UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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UNCTAD MENA PROGRAMME

GUIDELINES ON CONSUMER PROTECTION:

Business Engagement

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CARICOM	Caribbean Free Trade agreement
COPOLCO	Consumer Policy Committee of the International Organization for Standardization
CSR	Corporate Social Responsibility
DGCCRF	Direction Generale de la Concurrence, la Consommation et la Repression des Fraudes
IBA	International Bar Association
ICC	International Chamber of Commerce
ICPEN	International Consumer Protection and Enforcement Network
IGE	Intergovernmental Group of Experts
ILA	International Law Association
ISO	International Organization for Standardization
MDG	Millennium Development Goals
MENA	Middle East and North Africa
MFSP	Mobile Financial Service Provider
MNE	Multinational Enterprises
NGO	Non-governmental organization
ODR	Online Dispute Resolution
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
SDG	Sustainable Development Goals
UNCTAD	United Nations Conference on Trade and Development
UNGCP	United Nations Guidelines for Consumer Protection
WTO	World Trade Organization

TABLE OF CONTENTS

LIST OF BOXES

LIST OF TABLES

FOREWORD

The *Guidelines on Consumer Protection: Business Engagement* and the accompanying analysis are based on a range of sources as well as exchanges with colleagues in the MENA (Middle East and North Africa) region. The sources include the 2015 *Inception Report* and survey data from some of the countries, provided to UNCTAD secretariat. These are set in the context of the *United Nations Guidelines for Consumer Protection* first drafted in 1985 expanded in 1999, and most recently revised in 2015. Other UNCTAD sources are used, in particular the *Manual on Consumer Protection,* first published 2004 and later revised in 2016-17. It was then published as a provisional advance copy for the UNCTAD Ministerial Conference in July 2016. The analysis of legislation is heavily concentrated on consumer protection acts in the countries studied, namely Algeria, Egypt, Jordan, Lebanon, Morocco, Tunisia and the State of Palestine. Readers are advised that other legislation, covering particular sectors will also contain protections for consumers. However, although such legislation is referred to wherever possible, it is too extensive to be subjected to the same levels of detailed analysis. Of note, it is possible that some inaccuracies may occur due to the translation of documents from Arabic into English and/or French. These languages are the main ones in which the consumer protection team is working.

The present guidelines are accompanied by a sister volume of *Guidelines on Consumer Protection: Agency Structure and Effectiveness* in MENA Region. They also form part of a series which also includes competition policy: *Good Governance Guidelines: Independence and Transparency*, and *Competition Guidelines: Leniency Programmes;* UNCTAD, MENA programme, 2016*.* Readers are recommended to refer to those publications whenever possible.

1. INTRODUCTION

A consumer protection framework covers a range of institutional mechanisms. The accompanying document, titled *Consumer Protection Guidelines: Agency Structure and Agency Effectiveness in the MENA Region* (2017) provides guidelines to state agencies for consumer protection. It informs readers that the essential elements of a consumer protection framework are as follows:[1]

A national consumer policy that sets out the approach of the State towards consumer protection, enumerates the rights of consumers, and apportions responsibility for consumer protection to appropriate official organs;

A designated consumer protection agency responsible for the development and enforcement of consumer protection, whereby an agency can collaborate closely with the different relevant ministries, and consult with other stakeholders such as consumer organizations, business, academics and the media.

This volume attempts to enlarge the circle of concerned stakeholders to include business - not solely as a "subject" or recipient of consumer protection law and policy - but equally with a responsibility to comply. Business is envisaged as a potential partner with government and with other stakeholders, including consumers. It is understood that each party will have a specific contribution to make. Furthermore, it is argued that participation by the business sector serves not only in the public interests but also in the interests of business as well. The guidelines are constructed in line with the analysis and referred to as "recommendations" in order to distinguish them clearly from those in the *United Nations Guidelines for Consumer Protection,* which are available in Arabic, Chinese, English, French, Russian and Spanish at the UNCTAD website.[2]

Initially, the international context is set where there is no absolute "gold standard" for consumer policy and practice. A major standpoint for comparative study is that of the *United Nations Guidelines for Consumer Protection* (*UNGCP*), which have served as the baseline for the accompanying guidelines for consumer protection agencies. They provide a multilaterally and unanimously agreed set of principles that have been endorsed by the United Nations General Assembly - a truly global body which includes all the beneficiary countries in the MENA program on consumer protection.[3] The *UNGCP* incorporates other bodies together with their principles and objectives such as those agreed under the Sustainable Development Goals (SDGs), and other guidelines issued by the OECD for e-commerce and the G20 (through the OECD) for consumer protection in financial services.[4] Those sources are referred to as and when appropriate as well as others, including ISO standards which have a particularly important role to play given that they are often designed with business in mind.

1.1 CONSUMER PROTECTION LAW AND POLICY: UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The *UNGCP* document was most recently revised in late 2015 and their stated "Objectives" include Guideline (from here on abbreviated to GL) 1c) which aims "to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers," thus addressing the essence of producer-consumer relations. Section V. A - "National policies for consumer protection" - is directed specifically at governments. Its first sub-paragraph, GL 14 a) encourages "good business practices."

The revised *UNGCP* contains a new and substantial part, namely Section IV on "Principles for Good Business Practices" (GL 11). It sets out principles as "benchmarks for good business practices for conducting online and offline commercial activities with consumers." Its significance is that it explicitly addresses business as opposed to governments. This is a departure from previous versions of the *UNGCP* which directed such proposals predominantly at governments. The sub-headings of this new section are listed below and further analysed in 3.2 (see on):

- Fair and equitable treatment;
- Commercial behaviour;
- Disclosure and transparency;
- Education and awareness-raising;
- Protection of privacy;
- Consumer complaints and disputes.

The most quoted section of the *UNGCP* is GL 5 which refers to the "legitimate needs" of consumers. These are discussed in detail in the *Guidelines on Consumer*

Protection: Agency Structure and Effectiveness and referred to in Section 5 of this volume. The applicability of the *UNGCP* to state-owned enterprises under GL 2 is also significant as it explicitly binds the "merchant" activities of States to consumer protection principles - being a major extension of scope. Thus, it extends the concept of business conduct to public sectors which have all too frequently failed to apply customer care principles.

1.2 RESPONSIBILITY IN BUSINESS: CORPORATE SOCIAL RESPONSIBILITY AND CO-RESPONSIBILITY

The landscape of regulation has spread beyond governmental direction to variants involving business and other stakeholders. These include self-regulation, co-regulation (alongside the state), and in recent years, corporate social responsibility (CSR), by which companies voluntarily adopt ethical objectives as corporate citizens. CSR generally extends far beyond consumer protection matters by considering environmental and labour issues as well.

1.2.1 Self-regulation and co-regulation

The *UNGCP* broaches issues of self-regulation in GL 31, stating "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."

Self-regulatory codes - or "soft law" - should be complementary to consumer protection laws and set out agreed principles for consumer protection and responsible business behaviour. They can take the form of self-regulation by the industry or co-regulation between the state and industry. Though not legally enforceable, unless explicitly legislated, they have the force of moral authority over businesses, and form part of the corporate governance structures by which concerned businesses are expected to operate.

There are 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 term this "delegated self-regulation" - as it is commonly referred to by lawyers and doctors, and with the overall emphasis increasingly being on stakeholder verification.

The second form of self-regulation is where a group of businesses choose to regulate themselves, making voluntary commitments to behave in a certain way. This is the case in Switzerland, for example, and could be described as "voluntary self-regulation." Commitments should go beyond any legal requirements and set standards in areas where there are none set by law.

The third option is a "hybrid" route and under this category, criteria can be set by government for schemes to describe themselves as self-regulatory while guarding 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 that have 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 this hybrid model, the state vests its own authority through a badge of approval. Crucially, the state holds the reserve power to legislate should the self-regulatory mechanisms prove too weak.

The recent trend has been towards co-regulation in particular because the reserve powers of governments allow them to maintain the schemes up to standard and to inform the public - who can often be sceptical - that they are fulfilling their responsibilities. This was the basis of the Consumer Codes Approval Scheme in the United Kingdom of Great Britain and Northern Ireland where the Office of Fair Trading (OFT) was set up to validate the integrity of self-regulatory consumer codes. Where codes failed to meet certain criteria, the approval by the OFT was withdrawn.[5] The scheme continued in a slightly different form from 2013 under the Consumer Codes Approval Board and by the Trading Standards Institute. The latter liaises with local trading standards departments and, in this way, the integrity of the self-regulation "brand" is safeguarded.

One key argument in favour of self-regulation is that its flexibility can make it easier to operate across borders. To note, there are challenges concerning 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, and for consideration, 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, which places great responsibility on the businesses concerned.

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 with business in mind. It is also intended to provide ethical guidelines that create a level playing field while minimizing the need for legislative or regulatory restrictions. For the consumer, it is designed to build trust by assuring them that advertising must be honest, legal, decent and with easy redress when transgressions occur.[6] Related work has been developed in a number of areas, including behavioural advertising, food and beverage marketing, environmental marketing and direct selling practices.[7]

The UNCTAD 2013 survey on the implementation of the *UNGCP* (1999 version) reported briefly on self-regulation codes and agreements, noting that they were promoted by consumer protection agencies and adopted by the private sector. UNCTAD noted that self-regulation can be initiated privately and with very satisfactory results - as in Switzerland.[8] Although Swiss law did not mandate private codes of marketing, or other business practices, the marketing sector had formulated its own which was based on the Federal Act against Unfair Competition. Where a business violated this code, then a consumer could file a complaint at a private commission which would decide whether such a code had, indeed, been breached.[9]

The Federal Trade Commission of the United States of America has gone further and put forward the policy that should a company publicly claim to follow the principles set out in a code - and then fail to do so - then they can be found guilty of deceptive practices.[10] This is a very simple step and one which seems to be a good bridge between statute and codes.

It is important to note that voluntary codes should never be limited to restating legal obligations, and that they should always be more ambitious than the minimum legal requirements. Indeed, if a code merely adhered to the law then it would, ironically, have the contradictory effect by implying that businesses could pursue alternative options without necessarily having to comply.

Fortunately, businesses consistently try to avoid the embarrassment arising from the violation of their public commitments to a standard, and this preventive effect should not be underestimated. In the last analysis, self-regulation does not prevent statute from being put into place; the two routes are not incompatible but mutually reinforcing.

1.2.2 Corporate Social Responsibility

CSR concerns good corporate citizenship and has developed more spontaneously than self-regulation but without the pressures of government. This has often been in the face of criticisms of business by non-governmental organizations (NGOs), including consumer associations. 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 over the first decades of the twenty-first century. This has resulted in important publications such as ISO 26000 *Guidance Standard on Social Responsibility*[11] and the OECD *Guidelines for Multinational Enterprises*.[12]

ISO 26000: In 2002, the ISO's Consumer Policy Committee put forward the proposal for a ground-breaking standard on corporate social responsibility. The negotiation process attracted enormous interest involving 70 countries, 80 consumer experts, 30 liaison organizations and six stakeholder groups, including consumers.[13] The standard was published in 2010 and has been adopted as a national standard in over 80 countries with translations appearing in 22 languages.[14] Social responsibility principles emanating from ISO 26000 are referenced in the new Tunisian constitution and governance framework as well as Egypt's sustainable development strategy.[15]

This was the first time that consumer issues were recognized by ISO as a "core issue" and in connection with social responsibility. The other significant change was that social responsibility was widened beyond "corporate" to also embrace "social" responsibility. This means that it could be applied more widely than the private sector - where it had previously tended to be concentrated. For example, state-owned enterprises have often been under-regulated in terms of consumer rights. This tendency may well be reversed under the wider definition of social responsibility.

ISO 26000 is not a "certifiable" standard - the guidance standards are developed by consensus in the committee. That is to say that it does not have precise quantifiable standards that can be measured against enterprises

which are considered to have "passed" or "failed." Since it does not contain precise targets (in contrast to food standards, for example), it cannot amount to a barrier to trade. Of note here, no government can actually ban imports of a product if the enterprise does not follow ISO 26000 in its production processes.[16] In anticipation of potential misunderstandings on the nature of the new standard, ISO is fairly explicit, stating "ISO 26000 is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use."[17] Its value, therefore, is in being a publicly stated moral commitment. It is particularly relevant today due to the growing emphasis by consumer associations and individual consumers on ethical purchasing and information about products.

In the chapter that deals with consumer issues, ISO 26000 drew upon the *UNGCP* as a framework. (This was prior to the 2015 revision). In addition to cross-referencing the "legitimate needs" as outlined in GL 5 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* and incorporated within the UNGCP in 2015);
- The precautionary approach, drawn from the *Rio Declaration on Environment and Development*;
- Promotion of gender equality and the empowerment of women, drawn from *United Nations Universal Declaration of Human Rights*;
- Promotion of a universal design so that products can be used by everyone, especially disabled people.

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

- 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.

At the time of publication of ISO 26000 in 2010, neither privacy or access to essential goods and services were part of the *UNGCP*. In that sense, ISO was ahead in including those two elements, which were later inserted into the revised *UNGCP* in 2015.

Box 1 below gives examples of the implementation of ISO 26000 in the MENA region. What is notable about them is the very practical outcomes, particularly in the infrastructure sectors, including public services.

Box 1:
ISO 26000 in the MENA region

ISO has conducted a project in the MENA region to promote the sustainable development dimension of ISO 26000. The countries concerned are Algeria, Egypt, Jordan, Lebanon, Morocco and Tunisia. Equally involved are a wide range of stakeholders, including consumer organizations in national events. The benefits for consumers that emerged from the activity were identified as follows:

Algeria: Reduced consumption of energy and water in the Ministry of Public Works; Reduction of water use and contamination in the production of fruit juices; Development of biodegradable packaging.

Egypt: Reduced water consumption in the tourism sector;

Jordan: Reduced water consumption in the Environmental Protection Agency; Improved patient satisfaction in hospitals; Improved consumer satisfaction in the water sector and reduced fuel use;

Lebanon: Reduced water and energy use in the education sector; Reduced water and energy use in the wine sector;

Morocco: Improved water and electricity networks including reporting mechanisms, treatment of toxic waste, and water re-use;

Tunisia: Better customer relations in banking sector; Reduced water use in pharmaceutical sector; Improved recycling of waste; Improved energy networks in poor areas; Development of renewable energy and consumer education on energy saving.

Source: ISO, 2016, Impact study of the SR MENA project.

Organization for Economic Cooperation and Development: The OECD's revised *Guidelines for Multinational Enterprises* (MNEs) were agreed in 2011 - and without reference to ISO 26000.[18] 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. Unlike ISO, the *OECD Guidelines* foresee a mechanism to voice complaints regarding non-observance of the Guidelines through national contact points in all OECD Member States. Consumer issues are common to both guidelines - as are human rights, environment and employment matters. In simpler terms, OECD describes principles and policies, while ISO offers more detailed guidance on practices.

1.3 THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Completing the picture are the United Nations Guiding Principles on Business and Human Rights, widely known as the "Ruggie Principles," and adopted by the United Nations in 2011. They set global standards regarding human rights in the context of business.[19] They encompass three pillars, namely "Protect," "Respect" and "Remedy." Together, they outline how States and businesses should implement the framework. Unlike the OECD's Multinational Enterprise Guidelines, they are not solely aimed at multinational enterprises, but should apply to the full range of businesses. Unlike the MNE Guidelines and ISO 26000, the *UNGPB* document does not have a "consumer chapter." However, and as shown below, they are relevant to consumer protection.

The Ruggie Principles have received wide support from States, civil society organizations as well as the private sector. In presenting the drafted principles to the United Nations Human Rights Council in 2011, Professor Ruggie explained that "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it could be improved."[20] The Human Rights Council unanimously endorsed the Guiding Principles - and in doing so they created the first global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.

Highlighted below are those elements of particular relevance to consumers:

- **Protect:** The state's duty to protect human rights;

This pillar reaffirms the state's existing obligations under international human rights law through regulation, policymaking, investigation and enforcement. It should be borne in mind that some of the "legitimate needs" of consumers are considered by the United Nations to be human rights. Such an example is access to drinking water - which is often the responsibility of state-owned enterprises.

- **Respect:** Corporate responsibility to respect human rights;

The corporate responsibility to respect human rights indicates that businesses must act with "due diligence" *to avoid infringing on the rights of others and to address negative impacts with which they are involved.* This suggests, for example, proper investigation of product safety by businesses before their release in to a given market.

- **Remedy:** Access to remedy for victims of business-related abuses;

Having effective grievance mechanisms in place through judicial, administrative, and legislative means is crucial in upholding the state's duty to protect and the corporate responsibility to respect. The Ruggie Principles dictate that non-judicial mechanisms - whether state-based or independent - should be legitimate, accessible, predictable, rights-compatible, equitable, and transparent. Similarly, company-level mechanisms are encouraged to operate through dialogue and engagement - as opposed to the company acting as the adjudicator of its own actions. This is very much in line with the *UNGCP* principles for good business practices - as are under discussion in this report.

Professor Ruggie's report to the United Nations determined that "States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments."[21] It could, therefore,

be argued that MNEs operating in the MENA region could be scrutinized by governments and/or NGOs.

The *Ruggie Principles* note that the state should take additional care in monitoring and preventing human rights abuses by business enterprises that are owned, controlled, or supported by the state. This is in anticipation of the widening of the scope of the *United Nations Guidelines on Consumer Protection* which occurred in 2015. The *Ruggie Report* was careful to refer to privatized public services - as the foundational principle number 5 confirms: "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights. As a necessary step, the relevant service contracts or enabling legislation should clarify the state's expectations that these enterprises respect human rights."

The report continues by encouraging experimentation with models of scrutiny, including stakeholder participation. It states "One category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial but may use adjudicative, dialogue-based, or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach."

Recommendation 1: The various models of self-regulation, co-regulation and social responsibility mechanisms that have been drawn up by the United Nations, OECD, ISO and others, offer fertile ground for MENA jurisdictions and businesses. In particular to multinational and state-owned enterprises so modes of reporting on consumer rights can be developed, including those considered to be human rights. Businesses do not need to wait for governments to act in this regard, although partnership could well be the ideal arrangement. It must be borne in mind that such codes and undertakings should extend beyond simple compliance with national legislation - which are assumed here to be self-evident.

2. COMPANIES – RESPONSIBILITY TO COMPLY. WHAT IS COMPLIANCE?

2.1 POSITIVE AND NEGATIVE INCENTIVES

Businesses face a wide range of regulations and the reasons as to why they should comply are numerous. A recent study in the book *Explaining Compliance: Business Responses to Regulation* clarifies what they might be: "One is fear of detection and punishment by government enforcement agents. The second is fear of humiliation or disgrace in the eyes of family members or social peers. The third is an internalized sense of duty, that is the desire to conform to internalized norms and beliefs about the right thing to do."[22] After reviewing a wide range of evidence, Professor Christopher Hodges challenges the dominance of the "theory that people will obey a rule because of fear of potentially adverse consequences, or because they make calculations about the potential costs and benefits of disobedience." He argues that there is a moral dimension to business that can be mobilized and that legal or regulatory discipline is one of several pressures - alongside economic expectations and "social licence" - which encompasses a wider perspective. Indeed, he is sceptical that ex-post sanctions (post-market in consumer protection terms), have much effect. He believes that ex-ante regulation (pre-market) and the development of a culture of compliance are more effective in regulating future behaviour.[23]

More and more companies are turning towards internal compliance programmes, particularly in the United States. A reason for this is that companies are able to signal their existence when facing sentences by the courts in the event of corporate malpractice. This could be seen as an abuse if compliance programmes are mounted simply as a cover up for anticipated non-compliance. On the other hand, attempts at improvement of business conduct could equally be seen as genuine mitigation in terms of criminal law, but not in terms of damages - if any are to be awarded to consumers. So compliance has been described as "a form of internalized law enforcement which, if it functions effectively, can substitute for much of the enforcement activities of the state."[24]

The preceding section on corporate social responsibility also reflected a risk which cannot be captured by penalties, or by the reference to "social peers." The latter is a "reputational risk" which can take the form of moral disapproval, or the avoidance of purchase when a company's products are thought to be dangerous, or simply of inferior quality. The contrary is also true whereby reputations can be enhanced by good practices and even by measures dealing with defects. For a company to openly admit that errors have been made, then this can lead to greater trust from consumers over the longer term. Negative and positive incentives are often opposite sides of the same coin.

2.2 BUSINESS OBLIGATIONS AND CONSUMER RIGHTS IN MENA

In the same way that positive and negative incentives can be linked, it should be noted that consumer rights can also be seen as the contrary of business obligations. Sometimes, and notably in Algeria, the relevant Consumer Protection Act is drafted in precisely those terms, namely an obligation on the part of business to respect consumer rights. Table 1 below sets out how consumer rights and business obligations are framed in the consumer protection acts of the region.

Table 1:
Business obligations and consumer rights in the MENA region

Algeria
Law No. 09-03 of 25 February 2009, on Consumer Protection and Repression of Frauds;
Emphasis on obligations of suppliers rather than rights of consumers. Each obligation covered by a chapter: Hygiene and food safety; Product safety; Legitimate expectations of consumers: origins, quality, composition, conformity to regulations; Guarantees and after-sales service; Information; Moral and material interests;
Article 12. Pre-market product testing by supplier; Article 13. Replacement of defective products or reimbursement; Article 63. Product recall by supplier in event of danger to consumer or counterfeit.
Egypt
Law 67 of 2006, on Consumer Protection;
Emphasis on rights of consumers: "A person shall be prohibited from concluding any agreement or carrying out any activity that prejudices consumers' essential rights."
Article 2. Right to health and safety; Correct information and data; Free selection of products; Personal dignity and respect of religious values; Information relating to rights; Access to legal actions; Compensation for damages; Many specific obligations of a technical nature such as the disclosure of specific information;
Proposed revised law of 2014 — Three new rights: Protection in distance sales, in financial services and in cross-border sales; Supplier shall comply with standards and sell for fair price - refund, replace, return and recall as appropriate; Cooperation with Consumer Protection Agency staff.
Jordan
Law 7, 2017, on Consumer Protection Act;
Article 3b. Supplier prohibited from violating consumer rights; Availability of goods and services without damage; Access to "complete and correct information" displayed on goods or services; "Clear and complete information before completion of supply process"; Selection without undue pressure; Proof of purchase; Prosecution of infringements and compensation; Information on suppliers. Supplier also has obligations: Quality assurance and fitness for purpose; Respect for religious values; After sales service; Disclosure; Recall and refund; Negative obligations not to infringe intellectual property; No arbitrary contract terms.
Lebanon
Law of 4 February 2005, on Consumer Protection Law;
Article 3. Consumer health and safety; Fair and non-discriminatory treatment; Information; Exchange repair or refund if goods are non-compliant; Compensation for damages when used under proper conditions. Supplier obligations are not expressed generically; Disclosure. Article 18. Contracts interpreted in favour of consumer; Article 26. Desist from named unfair contract terms; Article 27. Spare parts and after sales; Article 38. Compliance with standards; Article 44. Product recall; Article 48. Negative obligations (such as counterfeit, non-compliance); Business has to consent for inspectors to enter premises unless specific override.
Morocco
Law No. 31-08 , on Consumer Protection;
Preamble details consumer rights as: Information; Protection of economic rights; Representation; Withdrawal from contracts; Choice; The right to be heard.
Obligations are not generically stated but comprehensively itemized; Article 18. Unfair contract terms listed. Detailed provisions on consumer credit.
Tunisia
Law 92-117 of 7 December 1992, relating to the protection of consumers;
Safety, fairness, information, guarantee; Choice, withdrawal, compensation, invoice/receipt; All listed but neither as set of consumer rights nor supplier obligations.
State of Palestine
Law No. 21-2005, on Consumer Protection;
Obligations mainly expressed as consumer rights. Article 3. 1. Health and safety; 2. To fair treatment without discrimination; 4. To live in a clean and safe environment and obtain compliant goods and services; 5. Free choice of goods or services, fair transactions with assurance of quality and reasonable price and right to refuse coercive transactions; 6. To access correct information; 8. Replacement and repair of goods and redemption of price, compensation for non-compliance; 9. Proof of purchase; Article 10. Product liability; Article 11. Product recall; Article 15. Accuracy of adverts; Article 18. Universal licensing; Article 19. Refund and replace; Article 22. Prohibitions; Article 24. Basic contract formats.

Source: UNCTAD MENA programme Inception Report 2015 and national legislation.

There is a great deal of convergence between different MENA countries in both the content of the rights (for consumers) and obligations (on business). The detailed implications are discussed later. What follows now is a discussion on the salient features from Table 1.

Product safety is a common term and usually applies with reference to national product standards, although particular standards are not necessarily listed and the legislation can be vague on whether a product is considered dangerous.

Alongside product safety, there are provisions for "product defect." This is where a product is not labelled as dangerous but simply fails to function as it should. Both product defect and product safety include measures to "refund, replace and return" (to quote the Egyptian draft law of 2014), and in the case of dangerous products, also to "recall." This latter measure is enforced by strong sanctions in the event of non-compliance.

An interesting element of product safety in MENA is that there is wide acceptance of the principle of "joint and several liability" through the production and supply chain. However, the effect is sometimes diluted by exemption from liability in the event of ignorance of defects on the part of the supplier or manufacturer. This is the case, for example, under the new Jordanian Consumer Protection Act (Article 20). The Palestinian legislation equally appears to limit supplier liability if the retail supplier can shift responsibility upstream. There are also elements of the Egyptian legislation on advertising that have similar dynamics. In practice, pre-market knowledge concerning defects is very difficult to prove. This situation makes prosecution by consumer protection agencies, or individual consumers, very difficult. There is a reliance on product safety standards but weaker liability provisions than exist, for example, in the European Union where "strict liability" is now widely accepted. There is less requirement to prove negligence or bad faith on the part of the supplier. The difficulties of product liability policy and the possible course of action for business are discussed below in Section 5.

Product and transaction information features prominently in the legislation such as product characteristics, safety warnings, price display, labelling, advertising, and indications of terms and conditions.

Unfair contract terms are sometimes described in translation from the Arabic as "arbitrary" and these feature in the consumer protection acts. This informs business that it is beneficial to know which contract terms are not allowed. Even so, there always exists the danger of new abuses evolving as technology advances. MENA follows other jurisdictions by emphasizing the need to guarantee consumer transactions.

One "traditional" issue which is now gaining importance for environmental reasons is after sales service and spare parts - both are highlighted in MENA and also feature in the *UNGCP*.

A common administrative requirement is the obligation - on the part of the business - to allow access to inspectors. This may be, for example, to take samples for analysis. Clearly, cooperation is required with the agents of the Consumer Protection Agency.

MENA jurisdictions generally enable consumers to take legal proceedings against suppliers whether in their own right, or through consumer associations. This can be either individually or collectively, but it involves a heavy reliance on court mechanisms. What seems to be missing is a right for consumers to request consumer protection agencies to take up cases at judicial level, or provision for judicial review to that effect. There is also little evidence of the development of Alternative Dispute Resolution (ADR) mechanisms.

Other features of legislation in the region include measures against counterfeit products and respect for religious values. The nearest equivalent to the latter in Western societies would be measures taken to protect public decency in the content of advertising or broadcast material - often dealt with through self-regulation. There are general references to a requirement for fair prices, which is seldom observed in legislation within the OECD countries as price controls have been gradually abandoned outside of the public utility sectors.

Observation 1: The above issues, whether phrased as consumer rights or trader obligations, are commonly referred to as "horizontal problems." These relate to business conduct and can be problems encountered across all, or many, sectors and/or forms of transaction. They are, therefore, commonly incorporated within consumer protection framework legislation covering consumer transactions as opposed to sectoral regulations, which tend to govern a given activity such as financial services, food, pharmaceutical products, etcetera. This division between horizontal and sectoral issues is a good base for cross-industry bodies like the chambers of commerce to set out general principles for business in their jurisdictions, while drawing on the United Nations Guidelines. The principles are elaborated upon below in Section 3.

3. COMPLIANCE IN THE MENA REGION AND UNITED NATIONS BUSINESS PRINCIPLES

3.1 NONCOMPLIANCE AND SANCTIONS

There is a heavy emphasis in the MENA consumer protection acts on criminal sanctions, including imprisonment. Table 2 below sets out the strong punitive element in the legislations of the region.

In the context of competition law, the MENA Guide to leniency programmes states the following: "While criminal law may impose substantial fines on companies, sanctions on individuals and more, it serves as a reflection of societal judgement directed at improper conduct. Criminal law prosecution, however, imposes higher costs and constraints. The higher standard of proof required, the greater the demand for more resources."[25] As the last sentence implies, there is a danger that the threat of criminal prosecution could have the perverse effect of failing to secure conviction because of the amount of evidence that is required. In extreme cases, imprisonment may be justified, but as part of a spectrum of sanctions.

Table 2:
Sanctions in MENA legislation

Algeria	
Law No. 09-03 of 25 February 2009, on Consumer Protection and Repression of Frauds;	
Articles 68-70. Prison or fines: misinformation, non-delivery, description; Falsification rendering dangerous; Article 79. Disposal of confiscated goods, trading while suspended; Products causing loss of life; Articles 72-74. Fines; Article 76. Product safety; Article 75. Respect of guarantee; Article 77. After sales; Article 78. Labelling; Article 81. Consumer credit; Articles 86-93. Transactional fines.	
Egypt	
Law 67 of 2006, on Consumer Protection;	
Graduated fines if terms of Consumer Protection Act are violated. Doubled for recidivism;	
Proposed revised law of 2014	Consumer safety endangered or harmed: imprisonment for 1 year or more and graduated fine; "Rigorous imprisonment" in the event of death; Imprisonment for obstructing Agency staff.
Jordan	
Law 7 2017, on Consumer Protection Act;	
Graduated fines or imprisonment for contravening the act. Permanent or temporary exclusion in event of recidivism.	
Lebanon	
Law of 4 February 2005, on Consumer Protection Law;	
Article 105. Prison or fines in the event of transgression of Article 11. Misleading advertising; Article 108. Fines or imprisonment for sale or manufacture of non-compliant products (safety) if "the non-compliance has been brought to his attention, or was supposed to be brought..."; Or failure to recall or warn; Article 109. Fine or prison for adulteration; Article 110. Fine and/or imprisonment if death or illness (for more than 10 days) even if alert issued; Articles 111 and 112. Misleading description results in fine or imprisonment; Imprisonment for weights and measures offence (Articles 113, 115 and 116) for sale of counterfeit with prior knowledge; Article 114. Fines for failure to label; Article 121. All sanctions can be doubled for recidivism; Court can suspend trader permanently or temporarily even if license not required.	
Morocco	
Law No. 31-08, on Consumer Protection;	
Article 173. Fines for violations of Consumer Protection Act. Detailed fine tariffs: Articles 174-7; Articles 178-180. Advertising; Articles 181-182. Distance sales; Article 183. Special offers; Article 184. Pyramid sales; Exploitation of vulnerable consumers punishment by imprisonment; Article 186. Consumer credit.	
Tunisia	
Law 92-117 of 7 December 1992, relating to the protection of consumers;	
Fines and/or imprisonment: Article 32. Product safety; Article 33. Conduct of transactions and fines; Articles 35-36. Honouring of guarantees; Article 38. Penalties doubled in case of recidivism; Article 41. Penalties can include closure of business premises, permanently or temporarily.	
State of Palestine	
Law No. 21-2005, on Consumer Protection;	
Article 27. Fines and imprisonment over wide range: non-compliant products; Linked purchases; Failure to display prices; Illegal food imports; Fines for failure to sign in Arabic; Article 28. Specifications, weights and measures; Fines or prison; Article 29. Counterfeit: fines or prison.	

Source: UNCTAD MENA programme Inception Report 2015 and national legislation.

3.2 UNGCP SECTION IV. PRINCIPLES FOR GOOD BUSINESS PRACTICES

Below is the actual wording (italicized) of the principles a) to f), and each one is followed by observational commentaries. The aim here is not to propose changes in law but to see how business might relate to consumer protection generally. The forums most suited to discussing these ideas would be the Consumer Protection Councils that exist in many jurisdictions.

***UNGCP* GL 11.** *The principles that establish benchmarks for good business practices 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.*

The key terms here are "culture," "equitable," "harm," and "vulnerable and disadvantaged."

Culture: "Business culture" has become something of a cliché but nevertheless contains substance when relating to attempts to go beyond a narrow and legalistic interpretation of responsibility and towards a more "internalized" set of ethics. Professor Hodges concludes that "Avoiding problems before they arise…is far more effective than trying to address future behaviour ex-post an individual disaster in the hope that that might affect things in the future. When an adverse event occurs, we should aim to learn from it and apply the lessons ex-ante in relation to future activity, but not expect that punitive responses will, by themselves, have much effect on general future behaviour. In fact we should establish systems and cultures so that we constantly learn from events and ideas on how to improve performance and reduce risk."[26]

The value of the above approach is that it can apply to businesses of any size and not just to companies advanced in management expertise. However, culture goes beyond simply learning from mistakes and also concerns ethical obligations that transcend the kind of industrial logic which was revealed by the financial crisis in 2008. The justification given at that time by large companies for the numerous dishonest practices that emerged was that they were legal. The fact that law and ethics do not coincide is clearly indicated by the United Nations Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System. This is also known as the Stiglitz Committee, after its chair.

Pointing to product development in the financial services sector, including complex "derivatives," the committee found that "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."[27] The products in question were legal - being a clear demonstration of the limitations of the law in a sophisticated economy. They were equally developed in major companies with full access to law and management science, neither of which prevented them from adopting the practices, which the United Nations termed "dubious." This illustrates that businesses throughout the MENA region have no need to assume that business ethics are steadfast for large companies. These principles are relevant at all levels - even small traders may apply them instinctively rather than "scientifically."

Does the appeal for a greater "moral" approach sound naïve? Perhaps. Nevertheless, it also reflects the shift that was seen during the early part of this century away from a "rules based regulation" and towards a "principles based regulation." The OECD/G20 high-level principles on consumer protection in financial services are an example.[28] The European Union saw a shift from a "duty to trade fairly" towards an "obligation not to trade unfairly." One consequence was national legislation in the United Kingdom which, encouraged by the European Union's Unfair Commercial Practices Directive (EU2005/29), developed the concept of the "unfair relationship test." According to such a test, a court could then set aside a credit agreement if it found the relationship between lender and borrower to be unfair after having considered all the circumstances, including those of the borrower. Nevertheless, a recent review of the Directive has found that it requires precise rules in order to endorse principles.[29]

Recommendation 2: Business may consider how it can suggest ways to shift consumer protection towards ethical principles into which specific practices can fit, thus moving away from an assumption that literal conformity to rules is equivalent to good business conduct. This is not intended to displace the role of government, but to help develop ethical foundations for legislation.

Equitable treatment: There are three issues regarding equitable treatment. The first is covered by GL 11 a) and concerns the "vulnerable and disadvantaged" consumers. Few MENA countries make explicit reference to vulnerable consumers within their consumer protection acts. Morocco is an exception and this can be found in Article 184 of the Consumer Protection Act of 2008. It should always be considered an offence to knowingly exploit the ignorance of vulnerable consumers. An example is to entice them into buying a product which they do not need, or trapping them in an abusive contract. The European Union's evolution towards a more qualitative assessment of the personal relationship between consumer and provider is a safeguard for vulnerable consumers.

Recommendation 3: In anticipation of legislative measures to protect vulnerable consumers, businesses could issue their own codes of practice to protect specific groups. This might include disabled persons, the semi-literate sectors of society, displaced populations and children - many of whom now have access to the internet.

The second issue relates to the lack of explicit references to e-commerce in legislation in the MENA region. Here businesses can make a contribution by providing clear information that any transaction via electronic means comes with the same level of protection as more traditional transactions. However, consumer surveys in many countries have found that e-commerce may in practice be less protected than traditional transactions, perhaps because of the lack of face-to-face contact.[30] One further concern is that as transactions become more electronic and "migrate" to mobile phones, then many people with limited literacy skills may be exposed to contracts which they simply do not understand, either because of the language or because of the technicalities of what can be displayed.

Business codes such as those developed by ISO could respond to these issues in ways which are more precise than legislation. For example, in 2017, the publication ISO 12812 appeared, titled *Core banking – mobile financial services*. Its General Framework (ISO 12812-1) has full international standard status and the goal of the standard is to "*Promote consumer protection mechanisms including fair contract terms, rules on transparency of charges, clarification of liability, complaints mechanisms and dispute resolution."* In the event of a breach of security, the particularly crucial reference to liability is reinforced in Part 2, titled "Security and data protection for mobile financial services, TS 12812-2." The relevant paragraph reads, "*The liability arising from any breach of privacy should extend beyond actions taken directly by the Mobile Financial Service Provider (MFSP) and include other handlers of the information including authorized agents. MFSPs should put in place an effective mechanism guaranteeing the security of customer information and accepting liability for breaches even when attributable to their authorised agents."* This is, in turn, further strengthened by reference in an Informative Annex (Liability Policy) to the *OECD 1999 E-commerce Guidelines* (and updated in early 2016), which supports limitations of consumer liability for unauthorized or fraudulent use of payment systems. This is discussed further in Section 5 below.

As discussed in the sister *Guidelines on Consumer Protection: Agency Structure and Effectiveness*, consumer protection law in the MENA region is not always explicit in covering e-commerce, but it is vital that it is understood to do so. As most of the issues covering transactions are common to both e-commerce and offline transactions, it should be presumed that both categories are covered by consumer protection acts.

Recommendation 4: Business organizations as well as governments could state in clear terms in their published guidance documents that both online and offline transactions are covered by consumer protection acts. This will prevent unscrupulous merchants from claiming otherwise. In addition, businesses could unilaterally adopt non-statutory standards such as those produced by ISO in order to protect consumers in e-commerce.

A third potential source of inequity is where there might be a difference between sectoral and generic consumer protection legislation. When consumer protection legislation is drafted, it should be proofed in order to determine whether or not there is a conflict with the sectoral legislation. If so, then it should be made obvious which scenario will prevail. An example of this in Article 24 of the 2017 Jordanian Consumer Protection Act which states "In addition to the relevant legislation, the provisions of this Law shall apply to suppliers submitted to sectoral regulatory bodies." In other words, the Consumer Protection Act will supersede sectoral law in the event of a contradiction. This might seem drastic but in practice it will likely provide clarification that contract terms in the banking sector - which are regulated under banking legislation - should also be fair under the terms

of the Consumer Protection Act.[31] This will, hopefully, increase the provisions covering banking rather than be contradictory. Generic consumer protection can act as a baseline for sectoral consumer protection measures - not forgetting that the consumer protection legislation can also supplement for those sectors and transaction types that do not have any specific legislation.

Recommendation 5: Business associations have an important contribution to make in clarifying the interface between sectoral and generic (often referred to as "horizontal") legislation to their own members and consumers. Documents to that effect could be developed in consultation with government.

Harm: When it comes to product safety, while the legislation is often general to the point of vagueness, the specific issues become far more technical. Under such a scenario, it may actually be better to adopt technical standards in advance such as those developed by ISO. For those sectors, there are some relatively simple suggestions that would be favourable for the enterprises themselves, helping them to improve customer care by the adoption of the relevant ISO standards. This would avoid the need to wait for legislative time to be dedicated to these sectors. These are discussed in detail later in Section 5 in terms of going "beyond compliance."

UNGCP **GL 11b). 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 to consumers. Businesses and their authorized agents should have due regard for the interests of consumers and responsibility for upholding consumer protection as an objective.*

As principle b) largely overlaps with the above principle a) - in terms of their content on "abusive" practices - the focus now is on "marketing."

Marketing: As shown in Table 1, sales practices are commonly regulated by consumer protection legislation in the MENA region by, for example, incorporating a cooling-off period that allows consumers to reconsider a decision made away from the actual business premises (See Article 36 of the Moroccan Consumer Protection Act 2008, and Article 55 of the Lebanese Consumer Protection Act 2005). Misinformation by the supplier, or other misconduct in the sales process, may be grounds to nullify a contract or a sale (see the Moroccan Consumer Protection Act, Article 26). Any further provisions within the legislation would be helpful when there is the risk of ambiguity. For example, the State of Palestine has a provision in its Consumer Protection Act (Article 3), stating the consumer's right to "refuse coercive transactions." It is assumed that this means the right to retract from any such transactions. This is not unlike the aforementioned United Kingdom's "unfair relationship test," which can be applied by the court on the consumer's behalf.

Recommendation 6: There is nothing to stop suppliers from voluntarily incorporating the best practices from within the MENA region, and under circumstances whereby they are not obliged to apply them by law. Sometimes the consumer protection acts are vague and voluntary undertakings can reassure consumers on detailed provisions and can lead to a market advantage - subject, of course, to such undertakings being honoured.

In terms of business awareness of consumer protection, several commentators from the region have indicated that businesses seemed better informed about competition law than actual consumer protection law. Business could make an important contribution with regards to setting standards of conduct and good practice voluntarily while minimizing the need for regulatory intervention. However, the shear range of consumer protection legislation - and not just the consumer protection acts - can make it difficult for businesses to become fully aware of the range of measures they may face. A useful contribution that business organizations could make would be to list problem areas and how best to avoid them. A good example is unfair contract terms. They would benefit from having a "Guide" that lists the terms to be discouraged in the hope that consumers do not become trapped in contracts; and their specific rights ought to be safeguarded such as the right to a cooling off period before agreeing to a purchase when made outside of the commercial premises. A list of examples of typical unfair contract terms that are covered by the European Union are emphasized further in Box 2 below. This could also be adapted to the MENA context.

Recommendation 7: The list below could be issued by business, possibly in cooperation with government and consumer associations, about which contract terms to avoid. It could also be used in a more simplified form for consumers and the media.

Box 2:
Unfair contract terms

The Annex to the *European Union Unfair Contract Terms Directive* contains illustrative terms which include:

- Excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- Inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance;
- Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount;
- Requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation (for example, disproportionately high early redemption fees for bank loans);
- Authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer;
- Enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- Enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- Obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- Excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.

Source: European Union Unfair Contract Terms (UCT) Directive (93/13/EEC).

By no means is this list exhaustive; , for example, "tie-in" contracts, whereby a consumer is tied to one agent for repair and maintenance following the sale of a product, are not included. This certainly is an issue which could intensify as the "Internet of Things" develops.[32] Such contract terms may be disallowed under competition policy. What is being suggested here is not necessarily a copying of the above UCTs but that a guide to the legislation can be used as a "living document" to be adapted to new UCTs.

***UNGCP* GL 11c). Disclosure and transparency.** *Businesses should provide complete and accurate information regarding the goods and services, terms, conditions, applicable fees and final costs in order to enable consumers to make informed decisions. Businesses should ensure easy access to this information, especially to the key terms and conditions, regardless of the means of technology used;*

This area is adequately covered in the legislation throughout the MENA region. Worldwide, however, there are growing doubts about the effectiveness of disclosure with regards to the Terms and Conditions (T&Cs). This is because so many consumers do not read them. Consumers cannot be expected to read and understand all disclosed information. It must be born in mind that one sixth of the world's population is illiterate. Also, much of the disclosed information is so complex that it is impossible for many consumers to fully comprehend the terminology - as was demonstrated during the financial crisis of 2008 when many consumers in developed markets suffered from the misselling of financial products. Organizations, such as the OECD Consumer Policy Committee, are moving away from relying on such advance disclosure of terms and conditions and towards accepting that consumers do not read them, and this will have consequences in policy-making.

For example, Professor Gail Pearson, Chair of the International Law Association, points to the shift occurring in Australia. There, the notion of the consumer as "the autonomous rational individual making free choices" has since changed and adopted the position that individuals who are vulnerable in the face of aggressive supplier behaviour require protective measures. *"In addition to enforcement litigation, the regulator can require firms to substantiate claims made about products, make enforceable undertakings including compliance programmes, issue public*

warning notices, and bring actions for compensation on behalf of consumers. In addition to the regulator, courts and tribunals, there is an extensive system of self-regulation notably through codes of conduct and external dispute resolution."[33]

An enquiry in 2014 by the Australian government into the financial system explored the limits of contractual freedom based on disclosure and concluded that there were shortcomings in disclosure as a regulatory tool. In fact, much of the disclosure was ineffective and behavioural biases challenge the notion that individuals are rational. This further limits the utility of disclosure. It also stated that financial literacy is not the sole answer. Nevertheless, it was recommended that more innovative forms of disclosure were needed while also increasing product issuer and seller liability for product design and distribution.[34]

The MENA region legislation relies heavily on disclosure for consumer protection - as many other jurisdictions also do throughout the world. It is difficult to know precisely how effective it is and, in any case, no-one is seriously advocating the withdrawal of such requirements. But there are strong arguments for simplifying the Terms and Conditions - many of which are suspected as being deliberately obscure and, therefore, incomprehensible for consumers. There is much good practice emerging from the United States and in favour of "Summary Boxes." These are simplified Terms and Conditions and are often referred to as the "Schumer Box," named after the Senator who proposed such changes. However, it is important to note that this did not prevent the financial crisis of 2008 from developing in the United States.

Recommendation 8: Business can make a contribution by simplifying the Terms and Conditions and by ensuring that they do not benefit from consumer ignorance in order to conduct their business. Even if this may only have a modest impact on consumers, it has a certain utility for regulators who also have difficulty in keeping pace with proposals.

***UNGCP* GL 11d). Education and awareness-raising.** *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.*

There is widespread support for such programmes in the MENA region and elsewhere. However, there are risks too; the first is that of a conflict of interests when consumer education can become a form of marketing. Businesses should be able to contribute their expertise - but their contact with consumers through such programmes should be mediated by consumer educators who do not carry such a conflict.

Furthermore, there is a need to respond to the evidence. There exist the same reservations regarding consumer awareness and education as in the disclosure of Terms and Conditions. These are explored further in the UNCTAD *Consumer Protection Manual*.[35] The idea that all consumers can be fully aware all of the time is unrealistic. As stated, many consumers have reading difficulties and as transactions often occur on small computers and mobile telephones, the difficulties of comprehension may actually increase. So, as with disclosure policy, the burden of consumer protection cannot be transferred to consumers. The regulatory bodies still have an important role in guarding against abusive business practices.

Recommendation 9: Business should participate in consumer education while avoiding conflicts of interest and indirect marketing. Consumer education programmes should be mediated by educators and not become a substitute for regulatory oversight.

***UNGCP* GL 11e). 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.*

The key term here is not only "privacy" but also "security." They are discussed at some length in the *Guidelines on Consumer Protection: Agency Structure and Effectiveness.*

The recognition of privacy and security as consumer issues have grown hugely in recent years - as demonstrated by their inclusion in the revised *UNGCP* in 2015. It is increasingly recognized that a situation of total security is unrealistic and, therefore, reducing the security risks is seen as a priority to building consumer trust. The experiences of businesses worldwide are showing how those companies which have demonstrated a commitment to limiting consumer liability in the event of a breach of security have performed very well.

However, as discussed in the *Guidelines on Consumer Protection: Agency Structure and Effectiveness* under e-commerce, the MENA region seems to be lagging behind in this regard in spite of some progress being made in Morocco and Tunisia. There are advances being achieved in legislative terms which require the cooperation of business.

***UNGCP* GL 11f). 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.*

The revised *UNGCP* entails a notable shift in this domain from "redress" to "dispute resolution." Indeed, there is a notable increase in references to the latter which was absent in the previous version. This suggests an intention to place greater emphasis on the development of alternative methods of resolving issues rather than on "redress," which generally implies greater use of judicially obtained compensation. Such change is in line with the terminology of the OECD 2007 publication, titled *Recommendation on Consumer Dispute Resolution and Redress*.[36] Additionally, it acknowledges the increase in dispute resolution systems since the last revision of the Guidelines in 1999.

Dissatisfaction with court procedures in many countries has led to the spread of ADR techniques and systems such as arbitration, mediation and conciliation - all of which employ third party intermediaries.

Table 3:
Dispute resolution under consumer protection acts in the MENA region

Algeria	
Law No. 09-03 of 25 February 2009, on Consumer Protection and Repression of Frauds;	
Articles 22 and 23. Consumer association access to judicial proceedings; No reference to non-judicial dispute resolution.	
Egypt	
Law 67 of 2006, on Consumer Protection;	
Article 2. Consumer right to bring legal action "with expeditious and easy procedures at no cost." Article 17. Dispute settlement committee to settle disputes between "consumers, suppliers, or advertisers subsequent to summoning them to appear for defence"; Presided by judge plus "person with substantial related experience" selected by Minister on nomination of CPA Board. Decisions can be challenged in court of appeal;	
Proposed revised law of 2014	Consumer associations have right to go to court; Also right to receive complaints and settle amicably.
Jordan	
Law 7 2017, on Consumer Protection Act;	
Article 15. Among functions of consumer associations: "Mediation to resolve disputes between consumer and supplier as agreed by the parties."	
Lebanon	
Law of 4 February 2005, on Consumer Protection Law;	
Article 82: Dispute settlement for small claims; Larger sums go to dispute settlement committee; Article 83. Mediator appointed by Ministry of Economy and Trade; Article 86. Convenes meeting; Mediator may refer case on to attorney general if illegal acts; Article 97. Dispute settlement committee: membership judge, industry and consumer association representatives; Takes longer or unresolved cases. Fees payable, legal representation not necessary. Decision treated as legal judgment.	
Morocco	
Law No. 31-08, on Consumer Protection;	
Article 157. Federation of Associations can take action in court. No reference to non-judicial dispute resolution.	
Tunisia	
Law 92-117 of 7 December 1992, relating to the protection of consumers;	
No reference to non-judicial dispute resolution.	
State of Palestine	
Law No. 21 2005, on Consumer Protection;	
No reference to non-judicial dispute resolution.	

Source: UNCTAD MENA programme Inception Report 2015 and national legislation.

The pattern of dispute resolution in MENA is quite distinct and contains some encouraging signs which business would be advised to follow. Firstly, the issue is current and there are extensive references being made to redress and dispute resolution in MENA. However, it is generally seen as operating through the courts or through the consumer protection agencies. As shown in Table 2 above, there are many references in the consumer protection acts to the rights of consumers to take legal action, and to be represented by consumer associations. Associations sometimes have the right to promote dispute settlements informally - as are the cases in Egypt and Jordan. Or, disputes can be settled by dispute committees of the consumer protection agencies - with Egypt and Lebanon being such examples.

Some jurisdictions make no reference to non-judicial mechanisms. The closest wording to ADR is to be found in the Egyptian Consumer Protection Act. In Article 2 there is a reference to the "essential right" of consumers "to bring legal actions for any matter related to the violation of consumers' rights….with expeditious and easy procedures at no cost." The reference to "legal" actions, however, demands caution as the actions could become formalized and this is one of the major barriers to consumer access. ADR systems have developed into more formal frameworks of consumer or sectoral Ombudsmen in some jurisdictions. This is discussed in the sister volume aimed at consumer protection agencies.

From here on, this guide focuses on business initiatives that resolve consumer complaints before they reach external ombudsmen, or ADR mechanisms. In other words, the aim is to determine what businesses can do to prevent disputes from escalating and being referred to from the very outset.

In-house dispute resolution: One advantage of having effective independent complaint systems - such as the ADR or Ombudsmen - is that their presence and activities provide an incentive for traders to operate effective in-house consumer complaint functions. Virtually all consumer ADR schemes require a consumer to contact the trader first before being able to access the scheme. Sometimes this encompasses a specific time period in which the trader can try to resolve the issue. If traders do not make efforts to resolve issues this will put them in a bad light should any further efforts at mediation arise. Indeed, the Ombudsmen have stated that a failure of a company to deal with complaints places them at a distinct disadvantage.

It should always be a requirement that traders respond fairly, quickly and openly to customer feedback, queries and complaints - and in line with the above Guideline 11 f). Many businesses have customer care departments that treat such concerns seriously while aiming for high levels of customer satisfaction. This is especially the case where a competitive market exists and maintaining a high reputation is seen as important. International standards (such as ISO) support customer care and complaint systems. A high volume of consumer contacts are enquiries that can usually be resolved in a few minutes – they may not be "disputes" at all but run the risk of becoming so if they are not handled sensitively and promptly. In-house care and complaint systems should not, however, be portrayed as being independent ADR or Ombudsman schemes.

Online dispute resolution: Many online traders have built-in "online dispute resolution" (ODR) arrangements. ODR mechanisms may take various forms varying from arbitration panels, composed of legally-qualified individuals, to automated proposals which are generated by algorithms and based on the sum of money that both parties would most likely accept - according to statistics and crowd-based "jury" decisions.[37] With the growth of e-commerce, it was equally a natural progression 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 ODR systems when dealing with cross-border e-commerce.[38] Of note, there is no *a priori* reason for ODR to be restricted to online transactions and, assuming that the parties can communicate electronically, ODR could also be used to resolve disputes around offline transactions. Indeed, in early 2016, the European Commission set up a new Online Dispute Resolution ODR platform which is not restricted to online transactions.

Faced with doubts about the cost-effectiveness for PayPal in the United States of investing ADR, a research team using large data sets generated by the system, analysed ODR results and found, unexpectedly, that "users who….went through the ODR process increased their usage of the marketplace regardless of outcome."[39] The biggest subsequent increase in market participation by consumers came from those consumers who settled their cases amicably, slightly greater in fact than those whose cases were upheld. It is interesting to note that even those who lost

their cases later registered an 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.

Do these ideas appear farfetched in the MENA context where there is still relatively low use of the internet? This seems like a weak argument for not investing in ODR given its remarkable rise - not just in telecommunications and information technology around the world in less developed regions than MENA (such as sub-Saharan Africa), but also access to the internet through mobile telephony. Underserved areas are leap-frogging the expensive stage of fixed line communications and, as a result, are managing to provide access to relatively poor populations, including displaced persons for whom the internet is becoming a flexible form of communication.

Recommendations: Our suggestions regarding dispute resolution are two-fold. On the one hand, the development of ADR systems that operate independently outside of business are welcomed - and these are still under development within the MENA region. Furthermore, when faced with the vast numbers of complaints being dealt with by some ADR schemes and Ombudsmen, the need for internal dispute resolution mechanisms within companies is also to be encouraged. This would permit them to filter out the more routine cases. To some extent, ODR systems fall into both categories depending on the precise governance.

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 European Commission drafted a set of criteria which are listed in Directive 2013/11/EU and having been based on earlier and widely accepted Recommendations from 1998 and 2001. The criteria include access, independence and impartiality, transparency and low cost. The in-house systems do not have to be bound by such criteria in the same way. For example, independence by definition is not attainable for an in-house system, although it should endeavour to be fair. But if in-house systems operate effectively they will prevent the more public Ombudsmen/ADR systems from being overwhelmed - as occurred in some jurisdictions during the financial crisis.

Recommendation 10 a). Mechanisms that are created in-house, such as voluntary dispute resolution, would contribute greatly to better customer relationships and a resolution to disputes at an earlier stage. Making the courts the locus of resolution for disputes immediately sets the bar too high for most consumers and escalates disputes to the most intense level from the outset.

Recommendation 10 b). As ADR mechanisms develop outside of businesses, then the latter are encouraged to cooperate and participate. However, while suitable ADR mechanisms can be in the interests of business, the passing on of cases to Ombudsmen when they should be dealt with in-house, has created unnecessary burdens for businesses and consumers.

4. BUSINESS PARTICIPATION IN CONSUMER PROTECTION POLICY

There is a wide involvement of business in stakeholder consultation in the MENA region. This takes the form of the formal associations such as the chambers of commerce and industrial federations - sometimes taking care to include a range of business sectors such as farmers in Jordan and Lebanon and the advertising syndicate in Lebanon.

There are dangers that business may see such membership as an opportunity to lobby. There are also risks that government may see itself as waiting to be lobbied, leading towards a collusive relationship. Equally, both sides could perceive the forums as opportunities to learn from each other; government wanting to avoid perverse policies due to unforeseen consequences of particular regulatory measures, while business seeking to acquaint itself better with knowledge of consumer protection. It has been indicated while discussing the *United Nations Principles for Good Business Practices* how the national consumer protection councils could provide excellent discussion forums.

Special care should be taken so that small traders and producers are included as far as possible in such discussions. Another group for possible consideration is the state-owned enterprise sector. Many operate services of strategic importance such as power and water, while being businesses themselves under the terms of the United Nations Guidelines. In such circumstances, other businesses will then find themselves in the role of being both fellow businesses and consumers of the services provided by state-owned enterprises.

Recommendation 11: The participation of business in the Consumer Protection Councils is to be welcomed and encouraged. The two functions of consultation between government and business and regulation by government need to retain their distinct character both as important public functions.

Table 4:
Business involvement in consumer protection policy in the MENA region

Algeria
Law No. 09-03 of 25 February, 2009, on Consumer Protection and Repression of Frauds;
Article 24. National Council for Consumer Protection (CNPC) to make policy proposals; Membership and competences set out in regulation. Decree 12-355. No reserved place for business, small businesses and commerce represented through ministries.
Egypt
Law 67 of 2006, on Consumer Protection;
Article 13. Agency Board of Directors, 15 members nominated by minister: One from the Chamber of Commerce; One from the Association of Egyptian Industry; Three members with related experience; Three-year terms, renewable once; See also Article 17 on Dispute Settlement Committees.
Jordan
Law 7 of 2017, on Consumer Protection Act;
Article 9A. Consumer Protection Council: Chaired by minister; Members: Jordan Chamber of Commerce, Jordan Chamber of Industry, Federation of Farmers, two representatives of the private sector; Two-year terms renewable once; Article 10. Wide range of functions.
Lebanon
Law of 4 February 2005, on Consumer Protection Law;
Article 60. Conseil National de Consommation under Ministry of Economy and Trade; Chambers of Commerce, industry and agriculture, Industrialists Association, advertising syndicate.
Morocco
Law No. 31-08, on Consumer Protection;
Article 204. Independent Consultative Council; Article 205. Membership and role fixed by legislation; Described as "recently created" (in 2015); Five members of consumer associations, five from business associations; 16 ministerial representatives.
Tunisia
Law 92-117 of 7 December 1992, relating to the protection of consumers;
Article 15. National Council envisaged; Membership under law of 2004: 33 members; 15 national organizations not explicit place for business; NB: Also Institut national de la consommation.
State of Palestine
Law No. 21-2005, on Consumer Protection;
Listed in definitions. Article 4 of Consumer Protection Act. Members of Consumer Protection Council: Chamber of Commerce, industrial federations, Union of Contractors, Businessmen's Association, power of request to minister.

Source: UNCTAD MENA programme Inception Report 2015 and national legislation.

5. GUIDANCE TO BUSINESS: BEYOND COMPLIANCE?

Such debates on consumer policy sometimes overlook the capacity for business to take action and to improve standards autonomously, regardless of the need for compliance. Private companies and public enterprises such as utilities are turning to internationally recognized standards both for their substantive benefits and for the improved public image which follows from their adoption. Product standards are widely referred to - without the need for listing them all in detail - in the legislation covering the MENA region. This usually comes in statutory form, binding standards with legal sanctions in the event of non-compliance. In some cases reference is made in the consumer protection act itself, whereas in others there is a separate standards act - as in Algeria, Jordan and the State of Palestine with the latter making frequent reference in the Consumer Protection Act. All the countries invoke standards in their legislation but not necessarily according to international standards.

Specific reference to international standards is not a requisite and States may decide to incorporate their substance into their national standards in full, or in part. The inclusion of all the countries throughout the region in the membership of ISO - through their national standards bodies - draws attention to international standards as, indeed, does the commercial pressure that results from trade flowing both inwards and outwards. The judgment as to the best way to proceed in this regard will vary in the light of the development of standards in each jurisdiction. The benefit for business is that if they consider standards and their public attribution to be advantageous, then they can adopt them unilaterally.

5.1 INTERNATIONAL STANDARDS AND UNGCP

Box 3 below details how the ISO standards function, and many have corresponding and specific standards also covered in the *UNGCP* document. In particular, there is a focus on Guideline 5, being the most quoted of the "legitimate needs" of consumers. This is intended to indicate to the reader the relevance of the standards. Consumer representatives took part in the development of many of the standards through Consumers International, and often supported by the ISO Consumer Policy Committee (COPOLCO).

Box 3:
ISO standards and UNGCP "legitimate needs"

The legitimate needs which the UNGCP guidelines are intended to meet are as follows:

UNGCP GL 5a). Access by consumers to essential goods and services; And **UNGCP GL 5b).** The protection of vulnerable and disadvantaged consumers;

ISO 24510, 2007, reaffirmed in 2013. Activities relating to drinking water and wastewater services. Guidelines for the assessment and for the improvement of the service to users:

- guidelines for satisfying users' needs and expectations;
- service to users assessment criteria;

ISO 50007. Energy services. Guidelines for the assessment and improvement of the energy service to users, 2017:

- guidelines for satisfying users' needs and expectations;
- assessment criteria for energy service to users;

ISO 14452. Network services billing, 2009:

Covers water, energy, telecoms networks and includes non-metered provision.

UNGCP GL 5c). The protection of consumers from hazards to their health and safety;

ISO 22000. Food safety management series:

The overall objective of following internationally consistent guidance is to produce safer consumer products, and thereby:

a) reduce the product safety risks to consumers;
b) reduce the risks to suppliers of product recalls;
c) provide consumers with the information they need in order to make informed choices with respect to the safe use and disposal of consumer products;
d) assist governments by improving the safety of consumer products.

ISO 22005. Food safety management systems-requirements for any organization in the food chain:

- to plan, implement, operate, maintain and update a food safety management system;
- to demonstrate compliance with applicable statutory and regulatory food safety requirements;
- to evaluate and assess customer requirements and demonstrate conformity with those that relate to food safety;
- to effectively communicate food safety issues to their suppliers, customers and relevant interested parties in the food chain;
- to demonstrate conformity to relevant interested parties.

ISO 22005, 2007. Traceability in the feed and food chain. General principles and basic requirements for system design and implementation;

ISO 10377, 2013. Consumer product safety. Guidelines for suppliers:

The standard describes how to:

- identify, assess, reduce or eliminate hazards;
- manage risks by reducing them to tolerable levels;
- provide consumers with hazard warnings or instructions essential to the safe use or disposal of consumer products.

UNGCP GL 5g). Availability of effective consumer dispute resolution and redress;

ISO 10002, 2014. Quality management. Customer satisfaction. Guidelines for complaints handling in organizations:*

- enhancing customer satisfaction by creating a customer-focused environment that is open to feedback, including complaints and their resolution, and enhancing the organization's ability to improve its product and customer service;
- recognizing and addressing the needs and expectations of complainants;
- providing complainants with an open, effective and easy-to-use complaints process;
- analysing and evaluating complaints in order to improve the product and customer service quality.

UNGCP GL 5i). The promotion of sustainable consumption patterns;

ISO 14000 Environmental management series:

The series includes practical guides for SMEs to satisfying legal and other requirements;

ISO 14044, 2006. Life cycle assessment: specifies requirements and provides guidelines for life cycle assessment;

ISO 14067. Carbon footprint, 2013. Greenhouse gases and the carbon footprint of products. Requirements and guidelines for quantification and communication;

ISO 14046. Water footprint, 2014. Environmental management, water footprint - principles requirements and guidelines.

UNGCP GL 5j). A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce;

The ISO/IEC 27000 series helps organizations keep information assets secure such as financial information and intellectual property;

ISO/IEC 27001, 2013. Information security. Information technology. Security techniques. Information security management systems – Requirements.

UNGCP GL 5k). The protection of consumer privacy and the global free flow of information;

ISO 27002, 2013. Information technology. Security techniques. Code of practice for information security controls.

** Not applicable to disputes referred for resolution outside the organization.*
Source: UNCTAD based on ISO 2017.

Box 4:
Examples of ISO standards in MENA region

In Egypt, Juhayna Food Industries saw a 70 per cent increase in manufacturing efficiency between 2008 and 2012 as a result of the adoption of ISO standards. Average annual revenue rose by 3.3 per cent - attributable to the implementation of the standards. The international standards used were: *ISO 9001 Quality management systems – requirements; ISO 14001 Environmental management systems – requirements and guidance; and ISO 22000 Food safety management systems – requirements in the food chain.* Direct benefits to consumers were seen arising from, for example, diminished delivery times and, therefore, reducing the risk of shortage and of product deterioration in transit. Non-conforming products in the market also declined. Clearly gains of the magnitude calculated above allow plenty of room for both consumers and producers to see the benefits – the classic "win-win" situation. Benefits can be derived from cost reduction, improved marketing, entry into export markets and the development of new products.

In Jordan, Petra Engineering produces air-conditioning, ventilation and heating systems. They export to many Middle Eastern countries and the United States. Applying generic standards under the ISO 9000 and 14000 series - as well as sector-applicable European Union Directives - have resulted in benefits equivalent to 4.2 per cent of annual revenue. The largest savings come from purchasing from certified suppliers and reducing the need for inspection. In this way, one certificate helps generate another.

Source: ISO, 2012, "Economic Benefits of Standards; International Case Studies" Vol. 2.

Box 4 draws upon the implementation of ISO standards in the MENA region.

Observation 2: There exists the ever present possibility of companies adopting standards voluntarily. This is especially relevant in instances where legislation is yet to keep up with evolving technology.

These examples are intended to demonstrate how mutual benefit to consumers and businesses can be arrived at through voluntary action on the part of the companies. There are incentives for adoption in terms of advantages in the market place - and this will be discussed in the final discussion on liability policy.

5.2 LIABILITY POLICY

Product liability is evolving rapidly as more attention is being paid to services and to "intangible products" such as those transmitted over the internet. There is also a new element emerging in the "Internet of Things." This terms refers to the operation of manufactured products controlled through the internet - more often than not at distance. It is difficult for legislators to keep up with these developments, partly for technical reasons but also for legal ones too, as computer software is subject to intellectual property law while other goods and services are governed by consumer protection law.

For Maria Lazarte, an ISO expert, the lack of consumer-awareness on the part of producers poses problems for privacy in particular, noting how "The heart of the problem lies in the fact that, from the start, much of the day-to-day equipment used by consumers in their daily lives is being brought to market with little or no regard for consumer issues like privacy and data protection."[40] Privacy rapidly becomes a security issue because of the risk of theft of consumers' financial data. Although the growth of e-commerce is dramatic, it is clear that it is still being held back by consumer fears regarding security - in particular as far as cross-border transactions are involved. Business needs to address these concerns further up the production chain and there are means to do so.

In the case of goods and services provided by multinational companies - or where international third party platforms are used for transactions even without legislation - the way is open for companies to gain market advantages in two ways. These are through "privacy by design" as suggested above, and by making public commitments to standards of conduct reinforced by certain codes of behaviour wherever they operate. Liability policy can be a part of the latter approach, where legislation is not adequate.

Limited consumer liability in e-commerce: Of particular significance is the cross-reference in GL 65 of the *UNGCP* to the *OECD E-commerce Guidelines*. The latter were revised in 2016, just three months after the *UNGCP* revision.[41] These address business regarding the key issues of security and liability in the event of a breach. Paragraph 49 of the *OECD Guidelines* requires businesses to "manage digital security risk and implement security measures for reducing or mitigating

adverse effects relating to consumer participation in e-commerce." In paragraph 40 of Section E on Payment, it calls on businesses to "implement security measures...commensurate with payment related risks, including those resulting from unauthorized access or use of personal data, fraud and identity theft." Governments are called upon in paragraph 41 to work with stakeholders, including, but not only businesses, "to develop minimum levels of consumer protection for e-commerce payments, regardless of payment mechanism used." This last point is significant given the increasing diversification of e-commerce payment methods into mobile payments for example.

The importance of liability is demonstrated by the history of "chargeback" - now widespread in Europe and North America - 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 fail to be delivered then a claim for a refund of the full cost can be lodged against the card issuer in the event of the Internet trader not responding. 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 become increasingly more frequent, it is now considered as a market advantage. In short, it is seen as an incentive for the consumer to use credit cards.

The limitation of consumer liability by third party platforms has also been a major market advantage for market operators offering this service. This is the case of Alibaba's successful development of Alipay in China, as a third party "escrow" system where the funds paid by the consumer are retained from disbursement to the provider until the goods and services have been delivered to the satisfaction of the consumer. Alipay's "escrow" system is generally regarded as a key component in Alibaba's rapid expansion.

Paragraph 41 of the *OECD Guidelines* endorses limitation of liability for consumers in the event of a breach of security. It is written that "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 Euros from the previous threshold of 150 Euros.[42] The Directive also tightens the security measures that need to be applied to all electronic payments. In particular, the use of strong customer identification is a requirement.[43]

The *OECD Guidelines* widen the scope of guarantee beyond chargeback. In paragraph 41 it is also explained that "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 mentioned above, although it is also used in other varied jurisdictions, including Argentina and California.[44]

Recommendation 12: Limiting consumer liability, as recommended by the *OECD E-commerce Guidelines* and endorsed further by the *UNGCP*, offers a relatively simple way for consumer confidence in e-commerce to be enhanced. It could prove to be a business opportunity, despite having initially been seen as an imposition. Were businesses to accept liability they would send a signal to consumers about their confidence. Equally, they would also have strong incentives to maximize security.

"Traditional" product liability: For electronic transactions, the recommendations in the *OECD Guidelines* limit consumer liability. In contrast, in the case of traditional products, it is producer liability that has been limited in the past by exceptions such as the "development risks defence," which maintains - in the cases of products under development - that it would be unreasonable to assume that the manufacturer could envisage all the potential difficulties that might emerge with use. Such exceptions have led some legal experts to regard tort law as having "long ago ceased to have any relevance to establishing monitoring or improving levels of safety or performance."[45]

As product standard harmonization has gathered pace around the world, most notably in the European Union in the context of market integration, some experts have expressed concern that it will generate a levelling down of standards. Within the European Union, this issue has led to the balancing shift towards "strict product liability" with less emphasis on actual, or potential prior knowledge of product defects on the part of the supplier. In simpler terms, it has been described - in the case of the Brazilian consumer code - as a change in contractual theory away from the "guilt principle."[46] "Strict liability" refers to the responsibility

of any, or all, parties along the manufacturing chain. It makes a party legally responsible for damages, regardless of culpability and without need to prove fault, negligence, or intention. The aim is to channel liability towards the party best placed to control the product and insure the risk involved. Joint and several liability means that this risk is shared upstream from the consumer under conditions of normal use of the product.

The clauses on product liability in the laws of the MENA region are reasonably up to date in the sense of establishing joint and several liability along the production chain. However, they are very variable in the extent to which they incorporate the shift envisaged by the Brazilian example away from the "guilt principle." For example, in the Jordanian Consumer Protection Act of 2017, the reference in Article 20 to causality and awareness of a defect on the part of the supplier imposes a burden of proof on consumers. Here, it is stated that "Liability may be joint between suppliers who have caused or are aware of a defect in a good or service sold to the consumer." In contrast, the Algerian Consumer Protection Act imposes a simple obligation to release products onto the market which are safe under normal use, or in conformity with any standards – the matter of prior knowledge as a condition of liability is not introduced. Chapter 4 of the detailed Moroccan Law 24-09 on Product Safety imposes a general duty to trade safely, and even if the product is found to comply with the required standards, the producer may still be liable.

As product standard harmonization evolves and legal debate remains unresolved, the need for a general framework of protection will become more widely discussed, especially as an already complex debate will be influenced by the development of the Internet of Things. Business would be well advised to take initiatives directly.

Recommendation 13: In recognition of the difficulty of developing safety standards and liability policy for all goods and services - and in the absence of comprehensive product standards - businesses could unilaterally adopt relevant international standards for goods and services, such as the ISO, IEC, as listed in Boxes 3 and 4, and develop methods of risk assessment.

In the meantime, businesses must continue to exercise due diligence, assisted by access to international alert systems such as RAPEX in the European Union and the OECD Global Recalls Portal, which enhance information sharing across jurisdictions and support regulators and businesses in taking corrective actions. Businesses and consumers can use the OECD portal to check whether there are safety concerns about the products they intend to buy, or distribute. This is particularly useful in the context of online purchases across borders.

Recommendation 14: Businesses can improve the tracking of emerging hazards from around the world, which will help them to move quickly to address problems.

6. CONCLUSION

6.1 IS STRONG CONSUMER PROTECTION IN THE INTERESTS OF BUSINESS?

A central question for all business is does having a strong corporate consumer protection policy yield better economic results? In 2010, The United Kingdom Office of Fair Trading commissioned a survey of businesses based within the United Kingdom. It found that "61 per cent of businesses saw organizational benefits as a result of enforcement of consumer protection law (more likely among large businesses) with the most commonly cited benefit of enforcement being that it created a level playing field, followed by its positive impact on customers (in terms of more satisfied customers and greater confidence in the sector)."[47] What emerged from these Office of Fair Trading surveys was the importance of reputation for businesses among consumers and the influence of competitors, which can be a driver of compliance. No business wishes to see its competitors doing well by cutting corners to gain an unfair advantage.

There is a potential danger of overlapping enforcement mechanisms where sectoral consumer protection law and generic consumer protection acts may overlap. Clearly, it would be undesirable for inspection mechanisms to be triggered from two inspectorates covering the same company. For example, in the event of complaints about a telecoms company it would be inefficient to have separate investigations by the Consumer Protection Agency and also the Telecoms Regulator. It would be far better to have a single process which could involve both agencies, or have one delegate powers to the other. Coordination will be necessary to avoid redundant inspections that serve neither the consumer nor the business interest, and bring government inspection processes into disrepute. "Strong" consumer protection should mean being effective in terms of results, and also being much more than merely assertive.

The concern that heavy reliance on penal sanctions may be counterproductive because criminal sanctions require high standards of proof has been noted. However, and as Hodges acknowledges, "where people break rules or behave immorally, people expect to see a proportionate response."[48] Retribution (punishment) is one aspect of regulation but by no means the only one. One could argue that the best deterrent is that which is not used because it has not been necessary.

6.2 CAN BUSINESS DO WELL BY DOING GOOD?

Some commentators take the view that ethical business, as exemplified by CSR, is a contradiction in terms. While some regard business ethics and CSR as forms of corporate public relations,[49] others - perhaps most notoriously Milton Friedman, the late economist - regard it as a subversion of business objectives. There are potential pitfalls that are safeguarded against by the principle set out by the European Union that Corporate Social Responsibility 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.

Is there an answer to the overriding question as to whether business can do well by doing good? There exists extensive literature on this subject, but only recently is it being synthesized. 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."[50]

This reinforces our hope here that business will aim to adopt some of the suggestions made in this volume.

NOTES

1. This section borrows from the 2016 edition of the UNCTAD *Manual on Consumer Protection.*
2. www.unctad.org/en/pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx.
3. *United Nations Guidelines for Consumer Protection.* General Assembly resolution II A/70/470/Add.1, December 22, 2015. The terms "UNGCP" and/or "Guidelines" are used to apply to the full set of guidelines in this manual. Sections of the UNGCP are referred to as appropriate. In French, the Guidelines are referred to as *Principes Directeurs*. They were first adopted in 1985 with later revisions appearing in 1999 and 2015.
4. OECD, October 2011, *G20 High-level Principles on Financial Consumer Protection*; OECD, 2016, *Consumer Protection in e-commerce: OECD Recommendation* (Paris).
5. OFT, 2004, *Consumer Codes Approval Scheme; Core Criteria and Guidance*; Trading Standards Institute, 2013, *Consumer Codes Approval Scheme, Core Criteria and Guidance.*
6. See *www.iccwbo.org/Data/Policies/2011/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English/*
7. OECD, 2015, "Industry Self-Regulation: Role and Use in Supporting Consumer Interests," *OECD Digital Economy Papers*, No. 247.
8. UNCTAD, April 2013, *Implementation Report on the United Nations Guidelines on Consumer Protection,* 1985–2013, note by the UNCTAD secretariat.
9. See http://www.lauterkeit.chapter/komm1F.htm
10. United States, Federal Trade Commission, 2012, "Seminar: Enforceable Codes of Conduct: Protecting Consumers Across Borders," (Washington D.C., November 29).
11. ISO 26000, 2014, *Guidance on Social Responsibility,* (2010, reviewed and confirmed in 2014). NB: ISO 26000 is not limited to corporations. It is equally aimed at "organizations," including government.
12. OECD, 2011, G*uidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*.
13. See Judith Vitt, 2011, "*Verbraucherzentralen Bundesverband*, Consumers Care: Access To Information for More Sustainable Markets," in *ISO Focus* (March 3); and Sadie Homer, 2007, (CI) "ISO WG Social Responsibility," presentation to ISO COPOCLCO/DEVCO Training Workshop on Social Responsibility, (Vienna).
14. Clare Naden, 2017, "The rise of 'being social,'" *ISO Focus* (July).
15. ISO, 2016, *Impact study of the SR MENA project*.
16. Nevertheless, several national standards bodies have developed certifiable standards for their jurisdictions. Denmark and the Netherlands are examples.
17. ISO, 2010, *Discovering ISO 26000*.
18. OECD, 2011, *Guidelines for Multinational Enterprises*.
19. United Nations Office of High Commissioner for Human Rights, 2011, *Guiding Principles on Business and Human Rights*, "Implementing the United Nations 'protect, respect and remedy' framework." They are known informally as the Ruggie Principles after their author, John Ruggie.
20. John Ruggie, 2011, "Presentation of Report to United Nations Human Rights Council," (Geneva May 30).
21. United Nations, *op cit.*, p.5.
22. R. A. Kagan, N. Gunningham and D. Thornton, 2012, "Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects," in C. Parker and V. L. Nielsen (eds), *Explaining Compliance: Business Responses to Regulation,* Edward Elgar.

23. Christopher Hodges, 2015, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics,* Hart, Oxford: pp. 36-41 and 155ff.
24. Hodges, *op cit.* p. 511.
25. UNCTAD MENA Programme, 2017, *Competition Guidelines: Leniency Programmes*.
26. Hodges *op cit.* p. 698.
27. United Nations Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System - also known as the Stiglitz committee. United Nations, 2009, *Recommendations 63rd session agenda item 48,* paragraph 40.
28. OECD/G20, 2011, *op cit.*
29. EC *Guidance on the implementation of Directive 2005/29/EC on Unfair commercial practices;* EC SWD, 2016, 163 final; also OECD/G20 2011, *op cit.*
30. Consumers International, 2013, *The State of Consumer Protection Around the World*.
31. For example, as the Central Bank of Jordan interpreted the Law of 2016.
32. The "Internet of Things" refers to the control of physical products by software, and is often operated at a distance. Some disputes have arisen as the products may be disabled as a result of being programmed only to function when used by pre-authorized agents, thus integrating repair and maintenance.
33. Gail Pearson, 2016, "Further Challenges for Australian Consumer Law," in Marques and Dan (eds), *op cit.* p. 150.
34. Commonwealth of Australia, 2014, *Financial System Enquiry, Final report*.
35. UNCTAD, 2016, *Consumer Protection Manual*, Advance Copy.
36. http://www.oecd.org/internet/consumer/38960101.pdf (See page 74).
37. http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm http://www.colinrule.com/writing/UALR2012.pdf
38. UNCITRAL, 2012, "Review of the Guide for the Incorporation of Domestic Law," *New Version of UNCITRAL Model Law*, (New York, June 25-July 7).
39. Colin Rule, 2012, "Quantifying the Economic Benefits of Effective Redress: Large E-commerce Data Sets and the Cost-Benefit Case for Investing in DR," *UALR, Law Review*, Vol. 34.
40. Maria Lazarte, 2016, "Are we safe in the internet of things?" In *All about ISO*, (5 September).
41. OECD, 2016, *Consumer Protection in E-commerce: OECD Recommendation*, (Paris).
42. *EU Payment Services Directive 2*, Article 74.
43. C. Riefa, 2015, *The Control of Electronic Payments in the EU: Payment Services Directives and Electronic Money Directive 2009/110/EC*.
44. Yu and Shen, *op. cit.*
45. Hodges, *op cit*., p. 705.
46. C. L. Marques, *op cit.* See also FN 16, p. 120.
47. IFF research for the Office of Fair Trading, 2010, "Factors Affecting Compliance with Consumer Law and the Deterrent Effect of Consumer Enforcement," *OFT*.
48. C. Hodges, 2016, *Regulatory Collaboration: Empirical Evidence on Ethical Behaviour,* (Oxford).
49. See for example, Corporate Watch, 2006, *What's Wrong with CSR?* (Oxford).
50. Floyd Whaley, 2013, "Is CSR Profitable For Companies?" *Devx Impact and USAID Partnership*. Refer to Box 2.

23. Christopher Hodges, 2015, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Hart, Oxford: pp. 36-41 and 155ff.
24. Hodges, op. cit. p. 511.
25. CNUCED MENA Programme, 2017, *Lignes directrices de la concurrence : Programmes de clémence*.
26. Hodges op. cit. p. 698.
27. Commission d'experts du Président de l'Assemblée générale des Nations Unies sur les réformes du système monétaire et financier international, appelée également « Commission Stiglitz ». Nations Unies, 2009, Recommandations à la soixante-troisième session, point 48 de l'ordre du jour, par. 40.
28. OCDE/G20, 2011, op. cit.
29. EC *Guidance on the implementation of Directive 2005/29/EC on Unfair commercial practices* ; EC SWD, 2016, 163 final; également OCDE/G20 2011, op. cit.
30. Consumers International, 2013, *The State of Consumer Protection Around the World*.
31. Par exemple, comme la Banque centrale de Jordanie a interprété la loi de 2016.
32. « L'Internet des objets » fait référence au contrôle de produits physiques par un logiciel, souvent à distance. Certains litiges sont survenus à la suite de la désactivation de produits programmés pour fonctionner exclusivement lorsqu'ils sont utilisés par des agents pré-autorisés, ce qui intègre la réparation et l'entretien.
33. Gail Pearson, 2016, « Further Challenges for Australian Consumer Law », dans Marques and Dan (éd.), op. cit. p. 150.
34. Commonwealth d'Australie, 2014, *Financial System Enquiry, Final report*.
35. CNUCED, 2016, *Consumer Protection Manual*, Advance Copy.
36. http://www.oecd.org/fr/sti/ieconomie/38960185.pdf.
37. https://ec.europa.eu/consumers/odr/main/?event=main.home2.show.
http://www.colinrule.com/writing/UALR2012.pdf.
38. CNUDCI, 2012, « Review of the Guide for the Incorporation of Domestic Law », *Nouvelle version de la loi-type de la CNUDCI*, (New York, 25 juin-7 juillet).
39. Colin Rule, 2012, « Quantifying the Economic Benefits of Effective Redress: Large E-commerce Data Sets and the Cost-Benefit Case for Investing in DR », *UALR, Law Review*, vol. 34.
40. Maria Lazarte, 2016, « Sommes-nous sans danger avec l'Internet des objets ? » dans L'ISO, (5 septembre 2016).
41. OCDE, 2016, *La protection du consommateur dans le commerce électronique : Recommandation de l'OCDE*, (Paris).
42. Directive (UE) 2015/2366 concernant les services de paiement dans le marché intérieur, art. 74.
43. C. Riefa, 2015, *The Control of Electronic Payments in the EU: Payment Services Directives and Electronic Money Directive 2009/110/EC*.
44. Yu et Shen, op. cit.
45. Hodges, op. cit., p. 705.
46. C. L. Marques, op. cit. Voir aussi FN 16, p. 120.
47. IFF Research pour l'Office of Fair Trading, 2010, « Factors Affecting Compliance with Consumer Law and the Deterrent Effect of Consumer Enforcement », OFT.
48. C. Hodges, 2016, *Regulatory Collaboration: Empirical Evidence on Ethical Behaviour*, (Oxford).
49. Voir par exemple Corporate Watch, 2006, *What's Wrong with CSR ?* (Oxford).
50. Floyd Whaley, 2013, « Is CSR Profitable For Companies ? » *Devex Impact and USAID Partnership*. Renvoi à l'encadré 2.

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NOTES

1. Cette section reprend des éléments de l'édition 2016 du document Manual on Consumer Protection de la CNUCED.
2. http://unctad.org/fr/pages/PublicationWebflyer.aspx?publicationid=1598.
3. *Principes directeurs des Nations Unies pour la protection du consommateur*. Résolution II A/70/470/Add.1 de l'Assemblée générale, 22 décembre 2015. L'expression « principes directeurs » est utilisée pour faire référence à l'ensemble de ces principes, d'abord adoptés en 1985, puis révisés en 1999 et 2015, dans le présent manuel. Des extraits de ces principes directeurs sont cités le cas échéant.
4. OCDE, octobre 2011, G20 High-level Principles on Financial Consumer Protection ; OCDE, 2016, *La protection du consommateur dans le commerce électronique* : *Recommandation de l'OCDE* (Paris).
5. OFT, 2004, *Consumer Codes Approval Scheme* ; *Core Criteria and Guidance* ; Institut des normes commerciales, 2013, *Consumer Codes Approval Scheme*, *Core Criteria and Guidance*.
6. Voir www.iccwbo.org/Data/Policies/2011/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English/
7. OCDE, 2015, "*Industry Self-Regulation : Role and Use in Supporting Consumer Interests*", Documents de travail de l'OCDE sur l'économie numérique, n° 247.
8. CNUCED, avril 2013, *Rapport sur la mise en œuvre des Principes directeurs des Nations Unies pour la protection du consommateur*, 1985-2013, note du secrétariat de la CNUCED.
9. Voir http://www.lauterkeit.chapter/komm1F.htm.
10. États-Unis, Commission fédérale du commerce, 2012, "Seminar : Enforceable Codes of Conduct : Protecting Consumers Across Borders" (Washington D.C., 29 novembre).
11. ISO 26000, 2014, *Responsabilité sociétale*, (2010, révisée et confirmée en 2014). NB : ISO 26000 n'est pas limitée aux entreprises. Elle s'adresse aussi aux « organisations », y compris aux pouvoirs publics.
12. OCDE, 2011, *Les principes directeurs de l'OCDE à l'intention des entreprises multinationales : Recommandations pour une conduite responsable des entreprises dans le contexte international.*
13. Voir Judith Vitt, 2011, « *Verbraucherzentralen Bundesverband, Protection des consommateurs – Accès à l'information pour des marchés plus durables* », dans *ISO Focus* (3 mars) ; et Sadie Homer, 2007, (CI) "*ISO WG Social Responsibility*", présentation pour l'atelier de formation ISO COPOCLCO/DEVCO sur la responsabilité sociale, (Vienne).
14. Clare Naden, 2017, « La montée en puissance de la "responsabilité sociétale" », ISO Focus (juillet).
15. ISO, 2016, *Impact study of the SR MENA project*.
16. Néanmoins, plusieurs organismes nationaux de normalisation ont élaboré des normes certifiables pour leurs juridictions respectives, notamment le Danemark et les Pays-Bas.
17. ISO, 2010, *Découvrir ISO 26000*.
18. OCDE, 2011, *Principes directeurs de l'OCDE à l'intention des entreprises multinationales*.
19. Haut-Commissariat aux droits de l'homme, 2011, *Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme*, « Mise en œuvre du cadre de référence "protéger, respecter et réparer" des Nations Unies ». Ils sont connus officieusement sous le nom de « Principes Ruggie », du nom de leur auteur, John Ruggie.
20. John Ruggie, 2011, « Présentation du rapport au Conseil des droits de l'homme des Nations Unies » (Genève, 30 mai).
21. Nations Unies, op. cit., p. 8.
22. R. A. Kagan, N. Gunningham et D. Thornton, 2012, « Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects », dans C. Parker et V. L. Nielsen (éd.), *Explaining Compliance: Business Responses to Regulation*, Edward Elgar.

6. CONCLUSIONS

6.1 UNE PROTECTION SOLIDE DES CONSOMMATEURS EST-ELLE DANS L'INTÉRÊT DES ENTREPRISES ?

Une question centrale pour toutes les entreprises est de savoir si le fait d'appliquer une politique solide de protection des consommateurs se traduit par de meilleurs résultats économiques ? En 2010, l'Office of Fair Trading britannique a commandé une enquête auprès d'entreprises établies au Royaume-Uni. Elle a permis de constater que 61 % des entreprises (probablement les grandes entreprises) considéraient que l'application de la loi sur la protection des consommateurs était bénéfique sur le plan de l'organisation, les avantages le plus souvent cités étant la création de règles du jeu équitables et l'impact positif sur les clients (les clients sont plus nombreux à être satisfaits et ont davantage confiance dans le secteur)[47]. Ces enquêtes de l'Office of Fair Trading ont mis en évidence l'importance qu'attachent les consommateurs à la réputation des entreprises et l'influence de la concurrence, qui peut être un moteur pour le respect des règles. Aucune entreprise ne souhaite voir ses concurrents réussir en bâclant le travail pour obtenir un avantage déloyal.

Les mécanismes d'application risquent de se recouper si les lois sectorielles et génériques de protection des consommateurs se chevauchent. À l'évidence, il n'est pas souhaitable que les mécanismes d'inspection soient déclenchés par deux services d'inspection distincts couvrant la même entreprise. À titre d'exemple, en cas de plaintes concernant une entreprise de télécommunications, il serait peu judicieux que des enquêtes indépendantes soient diligentées par l'agence de protection des consommateurs et l'organisme de régulation des télécommunications. L'efficacité commanderait de disposer d'un processus unique impliquant les deux agences ou de déléguer les pouvoirs de l'une à l'autre. La coordination sera indispensable si l'on veut éviter les inspections redondantes qui desservent à la fois le consommateur et les entreprises et jettent le discrédit sur les processus d'inspection de l'État. Pour que la protection des consommateurs puisse être considérée comme « forte », elle doit être efficace en termes de résultats, et aller bien audelà d'une simple assertion.

La contre-productivité d'un recours massif aux sanctions pénales, liée aux normes de preuve élevées exigées par ces procédures, a soulevé des préoccupations. Cependant, comme le reconnaît Hodges, lorsque des individus enfreignent les règles ou se comportent de façon immorale, les citoyens s'attendent à une réaction proportionnée[48]. Le châtiment (la sanction) est un aspect de la réglementation, mais en aucun cas le seul. On pourrait soutenir que le meilleur moyen de dissuasion est celui qui n'est pas utilisé parce qu'il n'a pas été jugé nécessaire.

6.2 LES ENTREPRISES PEUVENT-ELLES RÉUSSIR EN FAISANT LE BIEN ?

Certains commentateurs sont d'avis que l'expression « éthique des entreprises », telle qu'illustrée par leur responsabilité sociale, est une contradiction dans les termes. Si certains considèrent l'éthique des entreprises et la RSE comme des formes de relations publiques[49], d'autres – dont le plus célèbre est peut-être le regretté économiste Milton Friedman – y voient un détournement des objectifs de l'entreprise. Le principe énoncé par l'Union européenne, en l'occurrence une responsabilité sociale des entreprises allant bien au-delà des obligations légales, permet de se prémunir contre certains pièges potentiels. Cet aspect est d'une importance particulière dans le contexte des consommateurs, car la protection des consommateurs est déjà soumise à de larges obligations juridiques.

Existe-t-il une réponse à la question primordiale de savoir si les entreprises peuvent réussir en faisant le bien ? Une abondante littérature a été produite à ce sujet, mais la synthèse n'en a été faite que récemment. Une analyse documentaire de 167 études, menée par la Harvard Business School et les universités de Californie et du Michigan a permis de conclure qu'après trente-cinq ans de recherche, la majorité des preuves scientifiques laissent entrevoir une relation légèrement positive entre la performance sociale de l'entreprise et sa performance financière, mais ne suggèrent en aucun cas que l'investissement social de l'entreprise diminue systématiquement sa valeur actionnariale[50].

Cela conforte notre espoir de voir les entreprises adopter certaines des suggestions formulées dans le présent volume.

stricte découlant d'un produit », avec un accent moindre placé sur la connaissance préalable, réelle ou potentielle, des défauts du produit de la part du fournisseur. Plus simplement, le code de la consommation brésilien évoque l'abandon, dans la théorie contractuelle, du « principe de culpabilité »[46]. La « responsabilité stricte » renvoie à la responsabilité d'une ou de l'ensemble des parties tout au long de la chaîne de fabrication. Une partie sera juridiquement responsable des dommages occasionnés, sans égard pour sa culpabilité et sans qu'il soit nécessaire de prouver une faute, une négligence ou une intention. Le but est de canaliser la responsabilité vers la partie la mieux placée pour contrôler le produit et endosser le risque encouru. Dans le contexte d'une responsabilité conjointe et solidaire, ce risque est partagé en amont du consommateur dans les conditions normales d'utilisation du produit.

Dans les législations du Moyen-Orient et d'Afrique du Nord, les clauses de responsabilité du fait du produit sont relativement à jour, dans le sens où elles établissent une responsabilité conjointe et solidaire tout au long de la chaîne de production. Cependant, l'ampleur de l'intégration de l'évolution envisagée par l'exemple brésilien, en l'occurrence l'abandon du « principe de culpabilité », est très variable. À titre d'exemple, dans la loi jordanienne de 2017 sur la protection du consommateur, la référence de l'article 20 à la causalité et la connaissance d'un défaut de la part du fournisseur fait porter au consommateur la charge de la preuve. Il y est affirmé que la responsabilité peut être conjointe entre les divers fournisseurs à l'origine du défaut d'un bien ou d'un service ou en ayant eu connaissance. À l'inverse, la loi algérienne relative à la protection du consommateur et à la répression des fraudes impose simplement l'obligation de mettre sur le marché des produits sûrs dans des conditions normales d'utilisation ou conformes aux normes – la question de la connaissance préalable en tant que critère de responsabilité n'est pas abordée. Le chapitre 5 de la loi marocaine n° 24-09 relative à la sécurité des produits et des services énonce l'obligation générale de commercialiser des produits ou services sûrs, sachant que la responsabilité du producteur peut toujours être engagée, même si le produit est jugé conforme aux normes requises.

Comme l'harmonisation des normes des produits évolue et que la discussion juridique reste ouverte, la nécessité d'un cadre général de protection fera de plus en plus l'objet de débat, un débat déjà complexe en soi et de plus influencé par le développement de l'Internet des objets. Les entreprises seraient avisées de prendre elles-mêmes des initiatives directes.

Recommandation 13 : Conscientes de la difficulté d'élaborer des normes de sécurité et une politique de responsabilité pour tous les biens et services – et en l'absence de normes de produits complètes – les entreprises pourraient unilatéralement adopter des normes internationales pertinentes pour les biens et services, comme celles de l'ISO, de la Commission électrotechnique internationale ou celles énumérées dans les encadrés 3 et 4, et mettre au point des méthodes d'évaluation des risques.

Dans l'intervalle, les entreprises doivent continuer de faire preuve d'une diligence raisonnable, aidées en cela par l'accès à des systèmes d'alerte internationaux, tels que RAPEX de l'Union européenne et le Portail mondial de rappel de produits de l'OCDE, qui renforcent les échanges d'informations entre juridictions et aident les régulateurs et les entreprises à prendre des mesures correctives. Entreprises et consommateurs peuvent recourir au portail de l'OCDE pour vérifier si les produits qu'ils ont l'intention d'acheter ou de distribuer soulèvent des préoccupations en matière de sécurité. Cette démarche est particulièrement utile dans le contexte des achats en ligne transfrontaliers.

Recommandation 14 : Les entreprises ont possibilité d'améliorer le suivi des risques émergents à l'échelon mondial, ce qui leur permettra de réagir rapidement pour résoudre les problèmes.

d'intenter une action contre l'émetteur de la carte et contre le commerçant sur Internet. Dans ce contexte, si par exemple les produits achetés ne sont pas livrés, une demande de remboursement du montant total peut, en l'absence de réponse du commerçant sur Internet, être déposée auprès de l'émetteur de la carte. Lorsque cette mesure a été adoptée en vertu de la législation sur le crédit à la consommation dans les années 1970 et 1980, elle a rencontré une vive opposition. Les achats transfrontaliers étant de plus en plus fréquents, elle est désormais considérée comme un atout commercial. En clair, elle est perçue comme une incitation du consommateur à utiliser sa carte de crédit.

La limitation de la responsabilité du consommateur par des plates-formes tierces a également constitué un avantage commercial majeur pour les opérateurs proposant ce service. C'est le cas de la société Alibaba en Chine, qui a développé *Alipay* en tant que système de dépôt fiduciaire où la somme payée par le consommateur n'est versée au fournisseur qu'après livraison satisfaisante des biens et services. Le système de dépôt fiduciaire d'Alipay est généralement considéré comme un facteur clef à l'origine de l'expansion rapide d'Alibaba.

Le paragraphe 41 des *Recommandations de l'OCDE* entérine la limitation de la responsabilité des consommateurs en cas d'atteinte à la sécurité. Il est précisé que « les gouvernements et les parties prenantes devraient œuvrer ensemble au développement de niveaux minimums de protection des consommateurs dans le cadre des paiements associés au commerce électronique, quel que soit le mécanisme utilisé. Cette protection devrait être assurée notamment au travers de limitations de la responsabilité du consommateur, fixées par la réglementation ou à l'initiative des professionnels, en cas de débit non autorisé ou frauduleux, ainsi que par des mécanismes de remboursement lorsqu'il y a lieu ». Comme exemple pratique des mesures envisagées, la directive de l'Union européenne sur les services de paiement réduit la responsabilité du consommateur, pour les paiements non autorisés, à 50 euros, alors que le seuil précédent était de 150 euros[42]. La directive renforce également les mesures de sécurité qui doivent être appliquées à tous les paiements électroniques. En particulier, l'utilisation d'un système solide d'authentification des clients est un impératif[43].

Les *Recommandations de l'OCDE* élargissent le champ d'application de la garantie au-delà du remboursement. Au paragraphe 41, il y est dit que « le développement d'autres modalités de paiement susceptibles d'accroître la confiance du consommateur à l'égard du commerce électronique, comme le dépôt fiduciaire, devrait par ailleurs être encouragé ». La référence au « dépôt fiduciaire » est importante dans le contexte de l'expérience chinoise susmentionnée, même si ce mécanisme est également en vigueur dans d'autres états, dont l'Argentine et la Californie[44].

Recommandation 12 : La limitation de la responsabilité du consommateur, suggérée par l'OCDE dans ses Recommandations régissant la protection des consommateurs dans le contexte du commerce électronique et avalisée dans les Principes directeurs des Nations Unies pour la protection du consommateur, constitue un moyen relativement simple de renforcer la confiance des consommateurs dans le commerce électronique. Perçue au départ comme une contrainte, cette mesure pourrait s'avérer en fait un atout commercial. En acceptant d'endosser leur responsabilité, les entreprises enverraient un signal de confiance aux consommateurs, et seraient par ailleurs fortement motivées pour optimiser la sécurité.

Responsabilité « traditionnelle » du fait des produits : Dans les transactions électroniques, les *Recommandations de l'OCDE* limitent la responsabilité du consommateur. En revanche, dans le cas des produits traditionnels, c'est la responsabilité du producteur qui a été limitée dans le passé par des exceptions telles que le « risque de développement », selon lequel – pour des produits en cours de développement – il serait déraisonnable de supposer que le fabricant est en mesure d'envisager toutes les difficultés potentielles susceptibles de survenir lors de l'utilisation. De telles exceptions ont amené certains juristes experts à considérer que le droit de la responsabilité civile délictuelle a depuis longtemps cessé d'être pertinent pour l'établissement ou l'amélioration des niveaux de surveillance ou de performance[45].

Alors que l'harmonisation des normes de produits s'est accélérée dans le monde entier, notamment dans l'Union européenne dans le contexte de l'intégration des marchés, certains experts ont exprimé la crainte qu'elle n'entraîne un nivellement des normes par le bas. Au sein de l'UE, cette question a conduit à une évolution vers une « responsabilité civile

L'encadré 4 s'inspire de la mise en œuvre des normes ISO dans la région du Moyen-Orient et de l'Afrique du Nord.

Observation 2 : Les entreprises ont toujours la possibilité d'adopter volontairement des normes. Cette démarche est particulièrement pertinente lorsque la législation n'est pas encore en phase avec l'évolution technologique.

Ces exemples démontrent les avantages mutuels que les consommateurs et les professionnels sont susceptibles de tirer de l'engagement volontaire des entreprises. L'adoption de normes peut être un atout sur le marché – nous l'évoquerons lors de la discussion finale à propos de la politique de responsabilité.

5.2 POLITIQUE DE RESPONSABILITÉ

La responsabilité du fait des produits évolue rapidement, à mesure qu'augmente l'attention portée aux services et aux « produits intangibles », tels que ceux transmis via Internet. Par ailleurs, un nouvel aspect est apparu avec « l'Internet des objets ». Cette expression renvoie au fonctionnement de produits manufacturés pilotés par Internet – le plus souvent à distance. Il est difficile pour les législateurs de suivre cette évolution, pour des raisons techniques d'une part mais aussi juridiques, les logiciels informatiques étant soumis aux lois sur la propriété intellectuelle alors que d'autres biens et services sont régis par la législation de protection des consommateurs.

Pour Maria Lazarte, experte de l'ISO, le manque de sensibilisation des producteurs aux attentes des consommateurs pose notamment des problèmes de respect de la vie privée. Elle note à cet égard que le fond du problème réside dans le fait que, dès le départ, la plupart des équipements utilisés au quotidien sont commercialisés sans que les questions de confidentialité ou de protection des données n'aient été prises en compte[40]. La protection de la vie privée devient rapidement un problème de sécurité, étant donné le risque de piratage des données financières des consommateurs. En dépit de la croissance spectaculaire du commerce électronique, il est clair que ce secteur reste freiné par les craintes des consommateurs en matière de sécurité – notamment à l'occasion des transactions transfrontalières. Il appartient aux entreprises de répondre à ces préoccupations en amont de la chaîne de production et elles en ont les moyens.

Pour les biens et services fournis par des sociétés multinationales – ou lorsque des platesformes internationales tierces sont utilisées pour les transactions, même sans législation – les entreprises peuvent bénéficier d'avantages commerciaux de deux façons : en prenant en compte le respect de la vie privée dès la conception, comme suggéré plus haut, et en s'engageant publiquement à respecter des normes de conduite renforcées par certains codes déontologiques partout où elles opèrent. La politique de responsabilité peut s'intégrer dans cette dernière approche, lorsque la législation n'est pas adéquate.

Responsabilité limitée des consommateurs dans le contexte du commerce électronique : La référence croisée du paragraphe 65 des *Principes directeurs des Nations Unies pour la protection du consommateur* aux *Recommandations de l'OCDE régissant la protection des consommateurs dans le contexte du commerce électronique* est d'une importance toute particulière. Les *Recommandations de l'OCDE* ont été révisées en 2016, trois mois seulement après la révision des *Principes directeurs des Nations Unies*[41]. Elles abordent les questions clefs de sécurité et de responsabilité en cas d'infraction. Le paragraphe 49 des *Recommandations de l'OCDE* impose aux entreprises de « gérer le risque de sécurité numérique et mettre en œuvre des mesures de sécurité propres à en réduire ou en atténuer les effets préjudiciables en ce qui concerne la participation des consommateurs au commerce électronique ». Au paragraphe 40 de la section E « Paiement », les entreprises sont appelées à « appliquer des mesures de sécurité proportionnées aux risques liés au paiement, notamment à ceux résultant d'un accès non autorisé aux données personnelles ou d'une utilisation abusive de celles-ci, d'une fraude et d'une usurpation d'identité. Au paragraphe 41, les gouvernements sont invités à travailler avec les parties prenantes, y compris, mais pas seulement, les entreprises pour « œuvrer ensemble au développement de niveaux minimums de protection des consommateurs dans le cadre des paiements associés au commerce électronique, quel que soit le mécanisme utilisé ». Ce dernier point est significatif eu égard à la diversification croissante des moyens de paiement en matière de commerce électronique, par exemple les paiements mobiles.

L'importance de la responsabilité est démontrée par l'historique du concept de « remboursement » – aujourd'hui largement répandu en Europe et en Amérique du Nord – qui permet à un consommateur

ISO 14044:2006. Analyse du cycle de vie : spécifie les exigences et fournit des lignes directrices pour l'évaluation du cycle de vie ;

ISO 14067. Empreinte carbone des produits, 2013. Gaz à effet de serre et empreinte carbone des produits. Spécifie les principes, exigences et lignes directrices relatifs à la quantification et à la communication de l'empreinte carbone d'un produit ;

ISO 14046. Empreinte eau, 2014. Management environnemental – Empreinte eau – Principes, exigences et lignes directrices.

Principes directeurs, paragraphe 5 j). Octroi aux consommateurs recourant au commerce électronique d'une protection aussi efficace que dans les autres formes de commerce ;

La famille des normes **ISO/IEC 27000** aide les organisations à assurer la sécurité de leurs informations, notamment les données financières, les documents soumis à la propriété intellectuelle ;

ISO/IEC 27001:2013. Technologies de l'information – Techniques de sécurité – Systèmes de management de la sécurité de l'information – Exigences.

Principes directeurs, paragraphe 5 k). Protection de la vie privée des consommateurs et libre circulation de l'information à l'échelon mondial ;

ISO 27002:2013. Technologies de l'information – Techniques de sécurité – Code de bonne pratique pour le management de la sécurité de l'information

** Ne s'applique pas aux différends renvoyés pour règlement à l'extérieur de l'organisation.*
Source : CNUCED, ISO 2017.

Encadré 4
Exemples de normes ISO dans la région du Moyen-Orient et de l'Afrique du Nord

En Égypte, la société Juhayna Food Industries a réalisé un gain d'efficacité en matière de fabrication de près de 70 % entre 2008 et 2012, grâce à l'adoption de normes ISO. Le chiffre d'affaires annuel moyen a augmenté de 3,3 % – un résultat largement attribuable à la mise en œuvre des normes. Les normes internationales utilisées ont été les suivantes : *ISO 9001 Management de la qualité –Exigences ; ISO 14001 Management environnemental – Exigences et lignes directrices ; et ISO 22000 Systèmes de management de la sécurité des denrées alimentaires – Exigences pour tout organisme appartenant à la chaîne alimentaire. L*es consommateurs ont profité directement d'une diminution des délais de livraison, avec pour conséquence une réduction des risques de rupture de stock et de détérioration des produits en transit. La quantité de produits non conformes sur le marché a également diminué. À l'évidence, des améliorations d'une telle ampleur offrent aux consommateurs et aux producteurs de nombreux avantages – une situation « gagnant-gagnant » classique. Des bénéfices peuvent découler de la réduction des coûts, de l'amélioration des techniques de commercialisation, de l'entrée sur les marchés d'exportation et de la mise au point de nouveaux produits.

En Jordanie, la société Petra Engineering produit des systèmes de climatisation, de ventilation et de chauffage. Elle exporte vers de nombreux pays du Moyen-Orient et aux États-Unis. L'application des normes génériques des séries ISO 9000 et 14000 – ainsi que des directives sectorielles de l'Union européenne – a permis de dégager des avantages représentant 4,2 % du chiffre d'affaires annuel. Les économies les plus importantes sont réalisées grâce à l'achat auprès de fournisseurs certifiés, ce qui a diminué le besoin d'inspection. Une certification peut ainsi en faciliter d'autres.

Source : ISO, 2012, « Economic Benefits of Standards ; International Case Studies » vol. 2.

ISO 14452. Facturation de services en réseau, 2009 :

Couvre l'eau, l'énergie, les réseaux de télécommunications et inclut la fourniture sans compteur.

Principes directeurs, paragraphe 5 c). Protection des consommateurs contre les risques pour leur santé et leur sécurité ;

ISO 22000. Famille de normes internationales de management de la sécurité des denrées alimentaires :

L'objectif global du suivi de lignes directrices cohérentes au niveau international est de produire des produits de consommation plus sûrs et, par conséquent :

a) De réduire les risques en matière de sécurité des produits pour les consommateurs ;

b) De réduire pour les fournisseurs les risques de rappels de produits ;

c) De fournir aux consommateurs l'information dont ils ont besoin pour faire des choix éclairés en ce qui a trait à l'utilisation et à l'élimination sans danger des produits de consommation ;

d) D'aider les gouvernements en améliorant la sécurité des produits de consommation.

ISO 22000:2005. Principes généraux et exigences fondamentales s'appliquant à la conception du système et à sa mise en œuvre pour toute entreprise de la chaîne alimentaire pour :

- Planifier, mettre en œuvre, exploiter, maintenir et mettre à jour un système de gestion de la salubrité des aliments ;
- Démontrer le respect des exigences légales et réglementaires applicables en matière de salubrité des aliments ;
- Évaluer les exigences des clients et démontrer la conformité avec celles qui ont trait à la salubrité des aliments ;
- Informer efficacement leurs fournisseurs, les clients et les parties intéressées de la chaîne alimentaire des questions de salubrité des aliments ;
- Démontrer la conformité aux parties intéressées concernées.

ISO 22005:2007. Traçabilité de la chaîne alimentaire – Principes généraux et exigences fondamentales s'appliquant à la conception du système et à sa mise en œuvre ;

ISO 10377:2013. Sécurité des produits de consommation – Lignes directrices pour les fournisseurs :

La norme décrit comment :

- Identifier, apprécier et réduire ou éliminer les phénomènes dangereux ;
- Gérer les risques en les réduisant à un niveau tolérable ;
- Fournir aux consommateurs les instructions ou avertissements en matière de phénomènes dangereux et risques, essentiels à l'utilisation et à l'élimination des produits de consommation en toute sécurité.

Principes directeurs, paragraphe 5 g). Moyens effectifs de règlement des litiges et de réparation ;

ISO 10002:2014. Management de la qualité – Satisfaction des clients – Lignes directrices pour le traitement des réclamations dans les organismes* :

- Amélioration de la satisfaction du client en créant un environnement orienté client qui est ouvert aux retours d'informations des clients (y compris aux réclamations), en s'engageant à les résoudre tout en renforçant la capacité de l'organisme à améliorer ses produits et son service client ;
- Reconnaissance et prise en compte des besoins et des attentes des réclamants ;
- Mise à disposition des réclamants d'un processus de traitement des réclamations ouvert, efficace et simple d'emploi ;
- Analyse et évaluation des réclamations visant à améliorer la qualité du produit et du service au client.

Principes directeurs, paragraphe 5 i). Promotion de modes de consommation durables ;

ISO 14000 Famille de normes de management environnemental :

Cette série comprend des guides pratiques permettant aux PME de satisfaire aux exigences légales et autres ;

5. CONSEILS À L'INTENTION DES ENTREPRISES : AU-DELÀ DU RESPECT DES NORMES ?

Les débats sur la politique de protection des consommateurs négligent parfois la capacité des entreprises à prendre elles-mêmes des mesures et à améliorer les règles, indépendamment de l'obligation de se conformer aux normes. Les sociétés privées et les entreprises publiques telles que les services publics se tournent vers des normes internationalement reconnues, pour les avantages substantiels qu'elles procurent mais aussi pour l'image publique positive qui découle de leur adoption. Les normes de produits sont largement mentionnées – sans qu'il soit nécessaire de les énumérer toutes en détail – dans la législation couvrant la région du Moyen-Orient et de l'Afrique du Nord. Il s'agit généralement de normes contraignantes à caractère légal, accompagnées de sanctions judiciaires en cas de non-respect. Dans certains cas, il y est fait référence dans la loi sur la protection du consommateur proprement dite, tandis que dans d'autres, elles font l'objet d'une loi distincte – comme en Algérie, en Jordanie et dans l'État de Palestine, ce dernier renvoyant fréquemment à la loi sur la protection du consommateur. Tous les pays évoquent des normes dans leur législation, mais pas nécessairement des normes internationales.

Une référence spécifique aux normes internationales n'est pas une exigence et les États peuvent décider de les incorporer en tout ou partie dans leurs règles nationales. L'appartenance de tous les pays de la région à l'ISO par l'intermédiaire de leurs organismes nationaux de normalisation, et les pressions commerciales qui pèsent sur eux du fait des entrées et sorties des flux d'échanges permettent de les sensibiliser aux normes internationales. Le choix de la meilleure façon de procéder pour ce faire sera fonction du développement des normes dans chaque juridiction. Si les entreprises jugent avantageux de respecter une norme et de s'en prévaloir publiquement, elles y trouveront d'autant plus d'intérêt qu'elles peuvent les adopter unilatéralement.

5.1 NORMES INTERNATIONALES ET PRINCIPES DIRECTEURS DES NATIONS UNIES POUR LA PROTECTION DU CONSOMMATEUR

L'encadré 3 ci-dessous détaille le fonctionnement des normes ISO, dont certaines traitent de points couverts également par les *Principes directeurs des Nations Unies pour la protection du consommateur*. Un accent particulier est placé sur le principe directeur 5, le plus cité des « besoins légitimes » des consommateurs, dans le but de faire prendre conscience au lecteur de la pertinence des normes. Bon nombre d'entre elles ont été élaborées avec la participation de représentants des consommateurs, par l'intermédiaire de Consumers International (fédération mondiale des associations de protection des consommateurs) et souvent avec l'appui du Comité pour la politique en matière de consommation (COPOLCO) de l'ISO.

Encadré 3
Normes ISO et « besoins légitimes » des Principes directeurs des Nations Unies pour la protection du consommateur

Les besoins légitimes que les Principes directeurs des Nations Unies pour la protection du consommateur sont censés satisfaire sont les suivants :

Principes directeurs, paragraphe 5 a). Accès des consommateurs aux biens et services essentiels ; et **paragraphe 5 b).** Protection des consommateurs vulnérables et défavorisés ;

ISO 24510:2007, réaffirmées en 2013. Activités relatives aux services de l'eau potable et de l'assainissement – Lignes directrices pour l'évaluation et l'amélioration du service aux usagers :

- Lignes directrices visant à répondre aux besoins et aux attentes des usagers ;
- Critères d'évaluation du service aux usagers ;

ISO 50007. Services énergétiques – Lignes directrices pour l'évaluation et l'amélioration du service énergétique aux utilisateurs, 2017 :

- Lignes directrices visant à répondre aux besoins et aux attentes des usagers ;
- Critères d'évaluation du service énergétique aux usagers ;