. These are set out in box 17.

<sup>275</sup> L Coll, 2016, Cross-border e-commerce: building consumer trust in international data flows, in UNCTAD, *Data Protection Regulations and International Data Flows: Implications for Trade and Development*, available at [http://unctad.org/en/PublicationsLibrary/dtlstict2016d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf).

<sup>276</sup> UNCTAD, 2016, op. cit.

**Box 17. Key challenges for data protection**

- 1. Addressing gaps in coverage:** there is no single global agreement on data protection. The three key gaps in national coverage are:
  - a) A significant number of countries have no data protection law at all
  - b) A significant number of countries have only partial laws, or laws that contain broad exemptions
  - c) In some circumstances individual companies can limit the scope of their privacy promises (usually in the fine print of privacy policies)
- 2. Addressing new technologies:**
  - a) Cloud computing
  - b) The internet of things
  - c) Big data analytics
- 3. Managing cross-border data transfer restrictions:** numerous options and arrangements are in place for managing data flows in a way that still protects the rights of citizens. The most common mechanisms are:
  - a) Allowing one-off data transfers that meet common derogations or “tests” (for example, requirements to fulfil a contract, emergency situations, valid law enforcement requests and others)
  - b) Allowing ongoing data transfers where the target jurisdiction ensures an equivalent level of protection (as with Safe Harbour/Privacy Shield)
  - c) Allowing data transfers where the original company agrees to be held accountable for any breaches (this is an emerging approach that appears in the APEC Privacy Framework and to a limited degree in the laws of Australia and Japan)
  - d) Allowing data transfers where the company is bound by a set of corporate rules that apply across all its activities (this approach is used in the European Union and to a limited degree in national laws, for example, in Colombia and Japan)
  - e) Allowing data transfers subject to a very specific legal agreement between jurisdictions (e.g. European Union-United States of America agreements on transfer of airline passenger data and financial services data)
  - f) Some combination of the options above
- 4. Balancing surveillance and data protection: most laws and regulations are silent on this issue, which has come under scrutiny since the revelation of the extent of surveillance. The broad extent, scope and purpose of surveillance should be open, even if some operational details remain secret.**
  - a) Surveillance should be limited to specific national security and law enforcement objectives
  - b) Personal data collection during surveillance should be “necessary and proportionate” to the purpose of the surveillance
  - c) Surveillance activities should be subject to strong oversight and governance
  - d) All individual data subjects should have the right to effective dispute resolution and legal redress regarding surveillance (irrespective of their nationality)
  - e) Private sector involvement in surveillance should be limited to appropriate assistance in responding to a specific request
  - f) Private sector organizations should be able to disclose (in broad terms) the nature and frequency of requests for personal data that they receive from government, law enforcement and security agencies.
- 5. Strengthening enforcement:** there is a trend towards strengthening enforcement powers and sanctions in the data protection field. Strengthening enforcement has been a major theme in amending and updating laws (notably in Australia, the European Union, Hong Kong (China) and Japan).
- 6. Determining jurisdiction:** this has become a prominent issue in data protection regulation, partly due to the widespread data flows across borders and partly due to the lack of a single global agreement on data protection (and the consequent fragmentation of data protection regulation).
- 7. Managing the compliance burden:** some data protection regulation is criticized for being overly cumbersome or expensive to comply with, or that it creates specific compliance burdens for smaller businesses.

Source: UNCTAD Study on Data Protection and International Data Flows (2016).<sup>281</sup>

## G. CONCLUSION

The increased use of personal data is an inevitable consequence of transiting towards online consumer relations. This applies to developing countries as well as developed countries, as mobile commerce takes off around the world. Some personal data collection has been advocated by consumer associations and consumer protection agencies, in the context of responsible lending for example, to enable credit referencing as a safeguard against consumers taking on excessive commitments (see chapter XIV). But such data is sensitive by definition, and so it requires strong safeguards such as those introduced by the United States of America's Consumer Financial Protection Board in 2011. Under these provisions, entities using data must provide initial and annual privacy notices to customers, informing them of the type of non-public personal information collected and disclosed, the categories of affiliates and other third parties to whom disclosure takes place and any rights to opt out of disclosure. Brazil instituted similar regulations in 2010, including a prohibition on harvesting data irrelevant

to the purpose for which they were given. Generally, such constrained data use is viewed as promoting responsible behaviour in the market, especially if there is a regulatory authority to keep watch.

As seen above, it is in relation to cross-border transactions that consumers are particularly concerned. A number of other factors deter consumers from participating in cross-border trade too, but worries that consumers have with online data use in wider digital interactions are among the major issues. For e-commerce to grow within and between countries, regulators must think not just about aligning regimes and rules across borders, but about how to create the space for the sorts of innovative approaches described above to build trust in data use. User-friendly mechanisms that enable control and choice over who sees or stores their data and who it is shared with, and transparency and understanding about what it is used for (backed up by internationally agreed requirements), will be part of the solution to creating a trusted environment in which consumers can make the most of the opportunity of global ecommerce.





# PART THREE

## Consumer protection and basic goods and services



## XIV. Financial services

### A. FINANCIAL SERVICES IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

Along with e-commerce, the explicit inclusion of financial services in the revised UNGCP was one of the most expected novelties. Indeed, to proceed otherwise would have been strange in the light of the financial crisis and its repercussion on consumers around the world. The resolution adopting the UNGCP refers to the crisis and the resultant “renewed focus on consumer protection” clearly envisages regulatory and enforcement action. New section V.J on financial services (guidelines 66–68) uses similar language to the resolution, listing regulation, enforcement and oversight, consumer education and literacy, disclosure, responsible business conduct, data protection and financial inclusion.

Certain details stand out. The responsibility of firms for their authorized agents is dealt with in guideline 66e; “responsible lending” and the sale of “suitable” products (both guideline 66f) are two linked issues emerging from the financial crisis. Remittances, in particular the transparency of charging (guideline 66h) are included for the first time, a major issue for developing countries and for migrant workers.

Other details are mentioned elsewhere in the revised UNGCP. Guideline 40 deals with “collective resolution procedures” and specifically mentions those pertaining to over-indebtedness and bankruptcy. Financial services are added to guideline 44h, which lists subjects requiring consumer education.

The pre-existing UNGCP already contained references to consumer credit. They are currently to be found in guideline 26 which states that “consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers”, while guideline 44 calls for consumer education and information to “cover such important aspects of consumer protection as ... information on ... credit conditions”.

Insurance, on the other hand, is hardly mentioned at all in the UNGCP. The one explicit mention is in guideline 66c in the section on financial services, where Member States are asked to encourage “appropriate controls and insurance mechanisms to

protect consumer assets, including deposits”. But this is in effect a reference to safeguarding deposits against the risk of institutional collapse, rather than to insurance of consumers’ household effects.

There is increasing overlap between insurance and other financial services, and sales patterns have become much more fluid. Some of the abuses that took place during the last 15 years have been where banks have become sellers of insurance. But retail insurance is not directly addressed in the UNGCP. Guideline 68 references other relevant documents as sources of inspiration for Member States, in particular the G20/OECD high-level principles (HLPs) for consumer protection in financial services, the principles for financial inclusion emanating from the G20 and the good practice guidelines of the World Bank.<sup>277</sup> The G20 HLPs do not mention insurance by name but they do cover all retail financial products. The World Bank good practices contain an entire chapter devoted to insurance. The “referencing out” widens the scope of the UNGCP but extends them to documents which in aggregate are more copious than the UNGCP themselves. Conversely, the UNGCP take in some issues, including remittances, responsible lending and bank deposit insurance, which are not covered in the OECD/G20 HLPs. In aggregate then the ensemble acts as a reasonable checklist for a very large sector, albeit not concentrated in one document. This chapter pays most attention to credit and insurance.

### B. FUNCTION AND FORMS OF CONSUMER CREDIT

Many consumer transactions are financed either in part or completely by credit; it greatly contributes to the purchase of goods and services. Without such a financial service, many transactions would simply not take place. Thus, accessible consumer credit can make a major contribution to the welfare of consumers, stimulate growth of the economy and promote financial inclusion. However, unfettered growth of consumer debt can destabilize the credit industry and the economy in general. Such growth can cause market bubbles and subsequent busts which leave many consumers over-

<sup>277</sup> OECD, 2011, *G20 High-Level Principles on Financial Consumer Protection*; World Bank, 2012, *Good Practices for Financial Consumer Protection*; G20 Financial Inclusion Experts Group, Access through Innovation Sub-group, 2010, *Innovative Financial Inclusion: Principles and Report*.

indebted and hamper economic recovery. Consumer credit regulation can contribute therefore to the stability of the financial system.

The most difficult issue pertaining to the extension of credit is striking a balance between making credit accessible to those in need of it and denying it to those who will not be able or

not willing to meet their obligation to repay their debt. Over-exposure to credit leads to serious problems, including individual consumers being enticed to enter into burdensome and unrealisable commitments. There is a need to ensure that lenders do not “hawk” credit irresponsibly and that individuals do not borrow to an extent that there might be an inevitable default. The availability

#### Box 18. Microcredit and microfinance

Microfinance gained its current worldwide prominence following developments in South Asia during the final quarter of the last century. In India, the movement gathered momentum with the establishment in 1982 of the National Bank for Agriculture and Rural Development providing financial and development policy support to microfinance initiatives through a bank-linked programme in 1992. The peak of public recognition came with the award of a Nobel Prize to the founder of Grameen Bank in Bangladesh, Muhammad Yunus. The concept of microcredit and microfinance took off around the world, extending to Africa and Latin America and in due course to developed countries too. However, having been widely praised, microfinance underwent something of a moral crisis as it expanded. In 2008, Mr Yunus singled newly commercialized microfinance institutions (MFIs) out for criticism and warned against “new loan sharks created in the name of microcredit”.

Several factors explained this change in reputation. The industry moved from the rural to the urban market and “client overlap” set in, whereby consumers juggle microcredits from multiple MFIs – quite possibly using one loan to pay another. Some undesirable practices emerged, such as “forced savings”. For example, an MFI would grant a loan of US\$100, but retain US\$25 in a “savings account” on which it did not pay interest to the consumer. On the contrary, the borrower would continue to pay interest on the full amount borrowed, thus rendering calculations such as rates of charge even more complex than usual. Other worrying practices that emerged include: not giving the client a copy of the loan agreement; inappropriate practices with regard to collateralization, such as asking for collateral valued at 300–400 percent of the loan amount; not utilizing legal registration procedures and selling collaterals without the consent of the borrower and without due process.

The reputation of microcredit took a big hit in 2010 in Andhra Pradesh, India, where about 120 poor borrowers reportedly committed suicide because of financial duress linked to MFIs charging high interest rates, using aggressive, even coercive, money collection practices and over-lending to the destitute. Based on a calculation of the amount deducted upfront from the loan by the MFIs, the effective rate of interest reported was between 35 and 65 percent per annum in some cases. The incidents resulted in the Andhra Pradesh government passing the Andhra Pradesh Microfinance Institutions Act (Regulation of Money Lending) 2010, which greatly restricted MFIs’ operations. The Reserve Bank of India also issued guidelines by the end of 2011, capping interest rates at 10 to 12 percentage points above their own borrowing costs, keeping the interest rate in the range of 23–27 percent per annum.

Not all central banks took such action in the face of abuse. In the absence of imposed standards, some microfinance providers developed their own standards. Client protection principles were developed as a code of ethics by Accion and other industry investors who established the Smart Campaign. Microfinance transparency guidelines were developed and endorsed by various NGOs, development agencies and service providers. Examples are the Ugandan Association of Microfinance Institutions which developed a code of practice for consumer protection with a focus on disclosure, and the Principles for Client Protection in Microfinance drawn up by the Consultative Group to Advise the Poor (CGAP, a trust fund of the World Bank).

The Indian consumer association CUTS points out that “MFIs operating in Andhra Pradesh have ceased issuing fresh loans due to the growing non-performing assets and the limited scope of recovery. The direct effect has been to deny millions of India’s poorest citizens’ access to basic financial services. Studies show that the ban imposed by the Andhra Pradesh government, without much research and evidence, resulted in a largely negative impact on the microfinance industry, without significantly benefiting poor consumers”.

CUTS points to the work of Bandhan Financial Services which “has proved itself with over a decade of experience serving the poor since its inception in 2001”. With low operational expenses around 80 percent of its total lending is rural. As of July 2013, Bandhan served more than 4.7 million poor people through its network of 1,816 branches spread across 19 states. An impact evaluation study observed that the average annual net income of West Bengal households under Bandhan’s business saw a 13.8 percent increase of income from all sources. Furthermore, unlike other institutions, Bandhan was not affected by the multiple lending that caused the crisis in Andhra Pradesh. In summary, the problem is that bad practices provoke counter-actions, which may themselves bring about new problems. Poor consumers desperate for finance may well bypass the mechanisms set up to protect them in theory. Such is the conundrum of financial service regulation – it operates in a wider context.

Sources: UNCTAD; CUTS International.

and intensive marketing of easy credit can pose distinct disadvantages to consumers. First, there is the temptation to buy on impulse or to overspend. Second, credit costs money, ties up future income and thus raises the real price of a product. Third, in the event of a dispute with creditors or failure to meet credit obligations, consumers may lose their merchandise, or property held as collateral, as well as their eligibility to obtain further credit.

The term “consumer credit” is generally used to refer to credit provided to an individual, predominantly for personal, domestic or household purposes. It does not involve credit extended for commercial or business purposes. In many countries consumer and business credit may be intertwined, where, for example, an individual uses a credit card to finance a business. One problem that is not noticed as often as it should be is that many small businesses fail because they are unable to keep up with their obligations as borrowers of consumer credit.<sup>278</sup> Many microfinance products sold in developing countries for consumption expenditure are designed with production in mind, although their record in that regard appears mixed in both the short- and medium-term.

## 1. The poor pay more

Low-income families may face particularly severe problems in relation to credit. They may be either

<sup>278</sup> I Ramsay, 2016, Changing policy paradigms of EU consumer credit and debt regulation, in D Leczykiewicz and S Weatherill (eds.), *The Image of the Consumer in EU Law* (Hart).

ineligible for or, if eligible, pay more for their credit, in excess of what is paid by better-off borrowers. They may end up purchasing shoddy goods at high prices. This adds to the cost and is a particularly clear example of the “poor pay more syndrome” identified by David Caplovitz.<sup>279</sup> In his definitive study of poor households in New York during the 1960s, he concluded that the cost of credit and consumer durables was higher for the poor than for other social strata. Over forty years later, similar conclusions are still reached in financial services.<sup>280</sup> Some fear that during recessionary times, the temptation is for credit to be used by families on modest incomes to maintain routine consumption, food, rent, etc. as incomes fall – the “let them eat credit” syndrome.<sup>281</sup> Situations of urgency can drive consumers into the short-term, high interest subsector, such as payday lending discussed later.

## 2. Common forms of consumer credit

Consumer credit is provided by many types of lenders including banks, finance companies, insurers, cooperatives, pawnbrokers, moneylenders and vendors of goods and services. The law and contractual agreements governing such transactions, and consequently the rights and obligations of the

<sup>279</sup> D Caplovitz, 1963, *The Poor Pay More* (New York).

<sup>280</sup> R Bates et al, 2008, *Poor Choices: The Limits of Competitive Markets in the Provision of Essential Services to Low Income Consumers* (Energywatch).

<sup>281</sup> R Rajan, 2010, *Fault Lines: How Hidden Fractures Still Threaten the World Economy* (Princeton).

### Box 19. Common forms of consumer credit

#### Bank – personal loan

A lump sum amount is borrowed at a fixed or variable rate of interest based upon the timeframe. Often there are requirements as to securitization.

#### Bank overdraft

The bank agrees to honour transactions unless the account is overdrawn beyond a fixed ceiling. Interest is payable on the amount overdrawn with penalty fees for exceeding the overdraft limit.

#### Budget accounts

Budget accounts are often offered by department stores. This arrangement involves the consumer paying the shop a regular amount per month for example, and thereafter the consumer is allowed credit to buy goods up to a prearranged maximum limit.

#### Credit cards

A credit card allows the cardholder to make purchases for which he or she is billed later, usually carrying a balance from one billing cycle to the next.

#### Credit cooperatives/credit unions

A self-help way of providing credit for members usually based on a specific community or “common bond”. Credit unions are very widespread in the Caribbean, where they often started as church-based, and in South Africa where the stokvel is a village-based union. In Kenya savings and credit cooperatives are regulated by the Sacco Societies Regulatory Authority of Kenya.

**Credit sale**

The sale of goods paid for by a fixed number of instalments. Ownership of the goods passes immediately to the purchaser.

**Finance company personal loans**

Normally arranged from a finance company by car dealers or other vendors of expensive items. Although the credit and goods may come from the same dealer, the arrangement is regarded as two separate deals – the consumer buys from the dealer and borrows from the finance company.

**Hire-purchase**

A longstanding method of financing the purchase of goods bought on credit under which ownership to the goods does not pass until all instalments are paid. Hire purchase has tended to be replaced by finance company loans and credit sales (see above) over the last 25 years. A variant is conditional sale with further conditions.

**Microcredit**

In theory this refers to lending of small sums of money at low interest rates, to low-income consumers, usually for the purpose of setting up small businesses. In practice, as the sector has grown, the interest rates have turned out not to be so low and many microloans are used for household items, for example, smoke hoods. In Anglophone Africa, microcredit clubs based on fixed periodic payments by members are often known as “merry-go-rounds” and may be the main source of consumer credit in informal settlements.<sup>11</sup>

Moneylending (short-term high-cost credit including payday lending)

The practice of giving cash loans with or without security generally repaid at a high level of interest over a short period of time. “Short-term high-cost credit” sometimes takes the form of a payday or SMS loan which will normally last 30 days but may be renewable. It involves minimum checks by the lender on the ability of the consumer to repay. Rollovers of such debt are a common practice and have been subject to more regulation recently in developed economies. High default charges may also be payable.

**Mortgage**

A contract by which a person binds property in favour of a lender to secure the payment of the loan. It is often used to purchase a house or land. Second mortgages involve the borrowing of a lump sum amount using property with a first mortgage as security. In such transactions, interest rates are generally higher than first mortgages.

**Option accounts**

Some retail outlets provide option accounts as an alternative method of payment which eliminates the need to carry cash or cheques. It is a personal account that enables the consumer to spread payments to suit financial circumstances. There is no requirement to settle the entire outstanding amount at the end of the month, although there is usually a minimum amount that has to be settled. Interest is charged on the outstanding amount.

Pawnbroking

A simple and fast way of raising money on the basis of security of valuables deposited with the pawnbroker. It is sometimes known as “cash-on-items” credit, in Anglophone Africa for example.

**Sub-prime lending**

Sub-prime lending is lending to individuals with generally poor or blemished credit records who are unable to access the mainstream lending market. These loans came to prominence in the run-up to the financial crisis in the United States of America.

lender and borrower in each category of these transactions, vary greatly. The availability of numerous forms of consumer credit differs from country to country depending on the development of the financial system. The terminology may itself differ from country to country.

As a result of the financial crisis, international bodies have attempted to promote good practice in the consumer credit sector. In 2011, reporting under a G20 mandate, the Financial Stability Board concluded

that consumer protection in financial services would be helped by more work being done to “strengthen supervisory tools by identifying gaps and weaknesses”. They suggested that “a broad range of regulatory and supervisory tools” be used, “promoting responsible lending practices and providing disclosure guidelines”. They recommended a twin-track approach involving the “necessary supervisory tools while at the same time ensuring that sufficient information is being provided to consumers”. More specifically, they pointed to the need for work on:



- Establishing indicators of unsuitable product features
- Aligning and disclosing incentive compensation arrangements
- Evaluating the benefits of offering consumers and providers with benchmarks for financial products that can be used safely by a wide variety of unsophisticated users<sup>282</sup>

While carefully worded, this suggests a more active and evaluative stance by regulators. The reference to incentives corresponds with the increasing interest being shown in remuneration structures within the financial services sectors generally, discussed below.

### C. FUNCTION AND FORMS OF INSURANCE

Insurance is a broad generic term for an array of institutions that help manage risk through the device of sharing and transferring of risks from one individual to a group. Losses of the individual are then shared on some equitable basis by all members of the group.

Classifications of insurance abound. A primary distinction is between social insurance and private insurance. Nevertheless, private insurance is often predicated on the assumption that social insurance will provide a safety net for all citizens. Social insurance has the function of keeping consumers away from the “let them eat credit” syndrome mentioned above and was set up for the purpose of avoiding family budget collapse during times of economic disturbance. In the nineteenth and twentieth centuries, it developed first in Bismarckian Germany, New Zealand, the United Kingdom of Great Britain and Northern Ireland and France, where it formed a key part of the post-war settlement.

The defining characteristics of private insurance are that:

- It is usually voluntary; in the event that it is compulsory (such as car insurance), the consumer should have a choice of providers and possibly a choice of risks covered
- The transfer of risk is normally accomplished by means of a contract and thus the legal framework is that of contract law

It is beyond the scope of this manual to address the very many technical aspects of insurance law. Suffice

<sup>282</sup> Financial Stability Board, 2011, *Consumer Finance Protection with Particular Focus on Credit*.

it to note that the consumer cannot be expected to understand many of the common terms which are in use because of the applicable law (either by statute or custom) through which they form part of standard contracts.

### D. AREAS OF REGULATION FOR FINANCIAL SERVICES AND PROSPECTS FOR REFORM

Following up its 2012 recommendations, the World Bank carried out a survey of regulators involved in financial consumer protection in 114 jurisdictions.<sup>283</sup> It found that “some form of legal framework is in place in 112 out of the 114 jurisdictions” but also concluded that “fewer economies have provisions specific to financial industry such as restrictions on predatory lending (59 percent), bundling and tying of services (49 percent) and abusive collections (45 percent)”.<sup>284</sup> It concluded that “the function of financial consumer protection supervision is far behind prudential supervision in terms of available methodologies for compliance monitoring, range and nature of enforcement actions, and supervisory skills”. Clearly there is some way to go even after the talk of post-crisis reform.

Well-designed financial services legislation can promote efficient and fair markets. This can be achieved by enhancing the competitive environment relevant to the provision of financial services and ensuring the fair treatment of consumers. The most common areas of regulation include:

- Licensing and supervision of suppliers (including intermediaries), agencies (such as credit referencing) and financial services products
- Responsible business conduct including responsible lending
- Control of advertising
- Provision of information to consumers (comprehensibility and comprehensiveness)
- Fair contract terms, including reopening of contracts considered unfair
- Regulation of charges

<sup>283</sup> World Bank, 2014, *Global Survey on Consumer Protection and Financial Literacy: Oversight Frameworks and Practices in 114 Economies*.

<sup>284</sup> Compared to other areas of consumer protection such as client confidentiality and protection against deceptive advertising.

**Box 20. Private insurance products****Life insurance**

These policies provide risk cover either for the entire life or for a fixed term. Some policies also combine risk cover with other financial returns. For example, proceeds from a life insurance policy can also help supplement retirement income. It can be an important tool in the following ways:

- Income replacement
- Paying outstanding debts and long-term obligations
- Estate planning including legacy contributions

**Health insurance**

Although plans differ, they cover an array of medical, surgical and hospital expenses. Most cover prescription drugs and some also offer dental coverage. Managed care plans provide comprehensive health services to their members and offer financial incentives to patients who use providers named in the plan. Broad categories include:

- Fee-for-service
- Managed care
- Disability insurance

**Auto insurance**

Auto insurance protects against financial loss in the event of an accident or theft of a vehicle. Auto insurance products are a good example of cover from all three categories of insurance, i.e. insurance of the person, property and liability:

- Property coverage for damage to or theft of the motor vehicle
- Liability coverage for legal responsibility to others for bodily injury or property damage
- Medical coverage for the cost of treating injuries, rehabilitation and sometimes lost wages and funeral expenses

An auto insurance policy itself can be “fault-based” or “no fault”. This may depend on the applicable law.

Most countries require some, but not all, of these risks to be covered. If the purchase of the car is financed by credit, the lender may also have requirements.

**Home insurance**

Homeowners insurance provides financial protection against disasters. A standard policy would insure the home itself and its contents.

**Travel insurance**

There are three major types of travel insurance:

- Trip cancellation insurance
- Baggage insurance or personal effects coverage
- Emergency medical assistance

- Treatment of customers in arrears
- Financial education (not to be confused with information, see chapter X)

Many of the above issues could be described as widely supported good practice, but are still in need of legislation and improvement in many countries. In that respect the UNGCP, OECD/G20 HLPs and World Bank good practices all contain much that can be used by a government that seeks to reform the sector. The Financial Stability Board credit proposals on consumer credit, having been part of the same mandate as the OECD/G20 HLPs could also claim to be implicitly cited. The analysis below takes in proposals that are

already widely supported and those that are more future-oriented or react to recent developments where legislation is yet to catch up.

## 1. Cooling-off periods: a success to be built upon

The World Bank guidance sets out several applications of “cooling-off periods”, which may be one of the most effective methods of allowing consumers who may have been pressured to have second thoughts.<sup>285</sup>

<sup>285</sup> World Bank, 2012, *Good Practices for Financial Consumer Protection*.

This consumer safeguard has been introduced by legislation more widely in recent years. Cooling-off periods are established in the United States of America and the European Union. The European Union Directive on Credit Agreements of 2011 lays down a 14 day period after contract without having to give a reason. In Mexico, consumer credit providers are required to supply an offer binding on the provider for 20 days, so that the consumer has time to study and compare the offer before making a decision. Cooling-off periods are also required in South Africa.

There is a danger, however, that this very important safeguard against aggressive marketing could be undermined by the use of “processing fees”, which was envisaged by the World Bank in its 2012 report. In effect, such fees would penalize cancellation during a cooling-off period. This rather negates the concept and could make service providers careless about the offers that they make. In the event that such a provision is adopted, there needs also to be a test of the reasonableness of processing fees. In practice they could be indistinguishable from penalties and be tantamount to an unfair contract term.

## 2. Contract terms, transparency and comprehensibility

There is debate about whether financial services legislation should provide for certain built-in contractual rights laid out in statute without possibility of exclusion. It is becoming clearer that legislation or regulation must restrict contractual provisions that are harsh or likely to cause undue hardship, such as unauthorized bank charges, disproportionate penalties, nil refunds on single premium insurance policies and terms applied retrospectively without notification in the contract. Disproportionate early debt settlement fees which may not be clearly set out at the time of the loan agreement are also under challenge. In that respect, the interpretation of context of sale is coming further to the fore. For example, courts in the United Kingdom of Great Britain and Northern Ireland may use the “unfair relationship test”, which takes into account the overall context of a consumer credit agreement, to judge whether or not a particular consumer has been exploited by virtue of incapacity or illiteracy. The courts have wide-ranging powers in such circumstances, including the setting aside of the existing agreement.<sup>286</sup>

The UNGCP contain a brief but powerful reference to contract terms in guideline 14d, by which national policies should encourage “clear, concise and easy

to understand contract terms that are not unfair”. Many unfair contract terms relate to information or its obscurity. It is often said that problems arise from the inability of consumers to comprehend financial documents such as those illustrating methods of calculation. The information is often daunting and is clearly outside the competence of an average consumer. Implicitly blaming consumers for their own ignorance is surely undesirable, and may even underestimate the problem. As the World Bank has suggested, complexity may be a cover for unfairness and sometimes “even direct fraud”.<sup>287</sup> Research by the European Commission using expert advisers has shown that even people familiar with the financial products may not be able to fully understand the terms.<sup>288</sup> As the United Nations Commission of Experts on Reforms of the International Monetary and Financial System, chaired by Joseph Stiglitz, reported, “even if there had been full disclosure of derivative positions, their complexity was so great as to make an evaluation of the balance sheet of the financial institutions extraordinarily difficult”.<sup>289</sup> In other words, the problem goes beyond consumer comprehension; certain products may simply be incomprehensible, even to regulators and sales staff.<sup>290</sup> So transparency and disclosure are not just matters of consumer information, they are a vital part of the regulatory process. For that reason, transparency and disclosure are not to be written off as unrealistic objectives. Some people have a responsibility to be well-informed and service providers have an obligation to set out their stall publicly and clearly.

The danger of information overload, as discussed in chapter X, suggests the importance of “key facts” documents being provided before an individual enters an agreement. The World Bank recommends accordingly for the insurance sector, for example.<sup>291</sup> The continuing nature of many relationships mean that disclosures may be required to alert individuals to potential payment issues during the initial transaction and subsequent “product life”. Annual statements of amounts paid in charges on revolving credit may be effective in making consumers change their credit behaviour. Imaginative techniques might target consumers with information at the time of borrowing on revolving credit rather than the time of entering the contract.

<sup>287</sup> World Bank, 2012, *op. cit.*

<sup>288</sup> M Kuneva, 2009, Restoring consumer trust in retail financial services, DECO 35th Anniversary Seminar on Financial Services and the Consumer Interest (Lisbon, 27 April).

<sup>289</sup> United Nations, 2009, *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System.*

<sup>290</sup> G Tett, 2009, *Fool's Gold.*

<sup>291</sup> World Bank, *op. cit.*, 2012.

<sup>286</sup> Office of Fair Trading, 2008, *Unfair Relationships: Enforcement Action Under Part 8 of the Enterprise Act 2002.*

**Box 21. Transparency in consumer financial relations**

Transparency focuses on the following elements:

- **Accuracy.** There is a need for accuracy in the information provided to consumers. This will enable them to form clear conclusions about the total cost of credit. The United States of America led this field with the “Schumer Box” imposing obligations regarding information and format in consumer credit and mortgage loans under the Truth in Lending Act 1968, covering such matters as: annual percentage rates, total charge for credit, charges included and excluded, calculation of extortionate credit and remedies. Similar provisions exist in Canada.
- **Comparability.** Transparency calls for comparable information put forward by different service providers so as to ensure that consumers can make meaningful choices between competing offers. In 2011 the French Minister of Finance, Christine Lagarde, in the face of opposition from the profession, obliged French banks to produce tariffs in comparable form for 10 major banking services.
- **Conciseness.** Documents provided to consumers must be in a concise form, such as Key Fact statements as promoted by the World Bank. This will ensure that the documents are likely to be read and understood by consumers.
- **Clarity.** The information must be presented clearly, as required by the 2011 OECD/G20 High-level Principles on Financial Consumer Protection referred to in UNGCP guideline 68.
- **Timing.** There is a need to ensure consumers receive all relevant information before they commit to a particular credit transaction. Under the French Loi Murcef of 2001, banks were compelled to publish their tariffs, three months before they took effect.

Source: UNCTAD.

As part of the package of banking reforms, the Government of Australia has mandated the introduction of fact sheets for major financial products. The Home Loan Fact Sheet was introduced in 2012 (variable rate loans) and the Credit Card Fact Sheet was made mandatory the same year. However, the legislation requires a lender to provide the customer with a fact sheet only when the customer asks for one and it was found by the Australian consumer association, Choice, that lenders are adopting a very narrow view of what constitutes “asking”.<sup>292</sup>

### 3. Transparency and remittances

One relatively straightforward way in which transparency can promote consumer protection in financial services is in the remittance sector, especially given improvements in mobile transactions which have the potential to increase competition in this subsector. The UNGCP make explicit reference to this in guideline 66h.

There need to be clear signals about what happens at both ends of the transaction (e.g. exchange rates in country of despatch and country of receipt). Consumers International have pointed out that “the consumer is charged an initial fee to transfer funds, and is effectively charged a second time because the foreign exchange rate used generates a ‘bonus profit’ for the service provider who is not obligated to communicate this information to the consumer.

<sup>292</sup> E McNess, 2013, *The Australian Responsible Lending Act: The Verdict is Cautiously Optimistic for the Consumer* (Consumers International).

Payout locations in some countries are also charging recipients to collect the remittances”.<sup>293</sup> CI also argues that the “spread” of rates also needs to be referenced in comparable format. Guideline 66h lists the information to be provided as “the price and delivery of the funds to be transferred, exchange rates, all fees and any other costs associated with the money transfers offered, as well as remedies if transfers fail”.

### 4. Control of advertising

The World Bank recommends a tough stance on misleading advertising and in Ukraine, for example, recommended that the regulator for financial services markets have the legal authority to order withdrawal of any advertising that breached truth in lending rules.<sup>294</sup> However, the consumer may be not so much misled as distracted by imagery, which may not be illegal but simply irrelevant. For example, a South African study provides a salutary reminder of the difficulties of focusing consumers’ attention on what really matters in credit contracts. A study by Marianne Bertrand et al found that “including a photo of an attractive woman increases loan demand by about as much as a 25 percent reduction in the interest rate”.<sup>295</sup>

<sup>293</sup> CI, 2012, *The Remittances Game of Chance: Playing with Loaded Dice*.

<sup>294</sup> World Bank, 2012, *Conference on Consumer Protection and Financial Services* (Kiev, 22 March); World Bank, 2012, *Strategy for Financial Services Consumer Protection and Financial Literacy 2012-17*.

<sup>295</sup> M Bertrand et al, 2010, What’s advertising content worth? Evidence from a consumer credit marketing field experiment, *Quarterly Journal of Economics* 125(1):263–306.

## 5. Prescribed limits on interest rates?

The issue of interest rate caps stretches back to historic usury laws and the debate continues. It is even difficult to obtain agreement on establishing prescribed methods of calculating interest charges, both to ensure that consumers can compare effectively and also to inform the regulatory debate. Discussions on finance rates will necessarily require some understanding of financial mathematics.

Many countries employ interest rate ceilings. This is often justified as a means of protecting lower income consumers from the risks of high-cost credit and of providing credit at fair prices. Ceilings may take many forms, from a single ceiling through different ceilings for different types of loans. They may be linked to market prices or established as a fixed rate. They may include only interest charges or all costs associated with credit, in order to avoid diverting costs elsewhere such as administrative fees. There will be costs and benefits associated with ceilings. Some consumers will be protected from the dangers of high-cost credit while other consumers may see their access limited and resort to the black market. Policymakers should attempt to quantify these costs and benefits before introducing ceilings.

In South Africa the “usury ceiling” was lifted in 1992, since when cash lenders have been regulated by the Micro-Finance Regulatory Council.<sup>296</sup> The regulation requires that monthly repayment should not exceed a proportion of monthly income, an indirect way of imposing a duty of assessing “affordability” on lenders. One problem concerning interest rate caps is that they can incite companies to recoup the implicit cost of the rate caps through administrative charges. This tendency can be, to some extent at least, limited by applying the principle of proportionality. For example, in the United States of America the main federal consumer law that does contain such a requirement is the CARD Act 2009, which adopts a standard of reasonableness and proportionality against which all credit card penalty fees must be assessed.<sup>297</sup> Essentially, the CARD Act requires that the amount of any penalty fee or charge that a card issuer could impose for violation of the credit card contract “shall be reasonable and proportional to such omission or violation”. The Consumer Protection Financial Bureau of the United States of America has issued regulations expanding on this concept, and at the time of writing, has proposed similar “reasonable and proportional” requirements for various types of prepaid cards.

<sup>296</sup> M Bertrand et al, 2010, op. cit.

<sup>297</sup> Credit Card Accountability and Disclosure Act, 2009.

## 6. Payday lending

Among the more extreme manifestations of abusive lending during the past years is payday lending, which is found in many jurisdictions as far apart as Australia and the Russian Federation, its use having been accelerated by online sales. As internet access moves down the income scale this method of lending might spread. Although the stereotype of payday lending is one of loans offered at the moment of consumer liquidity (payday) at extortionate rates and subsequently enforced through violence and other threats, the approach of many lenders is in practice much more subtle, especially as the subsector has become more corporatized. Many contracts are designed to fail so that consumers, having defaulted on the first loan, are offered a second loan to clear the first one, with friendly sales staff disarming consumers who already feel guilty because of the first default.

In 2013, the Government of Australia introduced a national tiered maximum cap on payday loan charges (not applied to banks and credit unions, which lend at far lower rates). The overall cap was 48 percent per annum (including interest and fees) with additional “set up costs” allowed for smaller loans and a ban on small amounts where the term is 15 days or less. In the United Kingdom of Great Britain and Northern Ireland, where the Competition and Markets Authority concluded that the major payday loan companies made supra-normal profits,<sup>298</sup> the Financial Conduct Authority introduced a price cap in 2015 on daily interest rates of 0.8 percent per day and capped default fees, setting an overall repayment cap at twice the value of the original loan. Other limits were set on “rollover” lending and stronger affordability checks were imposed in 2014.<sup>299</sup> In consequence, 2015 saw a massive decline in the volume of payday lending. It is worth noting that the approach was a twin-track one, aimed at lending practices as well as mathematical rates. The same is relevant to the microcredit market in developing countries.

## 7. Regulation of credit-related insurance

Consumer credit insurance can also be used to ensure that repayments for a particular credit contract will continue to be made if the borrower dies, becomes unemployed or becomes ill. Home finance lenders may require a borrower to take out a life insurance policy with the value of the policy being assigned to the lender. Consumer credit-related insurance can be a detriment to consumers and in some countries has resulted in systematic consumer

<sup>298</sup> Competition and Markets Authority, 2014, *Payday Lending Market Investigation: Provisional Findings Report*.

<sup>299</sup> Which?, 2014, *Cleaning Up Credit: Cleaning the Market from Unfair Practices and Toxic Products*.



detriment through mis-selling practices. Credit insurance (often known as payment protection insurance, PPI) is often sold at point of sale when consumers are not in a good position to compare prices and is added to the cost of credit. Common problems include consumers having to pay excessive premiums for insurance or paying for policies which they do not need because they are already covered by other insurance, failure to disclose policies to the consumer and inappropriate insurance cover. It may be appropriate to ban the sale of such credit insurance at point of sale of credit.

## E. EMERGING ISSUES

### 1. Remuneration structures and conflicts of interest

Dominic Lindley makes the point that inappropriate remuneration and sales incentive schemes were an important root cause of PPI mis-selling in the United Kingdom of Great Britain and Northern Ireland, where many frontline staff were given strong incentives to sell the product regardless of whether it was appropriate for the consumer.<sup>300</sup> The consequences of the large scale mis-selling have been serious not only for consumers, but also for the banks themselves who have had to set aside around US\$40 billion to pay compensation to consumers, a sum that is still rising at the time of writing.<sup>301</sup> Both the G20 HLPs and the UNGCP raise matters around the behaviour of retail sellers, whether direct or through authorized agents. G20/OECD HLPs<sup>302</sup> paragraph 4 states that “financial services providers and authorized agents should provide consumers with information on conflicts of interest associated with the

authorized agent through which the product is sold”. The UNGCP, as well as referring to the HLPs, also recommend in guideline 66e that “financial institutions are also responsible and accountable for the actions of their authorized agents. Financial services providers should have a written policy on conflict of interest, to help detect potential conflicts of interest. When the possibility of a conflict of interest arises between the provider and a third party, this should be disclosed to the consumer to ensure that potential consumer detriment generated by conflict of interest be avoided”.

European Union Directive 2014/17/EU of February 2014 covering mortgages on residential property describes “appropriate management of conflicts of interest” as a key element of consumer confidence and requires that advice be given in the “best interest of the consumer”. It also specifically requires measures to avoid conflicts as a result of numerical targets (such as bonuses).

“Disclosure” in this context relates to two areas: the terms of contracts and rates of charge, on the one hand, and the disclosure of commissions and bonuses paid to the sales staff on the other. This second form of disclosure is still relatively rare. It is required in Australia and South Africa, while Japan has voluntary guidelines for the disclosure of incentives. The Financial Stability Board has said that the use of sales targets and remuneration structures rewarding sales are counterproductive to the aim of providing consumers with accurate and trustworthy information and increase the risk that products are being sold to customers who do not have the capacity to repay.<sup>303</sup> Sometimes the conflict of interest is not just at staff remuneration level but institutional, as shown by the case of the Spanish preferred shares set out in box 22.

<sup>300</sup> D Lindley, 2014, *Risky Business: The Case for Reform of Sales Incentives Schemes in Banks* (Consumers International).

<sup>301</sup> <http://www.thisismoney.co.uk/money/news/article-3181723/PPI-bill-soars-27bn-scandal-costs-banks-1-000-family-Britain.html>

<sup>302</sup> OECD/G20, 2011, *High-level Principles on Financial Consumer Protection*.

### 2. Responsible lending

The UNGCP make reference to responsible lending in guideline 66f. Given the contribution of consumer

<sup>303</sup> Financial Stability Board, op. cit.

#### Box 22. The Spanish preferred shares case

Before the financial crisis, banks in Spain raised money to increase their level of capital through the sale of “hybrid securities” to their retail customers. These complex products, known as “preferred shares” (*participaciones preferentes*), offered an income in the form of an annual payment. While they were sold to consumers as substitutes for simple deposits, the income paid by these hybrid securities was variable and consumers were at risk of losing their capital if the bank that issued and sold the product should run short of capital. Preferred shares were converted into ordinary shares when the savings banks were recapitalized in the midst of the financial crises of 2008, following a decision by the stock market regulator. As the financial situation of these savings banks deteriorated, consumers found that they were facing significant losses. Many of the customers affected were over retirement age and lost much of their savings as a result. After a campaign by the Spanish consumer group Organización de Consumidores y Usuarios, Santander Bank was fined US\$16.9 million in 2014, for inappropriately selling such products to its customers.

Source: Dominic Lindley, 2014, *Risky Business: The Case for Reform of Sales Incentives Schemes in Banks* (CI).

defaults to the inception of the financial crisis, a consensus is emerging around responsible lending which requires ensuring that consumers can repay a debt in a sustainable manner without incurring financial difficulties, and that lenders treat borrowers fairly and consider their interests throughout the transaction.

Measures used to prevent over-indebtedness include compensation and fines in respect of bad sales practices. In Australia, under the National Consumer Credit Protection Act 2009, if a consumer has been sold an unsuitable product, the consumer can seek injunction against the provider from collecting more interest payments and seek compensation for the loss or damage due. In a number of jurisdictions (China, Germany, Hong Kong (China), Singapore), consumer credit providers are also required to conduct checks with credit registers to assess the creditworthiness of borrowers. Credit reference bureaux are in increasing use in Kenya too, and it is a government requirement that the credit history of individuals be kept and made available when accessing credit.

Assessment of consumers' ability to repay loans is increasingly common, often through credit reference agencies or bureau, both public and private. As noted above in some jurisdictions, including France, Belgium and South Africa, such credit checks are mandatory. The practice of credit referencing sometimes relies on reporting of default. For example, with the setting up of the Credit Information Bureau of India, the banks provide the credit rating of customers who are defaulters to the bureau, and lenders use this information before sanctioning the loan.

The introduction of a credit bureau in a country may expand credit by reducing lender costs and in some countries may offset inefficiencies in the court enforcement system. It can promote competition by reducing the advantages of market incumbents. Credit bureaux often provide credit scores to lenders which are used to screen consumers and may include both negative and positive information, which may permit the deepening of the market to include more low-income consumers with good records.

One of the more comprehensive databases is that established by the People's Bank of China during the 1990s. It features a personal credit information system connecting all commercial banks and some rural credit cooperatives and helps lenders with risk assessment (and thus indirectly consumers, whose consent is required before data is disclosed). It includes basic information such as previous defaults or whether a property loan was granted to first- or second-time buyers. The introduction of this database resulted in a 10 percent refusal rate in applications for credit. While

this will have left some consumers unable to borrow, it is argued that reasonable constraints on credit granting are advisable in order to avoid the recent fate of less risk-averse markets, such as the United States of America.

China is at one end of the spectrum with positive and negative information brought together and centralized. As a safeguard, consumers should have the right to check and challenge the data which is held about them. In Belgium, such access is free of charge, and in the United Kingdom of Great Britain and Northern Ireland for a nominal charge. In the United States of America, one credit report per year is free. These rights of consumers and obligations of credit bureaux must be subject to strict oversight and enforcement. Consumer advocates in the United States of America have documented serious problems in getting credit report errors fixed despite clear statutory mandate. Where there are multiple credit bureaux, it is difficult for consumers to challenge them all at once.

### 3. Treatment of over-indebtedness

The UNGCP also mention over-indebtedness in guideline 40. Practice is developing to allow individuals to write down their debts when they are unable to repay and have a fresh start. Conditions need be included to ensure that access to such a facility is not abused.

Legislation for personal bankruptcy was adopted in Greece in 2010. After its introduction there were almost 35,000 applications during 2011 and 2012, and during 2013 the number of applications doubled. The law hinges on the determination of a "decent minimum amount for the cost of living" and attempts to put into practice the Greek constitutional provision for participation in social and economic life and development of personal life.<sup>304</sup> The "decent minimum amount" is not defined, however, and is based on interpretation by the courts.

### 4. Institutional structure: agency for regulation and enforcement

The UNGCP are understandably silent on the matter of detailed institutional structures for financial services, although guideline 66b calls for "oversight bodies with the necessary authority and resources to carry out their mission". Whatever the structure, an optimal agency should be well-funded (see guideline 15), able to obtain information at a low cost on emerging market practices, accurately assess practices that create the greatest risks for consumers, be able to move quickly

<sup>304</sup> A Angelousi et al, 2013, *A Constitutional Right to Debt Relief: The Greek Approach to Alleviating Over-Indebtedness* (New INKA).

to regulate emerging problems and be structured to avoid the dangers of capture by industry. Ideally, credit regulation should be carried out by a dedicated financial consumer protection agency that can oversee the whole market. Regulation should be evidence-based and take into account its impact on financial exclusion.

Several international organizations recommend that consumer credit regulation is part of a dedicated consumer finance authority or agency. One response to the financial crisis was for the Financial Consumer Protection Bureau of the United States of America to be established, while in the European Union, the new European Banking Authority was given a consumer protection mandate. In a hybrid version in Chile, SERNAC Financiero is a specialized agency within the national consumer protection agency, SERNAC, with a mandate to address financial services.

There are several advantages of establishing a specialist enforcement agency to handle consumer credit issues, for example including specialist expertise in the complexities of credit law and being able to group together actions on behalf of a number of consumers who have each suffered a small loss and are unlikely to take any action individually. However, as banking, lending and insurance have moved out of their silos, the regulatory structure needs to evolve to govern generic financial institutions in a way that picks up abuses that take place in all subsectors. The agency should be able to enforce legislation proactively (by stopping certain behaviour before it causes more harm) as well as reactively (by providing redress for harm and punishing whoever caused the harm). The scope of the agency should not be limited to acting on consumer complaints alone. It should actively monitor industry actions and developments.

In the meantime, different products have varying and sometimes unique consumer protection needs, and may be regulated differently as a result. For instance, in Kenya, commercial banks and deposit-taking microfinance institutions are regulated by the Central Bank of Kenya (CBK) with the Kenya Bankers Association (KBA) responsible for promoting good conduct and self-regulation. Savings and credit cooperatives are regulated by another government agency (Sacco Societies Regulatory Authority of Kenya) within a different act and policy.

## F. CONCLUSION

As a result of the traumas of the financial crisis, some have advocated a product safety approach to regulation: “consumers can enter the market to buy physical

products confident they won’t be tricked into buying exploding toasters and other unreasonably dangerous products. Consumers entering the market to buy financial products should enjoy the same protection”.<sup>305</sup> When one compares laws imposing strict liability for physical products on product safety (as described in chapter IX) with the emphasis on responsibility rather than blame, it is understandable that some will seek similar protection in the field of financial services.

After years of deregulation were followed by financial crisis, there has been a perceptible interest in a more interventionist stance on the part of financial services regulators. For example, while the original European Union Consumer Credit Directive of 1987 concentrated on information and minimal protection against unfair contract terms, the more recent Mortgage Credit Directive imposes far higher standards of responsible lending, while making reference to the OECD/G20 HLPs.<sup>306</sup> It is significant that greater interest is being shown in financial services remuneration structures with their potential for perverse results. The consumer credit sector has seen successful interventions to rein back the most abusive practices and to enforce a regime of credit checks in advance of loan agreements. Such safeguards are spreading to developing and transitional economies, including South Africa and China.

Turning to the reform agenda, the profile of consumer protection in financial services is rising and stronger safeguards are emerging in the availability and enforcement of cooling-off periods, a safeguard which becomes arguably even more important as online sales increase. Some jurisdictions apply pre-market approval mechanisms and, faced with the failures of disclosure and information obligations, stricter standards are being applied through mandatory fact sheets and summary boxes. Some particular sectors where services are intrinsically simple, such as remittances, could see progress through the “classical” approach of disclosure and competition.

Innovation in financial service products can be genuinely creative when responding to consumer needs. Unfortunately, too often innovation has been used to less positive effect, in effect spurious innovation to avoid regulatory constraints. To quote the Stiglitz committee again: “while there has been innovation, too much innovation was aimed at regulatory, tax and accounting arbitrage, and too little at meeting the real needs of ordinary citizens, ... financial regulation must be designed so as to enhance meaningful innovation that improves risk management and capital allocation”.<sup>307</sup>

<sup>305</sup> E Warren, 2007, *Unsafe at any rate, Democracy*.

<sup>306</sup> I Ramsay, *op. cit.*

<sup>307</sup> J Stiglitz, United Nations, *op. cit.*

## XV. Consumer protection in the provision of utilities

### A. PUBLIC UTILITIES IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The revised UNGCP represent a breakthrough in this very important field as they put into place a new “legitimate need” in guideline 5a: “access by consumers to essential goods and services”, immediately followed in 5b by “the protection of vulnerable and disadvantaged consumers”. Of equal relevance to utilities is that, for the first time, the UNGCP apply to “state-owned enterprises” (guideline 2). Section V.E on distribution facilities for essential consumer goods and services is also applicable and notable for guideline 36b’s encouragement of “the establishment of consumer cooperatives and related trading activities, as well as information about them, especially in rural areas”. Also relevant is the reference in the resolution to the Millennium Development Goals (MDGs) and Sustainable Development Goals (SDGs), the latter having just been agreed at the time of adoption of the new UNGCP.

The most directly applicable section is V.K, “measures relating to specific areas”, in which guideline 69 exhorts Member States to “give priority to areas of essential concern for the health of the consumer, such as (among others) water, energy, and public utilities”. Guideline 72 asks Member States to “formulate, maintain or strengthen national policies to improve the supply, distribution and quality of water for drinking. Due regard should be paid to the choice of appropriate levels of service, quality and technology, the need for education programmes and the importance of community participation”. The continued absence of a commitment to sanitation is frustrating for advocates of this neglected sector, although there is a now obsolete reference to the International Drinking Water Supply and Sanitation Decade which can serve as a marker. Sanitation is also explicitly included in the SDGs.

Guideline 76 advocates the promotion of universal access to clean energy, and Member States are asked to “strengthen national policies to improve the supply, distribution and quality of affordable energy to consumers according to their economic circumstances”. Guideline 77 advocates the promotion of “universal access to public utilities”, plus the incorporation of many elements of customer relations. It refers to “late payment fees” by consumers but contains no evident measure for compensation for non-service (such as interrupted service) by utilities, which is a major problem worldwide.

### B. THE NATURE OF UTILITIES PROVISION

Article 21 of the Universal Declaration of Human Rights states that everyone has the right to equal access to public service. The United Nations General Assembly proclaims this as a common standard of achievement for all peoples and all nations, which must be observed by all. Unfortunately though, this is not what is happening around the world and the definition of public service is far less clear than hitherto.

The conventionally defined utility industries, i.e. suppliers of water, sanitation, energy and communication services, among others, present special challenges for consumer protection. Not only do these industries provide very basic and essential services, but they also have particular economic characteristics that often make it difficult to open their services up for competition. There have been attempts within the European Union to redefine them as “services of general economic interest” (SGEI) characterized by identifiable public policy goals, such as universal service, leaving member states to specify the services included in the definition.

The European Union approach is that SGEIs are subject to duties other than purely commercial ones, even though they may be run with a substantial commercial element and usually in return for payment. Such duties are summed up by the concept of public service obligations. A European Commission Eurostat publication explained in 2007:

SGEIs can be defined as collective or social goods in the sense that they are different from ordinary services ... Public authorities can lay down a number of specific obligations for the provider. The fulfilment of these obligations may trigger the granting of special or exclusive rights, or the provision for specific funding mechanisms. The classic case is the universal service obligation i.e. the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations.<sup>308</sup>

While the SGEI nomenclature has not spread much further afield, the concept remains widely accepted.

<sup>308</sup> Eurostat, 2007, *Consumers in Europe: Facts and Figures on Services of General Interest*.



Most utility industries rely on some sort of network to deliver their services. The economics of these fixed networks mean that it is cheaper for a single firm to supply an entire market than for several firms to do so. Once a distribution network is in place, it makes no economic sense to duplicate it by laying a second connection between the same points. The “natural monopoly” produced by these distribution systems leaves consumers “tied in” to particular supply companies.

However, this assumption is less valid now than a generation ago. Many aspects of natural monopoly are dissolving and since the move of telecommunications to mobile individualized service, it has become a competitive service with fewer network effects as its relatively inexpensive capital assets can overlap in the same territory. There are new issues about internet capacity which could recreate network problems in the future, and there remain issues of spectrum availability which are not explored here. But for most purposes, telephone services are competitive and subject to individual contracts which require supervision of a “fair trading” nature, checking for transparency, unfair contract terms and anti-competitive practices such as “lock in” contracts. Given the above, in this chapter we concentrate on water/sanitation and electricity.

### C. REGULATION

As natural monopolies were initially recognized as inevitable, many public policies concentrated on formalizing and regulating monopolies through government control of profits, prices and other aspects of supply. This is sometimes known as the “regulatory bargain”. An effective rate cap is seen as balancing the need for affordable prices with the requirement for cost recovery and revenue. If the two goals cannot be reconciled, then a subsidy may come into operation in order to achieve specific objectives such as universal service. Regulation has taken different forms with publicly owned utilities often the least regulated in legal terms, but with more direct governmental control.

There are broadly four regulatory models identified by Eberhard:<sup>309</sup>

- **Regulation by government.** A particular challenge here is the ability of governments to understand the costs and revenue requirements of individual utilities (necessary for economic regulation). There is an evident

conflict of interest presented by governments both owning and regulating state-owned utilities.

- **Independent regulation.** This embodies principles of independence of decision-making. There are subvariants such as price cap regulation (as in the United Kingdom of Great Britain and Northern Ireland) or rate of return regulation (as in the United States of America) and assumed operational profits (as in the Russian Federation).
- **Regulation by contract,** as in France.
- **Outsourced regulation to third parties,** for example through tariff reviews, benchmarking and dispute resolution. Chile, Senegal and Romania have all applied such review mechanisms.

There is however a problem of scale. Under the traditional utility model, as water and sanitation services tend to be regulated at municipal level, it is very difficult for a national agency to regulate such a large number of providers. In contrast, in electricity where the number of suppliers tends to be smaller and the territories larger, the national regulatory model has been more feasible.

### D. OWNERSHIP

Public ownership of utilities providing water sanitation and energy remains dominant, yet the issue of ownership is contested. There was a high level of interest in privatization at the end of the twentieth century and this was often seen at the time as unprecedented. In fact there have been private operators of utilities for many generations, as well as municipal counterparts with services at times passing between public and private control and sometimes back again in several European cities in the nineteenth and twentieth centuries.<sup>310</sup>

The binary contrast of public and private can be very misleading in countries with a tradition of regulation by contract as in France, where for example, the *Compagnie Générale des Eaux* was established in the 1850s and still continues today.<sup>311</sup> Table 1 illustrates a variety of contractual models, most of which, except divestiture, originated under the

<sup>309</sup> A Eberhard, 2007, *Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models*, PPIAF Working Paper.

<sup>310</sup> PS Juuti and TS Katko, 2005, *Water, Time and European Cities: History Matters for the Futures (Watertime)*. See also, by the same authors, 2004, *From a Few to All: Long Term Development of Water and Environmental Services in Finland*.

<sup>311</sup> Under the name of Veolia.



Table 1. The spectrum of private sector participation

Option	Asset owners	Investment	Revenue collection	Operation	Length	Risk
Management contract	public	public	public	private	3–5 years	public
Lease or affermage	public	shared	private	private	8–15 years	shared
Concession	public	private	private	private	25–30 years	private
BOT	shared	private	private	private	20–30 years	private
Divestiture	Private	private	private	private	indefinite	private

## Notes:

1. BOT is a particular form of concession (Build-Operate-Transfer) in which ownership of a constructed operating asset effectively remains with the operator for a fixed term and is then transferred to the public authority for an agreed sum. In the short- to medium-term, it is akin to privatization.
2. The main difference between leases and affermages is that under leases, the operator's remuneration depends on the customer tariff, while with affermages, the operator tariff is divorced from the customer tariff, even though the operator may be charged with collecting payments.
3. Across the whole spectrum including divestiture, it is usual for there to be government controls on tariffs.
4. "Traditional" outsourcing has similar features to management contracts, although the latter tend to be more comprehensive.

Sources: principally Foster et al. 2005; also Guasch 2004.

French water services. French communes have had responsibility for drinking water since 1789, but the service is commonly provided by a private operator under contract.<sup>312</sup> National legislation sets standards (such as non-discrimination between customers and financial probity of operators). The various forms of contract have been elaborated around the world, often using the French variants as options for local implementation, with the municipalities as contractors and the private operators as contractees.

Interest in privatization reached its peak around the turn of the millennium. An OECD study of private sector participation in the water sector completed in 2009 distinguished two purposes for the trend towards the private sector: "private sector involvement was seen as a way to improve the often poor performance of publicly run utilities, and/or to inject much needed investment capital. However, experience has not always matched expectations and the hoped for surge in private investment flows has not materialized".<sup>313</sup>

The turn of the millennium saw a shift in the pattern of participation in the water sector in particular. By 2000, just five international companies accounted for 80 percent of the population served by private operators. From 1990–97, the same five won

53 percent of all contracts awarded to private water operators. In 2002 their share fell to 23 percent with a greater prevalence of local and regional actors and hybrids, for example, public companies operating abroad as private companies.<sup>314</sup> By 2007, private water operators from developing countries were serving more than 40 percent of the developing country urban market (not including China, where there were hybrid contracts). By the end of 2007, some of the most active private operators had "significantly retreated from developing countries" according to Philippe Marin's study of the sector for the World Bank.<sup>315</sup>

Marin and Izaguirre argued at the time that the enthusiasm, particularly for concessions, that characterized the 1990s had faded: "contracts often reflected excessive optimism by both private investors and governments, and the socio-political difficulties of raising tariffs to levels covering costs were often underestimated. Financial markets were hesitant to provide nonrecourse financing for water projects, often requiring that financing be backed by the sponsors' balance sheets".<sup>316</sup> By 2005, 34 percent of investment commitments made since 1990 (11 percent in number) were either cancelled or under distress,

<sup>314</sup> OECD, 2008, op. cit.

<sup>312</sup> S Trémolet and D Binder, 2010, *La régulation des services d'eau et d'assainissement dans les pays en développement* (AFD).

<sup>313</sup> OECD, 2008, *Financing and Pricing Water: The Roles of Government Policies, the Private Sector and Civil Society*, ENV/EPOC/GF/SD 2008.

<sup>315</sup> P Marin, 2009, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries* (World Bank).

<sup>316</sup> P Marin and AK Izaguirre, 2006, *Private Participation in Water, Toward a New Generation of Projects?* (PIAF/World Bank).

i.e. under request for cancellation or in international arbitration.<sup>317</sup>

One of the reasons for the unpopularity of private sector operators was the frequency of renegotiations of contracts before their due date. This was particularly frequent in Latin America during the final years of the last century.<sup>318</sup> Another reason was a function not of operators' performance but of the contracts they were given, which focused heavily on price as opposed to coverage. The contracts for the two zones of Manila for example, saw bids which set price levels of only 26 percent (eastern zone) and 57 percent (western zone) of pre-bid levels. This meant that the connected populations, which were of course the better off, received a windfall, while the non-connected poor gained nothing.<sup>319</sup>

The decline of concessions was particularly interesting from the point of view of capital finance, as it is concessions that bring private finance capital, hence the long-term nature of the contracts. Their decline indicated a shift to a more flexible involvement of the private sector, through leases, affermages or simple management contracts as set out in table 1.

## E. THE PERFORMANCE OF PUBLIC UTILITIES

What gave rise to the vogue for the private sector was a widespread failure of some incumbents in developing countries to provide the level of service that was in their mandate. Essentially this was a problem of connectivity arising from revenue starvation.

By the mid-2000s, surveys by Global Water Intelligence of over 100 cities at all levels of development found that about two fifths (and nine tenths in low-income countries) did not recover even operations and maintenance costs. 30 percent paid some contribution to capital costs, but in low income countries this was very rare (only 3 percent).<sup>320</sup> For electricity, the picture was more sustainable. Out of 84 countries surveyed by a World Bank team, almost a third of low-income countries did not cover operation and management costs. Globally, 41 percent made a contribution to capital costs.<sup>321</sup>

<sup>317</sup> Marin and Izaguirre, op. cit.

<sup>318</sup> J Guasch, 2004, *Granting and Renegotiating Infrastructure Concessions* (World Bank Institute).

<sup>319</sup> P Marin, op. cit.

<sup>320</sup> Global Water Intelligence, 2004, *Tariffs: Halfway There* (Oxford).

<sup>321</sup> K Komives et al, 2005, *Water, Electricity and the Poor: Who Benefits from Utility Subsidies?* (World Bank).

The above shortfalls had either to be made up by governments or costs were reduced by failing to maintain networks, thus allowing them to deteriorate. The consequences were thus even worse than balance sheets demonstrated. First of all, below cost prices encouraged over-consumption among customers (or at best discouraged conservation) often contributing to shortages. Secondly and most importantly, artificially low prices for both the poor and wealthy meant that no revenue could be generated to fund extensions to networks.

Those who paid the price in terms of their daily lives were therefore the non-connected and unserved. But private sector participation did not necessarily solve this problem either, especially where contracts did not specify network extension. It is questionable whether it will ever be more profitable to connect a new consumer than to just take profits from the existing network, or at least not incur losses by extending to the less profitable customers, unless a company is given an explicit requirement to increase coverage. In the absence of such requirements, or without the finance to implement them, the incumbents proved unable to meet the challenges of demography and urbanization. This was most vividly demonstrated by the development of peri-urban settlements in developing countries. It is such places that are the focus of the MDGs and the SDGs, and by extension the UNGCP.

Given that energy, water and sanitation are essential services, and that going without is not an option, the populations of unserved areas often had to make other less formal arrangements.<sup>322</sup> The scale of this has often been underestimated partly because the informality (even illegality) itself makes it difficult to estimate, and partly because informal settlements grew so quickly and were sometimes seen as embarrassing or even viewed with hostility. The same was true of the small-scale independent providers (SSIPs) that sprung up all over the world. They could be small piped or wired networks, sometimes running supplies illegally from the official networks; they could be point sources such as standpipes or battery chargers, mobile distributors such as water vendors on bicycles or trucks, or wood sellers, often gathering their own fuel sources. They could also be "frogmen" operating often illegally in the absence of a sanitation system. Sometimes high proportions of populations in cities are served by drinking water SSIPs. During the first decade of this century the levels reached 44 percent in Jakarta, 60 percent in Nairobi, 66 percent in Conakry and

<sup>322</sup> D Mitlin and D Satterthwaite, 2013, *Urban Poverty in the Global South*.

80 percent in Khartoum. Conversely, better served cities like Dakar (21 percent) saw lower proportions.<sup>323</sup>

One way of describing SSIPs is as being present by “default or design”. There has been some shift towards the latter as SSIPs are increasingly seen as operating small public systems that need to expand or improve. A well-known example is that of the *aguateros* in Asunción/Ciudad del Este, Paraguay.<sup>324</sup> Little by little, informal services have been recognized and sometimes operate under licence, even as regulated subcontractors within private concession contracts as was the case with Inpart Engineering in Manila.

## F. PRICING AND SUBSIDIES

Two of the main causes of the underfunding of utilities are affordability and the fear of consumers’ reactions to unaffordability. There are many estimates of an affordable percentage of disposable income. (Such estimates are often theoretical, for the most expensive service is that which does not exist at all because it drives consumers towards the more expensive informal sector). At various times, the United Nations Development Programme has recommended a 3 percent limit of household income for drinking water, while 5 percent has been commonly used in Latin America for both water and electricity.<sup>325</sup> Energy poverty has been deemed to be above a 10 percent threshold in the United Kingdom of Great Britain and Northern Ireland and that concept has been widely used in other European Union member states. In fact, arbitrary limits can close down options. Where families spend far higher proportions (well in excess of 10 percent is widely reported in developing countries) and incur vast amounts of time fetching and carrying, then even spending 8 percent of income on drinking water would be an improvement on the present situation, especially if the service were provided on site. The Africa Infrastructure Country Diagnostic (AICD) found that a monthly power and water bill of US\$10 would be enough to meet full cost recovery for typical household consumption in Africa and would absorb 1–4 percent of the incomes of higher income customers who currently enjoy those services. However, the same utility bill would absorb

7–15 percent of the household budget of the poor.<sup>326</sup> Cost recovery tariffs may well be beyond the means of the poorest and there is some evidence that if tariffs rise too far too fast then consumers “self-disconnect”.

What are the unserved poor already paying? AICD reported that “in the largest African cities, alternatives to piped water supply are priced from 1.3 times as high for small piped networks to 10 to 20 times as high for mobile distributors”. For energy, non-connected consumers use more costly sources such as candles, kerosene, car batteries, wood or charcoal. In Mali, these sources cost ten times more per kilowatt hour than supply from the grid which only goes to 13 percent of the population.<sup>327</sup>

This adds up to a clear example of the “poor pay more syndrome” which has been described several times in this manual. It has several dimensions:

- The poor pay more per unit because they depend on high-cost small-scale independent providers
- The better off receive a subsidy from below cost network prices from which the poor are excluded
- The poor may pay for those subsidies as taxpayers
- Connection charges go up to recoup revenue when network running costs are below costs thus making it even more difficult for the poor to gain access
- The non-connected poor waste time fetching and carrying
- The quality of alternative services to the poor will often be low and even dangerous

The poor paying high unit prices gives some sort of clue for eventually moving away from the present pattern of regressive subsidy to the better off and no service for the poorest. The AICD concludes that “if provided with access to utility networks, even at cost recovery prices, poor households would still be better off than they are today using alternative service. This suggests that ultimately, subsidization of connection costs may be a more equitable and cost-effective way of targeting public resources.”<sup>328</sup> Subsidizing consumption rather than connection would then seem

<sup>323</sup> M Kariuki et al, 2006, *Reaching Unserved Communities in Africa with Basic Services* (PPIAF).

<sup>324</sup> B Dardenne, 2006, *The Role of the Private Sector in Peri-Urban or Rural Water Services in Emerging Countries* (Paris, OECD).

<sup>325</sup> H Smets, 2009, *Access to Drinking Water at Affordable Prices in Developing Countries* (Options Méditerranéennes); M Fay and M Morrison, 2007, *Infrastructure in Latin America and the Caribbean* (World Bank/PPIAF).

<sup>326</sup> SG Bannerjee and E Morella, 2011, *Africa’s Water and Sanitation Infrastructure: Access, Affordability and Alternatives* (World Bank).

<sup>327</sup> V Foster and C. Briceno-Garmendia, 2010, *Africa’s Infrastructure: A Time for Transformation, Summary of Main Findings* (World Bank).

<sup>328</sup> V Foster and C. Briceno-Garmendia, op. cit.

to be the wrong strategy. If that is assumed, then there are two approaches to protecting the poor while moving away from consumption subsidies: through carefully restricted “social” tariffs or through direct subsidies to individual householders.

## 1. Tariff-based measures

Tariff-based measures provided by service providers to help low-income consumers usually take the form of an initial tranche of consumption charged below cost price (or sometimes even at zero price) in an increasing/rising block tariff structure (IBTs or RBTs). One of the common criticisms of RBTs has been that they tend to be indiscriminate, in that all consumers pay low tariffs for their first tranche of consumption. For this reason, raising the threshold too high erodes the revenue base of the service.

Tariff-based measures have been severely criticized for “errors of inclusion” (subsidies going to people who are not defined as needy) and “errors of exclusion” (needy consumers not receiving benefits to which they are entitled).<sup>329</sup> For example, according to the Global Monitoring Report of the World Bank for 2014–2015: “in low- and middle-income countries, blanket subsidies for energy (except for kerosene in low income countries) benefit the richest 20 percent of households six times more than the poorest 20 percent”.<sup>330</sup> However, it is worth noting that there are many families that hover on the brink of poverty and for whom exposure to full cost recovery might thrust them back again.

There are examples of well-targeted RBT thresholds which have sheltered poor consumers from the problem of rising tariffs without undermining the revenue of the service provider. For example, until recently the Serbian electricity service provided a general low-cost tranche below 350kWh per month that went to all users of the system, a classic RBT such as is found in many countries. During price increases in 2011, the consumption discounts shielded the poor and the overall increase in electricity tariffs by 13.5 percent had only a small impact on electricity poverty.<sup>331</sup> This is due partly to the fact that tariffs for the bottom consumption block remained unchanged, showing that the threshold was well chosen. Households that are below the poverty line in Serbia have particularly low electricity consumption,

around 300kWh per month, well below the national average. So holding the bottom block tariff constant helped protect households at the bottom of the income distribution during a very difficult period for Serbian society.

It could be argued that the RBT threshold is best situated somewhere around average consumption for poor households. Setting it at a higher level makes it more difficult to recoup revenue from consumers whose consumption may be above the threshold but who may nevertheless be hard-pressed.

## 2. Means-tested assistance

An alternative to attempting to assist poorer households through prices is to do so through their incomes, a practice favoured by many World Bank and other experts, who prefer a neat differentiation between service provision on the one hand, and income support on the other.

The problem with this apparently simple logic is consumer resistance. Means-tested benefits are invasive, expensive to administer and suffer from widespread failures of take up, usually only going to a minority of those eligible, even among much admired schemes such as water and energy direct subsidies in Chile.<sup>332</sup> Such subsidies often do not work partly because people dislike applying for them as they find them humiliating, and partly because of the sheer volume of documentation required. To reach a percentage figure of household income, there has to be a definition of that income, which is not a simple matter. Income needs to be defined over a given period to avoid a misleading picture. How long should that period be? Whose incomes should be assessed? The individual? Parents? Other household members? Should savings be taken into account?

Particularly ineffective have been sector-specific social assistance mechanisms payable by public authorities, often from social assistance offices, as they usually only deal with a relatively small proportion of a consumer’s expenditure – for example 10 per cent of disposable income as we have seen. Further, if fuel poverty is the result of the inefficiency of appliances and the quality of housing, means-tested social assistance bears little impact on this fundamental problem and puts the burden on the public purse to continue to pay for the income support, while letting inefficient household energy consumption continue. One efficient and sustainable way of proceeding in this case would be to charge cost recovery tariffs and reduce energy consumption (therefore holding bills

<sup>329</sup> For the most thorough analysis, see K Komives et al, op. cit.

<sup>330</sup> World Bank, 2015, *Global Monitoring Report 2014–15*.

<sup>331</sup> A Cojocaru and C Ruggeri Laderchi, 2012, *Balancing Act: Cutting Subsidies, Protecting Affordability and Investing in the Energy Sector in Eastern Europe and Central Asia* (World Bank).

<sup>332</sup> K Komives et al, op. cit.



steady) while shielding the poor. The Government of Hong Kong (China) offers assistance to certain categories of consumers to invest in energy saving. The great virtue of energy saving schemes is that, even if they have a wider “trawl” in social terms than direct assistance through incomes or tariffs, there is a benefit to all in terms of reduced consumption and hence reduced pollution.<sup>333</sup> Better appliances and more energy efficient housing can also be passed on for future use.

## G. ACCESS AT THE MDG/SDG INTERFACE

According to the United Nations’ Millennium Development Goals Report 2015, about 660 million people use unimproved water sources and 2.4 billion do not have access to acceptable sanitation facilities.<sup>334</sup> In announcing the SDGs in 2015 the United Nations reported that 1.2 billion people in the world do not have access to electricity. The situation regarding telecommunications has transformed, however, since the last manual. There are now 7 billion mobile phones in use, taking on ever more sophisticated functions. Partly as a result of this, the internet is now emerging as a new public utility.<sup>335</sup>

Progress has been made in correcting one of the greatest failures, namely integrating informal settlements. According to the United Nations MDG Report 2015, over 880 million people are estimated to be living in slum-like conditions in the developing world’s cities, compared to 792 million reported in 2000 and 689 million in 1990. However, the proportion of urban population living in slums in developing regions fell from approximately 39 per cent in 2000 to 30 per cent in 2014. That sounds like progress and indeed, the corresponding MDG target has been met, but absolute numbers of urban residents living in slums continue to grow, partly due to accelerating urbanization, population growth and the lack of appropriate land and housing policies. Sub-Saharan Africa continues to have the highest prevalence of slum conditions of all regions, estimated at 55 per cent of urban population in 2014. Nevertheless, this represents a decline of almost 10 percentage points in prevalence since 2000. This is a case of “running fast to stand still” and there are setbacks due to local or

regional conflicts which have increased the prevalence of slum settlements. Iraq, for example, experienced an increase of more than 60 per cent between 2000 and 2014.<sup>336</sup>

## H. SAFEGUARDING THE CONSUMER INTEREST

The above difficulties and proposals to solve them may overlook some rather basic issues around quality of service and customer care. Some of these have been taken up by ISO 24510 (2007), “Activities relating to drinking water and wastewater services: Guidelines for assessment and improvement of service to users”, which attempts to improve customer care. The hope underpinning the standard is that it will improve customer compliance including payment rates and set in train a virtuous circle of rising standards and widening networks. The objectives adopted by consumer representatives for incorporation into ISO 24510 are worth spelling out, as the standard has been widely adopted in Latin America and an analogous standard for energy services (ISO 50007) is under final approval at the time of writing.<sup>337</sup>

- The standard should be applied to **“non-reticulated” systems**, i.e. those systems that are not necessarily physically connected and fully integrated. It should cover services such as drinking water services delivered by trucks or distribution of bottles, or systems of dry latrines and cesspit emptying services. Furthermore, if people are not served they should have the right to know when they will be served.
- The principle of **equitable distribution of service**. If existing networks are subject, as many are, to cuts in supply then such cuts should be managed in an equitable manner, avoiding discrimination against poor districts which is common in many countries.
- There should be **contractual rights to service**. Contracts should be “implicit”, that is not necessarily in the form of individualized paper contracts for individual households. Of course contractual rights need to be written down in order for people to exercise their rights but the individual should be able to assert rights when not in possession of a written contract. This is of particular importance to the

<sup>333</sup> See analysis for Hong Kong (China) Consumer Council, 2014, *Searching for New Directions: A Study of HK Electricity Market*.

<sup>334</sup> UNDP, 2015, *Millennium Development Goals report*, available at <http://www.undp.org/content/undp/en/home/librarypage/mdg/the-millennium-development-goals-report-2015.html>.

<sup>335</sup> UNDP, 2015, *MDG report*, op. cit.

<sup>336</sup> UNDP, 2015, *MDG report*, op. cit.

<sup>337</sup> R Simpson, 2007, *The ISO Draft Standard for Water and Waste Water Services* (Kampala, Uganda, World Bank Institute).



significant proportion of the world's adults who are illiterate.

- There needs to be **public participation in the regulation of the service**, not necessarily in its internal management, although that should not be ruled out where such models are developed such as cooperatives. This requires the development of forums for such participation and the release of relevant information in comprehensible form.
- **Payment methods should be developed to help those on low incomes.** For example, it is well established that consumers on low incomes much prefer to make frequent small payments, and in doing so often prove to be no less willing to pay than more wealthy consumers.
- **Prices need to be set in function of a range of factors including capacity to pay of the population, costs of production, historic prices and rate of return on capital** (regardless of public or private). There is no fixed answer as to which factor should predominate: that is a matter for local political decision.

One very basic improvement which can mitigate the pressure for tariff improvements is raising collection rates. Extremely low levels of payment have been reported from many developing and transitional economies, some as low as 35 percent.<sup>338</sup> Raising tariffs can be very provocative when it is widely known that many consumers choose not to pay, so improved collection both raises revenue and, by moderating tariffs, diminishes the incentive to avoid payment. In East Africa, the rise of the M-Pesa system has allowed service providers such as Kenya Light and Power to introduce payment from mobile phones, which will bring with it the benefit of avoiding lengthy queues at offices. If revenue is to be improved, it is essential that payment is made easier.

Further innovations, controversial to some, involve a choice of service levels (such as hours of service, voltage of electricity), which might enable some service to be provided when otherwise none is on offer. This option has been offered on the basis of village-level consultation in remote areas of eastern Senegal, for example.<sup>339</sup> This is open to the charge of double standards but at least provides service to disadvantaged consumers. The UNGCP envisage different levels of service in guidelines 72 and 76

<sup>338</sup> AICD, 2011, op. cit.

<sup>339</sup> Agence Senegalaise d'électrification, 2010, *Etude du plan d'électrification de la concession de Matam-Ranerou-Bakel*.

covering water and energy, both of which refer to "appropriate levels of service, quality and technology".

Steps regarding service levels may be taken in consultation with consumers, or rather with potential consumers. There is a rich tradition of consumer participation in the governance of these sectors, which the UNGCP acknowledge, again in guidelines 72 and 76. A comprehensive study by Meike van Ginneken et al sets out the various gradations of consumer involvement in the water sector, including information, consultation, participation and redress or recourse.<sup>340</sup> Some participatory schemes have been a great success; Porto Alegre in Brazil is often cited. On the other hand, one of the greatest public sector success stories, that of Phnom Penh water service, did not use the participatory model at all, instead it was "lead from the front".<sup>341</sup>

## I. INTRODUCING COMPETITION IN UTILITY SERVICES

The policy innovations that have been adopted in recent years, for example, competing networks, common carriage and retail competition plus new ownership models (the separation of assets from operations, separation of supply and distribution to be managed by different firms) have been put forward as a means of bringing market efficiency to publicly owned assets. It has been questioned how successful the introduction of competition has been in the utilities sector, partly because of the emphasis on price at the expense of coverage and partly because when offered retail choice, so many consumers make the wrong choice and end up with higher bills than if they had not switched.<sup>342</sup>

The clear exception to these doubts is telecommunications, where the astonishing development of mobile telephony under a more liberalized regime than the old fixed line networks has been an extraordinary success, and has spun off, particularly in East Africa, into further successes such as the development of mobile banking and other financial services. This is largely, perhaps almost entirely, due to technological development which has reduced the need for large upfront investment and

<sup>340</sup> M van Ginneken et al, 2008, *Ways to Improve Water Services by Making Utilities More Accountable to Their Users* (World Bank).

<sup>341</sup> E Sonn Chan et al, 2010, *Sharing the Reform Process: Learning from the Phnom Penh Water Supply Authority* (Mekong Water Dialogues).

<sup>342</sup> J Hills, 2012, *Getting the Measure of Fuel Poverty: Final Report of the Fuel Poverty Review* (London School of Economics).

low entry costs both for service providers and for consumers too. It is worth bearing in mind that the vast majority of African mobile phones have been based on prepayment of SIM cards which has greatly reduced the commercial risk for providers.<sup>343</sup> In other words, the telecommunications sector has become less and less of a natural monopoly. There are, however, risks that new monopolies may emerge where there are tie-ins of financial services and telecommunications within the same holding companies. This is now raising concerns in Kenya and even in Somalia where remittances are a major source of income operating through telephone transmission. These issues will require attention in the coming years and competition principles will need to be brought to bear.

## 1. Retail competition

Retail choice is a recent policy which emanated from the United Kingdom of Great Britain and Northern Ireland at the end of the last century and has been adopted by the European Union through energy directives. So far, most consumers have chosen to stay with regulated prices where these have been on offer, notably in France. The European Commission staff paper of 2011 reports that “the switching rate is generally low especially at household level with very few exceptions. This can be ascribed to the fact that the prices offered by different suppliers are not sufficiently attractive in economic terms to justify the consumers’ effort to move to a new supplier ... This analysis is also confirmed by the fact that the switching rates based on volume are higher than the ones calculated by meter points therefore indicating that at higher levels of consumption the convenience to switch to a new supplier is a bigger stimulus”.<sup>344</sup> In other words, the main beneficiaries of consumer choice are likely to be large industrial or commercial consumers.<sup>345</sup> Furthermore, the cost of setting up switching operations is very high. In 1990, before retail competition for small customers was allowed in the United Kingdom of Great Britain and Northern Ireland, only 5 percent of domestic consumers’ bills went to meet supply costs such as billing and meter-reading. By midway through the last decade the level was 30 percent.<sup>346</sup> Effectively, those who stay with their existing suppliers are cross-subsidizing those who switch and gain.

<sup>343</sup> AICD, op. cit.

<sup>344</sup> EC, 2011, *Report on Progress in Creating the Internal Gas and Electricity Market* (9 June).

<sup>345</sup> Power United Kingdom, 2002, *Prices Fall for Some but Stay the Same for Others*.

<sup>346</sup> S Thomas, 2006, The grin of the Cheshire cat, *Energy Policy* 34(15): 1974–1983.

Retail competition has sparked interest in a new role for consumer associations, as collective purchasers in energy auctions. Recent examples are the Spanish Organización de Consumidores y Usuarios and the French Union fédérale des consommateurs. The associations register interested consumers and then negotiate collectively on their behalf, obtaining lower tariffs and better conditions than would be available to isolated consumers. The number of final contracts is smaller than the registers of interest (about half in the case of France; significantly less than that in Spain), but the savings for those who enter into contracts can be significant: €196 per annum in the first round of auctions in France in 2013. Such collective activities can work well for members, but can they benefit non-members too? The associations argue that the pressure they bring to bear puts downward pressure on companies so all consumers can gain. However, given that retail competition seems to bring with it considerable (though largely hidden) administrative costs, the overall gains for all consumers are still uncertain.

## 2. Exclusivity

The failures of competition policy as applied to utilities do not necessarily mean that the solution is to maintain exclusivity. A dramatic case from the slums of Dar es Salaam in Tanzania<sup>347</sup> shows that opening markets and accepting a plurality of service providers (including informal ones) is crucial for the wellbeing of consumers. Indeed, imposing exclusivity could have the perverse effect of reducing standards. The service in question in this case was latrine and cesspit emptying, where the city had a monopoly. As the service was unable to keep up with demand, richer clients operated a system of “express” payments for the pits to be emptied with vacuum equipment while the poor would employ informal “frogmen” to empty the pits manually and they would then dump the ordure illegally, which led to protests from those nearby. At times the frogmen were attacked, and their already unpleasant and dangerous work often had to be done under cover of darkness. One of the authors studying this case, Mukame Kariuki, advocated that municipalities should relinquish their monopolies thus legalizing alternative provision through a legal framework, such as incorporating community-based organizations. In due course, her advice was partly followed (licensing, access to depots) and the situation improved to the extent that charges fell and the numbers served increased. Reliance on a legal monopoly had in this case proved to be counter-productive and forced competent independent providers out of business.

<sup>347</sup> PPIAF, 2012, *Lessons Learned: Small-Scale Service Providers have a Contribution to Make*.

## J. CONCLUSION

Open markets for utilities are becoming more common in both developing and developed countries. As telephones have gone mobile and onsite energy production proliferates through decentralized power production, the relationship between supplier and consumer fundamentally changes. Where consumer choice has become feasible, as in the telecommunications sector, consumer protection policy shifts from utility regulation towards trading standards and competition policy. This is still largely unknown in water and sanitation, while energy is starting to occupy an intermediate position as technology enables it to decentralize. The utility models are becoming ever more variable both between and within sectors.

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## XVI. Food for all

### A. THE RIGHT TO FOOD

The right to food is recognized in international law, in particular article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights.<sup>348</sup> In 1999, the United Nations Committee on Economic, Social and Cultural Rights elaborated the right to food as “physical and economic access at all times to adequate food, or means for its procurement”, going on to define as “core content” of the right the “availability of food in a quantity and quality sufficient to satisfy the needs of individuals, free from adverse substances and acceptable within a given culture”.<sup>349</sup> As a human right, access to food constitutes an individual claim against the state, and generates individual entitlements and related state obligations that eventually may be enforceable in the courts.

### B. FOOD IN THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The most conspicuous presence of food in the UNGCP is in section V.K on “measures relating to specific areas”, where it is listed in guideline 69 as requiring governmental priority and, along with other products, needing quality control, adequate and secure distribution facilities, standardized international labelling and information, education and research programmes. Guideline 70 pointedly calls for Member States to take into account “the need of all consumers for food security”, but the detail concentrates mainly on standards as issued by the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the international food standards body *Codex Alimentarius* “or in their absence, other generally accepted international food standards”. Guideline 5a establishes a new “legitimate need”: “access by consumers to essential goods and services”, which should be read to include food, immediately followed in 5b by “the protection of vulnerable and disadvantaged consumers”. Other references to food include guideline 21, “adulteration of foods”, as a practice to be prevented and monitored, and again in

guideline 44a, as an element of consumer education alongside nutrition and food-borne diseases.

### C. MALNUTRITION AND FOOD SECURITY

FAO defines food security as food that is safe, nutritious and culturally acceptable and is available, accessible and affordable to all people.

#### 1. Hunger facts

According to the 2015 MDG report:<sup>350</sup>

- In 2015, an estimated 825 million people still lived in extreme poverty and 800 million still suffered from hunger
- Over 160 million children under 5 years of age had inadequate height for their age due to insufficient food
- One in seven children worldwide is underweight (down from one in four in 1990)

This means that nearly one in nine individuals do not have enough to eat. The vast majority of them (780 million people) live in developing regions. Startling though this might be, trends indicate a drop of almost half in the proportion of undernourished people in the developing regions, from 23.3 percent in 1990–1992 to 12.9 percent in 2014–2016, which is very close to the MDG hunger target.

China alone accounts for almost two thirds of the total reduction in the number of undernourished people in developing regions since 1990. Northern Africa is close to eradicating severe food insecurity. In contrast, the pace of reduction in the Caribbean, Oceania, Southern Asia and Sub-Saharan Africa has been too slow to achieve the target. Southern Asia faces the greatest numerical hunger burden, with about 281 million undernourished people.

In Western Asia, a starkly different pattern emerges. Despite a relatively low number of undernourished people and fast progress in reducing food insecurity in several countries, projections indicate that the prevalence of undernourishment will rise by 32 percent

<sup>348</sup> Art 11.1 refers to “the right of everyone to an adequate standard of living, including adequate food”. Article 11.2 refers to “the fundamental right to freedom from hunger and malnutrition”.

<sup>349</sup> UN Office of the High Commission on Human Right, 1999, *Right to Adequate Food*, UN doc.E/C.12/1999/5.12.

<sup>350</sup> [http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf).

between 1990–1992 and 2014–2016 due to war, civil unrest and a rapidly growing number of refugees.

## 2. Obesity as malnutrition

A generation ago it would have seemed incongruous to follow the previous section with a discussion on obesity. But obesity has come to be seen as a form of malnutrition and is not confined to the most developed countries. High-profile government actions to apply sugar taxes in Mexico in particular,<sup>351</sup> and the announcement by the Government of the United Kingdom of Great Britain and Northern Ireland in their future budget statement in 2016 of a similar proposed tax, have brought the issue into sharp relief. According to OECD health facts, in 2012 the most obese over 15 population in the OECD is Mexico, one of its less developed members, where over 70 percent of over 15s are overweight or obese.<sup>352</sup> The Mexican level is just above the United States of America, but neighbouring Canada is 50 percent.

Worldwide, obesity has nearly doubled since 1980. 44 percent of diabetes, 23 percent of ischaemic heart disease and up to 41 percent of certain cancers are attributable to overweight and obesity.<sup>353</sup> There are about 42 million children under 5 years of age who are overweight or obese, of whom 35 million are in developing countries. The WHO has issued recommendations on the marketing of food and beverages to children, including self-regulatory measures which are not enforceable in judicial or regulatory terms.<sup>354</sup> In 2014, consumer organizations and campaigners developed a draft convention explicitly modelled on the WHO Framework Convention on Tobacco Control, pointing out that unhealthy diets now rank above tobacco as the world's leading drivers of preventable non-communicable diseases (NCDs).<sup>355</sup> The measures put forward are wide-ranging, including education, information, advertising controls, nutritional standards in public institutions such as schools, and other economic measures including taxes and subsidies. In the meantime, the advertising spend for food and beverages in just one country came

to US\$136.53 million in 2013, equivalent to around 40 percent of the entire World Health Organization's non-communicable diseases programme budget for 2016–17 (US\$340 million).<sup>356</sup>

Although convention status is stronger than recommendations, the wording of the draft convention suggests, rather than requires, measures such as taxation. The Mexican tax is a case study of lobbying by civil society, using carefully marshalled evidence, resulting in an excise tax which will raise the price of SSBs (sugar sweetened beverages) by about 10 percent.<sup>357</sup> The trajectory of the debate around obesity is now one that clearly extends beyond the more developed countries.

## 3. Realizing food security

Food security is often associated with food self-sufficiency and the need to produce more food. However in reality it has much stronger links with issues of poverty, employment and income generation. Consumers facing food insecurity are not confined to those who have deficient diets at a given point in time. They include those whose access to food is insecure or vulnerable and those who are in danger of inadequate diets.

Heavy reliance on food imports renders a country vulnerable to price and supply fluctuations, political upheavals and economic and financial manipulation by powerful interests. With the diminution of import restrictions and lower tariffs, many imported and highly subsidized food crops are cheaper compared to locally grown varieties. Such an influx of cheaper imports may increase consumer choice, but may also undermine the livelihood of local producers who will not be in a position to compete. The issue of export subsidies by rich countries, overwhelmingly the United States of America and countries of the European Union, has been a sticking point in trade negotiations which, among other issues, stalled the WTO Doha Round negotiations. Export subsidies are often set in function of the gap between internal prices in the exporting countries and global prices so that when global prices are low the developed country exports remain competitive because of the subsidy. In November 2015, an agreement was reached in the WTO to phase out export subsidies with immediate effect.

<sup>351</sup> E Donaldson, 2015, *Advocating for Sugar Sweetened Beverage Taxation: A Case Study of Mexico* (Johns Hopkins).

<sup>352</sup> Obese people are defined for these purposes as "inhabitants with excessive weight presenting health risks because of high proportions of body fat", OECD Health Facts, 2012.

<sup>353</sup> World Obesity, 2014, *Recommendations Towards a Global Convention to Protect and Promote Healthy Diets* (World Obesity/CI).

<sup>354</sup> WHO, 2010, *Set of Recommendations on the Marketing of Food and Non-Alcoholic Beverages to Children*, endorsed by WHO member states at the sixty-third World Health Assembly, resolution WHA63.14.

<sup>355</sup> World Obesity, op. cit.

<sup>356</sup> www.statistica.com; WHO, *About WHO: WHO Programme Budget 2016-17*.

<sup>357</sup> E. Donaldson, op. cit.



## D. CONSUMER CONCERNS ABOUT FOOD SAFETY

Food safety is a critical public health issue and consumers must be protected against foods and food production processes that are hazardous to health or life. The growing movement of people, live animals and food products across national boundaries, as well as the rapid pace of urbanization in developing countries, changes in food handling, dietary change and the emergence of new pathogens contribute to food safety risks. The relative importance of these risks varies according to climate, food practices, level of income and social infrastructure. Many of the risks are greater in developing countries where poor sanitation and unsafe water and associated food contamination are major causes of diarrhoeal diseases contributing to approximately 1.7 million child deaths annually. Diarrhoea is the second cause of death among children under 5.<sup>358</sup>

Food safety risks related to modern agricultural methods are also on the increase. Pesticides pose health risks through direct contact in farming communities from exposure through farm work and spray drifts and through toxic residues in food and drinking water. Hormones, veterinary drugs and antibiotics are used in animals to treat illnesses or promote growth but can leave residues in foods which end up in consumers' diets. Unhygienic practices in food production, processing, transport and storage can also result in contaminated foods.

Two important safety issues affecting food systems are:

- Microbiological hazards and foodborne diseases have been reported in many countries over the past few decades as a result of microorganisms transmitted mainly by food, such as salmonella and campylobacter.
- Chemical hazards remain a potential source of food-borne illness. Chemical contaminants in food include natural toxins, such as mycotoxins and marine toxins, environmental contaminants, such as mercury and lead, and naturally occurring substances in plants. Food additives, micronutrients, pesticides and veterinary drugs are deliberately used in the food chain; however, assurance must first be obtained that all such uses are safe.

Building capacity in food safety is essential in most countries, especially in developing ones. Both positive and negative experiences from countries with well-

developed food safety systems should be used as a means to improve systems globally. Foodborne disease has a significant impact not only on health but also on development.

## E. FOOD STANDARDS MECHANISMS

The *Codex Alimentarius* was established by FAO and WHO in 1962 in order to harmonize food standards between countries. Its purpose is to protect the health of consumers (through ensuring the provision of sound, wholesome food) and ensure fair practices in the food trade. Codex's membership includes the great majority of countries, accounting for 98 percent of the world's population. There are committees within Codex on: meat and poultry hygiene; food additives and contaminants; pesticide residues; residues of veterinary drugs in foods; food hygiene; animal feeding; biotechnology and on general principles.

The status of the Sanitary and Phytosanitary (SPS) Agreement was reinforced by the WTO treaty in 1995, having previously been a code. One of the key debates around SPS and trade measures to protect food safety has been the "precautionary principle", also known as the "precautionary approach". It is recognized in article 5.7 that the state of scientific knowledge may be insufficient to make a definitive judgment on whether or not to block a product, but that a precautionary approach can be taken in the meantime. The article reads: "in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information but shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly". The wording indicates that the precautionary approach should be for a finite period and that efforts have to be made for the risk level to be clarified.

## F. CONSUMER CONCERNS WITH GENETIC ENGINEERING

Genetic engineering is a revolutionary technology. The fundamental difference between conventional breeding and genetic manipulation is that conventional breeding involves transferring genetic material between similar or closely related species whereas with genetic engineering, genetic material is transferred across species barriers (e.g. between various species of viruses, bacteria, plants and animals).

<sup>358</sup> WHO, 2013, *Diarrhoeal Diseases*, fact sheet no. 330.

Fears have been expressed that large-scale monoculture of genetically modified crops may have serious adverse implications on the sustainability of biodiversity, the ecological balance of life support systems, wildlife and the environment. Genetically modified foods could exacerbate health problems such as the proliferation of antibiotic resistance from the use of antibiotic-resistant gene markers. Controls have been put in place in many jurisdictions to protect the consumer right to information, including labelling of genetically modified foods and mandatory labelling and segregation by exporting countries of their export products. The multilateral Cartagena Protocol on Biosafety (2000) requires indication of “living modified organisms” in the event of cross-border trade with scope for application of precautionary measures.

Jurisdictions that have implemented labelling legislation include Japan, Republic of Korea, Taiwan Province of China, New Zealand, Norway, Switzerland, Israel and the Russian Federation. The list also includes genetically modified crop producing countries such as China, Australia and Brazil. In the European Union, labelling is required and sale is allowed, but the situation regarding production is complicated by national policy such that major agricultural producers as France, Germany, Italy and Hungary ban the cultivation of genetically modified crops, while others allow it, such as Spain and the England. Notable absentees from the list of countries with labelling obligations are Argentina, all of North America, much of the Middle East (except Saudi Arabia) and most of Africa (not including South Africa).<sup>359</sup> Some 38 countries are reported as banning cultivation, including major agricultural producers the Russian Federation and Turkey.<sup>360</sup> In contrast, 28 countries are reported as producing genetically modified crops including major agricultural producers such as the United States of America, Argentina, Australia and Canada.<sup>361</sup> These overlaps of production (or not), labelling (or not) and merchandising are extremely complex for consumers to make informed choices in a globalized marketplace.

## G. FOOD LEGISLATION

In order to have a comprehensive, integrated approach, legislation must cover all aspects of the food production chain: primary production, processing,

<sup>359</sup> <http://www.justlabelit.org/right-to-know-center/labeling-around-the-world/2016>. List derived from data gathered by the Centre for Food Safety.

<sup>360</sup> <http://naturalrevolution.org/list-countries-banned-genetically-modified-food/2016>; <http://sustainablepulse.com/2015/10/22/gm-crops-now-banned-in-36-countries-worldwide-sustainable-pulse-research/#.V0GsgjMrLZu>

<sup>361</sup> <http://www.genewatch.org/sub-532326>.

transport, distribution and sale and supply of food and animal feed. At all stages, the legal responsibility for ensuring safety should rest with the operator. Procedures for food safety should include a rapid alert system and identifying measures to be taken in emergencies and for crisis management.

There are several fundamental goals for a regulatory approach that covers the entire food chain. The European Union, for example, identifies the following as general objectives of its food law:

- To protect human life and health as well as consumer interests
- To ensure fair trading
- To achieve free movement of food in the community
- To implement international standards
- Major components of a national food control system necessary for an effective national system can be summarized as:
  - Modern food legislation
  - A coordinated central government policy towards food law
  - An effective enforcement system
  - Adequate supporting bodies
  - Consumer concerns with processed animal- and plant-based food products are as follows:
    - Safety
    - Conditions of production
    - Information provided to the consumer
    - Likely immediate or delayed effect on health (i.e. presence of additives, pesticides, antibiotics, growth hormones etc.)
    - Particular health sensitivities of a specific category of consumers (e.g. diabetics, heart patients, people with allergies, etc.)

Governments must thus regulate areas of food and feed to ensure the above concerns are addressed.

A vital part of food legislation is the incorporation of labelling practices to inform and educate the consumer, as discussed in chapter X. Safety plays a particularly prominent role for consumers with specific requirements as a result of health concerns.

Gradually, food policy has shifted from food safety to “diet safety”, particularly as concerns have grown about obesity. Globally, dietary patterns are changing

as consumers prepare less food from raw ingredients and buy more processed, pre-packaged food. In the last decade global sales of pre-packaged foods have increased by 92 percent, reaching US\$2.2 trillion in 2012. The increase in the production, promotion and consumption of processed foods that are unhealthy – energy-dense, nutrient-poor and high in fat, salt or sugar – has become a global driver of unhealthy diets in high-, middle- and low-income countries. For consumers of pre-packaged foods who wish to make informed dietary choices – such as identifying which foods are high in fat, salt and sugar, or choosing the healthiest option from a range of packaged foods – the nutrition information provided on food packaging is key.<sup>362</sup>

Food labelling legislation must ensure the following information is available on labels:

- Ingredient list
- Additives
- Genetic modification
- Minimum durability indication/expiry date
- Net content
- Information of country of origin, manufacturers, packers and sole agent
- Nutrition labelling

## H. CONCLUSION

Millions of people still go short of food or live at the risk of disruption to food supplies. Progress is being made towards removing the trade distortions which have contributed to such insecurity, but there are other larger problems such as climate change which mean that risks are always present. The debate around malnutrition has widened to include obesity, which is not restricted to the richest countries and this in turn means that the focus has shifted from safety of products to the balance of diets, a much more subtle concept which has led to issues around food marketing.

<sup>362</sup> *The Economist*, 2012, Food For thought, available at: <http://www.economist.com/news/special-report/21568064-food-companies-play-ambivalent-part-fight-against-flab-food-thought>; R Moodie et al, 2013, Profits and pandemics: Prevention of harmful effects of tobacco, alcohol and ultra-processed food and drink industries, *The Lancet* 381:9867; D Stuckler et al, 2012, Manufacturing epidemics: The role of global producers in increased consumption of unhealthy commodities including processed foods, alcohol and tobacco, *PLoS Medicine* 9(6):e1001235; Consumers International, 2015, *Nutrition Labeling on Pre-Packaged Foods*.

Despite the growing complexity around the provision of food to consumers, effort should not be distracted away from ensuring that individual products are safe. Ultimately, the control of food systems in each country is dependent on its national food policy and legislation. Although steps have been taken at the international level to introduce standards through the *Codex Alimentarius* Commission, the implementation and level of control differs widely within and between countries.

In summary, to protect consumers against food insecurity and against unsafe foods that threaten life or health, there is a need to:

- Assure access to clean and potable water and sanitation for all
- Ensure access to food supplies through maintenance of supply stocks in case of emergencies
- Apply the recent agreements on agricultural export subsidies
- Develop controls over marketing of food, particularly to children
- Develop policies to deter consumption of excessively sweetened beverages
- Support the development of national food control systems which are in line with international norms, both in the interests of local consumers and to facilitate participation in international food markets
- Ensure transparency, openness and participation of stakeholders in the risk analysis process to ensure an effective precautionary approach can be followed
- Encourage and enable consumer participation in setting national and international food standards
- Set up national *Codex Alimentarius* committees and hold public meetings in which all interested parties, including consumers, can feed into national positions on issues pending before Codex bodies
- Ensure that food is safe and presented and labelled in ways that do not deceive consumers
- Ensure that any food health claims are clearly defined, easily understood, truthful and verifiable
- Ensure that measures taken to combat foodborne disease are effective, safe, cost-effective, environmentally sustainable and acceptable to the consumer

