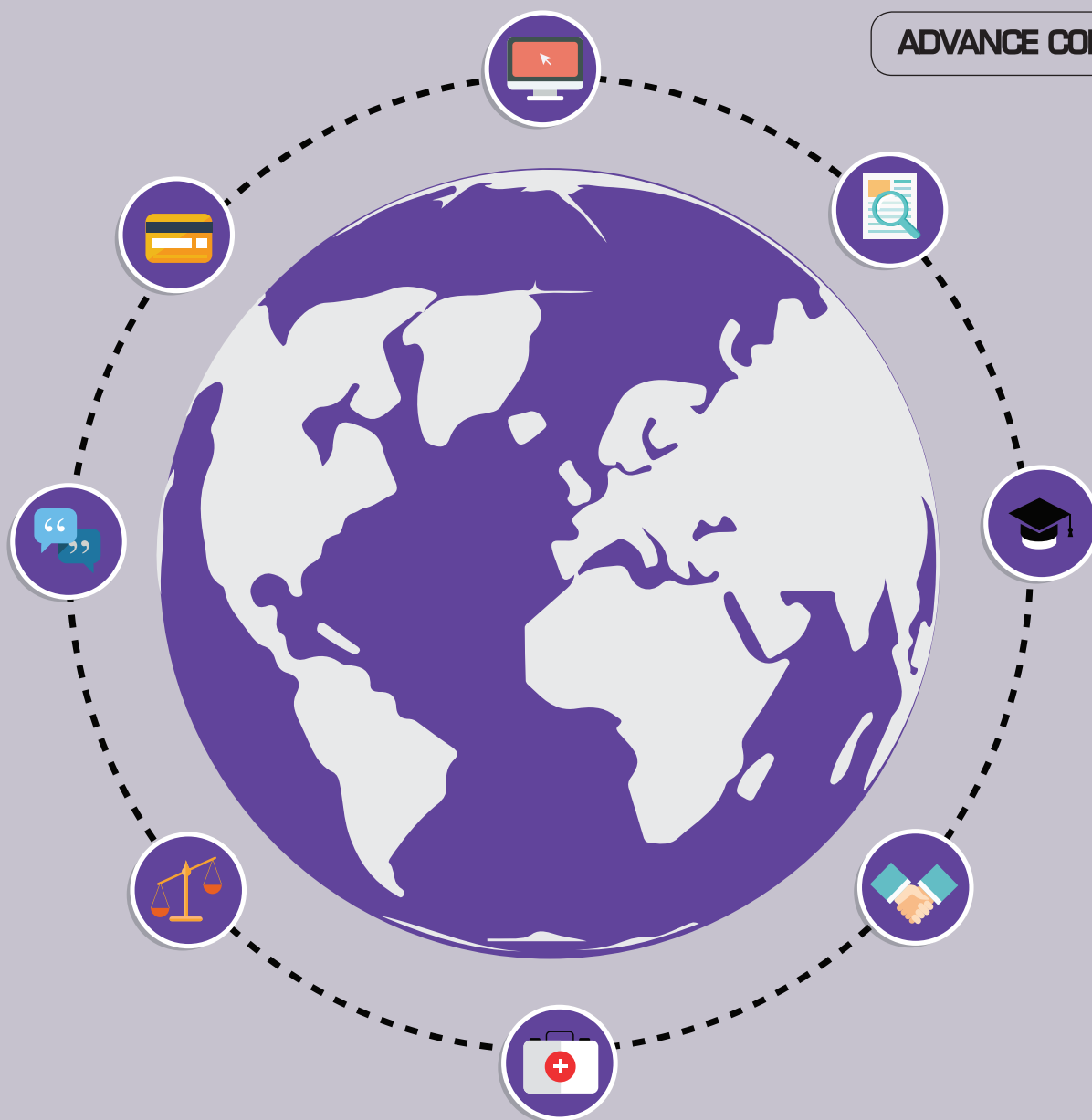


Manual on Consumer Protection

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DEVELOPMENT

UNCTAD

MANUAL ON CONSUMER PROTECTION

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This publication is an advance copy of the
Manual on Consumer Protection.

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Contents

NOTE	ii
ACKNOWLEDGEMENTS	iii
LIST OF ABBREVIATIONS	ix
PART I: A CONSUMER PROTECTION SYSTEM	1
Chapter 1 Consumer Protection - An Overview	2
1.1 The rationale for consumer protection	2
1.2 Who is the consumer and what is consumer interest?	6
1.3 Who is responsible for consumer protection?	7
1.4 A framework for consumer protection	8
1.5 Conclusion	10
Chapter 2 The United Nations Guidelines for Consumer Protection	11
2.1. International instruments and consumer protection	11
2.2 The United Nations Guidelines for Consumer Protection	11
2.2.1 Objectives, scope of application and general principles	12
2.2.2 Principles for good business practices	13
2.2.3 Guidelines	13
2.2.3 International cooperation	16
2.2.4 International institutional machinery	16
2.3 Conclusion	17
Chapter 3 Consumer Law	19
3.1 Consumer law in the United Nations Guidelines for Consumer Protection	19
3.2 Constitutional provisions on consumer protection	19
3.3 Framework consumer protection laws	20
3.4 Interface between consumer laws and other laws	23
3.4.1 Sectoral laws	23
3.4.2 Professional service legislation	23
3.4.3 Intellectual property	23
3.4.4 International trade law	24
3.5 Conclusion	25
Chapter 4 Consumer Protection Agencies	26
4.1 Consumer protection agencies in the United Nations Guidelines for Consumer Protection	26
4.2 Functions of consumer protection agencies	26
4.3 Organizational models for consumer protection agencies	27
4.3.1 Examples of Government agencies within ministries	27
4.3.2 Consultation mechanisms	28
4.3.3 Operational autonomy	29
4.3.4 The link with competition	29
4.3.5 Non-statutory public bodies	31
4.4 The changing scope of consumer protection	31
4.5 Conclusion	32

Chapter 5 Consumer Associations	33
5.1 Consumer associations in the United Nations Guidelines for Consumer Protection	33
5.2 Consumer associations in the modern economy	33
5.3 The functions of consumer associations	35
5.4 Consumer associations' independence	36
5.5 Consumer associations – are they representative?	36
5.6 Conclusion	38
Chapter 6 Business conduct	39
6.1 Business conduct in the United Nations Guidelines for Consumer Protection	39
6.2 Corporate social responsibility	41
6.2.1 European Union definitions of corporate social responsibility	41
6.2.2 ISO 26000 Guidance on corporate social responsibility	41
6.2.3 OECD Guidelines for multi-national enterprises	42
6.2.4 Is corporate social responsibility making progress?	43
6.2.5 Is it possible to do well by doing good?	44
6.3 Self-regulation	44
6.3.1 Cross-border codes	46
6.3.2 Criteria for self-regulation	46
6.4 Does collaboration work?	48
6.5 Conclusion	48
Chapter 7 Competition Law and the Consumer interest	50
7.1 Competition in the United Nations Guidelines for Consumer Protection	50
7.2 Nature and characteristics of competition law and policy	50
7.3 Concepts of competition law	51
7.3.1 Abuse of dominance	52
7.3.2 Cartels and collusive behaviour	53
7.3.3 Mergers and acquisitions	55
7.4 Institutional architecture for competition	55
7.5 A challenge for competition policy coherence: consumer resistance to switching	57
7.6 Conclusion	58
Chapter 8 International Cooperation	59
8.1 International cooperation in the United Nations Guidelines for Consumer Protection	59
8.2 Applicable law and jurisdiction	60
8.3 Practical international cooperation	62
8.4 International institutional machinery	63
8.5 Conclusion	64
PART II: CONSUMER PROTECTION IN THE MARKETPLACE	65
Chapter 9 Product Safety and Liability	66
9.1 Product safety in the United Nations Guidelines for Consumer Protection	67
9.2 Product Safety Laws	67
9.2.1 The rationale for product safety laws	67
9.2.2 Components of a comprehensive product safety policy	67

9.3 Product Liability	70
9.3.1 Contractual liability	70
9.3.2 Tortious liability	71
9.3.3 Strict liability	71
9.3.4 Rationale for strict liability	71
9.3.5 What is a defect?	72
9.3.6 Standards for determining defectiveness	73
9.3.7 Defences against product liability	74
9.4 Services as dangerous products	76
9.5 Product safety in international law and policy	76
9.6 Second hand goods	77
9.7 Conclusion	78
Chapter 10 Consumer Information and Education	79
10.1 Concepts of consumer information and education	79
10.2 Consumer information and education in the United Nations Guidelines for Consumer Protection	79
10.3 The transfer of risk	80
10.4 Consumer information	80
10.5 Critical issues with respect to labelling	82
10.5.1 Mandatory labelling	82
10.5.2 Voluntary labelling	82
10.5.3 Product information criteria	83
10.6 Critical issues with respect to advertising	84
10.7 Implementation of consumer education	86
10.8 Conclusion	89
Chapter 11 Consumer Dispute Resolution and Redress	91
11.1 Consumer dispute resolution and redress in the United Nations Guidelines for Consumer Protection	91
11.2 The need for consumer dispute resolution and redress	91
11.3 Pathways for delivering consumer redress	92
11.3.1 Courts	92
11.3.2 Collective redress	92
11.3.3 Public regulatory and enforcement action	93
11.3.4 Alternative dispute resolution	93
11.3.5 Ombudsmen	94
11.3.6 Business customer care and complaint functions	95
11.3.7 Online dispute resolution	95
11.4 Criteria for assessing consumer redress systems	96
11.5 Conclusion	97
Chapter 12 Electronic Commerce	98
12.1 Electronic commerce in the United Nations Guidelines on Consumer Protection	98
12.2 The scope and extent of e-commerce	98
12.3 Consumer trust in the digital market	102
12.4 Guidelines from the Organization for Economic Cooperation and Development	103
12.4.1 Applicable law for cross-border redress	103
12.4.2 Identification of the provider	103
12.4.3 Authentication of the consumer	104
12.4.4 Privacy issues	104

12.4.5 Security issues	104
12.4.6 Electronic contracting	105
12.4.7 Other issues	105
12.5 Other international guidelines for the regulation of e-commerce	105
12.5.1 The United Nations Commission on International Trade Law	106
12.5.2 UNCTAD's e-commerce and law reform project	106
12.6 Conclusion	106
Chapter 13 Privacy and Data Protection	109
13.1 Privacy in the United Nations Guidelines for Consumer Protection	109
13.2 Is privacy a right?	109
13.3 Understanding the data dimension from a consumer perspective	110
13.4 Regulating the digital age	111
13.5 International regulation	112
13.6 Can technology respond to the challenges that technology creates?	114
13.7 Conclusion	117
PART III: CONSUMER PROTECTION AND BASIC GOODS AND SERVICES	118
Chapter 14 Financial Services	119
14.1 Financial services in the United Nations Guidelines for Consumer Protection	119
14.2 Function and forms of consumer credit	120
14.2.1 The poor pay more	122
14.2.2 Common forms of consumer credit	122
14.3 Function and forms of insurance	123
14.4 Areas of regulation for financial services and prospects for reform	125
14.4.1 Cooling off periods: a success to be built upon	125
14.4.2 Contract terms, transparency and comprehensibility	126
14.4.3 Transparency and remittances	127
14.4.4 Control of advertising	127
14.4.5 Prescribed limits on interest rates?	128
14.4.6 Payday lending	128
14.4.7 Regulation of credit-related insurance	129
14.5 Emerging issues	129
14.5.1 Remuneration structures and conflicts of interest	129
14.5.2 Responsible lending	130
14.5.3 Treatment of over indebtedness	131
14.5.4 Institutional structure: agency for regulation and enforcement	131
14.6 Conclusion	132
Chapter 15 Consumer Protection in the Provision of Utilities	133
15.1 Public utilities in the United Nations Guidelines for Consumer Protection	133
15.2 The nature of utilities provision	133
15.3 Regulation	134
15.4 Ownership	135
15.5 The performance of public utilities	136
15.6 Pricing and subsidies	137
15.6.1 Tariff-based measures	138
15.6.2 Means tested assistance	139
15.7 Access at the MDG/SDG interface	139
15.8 Safeguarding the consumer interest	140

15.9 Introducing competition in utility services	141
15.9.1 Retail competition	141
15.9.2 Exclusivity	142
15.10 Conclusion	142
Chapter 16 Food for All	143
16.1 The right to food	143
16.2 Food in the United Nations Guidelines for Consumer Protection	143
16.3 Malnutrition and food security	143
16.3.1 Hunger facts	143
16.3.2 Obesity as malnutrition	144
16.3.3 Realising food security	144
16.4 Consumer concerns with food safety	145
16.5 Food standards mechanisms	146
16.6 Consumer concerns with genetic engineering	146
16.7 Food legislation	147
16.8 Conclusion	148
Chapter 17 Consumer Protection in the Health Care Delivery	149
17.1 Health care delivery in the United Nations Guidelines for Consumer Protection	149
17.2 Health as a basic human right	149
17.3 Public health context	150
17.4 Health care financing	151
17.5 Essential medicines	151
17.5.1 Access to medicines	151
17.5.2 Drug prices and intellectual property	152
17.5.3 Rational drug use	153
17.5.4 Adverse Drug Reaction (ADR) monitoring system	153
17.6 Patient rights	154
17.7 Criteria for assessing health care delivery	154
17.7.1 Comprehensibility	154
17.7.2 Consumer participation and control	154
17.7.3 Eligibility	154
17.7.4 Comprehensiveness and continuity of services	155
17.7.5 Accessibility and availability of services	155
17.7.6 Quality control	155
17.8 Health and consumption	155
17.8.1 Non-communicable diseases	155
17.8.2 Antibiotic resistance	156
17.9 Conclusion	157
Chapter 18 Sustainable Consumption	158
18.1 The concept of sustainable consumption	158
18.2 Sustainable consumption in the United Nations Guidelines for Consumer Protection	158
18.3 The implementation by Governments	159
18.4 The contribution of businesses	159
18.5 The responsibilities of consumers	161
18.6 Future generations	162
18.7 The role of consumer policy in meeting the Sustainable Development Goals	162
18.7.1 Goal 1: end poverty in all its forms everywhere	162
18.7.2 Goal 2: end hunger, achieve food security and improved nutrition	

and promote sustainable agriculture	163
18.7.3 Goal 3: Ensure healthy lives and promote well-being for all at all ages	163
18.7.4 Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all	163
18.7.5 Goal 5: Gender equality and empower all women and girls	164
18.7.6 Goal 6: Ensure availability and sustainable management of water and sanitation for all	164
18.7.7 Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all	165
18.7.8 Goal 8: Promote sustained inclusive and sustainable economic growth, full and productive employment and decent work for all	165
18.7.9 Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation	165
18.7.10 Goal 10: Reduce inequality within and among countries	166
18.7.11 Goal 11: Make cities and human settlements inclusive, safe, resilient and sustainable	166
18.8.12 Goal 12: Ensure sustainable consumption and production patterns	166
18.8.13 Goals 13, (climate change,) 14 (marine conservation,) and 15 (terrestrial biodiversity)	166
18.8.14 Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels	167
18.8.15 Goal 17: Strengthen the means of implementation and revitalize the global partnership for sustainable development	167
18.7 Conclusion	167

PART I: A CONSUMER PROTECTION SYSTEM

CHAPTER 1

CONSUMER PROTECTION - AN OVERVIEW

In this chapter the following issues are discussed:

- *The rationale for consumer protection*
- *The concept of consumer rights and consumer protection*
- *Who is the consumer and what is the consumer interest?*
- *Who is responsible for consumer protection?*
- *A framework for consumer protection*

1.1 The rationale for consumer protection

Consumer protection addresses disparities found in the consumer-supplier relationship, which include:

- Bargaining power;
- Knowledge; and
- Resources

State intervention is premised to provide consumer protection on a number of grounds, including:

Economic efficiency: In the case of a market economy, economic efficiency is a pre-requisite to ensuring that all systems are functioning optimally. In an ideal market economy, the market is in perfect equilibrium when the supply and demand side have equal power. Suppliers will:

- Engage in fair competition;
- Provide consumers with full information on their products;
- Observe all laws regarding safety and quality standards; and
- Compensate consumers if problems arise with their products or services.

On the demand side, consumers will act reasonably and purchase only products of the required quality at the best price, thereby weeding out any uncompetitive suppliers. Consumers should be well informed about a product or service before making a purchase. They should be knowledgeable remedies available to them so that they can actively pursue these rights.

It is impossible to envisage an economy where there is no possibility of abuse, whether centrally planned or a laissez-faire system. State intervention is necessary to ensure that suppliers behave responsibly and that aggrieved consumers have access to remedies. The

modern market is not a simple process of private economic relations between supplier and consumer. It is characterized by a certain degree of State involvement through the enactment and enforcement of consumer protection laws dealing both with private rights and statutory obligations to ensure a safe and orderly market for consumers.

Broadly speaking, consumer protection is meant to ensure that the demand side of the market economy is functioning optimally for the market system to work effectively, and is complemented by competition policy to ensure that the supply side is functioning optimally. The State enacts consumer protection laws, covering issues that are discussed throughout this manual such as: fair trading, information, redress mechanisms, and access to essential goods and services, among many others.

Individual rights: Consumer protection is designed to protect individual rights in the pursuit of considerate treatment and dignity. Consumer rights are part of the range of social rights which individuals are entitled to claim in a modern society. Such rights, often of an aspirational nature, have been enshrined in national constitutions (as discussed in chapter 3 of this manual). Other rights, present in United Nations resolutions and other definitive statements, such as the Millennium Development Goals (MDGs) leading up to 2015 and the Sustainable Development Goals (SDGs) from then on, may not necessarily be labelled as 'consumer rights,' but have great importance for consumer welfare. Many of these Goals are reviewed in chapter 18.

Consumer protection measures contribute to equity and social justice primarily by: a) achieving bargaining equality between consumer and producer interests; and b) alleviating the problems of those who are

particularly vulnerable in the market place such as children, the poor and illiterate, and those with particular needs such as persons with disabilities.

Inequality of bargaining power exists in most areas of consumer transactions,¹ particularly in complex products such as financial service transactions where standard-term contracts are the norm and are encouraged by the development of large enterprises involved in mass marketing.

The disadvantages of standard-term contracts have been succinctly summarized by Professor Hondius as follows:²

- a) A consumer will usually not review standard contract terms which are lodged in a Chamber of Commerce or company headquarters (or as required in some countries, with a Court) and which have subsequently been incorporated into the contract by reference;
- b) The length and typography of the full text of general conditions does not invite a consumer to read the small print;
- c) A consumer will often not grasp the full meaning of the text of general conditions;
- d) If the consumer grasps the full meaning of the text of general conditions, they may believe that the event mentioned with will not take place, nor will the supplier invoke the terms in particular cases;
- e) A consumer may be under the false impression that the contract terms have been officially endorsed or are in compliance with the law; and
- f) A consumer will generally not succeed in altering the contract terms nor will the agent or employee of the supplier have the authority to do so.

Rules on the disclosure of contract terms have become tighter over the years. The development of e-commerce, standard contracts, and the 'disclosure and consent' practice have penetrated even further than when the above words were written a generation ago. The United States President's Council of

Scientific Advisers has openly dismissed this approach as a form of consumer protection: "When the user downloads a new app to his or her mobile device, or when he or she creates an account for a web service, a notice is displayed, to which the user must positively indicate consent before using the app or service. In some fantasy world, users actually read these notices, understand their legal implications (consulting their attorneys if necessary), negotiate with other providers of similar services to get better... treatment, and only then click to indicate their consent. Reality is different."³ In the internet age, it is a matter of 'tick, click and hope for the best'.⁴

Distributive Justice: Many States concerned with the public welfare implement policies that aim at redistribution from the wealthy to the poor and guarantee access to basic goods and services. This apparently egalitarian approach is endorsed by SDG 10: "Reduce inequality within and among countries" and Guideline 1 of the United Nations Guidelines for Consumer Protection (UNGCP), which states that: 'Consumers should have the right to promote just, equitable and sustainable economic and social development'.⁵ The relevant Targets for SDG 10 include the adoption of 'social protection policies' and an aim to: 'improve the regulation of monitoring of global financial marketing and institutions and strengthen the implementation of such regulations.'

Subsidized health care, social insurance and education are features of most modern societies. Examples are given in chapter 17 on health and chapter 14 on financial services. The development of rights to consumer protection, especially in the developing world, can now be seen as part of the strategy to eradicate poverty and to bring socio-economic justice to the underprivileged. In this regard, one of the advantages of consumer protection is that it does not merely focus on the income of the poor, but also on their expenditure. In addition to trying to expand the earning power of the poor through education, job training, and the creation of new jobs, consumer protection takes account of how the poor spend the little income they have. For example, SDG target 10

¹ Recognized by Guideline 1 of the United Nations Guidelines for Consumer Protection, 2015.

² UNCTAD, Consumer Policy Manual, 2008.

³ https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_may_2014.pdf

⁴ Consumers International, Connection and Protection in the Digital Age, CI, 2016.

⁵ United Nations Guidelines for Consumer Protection; General Assembly resolution II A/70/470/Add.1, December 22, 2015.

contains the highly specific directive: “reduce to 3% the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5%.”

Consumer protection serves to highlight the fact that the poor often receive far inferior goods and services on more onerous terms than those who are better off. It needs to highlight how the poor are denied the benefit of their earning power and how they are forced to live in a world of higher costs and greater scarcity than wealthier populations. This theme is recurrent in consumer protection literature. In fact, the famous speech by United States President John F. Kennedy in 1962 alluded to this: “... increased efforts to make the best possible use of their incomes can contribute more to the well-being of most families than equivalent efforts to raise their incomes.”⁶

In 1968, the United States Federal Trade Commission documented the particular problems facing low-income families. Consumers purchasing from retailers, catering mainly to persons with low incomes, pay significantly higher prices than those charged by retailers for identical products to the rest of society. David Caplovitz’s often quoted study ‘The Poor Pay More,’ and Alan Adreassen’s ‘Disadvantaged Consumer’ confirmed decades ago that the poor indeed pay more.⁷ In 2008, the consumer protection body “Energywatch” of the United Kingdom published a study showing how the same patterns persisted for 40 years in that country.⁸ Even more noteworthy are the large differentials in the unit prices paid for water and energy by the poor inhabitants of slum settlements in many developing countries because of their lack of access to ‘official’ network services, which are frequently subsidized.⁹ Both of these syndromes are discussed in chapter 15 on public utilities. These findings support the contention that consumer protection can and should be part of the legitimate methods of achieving the redistributive goals of any society.

Consumer protection is also premised on the right to participate in the process of making social and

economic decisions. This right extends not only to Government decisions, but also to those emanating from other centres of power, such as large enterprises. As later observed in chapters 2 and 15, the UNGCP recommend consumer participation in the provision of essential services such as utilities.

Right to development: As discussed in chapter 2, the MDGs and the SDGs are both referenced in the United Nations General Assembly resolution 70/186 of December 2015, which adopted the revised version of the UNGCP.¹⁰ The discussion of the detail of the SDGs and MDGs is found in chapter 18 and the reference to development in the opening paragraph of the UNGCP marks a unanimous acceptance that development and consumer protection are complementary.

The modern day concept of the right to consumer protection was articulated in a landmark speech by President Kennedy on March 15, 1962 in his *Special Message to the Congress of the United States on Protecting the Consumer Interest*. In his message, he held that:

“Consumers by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who is not effectively organized whose views are often not heard.

We cannot afford waste in consumption any more than we can afford inefficiency in business or Government. If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers.”¹¹

President Kennedy asserted that legislative and administrative actions were required if the Government was to meet its responsibility to consumers in the

⁶ <http://www.presidency.ucsb.edu/ws/index.php?pid=9108>

⁷ Alan R. Adreassen, *The Disadvantaged Consumer*, The Free Press, 1975, D. Caplovitz, *The Poor Pay More*, 1963.

⁸ Energywatch, *Poor Choices: The Limits of Competitive Markets in the Provision of Essential Services to Low Income Consumers*, eds. S. Thomas and R. Bates, 2008.

⁹ Judy L. Baker, *Opportunities and Challenges for Small Scale Private Service Providers in Electricity and Water Supply*, World Bank/PPIAF, 2009, PPIAF, *The Most Expensive Service Is That Which Does Not Exist*. In: *Lessons Learned; Pricing and Affordability in Essential Services*, Note 5, 2012.

¹⁰ United Nations General Assembly, op. cit. 2015.

exercise of their rights. These enumerated rights were:

- a) “The right to safety – to be protected against the marketing of goods which are hazardous to health or life;
- b) The right to be informed – to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labelling, or other practices, and to be given the facts one needs to make an informed choice;
- c) The right to choose – to be assured, wherever possible, of access to a variety of products and services at competitive prices; and in those industries in which competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and service at fair prices; and
- d) The right to be heard – to be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals.”

After describing his proposals for: 1) strengthening existing programmes in the area of food and drugs, 2) requiring truth in lending and in packaging, and 3) promoting competition and prohibit monopolies, President Kennedy concluded that: “All of us are consumers, these actions and proposals in the interest of consumers are in the interest of us all. The budgetary investment required by these programmes is very modest – but they can yield rich dividends in strengthening our free competitive economy, our standard of living and health and our traditionally high ethical patterns of business conduct. Fair competition aids both business and consumers.”

The President’s declaration of rights was seized upon by consumer campaigners (see chapter 2) and their efforts bore fruit when, on April 9, 1985, the General Assembly of the United Nations unanimously adopted a set of general guidelines for consumer protection – the UNGCP. The UNGCP represent an internationally recognized set of minimum objectives for consumer protection, which have become the baseline for entitlements of consumers worldwide. The best known section of the Guidelines, which sets out the

“legitimate needs” of consumers in Guideline 5, has become a template or checklist which serves to bring about widespread recognition of consumer rights. Nations throughout the world have enacted laws to give recognition to these rights, including newly drafted national constitutions, as discussed in chapter 3.

Consumer law, whether part of private or public law, is meant to apply the above principles and guidelines by measures that seek to:

- Impose certain rights and obligations on both parties and secure their enforceability;
- Equalize an essentially unequal relationship between the stronger and weaker parties, whether between large and small traders or traders and consumers;
- Allow State intervention to correct market failures in the public interest and to punish offending behaviour;
- Enable State control over suppliers entering the market through registration and licensing procedures, ensuring a degree of protection for consumers from unscrupulous and disreputable traders and from undesirable products and services;
- Ensure that products and services offered for sale are of a minimum standard of safety and quality; and
- Ensure access to certain basic goods and services essential for life.

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

Private law is dependent upon the aggrieved parties to claim or enforce their rights through the courts. Examples of such laws are “Unfair Contract Terms Acts” and the “Sale of Goods Acts.” The law of tort is another branch of private law which imposes certain duties or standards on producers and distributors of goods and services. Examples of such laws are those

¹¹ President Kennedy, *op. cit.*

which deal with aspects of product safety and liability. Consumers therefore hold rights conferred by contract or tort law, which they can directly assert without having to resort to State intervention. These issues are discussed in chapters 3 and 9.

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

1.2 Who is the consumer and what is consumer interest?

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

Typical definitions have been similar to the Malaysian Consumer Protection Act of 1999, which defines the consumer as “a person who acquires or uses goods

or services of a kind ordinarily acquired for personal domestic or household purpose” and actively rules out consumer protection law extending to sales or manufacturing. Legislation could also specify leasing or hiring, as in Fiji and Pakistan, but the term ‘acquires or uses’ could also cover cases where there is no outright ownership.¹²

The indicators of the need for local variation are contained in the terms ‘primarily’ and the ‘while recognizing’ sub-clause of Guideline 3. In several jurisdictions there is recognition that the distinction between use of products for work and household usage can be very difficult to draw: mobile phones are a pertinent modern example. The separation of work from home reflects mass manufacturing with its factories along with the development of large scale service industries (including public services) with their offices. In developing countries, notably in agricultural and village stores, this distinction was always less well defined. In developed countries, the emergence of distance-working from home results in the need for a certain amount of flexibility. The Chinese Law on Protection of Consumer Rights and Interests of 1993 widely defined consumers as “peasants who purchase means of production for direct agriculture.” This clause is no longer to be found in the updated 2013 version, but the underlying concept that small producers are in a similar position to household consumers is widely applied. Other countries, including India, Nepal, Philippines, Republic of Korea, and Viet Nam, have included in their legislation peasant farmers, small fishermen, petty traders and even “organizations” purchasing for their own consumption.¹³

A 2013 survey by Consumers International of some 60 jurisdictions found that “the great majority of countries clearly draw the line at household use of goods and services.”¹⁴ Australia, France and United Kingdom did not have single definitions. Belgium, Quebec and Uruguay explicitly excluded all professional use of products in the definition of a consumer.¹⁵

However, a degree of flexibility is demonstrated in some jurisdictions, particularly in Latin America, where the possibility of extending the concept of consumer

¹² Consumer Council of Fiji Act, 1976; Consumers’ Protection Act, 1995, Pakistan.

¹³ Consumer Protection Act, 1986, India; Consumer Protection Act, 1998, Nepal; Consumer Act of the Philippines, Republic Act 7394, 1990; Consumer Protection Act, Republic of Korea, 1986; Viet Nam Ordinance in the Protection of Consumer’s Interest, 1999.

beyond the realms of the personal is found in several countries: Chile, Panama, Peru and Guatemala.¹⁶ Some Latin American jurisdictions also extend consumer protection to small artisans (Costa Rica) or micro-enterprises (Mexico).¹⁷

The most recent EU Consumer Rights Directive (effective June 2014) defines the consumer in Article 2.1 as: “any natural person who is acting for purposes which are outside his trade, business, craft or profession.” However, the Directive also mentions in its preamble that “where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.”

In all, consensus seems to emerge around the legal definition “consumer,” summed up by the Guideline 3 as referred to above.

1.3 Who is responsible for consumer protection?

The function of consumer protection falls within the purview of both public and private bodies and may be conferred by specific laws or assumed by them through virtue of their status. The following bodies play a role in consumer protection:

- **Government agencies**

These may be Ministries or Departments of Consumer Affairs set up specifically to administer and enforce consumer protection laws, and are discussed in chapter 4. In some countries, there are also Consumer Advisory Councils or Committees, which have broad-based representation and serve as a consultative mechanism to advise the Government on consumer protection policies;

- **Statutory/non-statutory standards bodies**

There are Government and non-governmental bodies established to set standards for product

safety and quality control and issue certification marks. Most countries have national standards bodies with an autonomous status, usually affiliated to the International Organization for Standardisation (ISO), which negotiates standards between representatives of industry and other stakeholders, including consumers. National standards often transpose international standards, whose importance has been increasing since their recognition within the 1995 treaty that established the World Trade Organization (WTO) (discussed in chapter 3). Governments still developing consumer protection legislation may choose to adopt ISO standards in the meantime. The role of standards in safety is discussed in chapter 9 and the role of business in negotiations in chapter 6;

- **Ombudsmen**

A term of art developed in Scandinavia, the Ombudsman (also known in Iberomerica as El Defensor del Pueblo) provides the public with information and advice on consumer rights and assists with the settlement of disputes through mediation and arbitration. Initially developed to deal with maladministration in public services, Ombudsmen have spread to the private sector and may sometimes have a generic consumer protection remit in a given locality. They are further discussed in chapter 11;

- **Professional and industry associations**

Professional and industry associations may conduct their own complaints handling and disciplinary proceedings against their members and develop Codes of Conduct, often in negotiation with consumer protection agencies. Aggrieved consumers may refer their problems to these mechanisms for settlement. Alternatively, some companies may have set up their own complaints handling mechanisms for consumers to refer their problems with products or services purchased. These are discussed in chapters 6 and 11;

- **Consumer associations**

A well-organized and widely representative group of

¹⁴ Consumers International, *The State of Consumer Protection Around the World*, 2013.

¹⁵ Belgium, Article 2 of Law of April 6, 2010 on Market Protection and Consumer Protection; Quebec, Loi sur la protection du consommateur, 1978, modified 2010; Uruguay, Ley 17.250 de relaciones de consumidor, 2000.

¹⁶ Chile, Ley 19.496, 2004 Revised 2012; Panama, Ley 45.2007; Peru, Ley 29571, 2010; Guatemala, Ley de protección al consumidor y usuario, decreto 006-2003.

¹⁷ Costa Rica, Ley de promoción de la competencia y defensa efectiva del consumidor; Mexico, Ley federal de protección al consumidor 1992, latest revision 2012.

individual consumers can become a strong force. The independent consumer movement is now well recognized in many consumer protection regimes as a legitimate representative of the interests of consumers and consumer representatives are called upon to sit in Government-recognized committees to voice the views of consumers. Consumer associations can also provide consumers with independent and objective advice on products and services based on tests and surveys they have conducted. The history and evolution of consumer associations is discussed in chapter 5; and

- **Self-regulation**

The role of self-regulation is discussed in chapter 6 along with corporate social responsibility. The process of 'registration' for liberal professions has existed for long, with controls regarding entry into particular professions. However, this concept has evolved as a branch of public policy as well as a form of corporate governance, not simply relating to the regulation of products and services alone. A Government may choose to rely on self-regulatory schemes to relay regulations which would otherwise be promulgated by the State and can assume reserve powers to: a) make voluntary codes compulsory; b) require industry to have codes; or c) impose or prescribe mandatory codes, with the clarification that observance of self-regulatory codes is tantamount to legal compliance.

1.4 A framework for consumer protection

A consumer protection framework covers a range of institutional mechanisms. The State has an important role to play in ensuring that the mechanisms put in place do not unduly shackle the freedom of business to operate legitimately or stifle the freedom of consumers in exercising individual choice. The essential elements of a consumer protection framework are:

- **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 organs of the State;
- **A designated consumer protection agency** responsible for the enforcement of consumer protection, whereby an agency could collaborate

closely with the different relevant ministries, and consult with other stakeholders such as consumer organizations, industry, academics and the media. These bodies are discussed in chapter 4.

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

- **Consumer laws** must ensure that consumer rights are protected and enforceable. Some countries have provided for consumer protection at the highest legal level; that is, in their Constitution. Others have enacted a comprehensive legal framework on consumer protection followed by statutes dealing with particular areas. These different approaches are set out in chapter 3. Critical areas that should be covered by consumer protection laws are:

- a) A comprehensive definition of "consumer;"
- b) Rights of consumers;
- c) Standards for goods and services;
- d) Prohibition of business conduct which prevents consumers from enjoying their consumer rights and regulation of conduct so that it does not encroach on those rights;
- e) Regulation of agreements entered into between consumers and suppliers;
- f) Registration and licensing of suppliers of certain goods and services, including publicly owned providers;
- g) Powers for the authorities to take pre-emptive measures to protect consumers;
- h) Sanctions, compliance and enforcement

mechanisms for offences;

- i) Designating an agency for consumer protection and prescribed roles for it;
- j) Mechanisms to receive, investigate, and act upon complaints by consumers as well as assist consumers in making and pursuing complaints.

Examples of consumer protection framework legislation are presented in chapter 3 on consumer law;

- **Codes or soft law** should be complementary to consumer protection laws and set out agreed principles for consumer protection and responsible business behaviour by particular business sectors. This is an aspect of self-regulation by the industry or co-regulation between the State and industry. Though not legally enforceable, they have the force of moral authority over businesses and form part of the corporate governance structures by which concerned businesses are expected to operate. Furthermore, Governments may delegate authority for codes or co-regulatory mechanisms, while retaining the power to directly intervene in the event where the codes are not honoured. The development of codes is discussed in chapter 6 on business conduct;
- **Consumer redress mechanisms** are to be affordable, accessible and independent and provide speedy redress to aggrieved consumers. Mechanisms for conciliation, mediation and arbitration are useful in ensuring that consumer problems are handled effectively. These mechanisms are discussed in chapter 11;
- **Systems for monitoring and surveillance** should be in place regarding consumer problems in the marketplace for complaints handling, price surveillance, and market/household surveys with the objective of identifying consumer problems. This can enable the consumer protection authorities to take pre-emptive measures before problems become too widespread and difficult to resolve;
- **Mechanisms for compliance or enforcement** of consumer protection laws ought to be innovative, cost-effective and ultimately benefit the consumer. These could range from enforcement

units, industry undertakings, imposition of licensing and registration fees, security deposits, product recalls, and price controls, among others;

- **Consumer education and information programmes** should be made available to empower consumers with the knowledge to protect themselves and become responsible consumers. Consumer education may be incorporated into the school curriculum. Information programmes may be supported by national consumer protection programmes and can be conducted through the media and other community activities, often with the assistance of consumer organizations with experience in this area. This topic is further discussed in chapter 10; and
- **International co-operation and networking** is essential among consumer protection agencies in different countries to ensure regular exchange and sharing of information, technical training and capacity building for the implementation and reciprocal enforcement of multilateral agreements on consumer protection issues. Regional and international cooperation is also necessary to develop common positions when negotiating for standards and other measures. International cooperation on consumer protection is discussed in chapter 8.

International cooperation is also needed in other related domains, and those in the field of competition are described in chapter 7. While differences exist between demand side orientation in consumer protection work and supply side orientation which may be characterized by competition policy, consumer interest is essential to both. There is a contrast between national consumer protection agencies trying to operate with overseas colleagues on specific issues and international trade negotiators effectuating trade treaties. The latter is commonly a more adversarial process with countries putting forward 'interests', which usually identify with the producer's perspective. In such negotiations, the consumer interest may be at stake, but only as one of many interests around the table. This dimension is elaborated briefly in chapter 3. Also discussed in chapter 3 is the emerging overlap and potential conflict between international trade rules in

intellectual property and domestic consumer protection.

1.5 Conclusion

This manual takes an extensive approach to consumer protection by considering public services such as utilities and health services (see chapters 15 and 17) as consumer issues. In doing so, it takes a broader view than some governmental or intergovernmental bodies, which may define consumer protection as restricted to shoppers' rights. Such restrictions may gradually lead to the exclusion of the consumer dimension from sectors where it is needed. An example discussed in chapter 10 on financial services is the lack of recognition that recipients of social insurance benefits may have entitlements analogous to those of private pensions or insurance payments.

The danger of taking in a restrictive classification of users of public services is that it may perpetuate the limited perception that consumer protection is only about the freedom to spend. This chapter has suggested that a consensus is emerging among experts on the definition of the consumer. There remains intense debate in wider circles reflecting a dislike for the term 'consumer' as embracing an

ideology of 'consumerism,' one which is thought to be rather materialistic and, in environmental terms, possibly unsustainable.

It is argued sometimes that the term 'citizen' confers greater dignity on the recipient of a service and encompasses the concept of rights and responsibilities. It also suggests the possibility of participation in the process of governance. However, 'citizen' can also be too narrow as it could exclude migrants who are not citizens of the country and possibly does not apply to children, who are undoubtedly consumers. Furthermore, 'citizen' is a term that does not describe the producer/consumer interface; the focal point of much consumer law and policy. The term 'citizen' could in theory, apply equally to 'consumer,' 'worker' or 'producer.' To equate these two would be to neutralize the meaning of 'citizen'.

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

CHAPTER 2

THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

In this chapter, the following issues are discussed:

- *International instruments and consumer protection*
- *The content of the United Nations Guidelines for Consumer Protection (UNGCP)*

2.1. International instruments and consumer protection

The United Nations specialized agencies, the World Trade Organization (WTO), the Group of 20 (G20), the Organization for Economic Cooperation and Development (OECD), and regional bodies such as the Association of Southeast Asian Nations (ASEAN), the Asia Pacific Economic Cooperation (APEC), the African Union (AU), the European Union (EU), and the Organization of American States (OAS), are among intergovernmental organizations having developed, inter alia, agreements, resolutions, directives and guidelines, that have a bearing on consumer protection. This section will deal specifically with the UNGCP that have been adopted by the United Nations General Assembly by consensus, as a 'valuable set of principles'¹⁸ for consumer protection. There are a range of other international instruments that frequently address the consumer interest by providing:

- Benchmarks and minimum levels of protection or standards for policies and regulations;
- Minima to build upon that may serve to provide general recommended levels of protection for all countries within their competences, either globally or regionally;
- Mechanisms for intergovernmental cooperation in the relevant areas;
- Mechanisms for implementation (even enforcement) measures that can be undertaken by Governments to protect consumers and apply agreed standards and principles; and
- Moral authority pointing to acceptable practice and conduct, underpinned by the unanimous endorsement by Member States.

This final point regarding moral authority has sometimes

been underestimated, given the legal standing of 'soft law,' often encompassed by international guidelines. The argument that guidelines are weaker than 'hard law' in binding international conventions, sets aside the moral force of an undertaking made in the United Nations General Assembly by all Member States. In the case of the UNGCP, this has taken place three times: in 1985, 1999 and 2015. Informal evidence of the force of the commitments encompassed by the UNGCP is found in the manner in which they are negotiated with the same seriousness of purpose as if they were binding obligations. The legal status of United Nations declarations in general and the UNGCP in particular is discussed at the end of this chapter.

2.2 The United Nations Guidelines for Consumer Protection

The United Nations Guidelines for Consumer Protection were adopted by consensus by United Nations General Assembly in resolution 39/248 of 16 April 1985. This followed a long campaign by consumer associations in many countries, with Consumers International (formerly known as the International Organization of Consumer Unions) having called upon the United Nations to prepare a 'Model Code for consumer protection' at its World Congress in Sydney in 1975. In 1977, the Economic and Social Council (ECOSOC) directed the Secretary-General to prepare a survey of national institutions and legislation in the area of consumer protection. In 1981, ECOSOC requested the Secretary-General "to continue consultations on consumer protection with a view to elaborating a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries." Draft guidelines were circulated to Member States for comments in 1982 and, submitted to

¹⁸ Resolution II A/70/470/Add.1 Distribution December 15 2015, adopted by UNGA December 22nd 2015. NB: The term 'UNGCP' is used to apply to the full set of Guidelines in this manual. Sections of the UNGCP are referred to as appropriately.

ECOSOC in 1983, drawing on many sources including the OECD, the United States Consumer Bill of Rights¹⁹ and materials from national consumer protection agencies and consumer associations. These guidelines came to fruition in the General Assembly in 1985.

Fourteen years later, the UNGCP were expanded to include a new section on sustainable consumption (Section H of the current version) in resolution E/1999/INF/2/Add.2 of 26 July 1999. An account of this development is recounted in chapter 18 but it is worth noting that, as in 1985, this process demonstrated the effectiveness of coalitions of Member States, international NGO action and the relevant bodies within the United Nations.

The revised UNGCP of 2015, annexed to resolution 70/186 and an integral part thereof, make specific reference to the needs of developing countries, including the setting of the Sustainable Development Goals (SDGs) and the preceding Millennium Development Goals (MDGs). The Intergovernmental Group of experts on Consumer Protection Law and Policy is established to operate under the auspices of UNCTAD as the institutional machinery of the UNGCP. The revised UNGCP extend their scope to State-owned enterprises (Guideline 2) and introduce four new 'legitimate needs' into Guideline 5. Completely new sections are inserted on principles for good business practices (Guideline 11) and national policies for consumer protection (Guidelines 14-15), electronic commerce (Guidelines 63-65), and financial services (Guidelines 66-68). The pre-existing Section E on measures enabling consumers to obtain redress is renamed dispute resolution and redress (now section F) and is expanded to reflect the rapid evolution of such mechanisms and now includes references to debt and bankruptcy. The specific areas section (now K) is expanded to include energy, (Guideline 76), public utilities (Guideline 77) and tourism (Guideline 78). Finally, Section VI on international cooperation is significantly expanded by the additions of Guidelines 82-90, largely covering enforcement mechanisms at the international level, while new section VII, international institutional machinery, addresses the monitoring of implementation of the UNGCP

at the international level. Further to a periodic and institutionalized review of the Guidelines, it provides an annual forum for the exchange of experiences, the production of studies and research, and the provision of capacity building at the intergovernmental level. This far-reaching revision, greater than that of 1999, reflects the input of successive Ad Hoc Expert Group meetings on Consumer Protection held under the auspices of UNCTAD. The French Presidency²⁰ of the group provided the leadership for this ambitious process to take hold.

2.2.1 Objectives, scope of application and general principles

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

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

It is worth noting that sub-para "c," while present in the previous UNGCP, was not matched to a relevant

¹⁹ On March 15, 1962, President Kennedy presented a speech to the United States Congress in which he extolled four basic consumer rights; safety, information, choice and the right to be heard, later called the Consumer Bill of Rights.

²⁰ Represented by the Directorate General for Competition Policy, Consumer Affairs and Fraud Control.

section until the latest revision, which became Section IV ‘principles for good business practices’.

Section II is dedicated to the scope of application of the Guidelines. They apply to business-to-consumer transactions and to the provision by State-owned enterprises to consumers. Guideline 3 contains a flexible definition of the term “consumer,” which is discussed in chapter 3 on consumer law.

In Sector III on General principles, the ‘legitimate needs’ of consumers, (Guideline 5) have been significantly expanded. Sub-paragraphs “a”, “b,” “j” and “k” are new, and “g” has been amended to introduce the term ‘dispute resolution.’ They are:

- a) Access by consumers to essential goods and services;
- b) The protection of vulnerable and disadvantaged consumers;
- c) The protection of consumers from hazards to health and safety;
- d) The promotion and protection of the economic interests of consumers;
- e) Access by consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
- f) Consumer education on environmental, social and economic consequences of consumer choice;
- g) Availability of effective consumer dispute resolution and redress;
- h) Freedom to form consumer and other relevant groups/organizations with the opportunity of such organizations to present their views in decision-making processes affecting them;
- i) The promotion of sustainable consumption patterns;
- j) A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce; and
- k) The protection of consumer privacy and the global free flow of information.

The first two new legitimate needs of Guideline 5 were arguably present in the pre-existing UNGCP ‘in spirit,’ albeit not explicitly incorporated. Sub-

paragraphs “j” and “k” represent new principles that are clearly signalled in the resolution. A distinctive feature of both the legitimate needs (Guideline 5) and the Objectives (Guideline 1) is that no specific sectors are mentioned but the implied intention is horizontal, therefore applying to all sectors.

2.2.2 Principles for good business practices

A pertinent feature of the 2015 revision is that the UNGCP are not solely directed to Governments, but also contain, in Section IV, Guideline 11, ‘benchmark’ ‘Principles for Good Business Practice’. These cover:

- a) Fair and Equitable Treatment;
- b) Commercial Behaviour;
- c) Disclosure and Transparency;
- d) Education and Awareness Raising;
- e) Protection of Privacy; and
- f) Consumer Complaints and Disputes.

These provisions have much in common with other parts of the text, both pre-and post-2015. They are listed separately in a new section, clearly suggesting that businesses will be expected to adopt good practices beyond enforcement or regulatory action. They reflect the development of social responsibility guidelines during the last decade, such as ISO 26000,²¹ the OECD Guidelines for Multi-National Enterprises,²² and the continued, widespread search for effective methods of business self-regulation and co-regulation. This newly inserted dimension of business conduct is explored in chapter 6 of this manual, while education and information are discussed in chapter 10, complaints and disputes are found in chapter 11 and privacy is reviewed in chapter 13.

2.2.3 Guidelines

The UNGCP contain a set of recommendations to Member States. Below is a summary of the core Guidelines, which comprise Section V sub-sections A to K, by which Member States should act:

²¹ On ISO 26000, Guidance on Social Responsibility (2010).

²² OECD, Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 2011.

A. National policies for consumer protection.

This section, comprising Guidelines 14-15, requires Member States to:

- 1) Encourage good business practices;
- 2) High standards of disclosure of information;
- 3) Fair and clear contract terms and transaction procedures;
- 4) Ease of contact with enforcement bodies,
- 5) Secure payment mechanisms;
- 6) Dispute resolution and redress; and
- 7) Privacy, data security, consumer and business education.

Business conduct is discussed in chapter 6. This section also calls upon Member States to ensure adequate resources for consumer protection agencies to promote compliance and obtain redress. Consumer protection agencies are discussed in chapter 4.

B. Physical safety

This section, comprising Guidelines 16-19, requires that Member States ensure:

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

Product safety is discussed in chapter 9.

C. Promotion and protection of the economic interests of consumers

This section, comprising Guidelines 20-32, requires that Member States ensure:

- 1) Consumers obtain optimum benefit from their economic resources, by ensuring that goods meet satisfactory production and performance standards;
- 2) Adequate distribution channels and after sales services for such goods;
- 3) Fair business practices are employed;
- 4) Protection against contractual abuses;
- 5) Marketing practices are regulated; and
- 6) Information provided is adequate for consumers to make informed decisions and exercise choice.

This section is wide-ranging and its components are discussed in chapter 3 (consumer law), chapter 7 (competition), and chapter 10 (information).

D. Standards for safety and quality of goods and services

This section, comprising Guidelines 33-35, requires that Member States ensure that:

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

Although this section remains unaltered since its original adoption, the importance of standards has increased, in terms of the regulations of international trade. The issues surrounding standards are discussed in chapters 3 (consumer Law) and 9 (safety).

E. Distribution facilities for essential goods and services

This section, comprising Guideline 36, requires that Member States ensure the efficient distribution of goods and services, especially essential goods and services to consumers who are disadvantaged, for example residing in rural areas. This section has increased significance for the United Nations over the years as the MDGs and SDGs make explicit reference to various goods and services. It is therefore reinforced by the new Guidelines on energy (Guideline 76) and public utilities (Guideline 77), which are discussed in chapter 15 (utilities).

F. Dispute resolution and redress

This expanded and renamed section, comprising Guidelines 37-41, requires that Member States establish and publicize redress mechanisms that are expeditious, fair, affordable and accessible, especially taking into account the needs of low-income consumers. Member States are also required to ensure that businesses set up mechanisms to handle consumer disputes in a fair, expeditious and informal manner. Since the 1999 expansion, principles and practice in dispute resolution have evolved significantly, with increasing consensus around the above qualities and greater emphasis attached to cross-border dimensions. The revised Guidelines make specific reference in Guideline 40

to 'collective resolution procedures' and to cases of bankruptcy and over-indebtedness as well as to the need for businesses to establish procedures, such as improved complaints handling, that would reduce the need for redress mechanisms to be triggered. This is discussed in chapter 11 (dispute resolution and redress).

G. Education and information programmes

This section, comprising Guidelines 42-48, requires that Member States develop and implement consumer education and information programmes to enable consumers to be informed of their rights and responsibilities and to be selective in the exercise of their consumption choices, including taking into consideration environmental consequences. Member States are urged to involve consumer groups, business, and other civil society organizations in such efforts with particular attention to vulnerable and disadvantaged consumers. Consumer education should be included in the school curriculum and Member States are expected to organize training programmes for educators, mass media professionals and consumer advisers to enable them to conduct education and information programmes. The UNGCP now include electronic commerce in the list of issues that need to be addressed. Education and information programmes are discussed in chapter 10.

H. Promotion of sustainable consumption

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

- 1) Regulation;
- 2) Economic and social instruments; and
- 3) Sectoral policies in areas such as land use, transport, waste management, energy, housing, information and education programmes.

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

and the recognition of sustainable consumption are discussed in chapter 18.

I. Electronic commerce

This section, newly inserted in 2015 and comprising Guidelines 63-65, calls for:

- 1) Equity of treatment of e-commerce with other forms of commerce in terms of consumer protection;
- 2) Cross-border cooperation; and
- 3) The study of the OECD Guidelines on e-commerce for guidance (developed in 1999 and revised in 2016).

Electronic commerce is discussed in chapter 12.

J. Financial services

This section, newly inserted in 2015, comprising Guidelines 66-68, points to the High Level Principles developed by the OECD as mandated by the G20 and include:

- 1) Avoiding conflict of interest in remuneration of staff;
- 2) Institutional responsibility for agents;
- 3) Development of regulatory structures; and
- 4) Protection against fraud and abuse.²³

These actions recommend the development of responsible lending policies, bank deposit insurance and regulatory frameworks for remittance services with particular attention to transparency within those transactions. These issues are discussed in chapter 14.

K. Measures relating to specific areas

With respect to Guidelines 69-78, prior to 2015 Member States were requested to prioritize the areas of critical concern regarding health of consumers, which included food, water and pharmaceuticals. In 2015, its scope was extended to public utilities and energy services (including community participation in regulatory oversight) as well as tourism/travel. Measures taken in these areas address ensuring quality control, adequate distribution, and standardized information. Member States are required to apply the accepted international standards in food and pharmaceuticals. Concerning food production, subjects such as sustainable agricultural policies and practices, conservation of biodiversity and traditional knowledge are to be promoted. National polices should be developed

to improve the supply, distribution and quality of drinking water and for other purposes, taking into account the finite character of aquatic resources. Member States are also required to develop integrated national policies to ensure appropriate use of pharmaceuticals, their procurement, distribution, production, licensing arrangements, registration systems and information to consumers. The reference to licensing arrangements and to the promotion of the use of international non-proprietary names for drugs, clearly envisages the possibility of compulsory licensing, agreed as permissible under WTO rules in the Doha declaration of 2001.

These issues are discussed in this manual: food in chapter 16, water and energy in chapter 15 (utilities), pharmaceuticals in chapter 17 (health) and tourism in chapter 8 (international cooperation).

2.2.3 International cooperation

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

In 2015, Section VI, comprising Guidelines 79-94, was lengthened to require improved cross-border cooperation, including designation of national contact agencies, combating fraud and deceptive commercial practices, taking into account the Guidelines emanating from the OECD.²⁴ International cooperation is discussed in chapter 8.

2.2.4 International institutional machinery

One of the major innovations of the revised UNGCP of 2015 is the inclusion of Section VI on the

international institutional machinery, Guidelines 95-99, for monitoring the compliance with the UNGCP through the Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy under the auspices of UNCTAD. In accordance with Guideline 97, the IGE has the following functions:

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

²³ OECD, G20 High-level Principles on Financial Consumer Protection, October 2011.

²⁴ OECD, Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders, Recommendation of the Council, 2003.

- application and implementation of these Guidelines;
- h) To operate between and report to the United Nations Conferences to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;
 - i) To conduct a periodic review of the Guidelines, when mandated by the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; and
 - j) To establish such procedures and methods of work as may be necessary to carry out its mandate.
- (x) Establishment, or recognition, of consumer information and advice centres;
 - (xi) Encouragement and enabling of dissemination of product testing information directly by Governments or through consumer organizations;
 - (xii) Establishment of access policies for basic goods and services;
 - (xiii) International cooperation through assistance for the development of consumer protection legislation and/or support for training of Government officers; and
 - (xiv) Participation in reviews of national consumer protection policy and in the periodic reviews of the UNGCP under the institutional machinery established within UNCTAD.

In order to evaluate the practical implementation of the newly revised UNGCP in a particular country, the following indicators may be used:

- (i) Allocation to Ministries and/or Government agencies, specific responsibility for consumer affairs in general; this should extend to the development of a consumer element in sectoral ministries, especially those sectors identified in section “J” and “K” of the UNGCP, and should take in state-owned enterprises;
- (ii) Adoption of national consumer policy and consumer protection laws, including those pertaining to protection of data security and privacy;
- (iii) Adoption and application of competition law;
- (iv) Adoption and application of standards for consumer products and services;
- (v) Adoption by industry of codes of good practice, either unilaterally or in cooperation with Government or regulators;
- (vi) Organization of consumer education programmes and the dissemination of consumer protection information;
- (vii) Establishment of consumer dispute resolution and mediation/arbitration mechanisms, including online dispute resolution;
- (viii) Recognition of consumer organizations, (possibly extending to financial support by Governments), as participants in decision-making processes in areas of consumer protection and policy;
- (ix) Incorporation of consumer education studies in the school curriculum and elsewhere;

2.3 Conclusion

The UNGCP have provided the basis of a framework for the consumer protection laws of many countries. However, the progress achieved in the implementation of the UNGCP has not been uniform. In some parts of the world, there still remain a number of jurisdictions with no consumer protection laws, Government consumer protection agencies nor independent consumer associations. Furthermore, laws may exist but sometimes are devoid of practical impact.

It is difficult to accurately assess how well the UNGCP have been implemented since their adoption. The consensus from various sources suggests they have made an important contribution to consumer protection worldwide. Throughout 2012, UNCTAD carried out a global survey of measures taken by United Nations Member States to implement the provisions of the UNGCP. The review concluded that:

“Since 1985, the United Nations Guidelines on Consumer Protection have been widely implemented by Member States of the United Nations. National contributions to this revision process show that all areas of the current Guidelines remain valid and useful.”

Conversely, a survey by Consumers International in 2013 pointed to the: “intense frustration” expressed by its members (mainly consumer associations) concerning “the non-application of consumer protection measures already in place.”

The consumer today is operating within an enlarged

international marketplace. This calls for new dynamics of interaction between consumers, businesses and regulators. The UNGCP have taken significant steps in that direction and, given the right level of commitment, the 2015 revision may assist in even further progress.

CHAPTER 3 CONSUMER LAW

In this chapter the following issues are discussed:

- *Consumer law in the UNGCP*
- *Constitutional provisions on consumer protection*
- *Framework consumer protection laws*
- *Interface between consumer laws and other laws: sectoral laws, professional services laws, intellectual property law, and international trade law*

3.1 Consumer law in the United Nations Guidelines for Consumer Protection

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

The Guidelines themselves are less explicit, pointing out that (Guideline 2): “consumer protection policies include Member States’ laws, regulations, rules” wherein enterprises should obey the law (Guideline 9) and that there need to be ‘legal systems’ (Guideline 16) or ‘measures’ (Guideline 37) in place.

3.2 Constitutional provisions on consumer protection

Many modern constitutions explicitly confer a wide range of human rights. They specify not just civil and

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

Chapter 4 shows how sectoral legislation and policy has become ever more cognisant of the consumer protection dimension, often going beyond retail ‘shoppers rights’ and taking into account access issues, which may well include ‘non-shoppers’, i.e. unserved populations.

This issue of access is the subject of numerous United Nations declarations and most comprehensively by the MDGs and the SDGs, both of which have been explicitly recognized by the UNGCP. These goals are discussed in chapter 18 of this manual. Many such access rights are expressed in national constitutional provisions.

• **What aspects of consumer protection have been provided in constitutions?**

In 2008, UNCTAD reported that the constitutions of at least 24 countries provided for consumer protection, often linked with competition policy, as with the Mexican Constitution for example.²⁵ UNCTAD reported in 2013, that “in many cases, consumer protection has been constitutionally enshrined and some countries have recognized consumer rights as human rights.”²⁶ The report singled out for specific mention El Salvador,

²⁵ Article 28 applies consumer protection through its anti-monopoly measures. With exceptions, (such as State-provided services) monopolies are forbidden.

²⁶ *Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013*. Note by the UNCTAD secretariat, April 2015; See in the case of the Supreme court of Mexico: See - http://www.consumidor.gob.mx/wordpress/wp-content/uploads/2012/04/SENTENCIA_AMPARO_MEXICANA.pdf

Egypt, Poland and Switzerland and the recognition of the human rights dimension by the Mexican Supreme Court in 2012. Analysis of constitutional provisions indicates great differences in content, which can be synthesized as emphasising ‘high level’ principles such as:

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

Several jurisdictions have taken elements from ‘legitimate needs’ for constitutional provisions of comprehensive regional agreements, such as CARICOM (Caribbean Free Trade agreement) and the European Union.²⁷

The European Union Consolidated Treaty on the Functioning of the European Union states: ‘In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests.’²⁸ The European Charter of Fundamental Rights sets out, in Article 38 (under the title of Solidarity), the requirement for a high level of consumer protection: ‘Union policies shall ensure a high level of consumer protection.’ Other rights relevant to the legitimate needs are set out elsewhere in the Charter under Respect for Privacy (Article 7), Protection of Personal Data (Article 8), Freedom of Association (Article 12), Access to Health Services (Article 35) and Public Utility Services (Article 36). Such high level principles are often considered more appropriate for constitutional content than detailed provisions.

As indicated above, there are vital consumer issues

covered by constitutions, which are not indicated as consumer-related. Typical examples are access to basic public services such as water, health care, education and housing as in the South African constitution, where the word ‘consumer’ does not appear in the relevant clauses.²⁹ The South African Constitution, Article 184, mandates the South African Human Rights Commission to promote human rights. To this end it is mandated to demand of “relevant organs of State” to provide it with information on the measures taken to realize the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. These are referred to as socio-economic rights. The State must “respect, protect, promote and fulfil” these rights, based on principles specified in the Constitution, which must be observed and realised.

Constitutional law can be used to establish or reinforce basic or fundamental consumer rights, as well as provide some guiding principles such as that State or public authorities are responsible for promoting and protecting consumer rights, namely by setting-up adequate, comprehensive and effective legal and institutional frameworks for consumer protection. Constitutional provisions can be a tool for leveraging much needed improvement to levels of access. Certainly, civil society groups (not necessarily consumer associations,) have used constitutional rights to campaign in favour of consumer rights.³⁰ Such provisions may put into effect other rights that are guaranteed under the constitution.

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

3.3 Framework consumer protection laws

Although consumer protection law is often regarded as a modern phenomenon, many of what we regard

²⁷ Treaty of Chaguaramas, 2001, Article 169.

²⁸ Article 169.1 of the Consolidated version of the Treaty on the Functioning of the European Union; 26.10.2012 C 326/47.

²⁹ For discussion, see Ran Greenstein, *Social Rights, Essential Services and Political Mobilization in Post-Apartheid South Africa*, University of the Witwatersrand, Johannesburg, South Africa, 2005.

³⁰ Greenstein, *op. cit.*

as consumer protection laws have their origin in much earlier laws, such as those on weights and measures. The focus in the early phase of consumer protection law was very much the buyers and sellers of particular goods and services. These laws also did not distinguish between different categories of buyers (i.e. commercial or household). Before the Second World War, there were sectoral initiatives (drugs, food, motor vehicles, transport etc.) mainly motivated by public health and safety, and not envisaged as consumer protection measures as such. In due course, specific horizontal laws were widely adopted too, not necessarily attached to particular products such as:

- Price Control Act;
- Sale of Goods Act;
- Trade Descriptions Act;
- Weights and Measures Act; and
- Hire Purchase Act.

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

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

- Consumer Protection Fundamental Act 1968, Japan;
- Consumer Protection Act Quebec 1971, Canada;
- Trade Practices Act 1974, Australia, (subsumed within the Competition and Consumer Act 2010) ;
- Consumer Protection Act 1975, the Bolivarian Republic of Venezuela;
- Consumer Protection Act 1976, Mexico;
- Consumer Protection Act 1984, Spain (superseded by Royal decree 2007) ;
- Consumer Protection Act 1986, India;
- Consumer Protection Act 1993, China (revised

2014) ;

- Consumer Protection Act 1992, the Russian Federation;
- Consumer Protection Code 1997, Brazil;
- Law on Consumer Protection 1999, Indonesia;
- Consumer Code 2005, Italy;
- Consumer Code 2010, Peru;
- Consumer Code 2011, Colombia; and
- Consumer Code 2014, France.

There is an on-going debate on the advantages and disadvantages of having a generic Consumer Code on the one hand, and a variety of specific pieces of legislation (as in the United States). The debate is framed not only in terms of the relative merits of vertical (sectoral) and horizontal (cross-cutting/principle based) law, but also around whether consumer protection law should be written as a single text or code. Advantages of a framework approach are as follows:

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

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

- a) Some of these statutes include the rights of consumers as protected in law – rights such as safety, choice, information, education, fair price, representation and redress, often taking their lead from the UNGCP 'legitimate needs', Guideline 5;
- b) They define the term 'consumer' broadly. They may cover three categories – the purchaser, user and third parties;
- c) They frequently cover the delivery of both consumer goods and services, and sometimes include the provision of professional services (doctors, dentists, engineers, architects, etc.);
- d) They impose pre-contractual disclosure requirements on the products sold or services

- provided, covering price and tariffs, as well as contract terms;
- e) They may provide for the prohibition of unfair terms in consumer contracts;
 - f) They prohibit false, misleading or confusing advertising and other dubious forms of commercial communication;
 - g) They prohibit or restrict commercial practices that are considered to be misleading, aggressive or unfair to the consumer;
 - h) They may create consultative bodies comprising Government, industry and consumer representatives proactively addressing systemic consumer problems and recommending legislation and other consumer protection measures;
 - i) They often address issues relating to product and service safety and provide for standard setting, notification of unsafe products and recall of defective products;
 - j) They may facilitate compensation of consumers for defective products by introducing the principle of strict liability where products have caused material losses, personal injury or death to consumers;
 - k) The statutes may vest existing or specially created agencies with rule-making power to enable a swift response to evolving malpractice. In some instances, the rule-making power is vested in the executive branch of the Government, but advisory committees comprising both consumer and industry representatives are permitted to formulate recommendations of the regulations to be promulgated;
 - l) They may establish special tribunals (more recently ADR and ODR systems as discussed in chapter 11) where simplified rules of procedure and evidence are created to hear consumer complaints. Some are quite long standing such as the Indian Consumer Courts and the Spanish and Argentinian Consumer Arbitration courts established in 1986 and 1998;
 - m) They usually facilitate access of consumers to justice by admitting collective redress procedures. In such cases, they may confer upon a public officer (such as the Director of

- Trade Practices, consumer Ombudsman, etc.) and in some instances social action groups such as consumer associations, the right to commence litigation on behalf of a consumer or a group of consumers; and
- n) They usually provide a range of remedies, including rescission, the right to damages (including punitive damages), injunctive and declaratory relief are provided for. This maybe in recognition of the absence of a full, balanced and flexible range of remedies which may have the effect of neutralising in practice the rights that such statutes seek to confer upon the consumer.

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

Care in the use of the term 'consumer protection' is worth bearing in mind for States preparing consumer protection legislation. Model consumer protection laws have been prepared for several regions (e.g. Latin America, Africa, Caribbean) incorporating the features of the framework laws seen above.³¹ One can see the logic of this approach for regions, such as Latin America, in which there are certain continuities of language and legal tradition, or in regions with many small economies, such as the Caribbean or Pacific islands. However, there are challenges in adopting models that can override genuine differences in geographical and social conditions requiring different solutions. This is particularly true of public utility services where levels of connectivity among the local populations and natural resource constraints require very different approaches

³¹ Consumers International: *Model Law for Consumer Protection in Africa*, 1996. Also: *A Guide to Developing Consumer Protection Law*, 2011.

to, for example, tariff and subsidy structures and how to deal with 'non-consumers' (These issues are discussed in chapter 15). For this reason, a 'checklist' approach may be worth considering. It differs from the model law in that it does not seek to place all consumer protection provisions in one place, but to verify that all necessary protections are in place across legislation and institutional architecture, rendering more flexibility than model law.

3.4 Interface between consumer laws and other laws

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

3.4.1 Sectoral laws

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

- Food Act;
- Medicines (Advertisement and Sale) Act;
- Moneylenders Act;
- Insurance Act;
- Consumer Credit Act;
- Water Services Act;
- Telecommunications Act;
- Energy Act; and
- Transport Act.

The relationship between framework laws on consumer protection and sectoral laws has given rise to controversy in many countries. In particular, banks, insurance companies, air passenger companies, and providers of telecommunications services have argued that they are not subject to the general law on consumer protection but only to the law applicable to their sector. This interpretation has commonly been rejected by courts and the horizontal or comprehensive scope of application of the framework law on consumer

protection has been confirmed. Sectoral legislation does not preclude the application of the framework law, but complements it.

3.4.2 Professional service legislation

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

3.4.3 Intellectual property

An emerging interface is that observed between consumer protection law and intellectual property (IP) law. (Patents are dealt with in chapter 17 on health). The revised UNGCP address issues around e-commerce (see chapter 12) concentrating on issues around online transactions, such as disclosure and security, which are clearly important issues. However, the revised UNGCP do not deal with the emerging issues around consumer products that are governed by IP law because they incorporate copyright works. This includes products that operate (often invisibly to the user) through software, as well as those that incorporate text or audio-visual content. In many countries, anti-circumvention laws prevent the consumer from bypassing any technological protection measures (TPMs) that control how this copyright content may be accessed or copied. In light of the growth of digitally-delivered content, as well as the 'Internet of things', in which embedded sensors control hardware products at a distance through the internet, this is a crucial challenge as the line between consumer protection and IP may become

blurred. Indeed, one can envisage that one day, most manufactured products will contain an IP element.

The evolution of digital and non-tangible products, such as entertainment/cultural products, has taken place under the aegis of copyright law. As a very clear example of this, under Article 10.1 of the 1995 WTO Agreement on Intellectual property (TRIPS),³² software (or 'computer programmes' in 1995 parlance), is protected in the same way as literary works: "computer programmes, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)." It is worth noting that the TRIPS agreement, and IP law in general, traditionally allow some exceptions to copyright, such as 'fair use' or 'fair dealing'. The permissible exceptions are framed within limitations including limited scope, non-interference with the normal use of the product, and respect for the rights of the copyright holder as recognized under Article 13 of TRIPS. The danger for consumers in the current evolution is that IP rights-holders are protected in terms of the defence of their copyright, while the defences of consumers that also exist in IP law might not be invoked.

In theory, the consumer is notified in advance of the restrictions and penalties for transgression, in particular for unauthorized copying. There is convincing evidence that millions of consumers are unwittingly falling foul of digital product contracts. It is becoming ever clearer that in practice, hardly anyone reads the small print before they sign. The United Kingdom communications regulator, OFCOM, has found that only 0.5% of consumer read End Use Licence Agreements (EULAs). Consumers tend to believe that they own what they buy. Unfortunately, this reasonable assumption is often not legally valid with regard to digital products. The Australian Consumer Association ('Choice') giving evidence to the Law Commission, commissioned a nationally representative survey in 2013 that found very high proportions of users of digital products thought they had the right to transfer digital products within their own range of terminals (laptop, smartphone etc.), when in fact they would have unwittingly transgressed conditions of copyright by doing so.³³ The survey found that while 'overwhelmingly, consumers correctly

identified infringing use (such as 'selling on' or uploading digital products online) as illegal... Just over half (52%) of - consumers incorrectly believe that making a copy of music to listen to on more than one device is legal' and: 'A majority (57%) of consumers incorrectly believe that making a copy of a video to watch on a personally owned device is legal'.

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

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

3.4.4 International trade law

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

The aims of the still applicable General Agreement on Tariffs and Trade (GATT) remain to reduce levels of trade protection and to ensure that there is a fair and equal trading agreement between countries. As a result, the average tariff (measured against trade flows) on manufactured products in the world's nine major industrial markets fell from 40 percent to below five

³² Dr. Henning Grosse Ruse - Khan Fair Use, Fair Dealing and Other Open Ended Exceptions: The Application of the Three Step Test, Max Planck Gesellschaft, WIPO African-Arab Seminar on Copyright Limitations and Exceptions Cairo, November 2009.

³³ www.alrc.gov.au/sites/default/files/subs/745_0rg_choice_submission.docx

per cent by the mid-90s, with 99% of all product lines 'bound' (i.e. with commitments to limit tariff levels) by 1994 and 73% of those in developing countries. The spectacular reductions in tariffs that took place as a result of the GATT negotiations were clearly of great potential benefit to consumers in terms of price and availability (and thus choice) of goods in particular.

In this context, it is worth noting that Guideline 13 of the UNGCP stipulates: "in applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations." There is an inbuilt tension between product standards and open trade, hence the importance of the GATT general exceptions clause. This tension is explored further in chapter 9, which also discusses the fears of developing countries that safety standards may be used against them. Apart from the issue of tariffs, it has also been the case from the outset that the GATT allowed for consumer protection measures to be taken by members, even if they had the effect of acting as barriers to trade. Article 20 (the general exceptions clause) allows measures to be taken to protect "human, animal or plant life or health" or for "the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The consensus interpretation is that a country can apply the safety standards to imports that it applies to its own products, which may result in refusal of entry. However, unilateral action cannot be taken against other countries' internal production processes, nor internal and imported products be treated in different ways, such as applying higher standards to imports than those applied to domestically produced products.

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

6.4 of the GATS, which seeks to prevent regulatory rules from being used as spurious barriers to trade. Thus, a new debate has been sparked, one that relates to the international harmonization of standards and regulations. However, the WTO has ceased to be the sole focus of this debate. Coming to the fore at the time of writing are the provisions of the Trans-Atlantic Trade and Investment Partnership (TTIP - European Union and United States), the Trans-Pacific Partnership (TPP - 12 countries of the Pacific Rim) and the Trade in Services Agreement (European Union, United States and 21 other jurisdictions). Concerns have been expressed by civil society, including consumer organizations, regarding the confidential nature of the negotiations and the way that they enter into regulatory policy.³⁴ The new negotiations are taking the form of Preferential or Regional Trade Agreements (PTAs or RTAs) or bilateral agreements, often between rich and developing countries. By 2006, 197 PTAs with services commitments had been notified to GATT/WTO, with 106 of them having been notified since 2000. A WTO study suggested that "it may well be that negotiations of the PTAs have to some extent diverted resources and attention from the Doha services negotiations."³⁵

3.5 Conclusion

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

³⁴ See BEUC (The European Consumer Organization) Transatlantic Trade Deal and Consumers, 2016, and Factsheet: Trade in Services Agreement, 2016.

³⁵ M. Roy, J. Marchetti, H. Lim, *Service Liberalization in the New Generation of Preferential Trade Agreements. How Much Further Than GATS?* WTO Economic Research and Statistics Division, ERSD 2006-7.

CHAPTER 4

CONSUMER PROTECTION AGENCIES

In this chapter, the following issues are discussed:

- *UNGCP provisions relevant to consumer protection agencies*
- *The functions of a consumer protection agency*
- *Organizational models for a consumer protection agency*
- *The changing scope of consumer protection*

4.1 Consumer protection agencies in the United Nations Guidelines for Consumer Protection

The UNGCP are non-prescriptive regarding the organization of consumer protection agencies, for example setting out in Guideline 4 that Member States should “provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies.” The term infrastructure is rather apt and the analogy with physical infrastructure continues with Guideline 32, which indicates that States should assess the adequacy of the machinery for... enforcement of weights and measures legislation (one presumes that the same applies to other legislation). Section VI on International Cooperation requires improved cooperation between agencies, again without specifying structures.

4.2 Functions of consumer protection agencies

When an agency is delegated with both rule making and administrative powers, its powers may include the following:

- a) Enforce consumer protection and competition laws;
- b) Register and issue licences for certain designated types of business activities;
- c) Issue administrative rules to regulate conduct of business entities and ensure protection of the consumer interest;
- d) Advise the Government on appropriate measures for consumer protection;
- e) Represent the consumer interest in other intergovernmental committees;
- f) Advise consumers and businesses of their rights and obligations under the relevant

- g) consumer protection laws;
- g) Conduct, or commission, market surveys and research into consumer protection problems;
- h) Conduct or commission product testing for safety and quality and disseminate information to consumers;
- i) Manage and/or monitor the performance of consumer tribunals or other mechanisms for the mediation of consumer claims;
- j) Consult with relevant stakeholders to understand consumer issues and develop policy to address problem areas;
- k) Organize public education and information programmes independently or in collaboration with consumer organizations or business entities; and
- l) Represent the national consumer interest at international negotiations on individual cases and discussions of international policy.

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

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

While there are several models to choose from, the functions of the consumer protection agency are quite similar whether it is part of the Government or an autonomous entity. Some agencies though independent in structure, are still dependent on the Government for their operating costs and are answerable to the

minister charged with the responsibility and, as public bodies, to national parliaments or assemblies. This may result in lack of independence as directions may come from the Government as to what the emphasis, if at all, should be at any given moment. On the other hand, official recognition can give such an agency a high degree of 'clout' should the agency choose to use it.

4.3 Organizational models for consumer protection agencies

The UNGCP show a large degree of flexibility, given differences in national traditions and geographies, with a focus more on results than on the specifics of structures. Accordingly, there is a wide range of approaches to the precise location of consumer protection within the institutional architecture of Government. Nevertheless, certain types can be identified.

Various models have been adopted including a department within the Ministry of Commerce, a department within the Prime Minister's Office, or a separate agency or sometimes a Ministry of Consumer Affairs. Consumer protection has quite often been allocated to ministers with more than one portfolio,³⁶ for example, the Minister for Women's Affairs (Austria), Science and Tourism (Australia) and Children and Family Affairs (Norway). European Commissioners for Consumer Protection have also carried a variety of accompanying portfolios including, for a short time, Nuclear Safety. Even where the more 'conventional' choice is made, such as within the Ministry of Trade and Industry, there is a recurring complaint that the responsibility for consumer protection gets subsumed within the larger role of promoting business. This can cause conflicts within the Ministry, from which consumer protection sometimes emerges as the weaker partner. The same dynamic of built in conflict has emerged from sectoral agencies too. The financial crisis brought forward calls for consumer protection to be reinforced and this could lead to clashes over jurisdiction, between consumer protection agencies

on the one hand and prudential supervision on the other, within the relevant ministries or central banks.

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

One further model is for consumer policy to permeate all of Government policy and for governmental consumer protection agencies to have a degree of jurisdiction across all the sectoral ministries, such as energy, telecommunications, agriculture, etc. This has been achieved in Brazil and more recently in Peru (see below).³⁷ It has been attempted in Egypt during the early 21st century, where the cross-cutting application of consumer protection law became overshadowed at sectoral level by sectoral ministries.³⁸ The revised EU Treaty in 1997 provided under Article 153 that henceforward, '*consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.*'³⁹

4.3.1 Examples of Government agencies within ministries

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

In New Zealand and South Africa, consumer protection was directly administered from the relevant Ministries until relatively recently. They have developed clearly identifiable agencies, Consumer Protection of New Zealand within the Ministry of Business Innovation and

³⁶ Consumers International, Guidelines for Consumer Policy in Central and Eastern Europe, 2000.

³⁷ See *Edicao comemorativa Codigo de Protecao e Defesa do consumidor* Secretaria Nacional do consumidor (SENACON) Ministerio de Justicia, 2015. Also for history: L Rodrigues Maia Pinto, *Consumer Protection in Brazil: A General View*. George Washington University, 2002.

³⁸ Final Report: Support to the Implementation of a Consumer Protection Law and Regime in Egypt, EC/SOFRECO, 2007.

³⁹ Consolidated version of the Treaty establishing the European Community 1997, Article 153; <http://www.lexnet.dk/law/download/treaties/Ect-1997.pdf>

Employment, and the National Consumer Commission within South Africa as an 'institution outside public service' performing many of the functions associated with consumer protection as throughout the world, with competition going to a separate agency.

In Latin America, national agencies in Brazil and Chile have gradually developed high public profiles, their institutions now being quite mature. In Brazil, the *Secretaria Nacional do Consumidor* (SENACON) is a federal Government agency under the Ministry of Justice. Its functions include receiving, collecting and disseminating information and advice to consumers, promoting consumer education, mounting investigations into consumer complaints and making recommendations to other Government agencies about consumer protection. Under the terms of the Consumer Protection Code, which celebrated its 25th anniversary in 2015, SENACON coordinates the National Consumer Defence System, which includes provincial consumer agencies (the PROCONs, which carry out much of the work on individual cases), public defenders and the relevant ministries.⁴⁰

In France, the *Direction Générale de la Concurrence, la Consommation et la Répression des Fraudes* (DGCCRF) is attached to the Ministry of the Economy, Industry and Digital Affairs and has an extensive network of offices in every département of France; 96 outlets in all. It has responsibility for the regulation of market competition, (with powers to refer to the Competition Authority), for economic protection of consumers, notably by encouraging the development of fair commercial practices, the respect of consumer rights, and for product safety (including the European Rapid Alert system RAPEX and the Food and Feed Safety Alerts RASSF). It covers particular sectors such as transport, tourism and financial services. It acts as a policy maker and enforcer. Its high public profile generated four million online contacts in 2015.

In some Former Soviet Republics, consumer protection remains as a department within ministries and has a low public profile. This is the case in Uzbekistan, Moldova, Belarus and Turkmenistan.

4.3.2 Consultation mechanisms

As consumer protection has matured as a discipline,

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

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

In Japan, the Consumer Policy Council was set up under the Prime Minister's Office under the Consumer Protection Fundamental Act 1968. It is chaired by the Prime Minister and comprises ministers, all of whom have roles in the development of the Government's consumer policy. The function of the Council is to plan and draft the direction of the Government's consumer policy and to promote related policy measures. The related Quality-of-Life Policy Council, also housed within the Prime Minister's cabinet office, comprises experts in the field of consumer protection, namely scholars, representatives of consumer organizations and representatives of major industries. It studies and deliberates issues relating to consumer protection policy. As elsewhere, an executive National Consumer statutory body funded by the Government and local consumer centres in all the prefectures and major cities and towns deal with consumer complaints, product testing, consumer education and information for consumers.

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

⁴⁰ SENACON, *op.cit.*

privileged by the location in the Prime Minister's office.

4.3.3 Operational autonomy

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

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

The location of responsibility for consumer protection became a matter of urgency after the collapse of Communism in the late '80s and early '90s in Central and Eastern Europe, where new systems had to be developed rapidly as economies shifted towards a more market based orientation. In these transitional economies, a tension soon developed between the institutions based on local market inspectorates and the high level policy bodies, which tried to push towards greater reliance on market forces.

One possible resolution of these dilemmas was to rely on a single national body for market surveillance, as was done in Hungary in the 1990s, where the General Inspectorate for Consumer Protection carried out local market surveillance under central direction. This resembled the approach in France, where the DGCCRF (see above) carries out local market surveillance even though it is a national body. In contrast, in the United Kingdom local market surveillance is, traditionally, the job of the local elected municipalities through their Trading Standards Officers (although they are currently developing a more central function). The application

of local market surveillance by national bodies tends to reflect the tradition of public administration based on a prefectural system as in France and the Russian Federation. In contrast, the local Government-based tradition, already mentioned in the United Kingdom, has developed in Poland in the form of strong local consumer Ombudsmen. It is the name of the Ombudsman, with its connotation of being on the side of the ordinary person that has given a boost to the idea of the people's watchdog. In this context it is worth noting that in Latin America the Ombudsman for public services is known as *El Defensor del Pueblo* (the Defender of the People) and in some jurisdictions, notably in Ecuador, has become a major public figure in a relatively short period of time.

The development of the Ombudsman concept, which originated in Sweden, where the consumer agency ("*Konsumentverket*") is a Government body whose Director General is also the Consumer Ombudsman. The *Konsumentverket* is empowered to represent the consumer interest under various consumer protection laws. It supports and draws upon, the work of local consumer advice centres across the country and administers the National Board for Consumer Complaints, a consumer redress agency. As in Poland, the evidence base represented by the local case work, feeds up into national policy. (The Ombudsman concept is discussed in chapter 11 on dispute resolution and redress).

4.3.4 The link with competition

Further challenges arise as to the benefit of separation or conjunction of responsibility over consumer protection, on the one hand, and competition policy on the other. The approach to the latter taken by Poland and by some countries in the Former Soviet Union, including the Russian Federation, Kazakhstan and Georgia, after the dramatic changes in that region, was to set up an autonomous State Anti-Monopoly Committee charged both with competition policy and consumer protection. In 1996 the Polish anti-monopoly office evolved into the Office of Competition and Consumer Protection.⁴¹ In contrast, the Russian Federation's anti-monopoly committee separated in due course from consumer protection, which was entrusted to an autonomous agency, *Rozpotrebnadzor*.⁴²

It is interesting then to observe that the convergence that took place in Poland in the 1990s is not unlike that

in Australia, where the two dimensions of consumer protection and competition have been brought together. There are then, instances of convergence and of separation but the move towards higher public profile for agencies is steady, if not always smooth. The place of competition policy is discussed in chapter 7. Examples of some autonomous consumer protection bodies (with statutory powers taking in competition and consumer protection) in selected countries are described below.

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

The United States' Federal Trade Commission (FTC) is an independent agency of the United States Government established in 1915. The FTC's mission is to protect consumers and promote competition. It uses three main divisions to fulfil its mandate – the Bureaus of Consumer Protection, Competition and Economics – and enforces over 70 federal laws and regulations. The consumer protection authority, including consumer privacy and data security, protects consumers against unfair and deceptive or fraudulent business practices. The FTC's consumer protection actions include individual company and industry-wide investigations, administrative and federal court litigation, as well as rulemaking proceedings. The FTC also takes complaints from the public, gives advice to consumers and to businesses and often obtains

redress and/or refunds as a result of its actions. The agency also enforces federal antitrust (or competition) laws that prohibit anti-competitive mergers and other business practices that restrict competition and harm consumers. The Bureau of Economics provides economic analysis and support for consumer protection and anti-trust matters. The FTC has seven regional offices and an Office of Technological Research and Investigation, which provides technical expertise and researches the implications of technology and technical change for consumers.

Peru's Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual (INDECOPI) oversees a wide range of issues, including: consumer protection, competition, the elimination of bureaucratic barrier measures (with a view to simplification), anti-dumping (applying the relevant WTO code), and intellectual property. It has the status of a 'specialized public agency' attached to the office of the Prime Minister with 'independent status of internal public law'. It enjoys 'functional, technical, economic, budgetary and administrative autonomy.' Its independence in managing its resources gives it greater possibilities for outreach and since its establishment in 1992, has developed a high public profile and is currently considered to be one of the best regarded State institutions in the country.⁴³

The Chinese Consumer Association (CCA) is a generic quasi-Government organization, with no individual consumer members, performing a public interest function. In 2014, under the terms of an amendment to the Chinese Consumer Protection Law, (originally adopted in 1993) several significant modifications came into effect. The amendment characterizes the CCA as a "social organization" rather than an association. With this new legal status, the CCA is, for the first time, authorized by statute to be both funded by the Government, and to be an active participant in the legislative process. Beside the dispute resolution functions stipulated by the former law, the CCA and its provincial branches are awarded a power to bring class action litigation against behaviour considered

⁴¹ For more in-depth discussion of this period, see T. Timberg, *The Role of Anti-Monopoly Committees in the Former Soviet Union in Demokratizatsiya*.

⁴² Although Rozpotrebnadzor has a high public profile at national level, regional offices are (at the time of writing) housed within the agency responsible for food safety and public health.

⁴³ See: <http://www.greatplacetowork.com.pe/storage/documents/suplemento-gptwperu-2014baja.pdf>, page 9.

detrimental to the public as consumers. The CCA is effectively a department of the State Administration for Industry and Commerce (SAIC). It carries responsibility for anti-monopoly enforcement, although its most public actions tend to be around enforcement of product safety.

4.3.5 Non-statutory public bodies

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

Fiji's Consumer Council was established under the Consumer Council of Fiji Act 1976 as a statutory body funded by the Government. It has an advisory role and no enforcement powers. Among its functions are advising the Minister, making recommendations to the Minister, making representations to the Government or giving evidence at any investigation or inquiry, collecting, collating and disseminating information, advising and assisting consumers, and supporting and maintaining legal proceedings contemplated or initiated by consumers. It has a very prominent public profile, campaigning on financial services and nutrition for example. Its negotiations with banks regarding the development of codes of practice for consumer protection were particularly public.⁴⁴

The Consumer Council of Hong Kong, China (HKCC) was set up as a statutory body in 1974. It does not have enforcement powers. Its functions include collecting, receiving and disseminating information on goods, services and housing. It handles complaints through its network of local advice centres and gives advice to

consumers including special services to visitors from Mainland China. The Council advises the Government of Hong Kong (China) or any relevant public office, for example the Ministry responsible for Energy Policy on which the Government of Hong Kong (China) carried out a major review in 2014-15 to which HKCC gave extensive evidence with high profile publicity in press and TV.⁴⁵ The Council encourages business and professional associations to establish codes of practice, especially important in Hong Kong, (China) because of the absence of a Consumer Protection Act. It performed a particularly important role during the financial crisis of 2008 giving advice to thousands of consumers. The sale of minibonds, for example, gave rise to some 20,000 consumer complaints and HKCC sponsored a legal action through its Consumer Legal Action Fund.⁴⁶

4.4 The changing scope of consumer protection

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

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

However, there have been further evolutions driven by the rapid change in technology and the attempts by Governments to keep up. As telecoms become a multi-

⁴⁴ Premila Kumar, *The Case of Fiji: Irresponsible Lending Practices in Consumer Credit Markets in Responsible Lending, An International Landscape*, Consumers International 2013.

⁴⁵ HKCC, *Searching for New Directions; a Study of Hong Kong Electricity Market*, December 2014.

⁴⁶ Connie Lau, *Presentation to International Forum on Justice and Consumer Rights*, UNGCP, Wuhan, China 2013.

functional bundle of ICT services rather than a simple communication device, offices of communication are bringing telecoms and other services such as broadband together (for example the United Kingdom's OFCOM). Furthermore, particularly in developing countries, financial services and telecoms are also converging, due to the rapid development of mobile banking. This presents a dilemma for national policy as to whether regulation should be seen as a part of financial or communication regulation. In India and South Africa, mobile money is seen as part of the Central Bank functions. In Kenya it has largely operated under self-regulation. Concerns are now emerging in Kenya about the dominance of the joint telecoms/financial service providers, a concern which is even more pronounced in neighbouring Somalia where mobile telephony is one of the few vectors of communication that functions in commercial terms.

Such changes pose huge challenges to national agencies, and efforts to develop international guidelines by bodies such as the G20 and the Financial Stability Board, in response to the financial crisis, have found it very difficult to address them. There have been attempts to approach the need for consumer protection by appealing directly to companies through international guidelines such as the OECD Guidelines for Multi-National Enterprises and ISO 26000 on Social Responsibility, as discussed in chapter 6 on business conduct.

4.5 Conclusion

There is no single best model for consumer protection agencies, as history and geography are legitimate influences on structures. Nevertheless, certain

trends can be discerned. One is that an autonomous functioning of a consumer protection agency allows it to develop a high public profile which brings consumers into contact and allows their experience to bear directly on policy. In this regard, a local presence of some kind is a big advantage, as many markets remain local, especially for the poor, despite the sophistication of modern electronic commercial relations. It is interesting to note that many of the agencies located within Ministries have high public profiles, as do others that are described above which have a more autonomous position in formal or legal terms. The precise form of the institutional architecture does not seem to be the determining factor in public recognition – what matters is that such recognition is possible.

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

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

CHAPTER 5 CONSUMER ASSOCIATIONS

In this chapter, the following issues are discussed:

- *Consumer Associations in the UNGCP*
- *Consumer associations in the modern economy*
- *Functions of consumer associations*
- *Consumer associations' independence*
- *Representativeness of consumer associations*
- *Consumer associations – matters of independence and representation*

5.1 Consumer associations in the United Nations Guidelines for Consumer Protection

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

The UNGCP now refer to the role of consumer associations in dispute resolution and redress mechanisms (Guideline 41), and widen the reference to ‘community participation’ in utilities; it is now mentioned in the energy sector (Guideline 76). In short, the UNGCP confirm the appropriateness of participation of civil society participants in consumer protection.

5.2 Consumer associations in the modern economy

As seen in chapter 3, the involvement of consumer

associations in consumer protection is now widely accepted. They have been given the mandate to represent the consumer interest in:

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

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

State sponsorship continues today in different forms sometimes as financial support to autonomous bodies, some of which are discussed below, but sometimes through a more direct form of promotion, as in China, where consumers have been encouraged to bring complaints forward and have been offered financial inducements to do so through compensation awards. The Chinese Consumer Association thus acts as what Trentmann describes as “the Government’s watchdog [...] local whistle blower and people’s lawyer.”⁴⁷

Throughout history there have been spontaneous consumer protests around food in particular. Such protests provided the sparks for both the French and Russian revolutions.⁴⁸ The more distinct notion of consumer rights could be said to have followed on

from industrialization with its associated specialization separating producers from consumers. In the early years, the movement took the form of consumer cooperative shops in such varied locations as industrial Britain in the mid-nineteenth century, and Germany, France and Italy a little later. Japan too had its adherents to the cooperative model, there having been instances of cooperative financial institutions as early as the 13th century.⁴⁹

In the United States and Argentina, another model developed based on consumer and farmer cooperatives for the development of public utilities such as water and electricity, (some still in operation)⁵⁰ Evoking such history perhaps, Guideline 36(b) asks Member States, with regard to 'distribution facilities for essential goods and services,' to "consider encouraging the establishment of consumer co-operatives and related trading activities, [...] especially in rural areas." More recently, similar public service cooperatives have developed in rural Bangladesh, Philippines and Sri Lanka, and some consumer associations have mounted consumer cooperatives, for example in Mumbai.⁵¹

Consumers Union of the United States was established during the 1930s,⁵² and its Consumer Reports and associated newsletter are read by around seven million subscribers in total. Professor Robert Mayer has pointed to the robust health of the United States consumer movement, noting that in 2012 there were eight associations with annual revenues in excess of US\$ 2 million.⁵³ Consumers Union had revenues of US\$ 250 million and three others had budgets in excess of US\$ 8 million. This model of independent and detailed technical assessment of consumer products independently published is a highly successful North American export to the rest of the world. Consumers Association of the United Kingdom, with initial financial assistance from their North American colleagues, grew up during the 1950s to develop a mass membership based on its product testing and its magazine 'Which'

reaching one million members at its peak. The highest level of market penetration in the world was reached in Belgium and the Netherlands, which have experienced the highest percentages of households taking product testing magazines. In due course, the associations publishing product testing magazines were financed by subscriptions to their publications, which were operated on commercial lines, albeit with a non-profit making status. Some product testing magazines were launched by Governments in Norway, Sweden and Austria, receiving both subscriptions and public subsidies. Some consumer associations were built up with the active participation of labour unions and tenants associations, France being an example of the latter case.

Testing products is intrinsically expensive, and so where products are available in international markets it makes sense for consumer associations to pool resources. Following a period of informal and bilateral cooperation between associations, some of the larger budget testing organizations came together in 1990 to form International Consumer Research and Testing (ICRT), a global consortium of 35 consumer organizations in 33 countries dedicated to carrying out joint research and testing in the consumer interest.⁵⁴ ICRT runs more than 50 large joint tests and numerous smaller joint tests each year and can reduce significantly the costs to smaller organizations as a result of resource pooling.

In the transitional economies of Central and Eastern Europe, the expense involved in testing and the more volatile conditions have made it very difficult to establish and sustain product testing magazines on a stable basis, even in large markets such as the Russian Federation. Consumer associations in this region have often drawn their historic legitimacy from local 'clubs,' sometimes based around home economics associations, giving the associations a direct contact with the general public which preceded the arrival of the market economy. The same link with local associations is to be found in the Chinese Consumers Association,

⁴⁷ Frank Trentmann *Empire of Things: How We Became a World of Consumers From the 15th Century to the 21st*, Allen Lane, 2016.

⁴⁸ Simon Schama, *Citizens*, Penguin, 1989, in Paul Bushkovitch, *A Concise History of Russia*, Cambridge, 2012.

⁴⁹ Trentmann, *op. cit.*

⁵⁰ F. Ruiz-Mier, and M. van Ginneken, *Consumer Cooperatives: An Alternative Institutional Model for Delivery of Urban Water Supply and Sanitation Services?* Water Supply and Sanitation, Working Note No. 5, Washington, DC, World Bank, 2006.

⁵¹ S. Ochieng, *Enhancing Access to Sustainable Energy in Developing Countries*, ISO/COPOLCO Seoul, 2008.

⁵² For a more detailed history and analysis of the US consumer movement: R. Mayer and R. Herrmann, *Encyclopedia of the Consumer Movement*, 1997. See also: Lizabeth Cohen, *Is It Time for Another Round of Consumer Protection?* Colston Warne Lecture, *Journal of Consumer Affairs*, 44, 2010.

⁵³ Robert Mayer, *The US Consumer Movement: A New Era Amid Old Challenges*, Colston Warne Lecture, 2012.

⁵⁴ ICRT, *International Organizations*, 2016.

where by 2010, over 3,250 consumer associations at county level, plus 156,000 local associations, accepted some 12.5 million consumer complaints.⁵⁵

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

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

5.3 The functions of consumer associations

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

- There is a need for an independent actor which

is non-party-political and non-commercial to give voice to the issues that impact on consumers;

- There is a need for the views of the under-represented, including the inarticulate and disadvantaged, to be heard in order to address the disparity in bargaining power, knowledge and resources between consumers and business;
- There is a need for associations to have a wide membership base and command popular support to represent the specific interests of consumers;⁵⁶ and
- There is a need for participatory decision-making, consultation and consumer associations which can form a part of the democratic process.

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

- a) Providing independent information (including test or survey results) on products and services as well as educational activities, to enable consumers to make informed choices and to consume responsibly;
- b) Organizing campaigns on specific issues to enable consumers collectively to voice their views and demonstrate their strength. This varies from organizing lobbies of parliament and coordinated press campaigns, to signature/letter-writing campaigns, even boycotts, rallies, etc;⁵⁷
- c) Advising and acting on individual consumer complaints, providing advice and obtaining redress; this may extend from participation in dispute resolution bodies to engaging in public interest litigation on behalf of consumers;
- d) Engaging in dialogue with Government and business to inform, persuade or negotiate on behalf of consumers. This may include, for example, organizing workshops and seminars on particular issues to highlight alternative views on these issues to policy-makers, business and

⁵⁵ Dr Ying Yu and R. Simpson, *International Forum on Justice and Consumer Rights: UNGCP*, University of Wuhan, China, 2013.

⁵⁶ Although care needs to be taken not to dismiss new associations embarking on their development – this issue is discussed below.

⁵⁷ Twenty-four hour telephone boycotts have been notably successful in gaining attention in locations as varied as Peru, Lebanon and Portugal.

- the media;
- e) Representing consumer views to official committees such as those organized by utility regulators, and enquiries around the crisis in financial services; and
 - f) Conducting surveys and research to study problems faced by consumers including the impact of Government policies on consumers and highlighting the findings to consumers, policy-makers and the media.

There are vast differences between the ways consumer associations operate, often depending on the economic status of the country. In economies where the consuming public is relatively well-educated and well-resourced, comparative testing and providing sound information to consumers has been the main role of many consumer organizations. Millions of consumers subscribe to their magazines, (and to the online services that are now overtaking them), and are willing to pay for the independent and well-researched information and advice contained in them on products and services. In developing countries, consumer associations have taken a more 'basic needs approach' and may be involved at the local level in educating and empowering consumers regarding their rights while advocating and representing consumer issues at the national level. Interestingly, there is a convergence of basic needs and richer consumers as choice web sites proliferate for energy services which are becoming a major service provided by associations in Europe to their members. There are echoes of past consumer cooperatives in this concept of pooling resources to provide a service, although one of the historic problems of cooperatives for public policy is how to help non-members who often include the poorest. That issue is discussed later in the chapter 15.

5.4 Consumer associations' independence

A key factor to ensure the credibility of consumer associations is independence, both from businesses and party political causes.⁵⁸

The financial viability of consumer organizations

may pose difficulties when it comes to holding on to their independent stance. While many consumer associations in developed countries have a reasonably strong financial footing in the sales of their magazines, which proved to be remarkably resilient during the financial crisis,⁵⁹ such is not the case in developing countries where consumer associations do not have as large a subscription base to depend on. The bulk of their funding is frequently from external sources and they are therefore vulnerable to restrictions applied by donor agencies (which may include their own Governments) to focus on particular issues in particular areas or indeed not to do so. This is a balancing exercise that consumer associations constantly have to face.

5.5 Consumer associations – are they representative?

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

a) Representative base

Consultation is an essential feature of true and effective representation. The absence of a significant membership and established consultation mechanisms can compromise their representative role. Can consumer organizations with limited membership truly claim to represent the consumer interest? Can consumer associations really be more successful in setting priorities, identifying regulatory targets and implementing strategies than public agencies? Many strive to be representative of the consumer interest. To be so, it helps to have a broad membership base and consultation mechanisms with the membership, but some caution is needed when it comes to recognition of consumer

⁵⁸ Article 12.1 of the *Constitution of Consumers International* indicates the independent role expected of consumer associations.

⁵⁹ The use of many consumer association services rose during the financial crisis for obvious reasons, but the extent to which this translated into membership has not been systematically researched.

associations. Small organizations will have difficulty in securing a representative role when starting out, especially when articulating a specific issue, which may have developed rapidly, for example in response to a public health emergency.

b) Competing organizations

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

c) Competing interests

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

issue is explored further in chapter 15 on public utilities.

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

d) Quality and competence

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

The problem is especially acute with consumer groups that lack the resources to undertake or commission research or have limited access to information, as is often the case with consumer groups in poorer countries. However, that should not be taken to mean that consumers cannot form associations until they have substantial financial resources. Some very effective and courageous consumer NGOs have formed as a result of frustration about specific and pressing issues that did not require (at least not initially) fully worked out scientific dossiers to address. Cases in point have arisen from lack of access to essential services or worries about safety, for example, the work of MAMA '86, the association of Ukrainian women protesting against the lack of transparency of information after the Chernobyl disaster in 1988 and their concerns for safety of the water supply.⁶⁰ In 2006-2007, the Association of Energy Consumers in Cameroon, *Réseau associatif des consommateurs de l'énergie* (RACE), protested against the lack of access to electricity supply despite reassurances that were given when a concession was granted to supply power to the aluminium smelting industry.⁶¹ It is worth noting that such movements often arise in response to single issues and associations

⁶⁰ See M. Muller, M. van Ginneken and R. Simpson, *Ways to Improve Water Services by Making Utilities More Accountable to Their Users*, Water Working Notes 15, Water Sector Board World Bank, 2008.

⁶¹ RACE, *Energie Info*, bulletin bimestriel d'information et de liaison des consommateurs de l'énergie, Editions 2008

cannot be expected to cope immediately with the full breadth of the consumer horizon, a scope which even the best resourced organizations have difficulty in covering.

e) Conflicts of interest and finance

A complex issue regarding the representation role of consumer organizations is whether consumer representatives should accept payment for their representation. Financing from either industry or Government poses obvious problems of independence. There are various ways in which these dilemmas have been addressed since the last revision of this manual. As discussed in chapter 4, some publicly funded consumer bodies have managed to maintain a high profile and maintain autonomy in policy making. One example of a system that could help resolve the issue of independence is the development of industry financed mediation and representation services, possibly incorporating the above mentioned representatives, financed through a general levy paid into a standing fund, so that there is not a direct link between a specific company and a specific consumer body. This can be funded by a small fraction of consumer utility bills, as has been customary in both the United States state regulatory commissions for energy and Canadian provinces in order to fund consumer representation during rate hearings.⁶²

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

Case by case individual representation has also been enabled by a variety of sources. These have included a proportion of fines being used to fund consumer

associations. While the award of such finance may be independent of the protagonists, one problem could be that it reduces incentives for the association to adapt to and embrace Alternative Dispute Resolution mechanisms. At the very least, consumer associations would expect court expenses to be met if they are to represent consumers. In several jurisdictions, this has been a long standing practice, such as in Eastern and Central Europe.

5.6 Conclusion

Chapter 3 drew attention to the blurring of lines between consumer protection agencies and associations, as the former have become more consultation based and open to consumer opinion. In some cases this is enshrined in treaties, such as the CARICOM treaty recognising the Caribbean Consumer Council.⁶³ In turn, consumer associations undergo an equivalent shift towards assuming responsibilities in the public arena. They have increasingly been granted locus standi in the courts. In the EU, they have for some time been able to seek injunctions in the general consumer interest to prevent actions by traders which are illegal under relevant consumer protection Directives.⁶⁴ Professor Fernandez Arroyo reported in 2012 that in the EU the German, Spanish, French, Greek, Italian and Slovenian systems allowed for consumer interests to be represented before the courts by a consumer association, “distinct from the consumers themselves,” and that the same was also true of Brazil.⁶⁵ In some EU Members States, consumer associations play a role in enforcement of consumer protection law alongside public bodies. For example, the German Verbraucherzentralen (consumer advice centres) can act alongside business associations. The ‘super-complaint’ mechanism in the United Kingdom has been used by designated consumer associations to trigger official investigations, to considerable effect (see chapter 14 on financial services). The longer-term trend is thus for consensus to emerge around the input of consumer associations.

⁶² Marilena Lazzarini, *Improving Utilities*, Guest Address to the World Bank, 2004.

⁶³ Treaty of Chaguaramas, 2001; See also Philip McClauren, presentation to *Ecole d'ete en droit de la consommation* Universite du Quebec a Montreal, 2011.

⁶⁴ EU Directive 98/27, Articles 1-3, for example.

⁶⁵ Diego Fernandez Arroyo, *Consumer Protection in International Private Relations-General Report*. In, *The Global Financial Crisis and the Need for Consumer Regulation*. Eds., Claudia Lima Marques, Diego Fernandez Arroyo, Iain Ramsay, Gail Pearson, International Law Association.

CHAPTER 6 BUSINESS CONDUCT

In this chapter the following issues are discussed:

- *Business conduct in the UNGCP*
- *Corporate social responsibility*
- *The rationale for self-regulation*

6.1 Business conduct in the United Nations Guidelines for Consumer Protection

In paragraph (c) the Objectives of the UNGCP (Guideline 1) include “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.

The revised UNGCP contain a substantial new section IV on Principles for Good Business Practices (Guideline 11). It sets out principles as ‘benchmarks’ for good practice online and offline. Most of the content of this section is also dealt with elsewhere in the UNGCP and

there is overlap of substance with section V.A: National policies for consumer protection, which is directed at Governments and whose first sub-paragraph Guideline 14(a) advocates the encouragement of good business practices. The significance of the new section IV lies in the fact that it is explicitly addressed towards business as opposed to Governments, to whom the previous versions of the UNGCP were predominantly directed. The application of the UNGCP to State-owned enterprises under Guideline 2 is also significant, as it explicitly bounds States’ commercial activities to consumer protection principles.

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

Box 1: UNGCP section IV Principles for good business practices

Guideline 11

11. The principles that establish benchmarks for good business practice for conducting online and off-line 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.

UNGCP: section V B on physical safety. UNCTAD manual: chapter 9 on product safety and liability

(b) Commercial Behaviour

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

UNGCP: section V J on financial services. UNCTAD manual: chapter 14 on financial services.

(c) Disclosure and transparency

Businesses should provide complete, accurate and not misleading information regarding the goods and services, terms, conditions, applicable fees and final costs to enable consumers to take informed decisions. Business should ensure easy access to this information, especially to the key terms and conditions, regardless of the means of technology used.

UNGCP: section V C on promotion and protection of consumers’ economic interests; section V J on financial services. UNCTAD manual: chapter 10 on consumer information and education.

(d) Education and raising awareness

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

UNGCP: section G on education and information programmes, especially Guideline 46. UNCTAD manual: chapter 10 on consumer information and education.

(e) Protection of privacy

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

UNGCP: Guidelines 5(k) and 66(g). UNCTAD manual: chapter 13 on privacy and data protection.

(f) Consumer complaints and disputes

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

UNGCP: section V F on dispute resolution and redress. UNCTAD manual: chapter 1 on consumer Redress.

Source: UNCTAD

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

The UNGCP broaches issues of self-regulation in Guideline 31: "Governments should, within their own national context, encourage the formulation and implementation by business, in cooperation

with consumer organizations, of codes of marketing and other business practices to ensure adequate consumer protection. Voluntary agreements may also be established jointly by business, consumer organizations and other interested parties. These codes should receive adequate publicity." This issue is discussed later in the chapter.

The UNCTAD 2013 survey on the implementation of the UNGCP reports briefly on self-regulation codes and agreements, noting that they have been promoted by consumer protection agencies and adopted by the private sector. These include self-regulation of advertising in Colombia and of marketing of cosmetics and of food and drink to children in Mexico. As chapter 10 discusses, the United Kingdom relies heavily on self-regulation for advertising, including sales promotion and direct marketing.

In Switzerland, self-regulation has been entirely privately initiated and is reported by UNCTAD as yielding very satisfactory results.⁶⁶ Although Swiss law does not mandate private codes of marketing or other business practices, the marketing sector has formulated its own, which is based on the Federal Act against Unfair Competition. If a business violates this code, then a consumer can file a complaint at a private commission, which will decide whether the code has been violated. This commission is the executive body

⁶⁶ UNCTAD, Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013, Note by the UNCTAD secretariat, April 2013.

of the Swiss Foundation for fair business practices whose members are the principal private organizations and associations in the Swiss marketing sector.⁶⁷

6.2 Corporate social responsibility

Corporate social responsibility (CSR) is about good corporate citizenship. It covers a range of issues, such as human rights and environmental matters that go beyond transactions between consumers and business. Interest in CSR has intensified since the publication of the last revision of this manual, resulting in such important publications as ISO 26000 Guidance standard on Social Responsibility⁶⁸ and the OECD guidelines for Multinational enterprises.⁶⁹

However, the notion of CSR is not new. There were ‘model employers’ in 19th century Europe, who were preceded in the early century by the New Lanark model village factories of Robert Owen in Scotland, a utopian project later transplanted to the United States. The 1920s saw the development of the concept of socially responsible investment, which has also experienced a renaissance in recent years. Chapter 5 has already discussed how the consumer cooperative movement developed in Europe during the nineteenth century.⁷⁰ Industrial cooperatives are still widespread in the Basque country to take a well-known example, and to this day, cooperatives are recognized by the European Union as speaking for consumers.

The notion of CSR taps deeper roots than modern Western business concepts. The 2016 *‘tour d’horizon’* by Christopher Hodges draws upon Rousseau’s social contract and John Rawls’ corporate citizenship.⁷¹ The concept of CSR is spreading in India, taking in

elements of Gandhian philosophy and its principle of ‘trusteeship’, the idea that we enjoy ‘delegated ownership’ of the world. Laxmitant Sharma argues that the duty of philanthropy “correlates to the concept of CSR” while still acting as a driver for growth, and development of new markets.⁷²

6.2.1 European Union definitions of corporate social responsibility

In its 2011 Communication, the European Commission put forward a simplified definition of CSR as “the responsibility of enterprises for their impacts on society” and outlined what an enterprise should do to meet that responsibility “over and above their legal obligations”.⁷³ Its previous definition was: “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”.⁷⁴ Some express disappointment at the apparent shift of emphasis away from the voluntary nature of CSR under the new definition, but the more succinct later definition is consistent with internationally recognized CSR principles and guidelines, such as the OECD and ISO documents. CSR was not envisaged by the European Union as limited to goods acquired through retail purchases, but also as extending to services including public services.⁷⁵

6.2.2 ISO 26000 Guidance on corporate social responsibility

In 2002, ISO’s Consumer Policy Committee put forward the proposal for a ground-breaking standard on CSR. The negotiation process attracted enormous interest: one meeting had 400 participants. 70 countries

⁶⁷ See: <http://www.lauterkeit.chapter/komm1F.htm>

⁶⁸ ISO 26000, Guidance on Social Responsibility, 2010. Reviewed and confirmed in 2014. NB: ISO 26000 is not limited to corporations but is also aimed at ‘organizations’ including Government.

⁶⁹ OECD *Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*, 2011.

⁷⁰ F. Trentmann, *Empire of Things*, Allen Lane, 2016.

⁷¹ C. Hodges, *Law and Corporate Behaviour*, Hart 2016. J. Rawls, *A Theory of Justice*, Harvard 1971; A. Sen, *The Idea of Justice*, Allen Lane, 2009.

⁷² L. Sharma, *Relevance of Gandhian Ideology: Philanthropy to CSR*. International Research Journal of Humanities, Language and Literature. V 2(3) March 2015. Also A V Joseph, *Successful Examples of CSR*. Indian Journal of Industrial Relations, 44(3), 2009.

⁷³ E. C., *A Renewed European Union Strategy 2011-14 for Corporate Social Responsibility; Communication from the Commission*, October 25, 2011 COM (2011), 681 Final.

⁷⁴ See E. C. *Corporate Social Responsibility: A New Definition, A New Agenda For Action*, Memo/11/730, October 25, 2011.

⁷⁵ OECD, *Guidelines for Multinational Enterprises*, OECD 2011.

⁷⁶ Knopf et al., *CSR Compendium: Public Policies in the European Union*, Adelphi, 2011.

were involved, some 80 consumer experts (including national delegations) 30 liaison organizations and six stakeholder groups. The ISO 26000 standard was published in November 2010.⁷⁷

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

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

ISO 26000 is not a 'certifiable' standard. That is to say it does not have precise quantifiable standards that can be measured and against which enterprises can be 'passed' or 'failed.' It is a guidance standard, developed by consensus in the committee. Since it does not contain precise targets (in contrast to food standards, for example) it cannot amount to a barrier to trade – no Government can ban imports of a product if the enterprise does not follow ISO 26000 in its production processes.⁷⁸ ISO, anticipating potential misunderstandings on the nature of the new standard, is quite explicit about this:

"ISO 26000 is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offer to certify, or claims to be certified, to ISO 26000 would be a misrepresentation of the intent and purpose and a misuse of this international standard. As ISO 26000 does not contain requirements, any such certification would not be a demonstration of conformity with this international standard."⁷⁹

Turning to the chapter that deals with consumer issues, ISO 26000 drew upon the UNGCP as a framework. In addition to drawing upon the 'legitimate

needs' Guideline 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); (discussed in chapter 13 of this manual) ;
- The precautionary approach, drawn from the Rio declaration on Environment and Development, (discussed in chapter 9);
- Promotion of gender equality and the empowerment of women, drawn from United Nations Universal Declaration of Human Rights; and
- Promotion of universal design, intended to enable usage of products by all, especially for disabled people.

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

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

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

6.2.3 OECD Guidelines for multi-national enterprises

The OECD's revised Guidelines for Multinational Enterprises were agreed in 2011, but did not include reference to ISO 26000. They provide guidance on human rights; employment and industrial relations; environment; combating bribery; bribe solicitation and

⁷⁷ See Judith Vitt, Verbraucherzentralen Bundesverband, *Consumers Care: Access To Information for More Sustainable Markets*, in ISO Focus, March 3, 2011, and Sadie Homer (CI) ISO WG *Social Responsibility Presentation* to ISO COPOCLCO/DEVCO Training Workshop on Social Responsibility, Vienna 2007.

⁷⁸ Nevertheless, several national standards bodies have developed certifiable standards for their jurisdictions, for example Denmark and the Netherlands.

⁷⁹ ISO, *Discovering ISO 26000: ISO 2010*.

extortion; consumer interests; science and technology; competition; and taxation. Consumer issues are common to both guidelines as are human rights, environment and employment matters. One might say that broadly speaking, OECD describes principles and policies, while ISO offers detailed guidance on practices.

6.2.4 Is corporate social responsibility making progress?

There is no doubt of the expansion of CSR activity. Among multinational enterprises (MNEs), annual global reporting output increased from close to zero in 1992, to around 4,000 in 2010.⁸⁰ Some 600 European Union enterprises had signed the United Nations Global Compact (on human rights, environment and labour) by 2006, some 1900 by 2011. By 2006, 270 MNEs had issued sustainability reports; 850 by 2011.⁸¹ However, there is still a long way to go as there are approximately 82,000 MNEs in existence today.

National initiatives in the European Union, reported by the CSR Compendium, have included a Danish action plan, Spanish legislation establishing transparency requirements, and performance indicators in cooperation with the State council on CSR. In Scandinavia and the Netherlands, heavy emphasis has been placed on the supply chain, thus connecting with retail consumers. The Dutch Social and Economic Council launched the International CSR Initiative, calling on Dutch trade and industry to actively pursue responsible supply chain practices, based on recommendations of ILO and OECD and the International Chambers of Commerce (ICC). Different countries have different approaches. A national prize for quality in the Czech Republic was amended to include the criterion of responsible supply chain selection; while in Slovakia the Via Bona awards were made by the Pontis Foundation for projects promoting business transparency beyond legal requirements.⁸²

There is a recurrent criticism of the slow pace at which States expose their own services or State-owned enterprises to CSR concepts, although Spain has moved in that direction. There has been widespread discussion on introducing mandatory requirements for CSR reporting and the European consumer federation, the *Bureau Européen des Unions de Consommateurs* (BEUC), has urged the European Union to move in this direction.⁸³

A 2012 report on a survey of Fortune 500 companies in the United States recorded that, around the turn of the Millennium, only about a dozen issued a CSR or sustainability report. By 2012, a majority were doing so.⁸⁴ The United Nations have made its own contribution through the adoption by the Human Rights Council, of the Guiding Principles on Business and Human Rights of 2011 with its 'three pillars' known as the 'Ruggie principles':

- Protect: The State's duty to protect human rights;
- Respect: Corporate responsibility to respect human rights; and
- Remedy: Access to remedies for victims of business-related activities.

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

Some commentators from opposite ends of the spectrum take the view that CSR is a contradiction in terms: some business journalists, on the one hand, and NGOs, on the other, may take the view that businesses are single minded in the pursuit of profit, and indeed legally constrained from being otherwise. While some regard the concept of CSR as a kind of corporate public relations,⁸⁵ others, perhaps most notoriously Milton Friedman, regard it as a subversion of business objectives. There are potential pitfalls that are safeguarded against by the principle set out

⁸⁰ Compendium, *op. cit.*

⁸¹ EC COM 681 final, *op. cit.*, United Nations Global Compact derives from *Universal Declaration on Human Rights; ILO Declaration on Fundamental Principles and Rights at Work; Rio Declaration on Environment and Development; United Nations Convention Against Corruption.*

⁸² Compendium, *op. cit.*

⁸³ J. Vitt and U. Pacht, *Towards a European CSR Framework: Reflection Paper for the Multi-Stakeholder Forum on CSR*, BEUC, November, 2010.

⁸⁴ 'Time' - *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, May 28, 2012.

⁸⁵ See for example, Corporate Watch, *What's Wrong with CSR?* Corporate Watch, Oxford, 2006.

by the European Union that CSR should go above and beyond legal obligations. This is particularly important in the context of consumers, as so much consumer protection is already subject to extensive legal obligations. Nevertheless, there has been a shift: CSR has evolved from philanthropy to a core activity for an increasing number of businesses, progressing 'from how business spread their money to how they earn it.'⁸⁶

6.2.5 Is it possible to do well by doing good?

One central question for all business is: does having a better corporate consumer protection policy yield better economic results? There is an extensive literature on the subject but little synthesis until recently. A literature review of 167 studies undertaken by Harvard Business School and the universities of California and Michigan, concluded: "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".⁸⁷

Box 2: Peru's promotion of good business practices

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

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

The three categories are:

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

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

Source: INDECOPI

6.3 Self-regulation

As with CSR, some consumer advocates see self-regulation as a poor alternative to statute. Some academic economists see self-regulation (SR) as a recipe for legalized cartels. Yet, as we have seen, it is envisaged and encouraged under United Nations guidelines. There seem to be three broad sets of circumstances for which SR is designed. One is where the task of protecting consumers has been delegated by Government to the professions and reinforced by legislation and licensing arrangements. One could call

this 'delegated self-regulation' as commonly used for lawyers and doctors, and the emphasis is increasingly on stakeholder verification.

The second kind of self-regulation is where a group of businesses choose to regulate themselves, making voluntary commitments to behave in a certain way. This could be described as 'voluntary self-regulation.' In plain words, businesses say: 'it's up to us'. Commitments should go beyond any legal requirements and set standards in areas where there

⁸⁶ United Kingdom Department for Business Innovation and Skills: *Corporate Responsibility, Good for Business and Society*, 2014. E. C., *Consultation About A Code For Effective Open Voluntarism*, EC DG INFSO, 2012.

⁸⁷ Floyd Whaley, *Is CSR Profitable For Companies?* Devx Impact, 2013, USAID Partnership, See Box 2.

are none set by law.

A frequent weakness of such schemes is the limited extent of the market that is covered by the members of the code. When the OECD CCP investigated SR, it noted the contrasting examples of the United Kingdom Direct Sales Association members, which had about 53 per cent of the direct sales market, while the membership of the equivalent body in New Zealand accounted for 90 per cent. New Zealand's high figure was thought to be accounted for by the fact that the code did little more than restate the law.⁸⁸ This illustrates the problem with the voluntary approach. The further the code goes beyond the law, the less inclined a trader may be to join, unless all their rivals do so as well – also known as the ‘first mover’ dilemma.

There is a third ‘hybrid’ route. Under this category, criteria can be set by Government for schemes to describe themselves as SR, to guard the integrity of the description. Such criteria include:

- Benefits which go beyond the law;
- The organization that sets up a code having a significant influence in the sector;
- Independent organizations, (such as consumer or advisory bodies) having influence on the preparation of the code ;
- Adequate complaints mechanisms and redress for breaches of the code ;
- Review and monitoring of the scheme;
- Sanctions against failure to comply; and
- Adequate publicity.

Under the hybrid model, the State has a legitimate interest in protecting the SR ‘brand’, especially where it vests its own authority through a badge of approval in the existence of a scheme. Crucially, the State has to hold the reserve power to legislate should the SR mechanisms prove too weak.

Indeed, the SR concept contains dilemmas. If SR is too weak the concept is devalued. On the other hand, if it is too far reaching, then SR could impose barriers to entry into a trade and thus act in an anti-competitive

way. Delegated self-regulation tends to have the most comprehensive level of coverage (indeed membership may become almost a license condition) and voluntary the least. Voluntary SR sometimes has an excessive number of small schemes. There are over 100 Japanese schemes, covering very narrow product areas such as soybean paste, soy sauce, biscuits, eyeglasses, pianos, as well as major product sectors such as home electronics and banking. Such diversity of scale and specialization may complicate consumer information efforts.⁸⁹

With the emergence of the hybrid, the language of SR began to change and the twin but distinct concepts of self- and co-regulation emerged. For example, a United Kingdom Government White Paper⁹⁰ defined the two concepts as follows:

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

Co-regulation refers to the situation where the regulator and industry stakeholders work together with, typically, the regulator setting the framework to work within. It may be left to industry stakeholders to draft detailed rules within this framework and to take responsibility for implementation and enforcement. Incentives for cooperation are often in the form of string fallback powers for the regulator.”

The trend has been towards co-regulation in particular because the Government's reserve powers allow it to keep the scheme up to standard and to point out to the, sometimes sceptical, public that it is not abandoning its responsibilities. This was the basis of the establishment of the Consumer Codes Approval Scheme by the United Kingdom's Office of Fair Trading to validate the integrity of self-regulatory consumer codes. When codes did not meet certain criteria, the approval by the OFT was withdrawn.⁹¹ The scheme continues in a slightly different form under the Consumer Codes Approval Board, operated by

⁸⁸ Information to OECD Consumer Policy Committee Working Group on Industry-Led Regulation, 2009.

⁸⁹ R. Simpson, *Harnessing Business and Consumer Interests; Is Statute the Only Way?* Fair Trading Commission of Barbados, 4th Annual FTC Lecture, Bridgetown, February 8, 2008.

⁹⁰ Department of Trade and Industry, *Modern Markets, Competent Consumers; The Government's Consumer White Paper*, 1999.

⁹¹ OFT, *Consumer Codes Approval Scheme; Core Criteria and Guidance*, 2004.

the Trading Standards Institute (which works with the local trading standards departments). In this way, the integrity of the self-regulation 'brand' is safeguarded. The World Bank study on the reform of financial services in the transitional economies recommends: "A code of conduct for sector-specific financial institutions is developed by the sector-specific associations (in consultation with the financial supervisory agency and consumer associations if possible). Monitored by a statutory agency or an effective self-regulatory agency, this code is formally adhered to by all sector-specific institutions. The code may be augmented by voluntary codes of conduct devised by individual financial institutions for their own operations. These codes are widely publicized".⁹²

6.3.1 Cross-border codes

One argument in favour of SR is that its flexibility makes it easier to operate across borders. Chapter 8 reviews some of the challenges around the legal enforceability of cross-border regulation arising from jurisdictional issues. Such disputes may be avoided by cross-border codes precisely because they are not laws. Clearly, within a given multi-national company the scheme should be relatively easy to establish with common criteria being agreed upon. However,

sectoral codes may also establish 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.

In the field of advertising, for example, the International Chamber of Commerce (ICC) developed a *Consolidated ICC Code of Advertising and Marketing Communication Practice* that is designed, on the business side, to provide ethical guidelines that create a level playing field and minimize the need for legislative or regulatory restrictions. On the consumer side, it is designed to build trust with the consumer by assuring them of advertising that is honest, legal, decent and truthful and quick and easy redress when transgressions occur.⁹³ Related work has been developed in a number of other areas including behavioural advertising, food and beverage marketing, environmental marketing and direct selling practices.⁹⁴

6.3.2 Criteria for self-regulation

Drawing on the above discussion, Box 3 contains some schematic criteria for the consideration of SR schemes.

Box 3 Criteria for self-regulation

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

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

Delegated: legal regulation is delegated by the State to the self-regulatory body, as is the case for legal services and medicine. Membership is compulsory and similar to a license to practice. Standard setting will usually be delegated to such bodies.

Hybrid: membership is not compulsory by law but recognition of the title of 'approved code' is awarded by Government and the observance of standards by practitioners may be equivalent to meeting legal requirements. Standard setting may be delegated to a national standards body by the industry body alongside consumer bodies.

Source: *OECD Industry self-regulation: role and use in supporting consumer interests. 2015*

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

⁹² The World Bank, *Good Practices for Financial Consumer Protection*, The World Bank, 2012.

⁹³ See www.iccwbo.org/Data/Policies/2011/ICC-Consolidated-Code-of-Advertising-and-Marketing-2011-English/

⁹⁴ OECD, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests*, OECD Digital Economy Papers, no. 247, 2015.

Box 4: Strengths and weaknesses of self-regulatory systems and legislation

Self-regulation

Strengths:

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

Weaknesses:

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

Legislation

Strengths:

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

Weaknesses:

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

Source: OECD Industry self-regulation: role and use in supporting consumer interests. 2015

There are various cases of Governments failing to secure adequate statutory regulation, sometimes due to political lobbying by the industry concerned. In consequence, many States have promoted SR as a fall back option, sometimes under pressure from consumer lobbies. Indeed, consumer groups usually prefer regulation over SR, but prefer SR

over no framework at all. There are also times when Governments have been slow to act and businesses have taken the initiative to develop codes of practice themselves. M-Pesa in Kenya is a case in point, having taken the strategic decision, during its early growth phase, to develop its own regulations and to behave as if it were a regulated entity.⁹⁵

⁹⁵ O. Morawczynski and M. Pickens, *Poor People Using Mobile Financial Services: Observations on Customer Usage and Impact* From M-PESA, Focus Note CGAP Brief, August 2009.

In the absence of imposed standards, some microfinance providers have also developed their own standards. Client protection principles were developed as a code of ethics by Accion and other microfinance industry investors who established the Smart Campaign, following widespread criticism of the \$150 million profit made by Compartamos of Mexico.⁹⁶ Microfinance Transparency guidelines have been developed and endorsed by various NGOs, development agencies and service providers working to raise standards. In Uganda, the Association of Microfinance Institutions has developed a code of practice for consumer protection with a focus on disclosure and financial education. It has been adopted by over 40 microfinance institutions and it is a condition of entry to the association, thus providing a 'badge' of conduct to reassure consumers.⁹⁷

6.4 Does collaboration work?

Professor Christopher Hodges mounts an eloquent plea for a collaborative approach to consumer

protection and regulation: "The basic idea is one of a collaborative approach between businesses, their stakeholders and public officials, based on a shared ethical approach."⁹⁸ He argues that the findings of behavioural psychology suggest that the regulatory system will be most effective in affecting the behaviour of individuals where it supports ethical and fair behaviour. He finds that individuals will not volunteer information if they fear attracting criticism or blame, and that a 'blame culture' will inhibit learning and the development of an ethical culture, so businesses and regulators should support an essentially open collaborative culture in which complaints are treated as gifts. This may sound fanciful, but some private sector companies have indeed adopted this model and sought out complaints. Nevertheless he acknowledges that "where people break rules or behave immorally, people expect to see a proportionate response."

Bearing this in mind, one could apply many criteria to both CSR and SR. Box 5 contains a check list for SR and CSR.

Box 5: Check list for self-regulation and corporate social responsibility

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

Source: UNCTAD.

6.5 Conclusion

CSR and SR codes commonly entail two rather simplistic reactions. One is that they are too weak and need to be backed by legislation at some point.

It is worth noting that during the preceding years to the financial crisis, many dubious practices were perfectly legal, a situation that reflects the scope for legislators to be outflanked or even captured and the risks therefore of waiting for legislation. The other, and

⁹⁶ See <http://www.smartcampaign.org/about-the-campaign/campaign-sponsors>

⁹⁷ David Baguma, Concept Note: *Consumer Code of Practice for Micro-Finance Institutions*; Association of Microfinance Institutions in Uganda AMFIU, Accra, 2009.

⁹⁸ C. Hodges: *Regulatory Collaboration: Empirical Evidence on Ethical Behaviour*, Oxford, 2016.

opposite, reaction is that statutory regulation always fails or produces perverse effects and that therefore the answer lies with SR codes. It would be unfair to say that legislation fails in cases when it has not even been tried.

In any case the weaknesses of SR and CSR are commonly exaggerated; they can have quasi-legal and even fully legal effects. For example, the United States FTC have put forward the policy that a company that publicly claims to follow the principles set out in a code and which then fails to do so can be found to be

guilty of deceptive practices. This is a very simple step and one which seems to be a good bridge between statute and codes. In any case, it needs to be restated that codes have to be far more than a restatement of the law. A code that simply commits to obey the law could be worse than useless as it implies, subtly, that companies have an alternative. We should not underestimate the potential for embarrassment arising from a public commitment to a standard in the event of its being violated. In the last analysis SR does not prevent statute from being put into place; the two routes are not incompatible but mutually reinforcing.

CHAPTER 7

COMPETITION LAW AND THE CONSUMER INTEREST

President Obama: *“Maintaining, encouraging, and supporting a fair, efficient, and competitive marketplace is a cornerstone of the American economy. Consumers and workers need both competitive markets and information to make informed choices.”*¹⁰⁰

In this chapter the following issues are discussed:

- Competition in the UNGCP
- Nature and characteristics of competition policy and law
- Complexities and concepts of competition law
- Institutional architecture
- Switching and competition

7.1 Competition in the United Nations Guidelines for Consumer Protection

The UNGCP contain relatively few direct references to competition policy, although the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ‘ (for the United Nations Set) is explicitly referred to twice in the body of Resolution and again in Guideline 22. This clearly implies a commitment to ‘formulate and implement’ competition alongside consumer protection.

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

7.2 Nature and characteristics of competition law and policy

Competition can bring benefits to market efficiency, such as encouraging firms to improve productivity, reduce prices and to innovate, while rewarding

producers with profits, consumers with lower prices, higher quality and wider choice than would be the case in a less competitive market. When markets fail competition laws and policies are among the tools that can be used to bring about efficient workings of markets and to alleviate market failures.

Competition policy encompasses all Government policies intended to influence competition in markets and provides the legal framework to give effect to those policies. It is estimated that out of 122 countries, including developing economies, have implemented or put in place competition policy and law.¹⁰¹ These laws have a number of characteristics:

- Competition law has tended to exist only at the national level, except in the event of regional single markets such as the Andean Community, CARICOM, the European Union, MERCOSUR, SIECA and the West African Monetary Union;¹⁰²
- The criteria for determining anti-competitive behaviour is applied in the national market only and welfare considerations are assessed only as they affect local jurisdictions;
- Anti-competitive behaviour that affects consumers in other countries are not within the domain of national competition laws;
- As national competition laws seek to protect competition in the national market, its benefits accrue directly to consumers at the national level and indirectly abroad; and

¹⁰⁰ Executive Order – *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy*, April 15, 2016.

¹⁰² UNCTAD, Assessment of the Application and Implementation of the Set, Note by secretariat TD/RBP/CONF.8/2 April 2015.

¹⁰³ MERCOSUR: *Mercado comun del sur*; East and South of South America, SIECA: *Secretaria de Integracion Economico Centroamericano*; CARICOM: *Caribbean Community*, Anglophone countries plus Haiti and Suriname.

- There is currently no mandatory multilateral regulatory framework for competition policy per se.

The United Nations Set on competition

Nevertheless, the United Nations Set on competition has considerable authority in practice, especially in the context of countries that are already setting up their competition structures. Given the prominence attached to the United Nations Set in the UNGCP, it is necessary to study its content. It gives particular attention to developing countries and international trade (or rather its distortion by anti-competitive practices). In particular, the danger that transnational corporations may pursue 'restrictive business practices' to the disadvantage of developing countries is repeatedly mentioned. In effect, this now forms an accompaniment to the new section IV Principles of Good Business Practices (see chapter 6) as the text of the United Nations Set is equally addressed to businesses as well as to Governments. In this spirit, renewed importance can be attached to paragraphs D3 and D4 of the United Nations Set. D3 sets out that: "Enterprises should refrain from practices such as the following:

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

The above list applies largely to measures of collusion between companies with direct effects against consumers. D4 goes onto measures that take the form of abuse of dominant position: "Enterprises should refrain from:

- Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;

- Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services;
- Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature; (NB: mergers are not ruled out a priori);
- Fixing the prices at which goods exported can be resold in importing countries; and
- Other measures such as: arbitrary restrictions of similar goods under the same ownership, unjustified refusal to deal, conditional supply dependant on purchase of other goods.

7.3 Concepts of competition law

Anti-competitive practices refer to a wide range of business practices that firms or a group of firms may engage in.¹⁰³ The types of practices that are considered anti-competitive and in violation of competition law vary from one jurisdiction to another, and on a case by case basis. Certain practices may be prohibited outright (or declared per se illegal), while others may be subject to the rule of reason. In practice, per se illegality may not be a reason for a competition authority to intervene, as they increasingly tend to look for a demonstrable market effect before proceeding to formal interventions.¹⁰⁴

Generally, competition-restricting practices such as those referred to in paragraphs D3 and D4, listed above, can be said to fall into two categories, namely horizontal and vertical restraints on competition. Horizontal restraints entail collusive conduct with other competitors in the market and include specific practices such as cartels, conspiracy, and pricing behaviour such as predatory pricing, price discrimination and price fixing. Vertical restraints entail supplier-distributor relationships and include practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance, and tied selling. Typologies and descriptions of anti-competitive behaviour are well documented. This part will deal with particular concepts in common use:

¹⁰³ See UNCTAD, *Manual on Formulation and Enforcement of Competition Law and Policy*, UNCTAD/DITC/CLP2000.

¹⁰⁴ See also footnote to UNCTAD set para D4.

7.3.1 Abuse of dominance

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

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

A famous case in this context is that of EU vs. Microsoft. The company undertook research and development spending to develop their range of operating systems, most notably Windows. Its success was rewarded by dominance in the market. After a long-running series of complaints, the EU ordered Microsoft to provide information for competing software to be able to interact with Windows desktops and servers. Specifically, Microsoft was obliged to offer Windows without Windows Media Player, which was thus disintegrated from the Windows offer. Furthermore, the EU imposed its largest fine ever in 2004. Microsoft appealed only to lose in 2007. In 2009, bundling of services was further investigated, the outcome of which was the acceptance by Microsoft of consumer choice of browsers. Failure to comply with this agreement resulted in a further fine in 2013.

While market dominance is not a satisfactory condition for assuming abuse, it is a necessary prerequisite. Market share is the usual basis for measuring

dominance. The percentage share that will cause an investigation varies from country to country but as a general rule, it is very unlikely that a firm with less than 35% of market share either could or would be found guilty of dominance abuse. The only exception to this is in special circumstances where, for whatever reason, all firms in the market are found to have particularly high levels of market power. If market dominance is assumed then it must be shown that the firm in question is abusing that dominance if action is to be taken. Abuse of a dominant position can take the following forms:

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

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

As already mentioned, action has to be triggered by some evidence of consumer detriment attributable to the anti-competitive practice. The OECD Consumer Policy Toolkit¹⁰⁵ sets out its interpretation of consumer detriment with regard to the decision to intervene:

¹⁰⁵ OECD, *Consumer Policy Toolkit*, 2010

The decision whether to intervene should consider a number of questions:

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

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

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

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

7.3.2 Cartels and collusive behaviour

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

A distinction needs to be drawn between public and private cartels: in the case of public cartels, the Government may establish and enforce the rules, sometimes known as 'orderly marketing arrangements', relating to such matters as prices and output. Export cartels and shipping conferences are examples of public cartels. In many countries, 'depression cartels' have been permitted in industries deemed to be requiring price and production stability and/or to permit rationalisation of the industry structure and excess

capacity. In Japan for instance, such arrangements have been permitted in the steel, aluminium smelting, shipbuilding and various chemical industries. International commodity agreements covering products such as coffee, sugar, bauxite, tin, rubber, palm and petroleum are examples of international cartels that have publicly entailed agreements between different national Governments. Crisis cartels have also been organized by Governments in different countries for various industries or products in order to fix prices and ration production and distribution in periods of acute shortage. In this way, Governments may exercise a sponsoring role towards international cartels that they would not allow for cartels organized between private proponents. This is similar to what has been in effect a 'carve out' (discussed elsewhere in this volume) for the agricultural sector from the provisions of the normal WTO anti-dumping provisions (which are intended to prevent predatory pricing).

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

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

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

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

- The ability to raise and maintain industry price.

However, if entry barriers are low or substitute products exist, collusion may not be successful and firms will not have any incentive to join the agreement. This means of course that States, by increasing barriers to entry such as quotas and duties, may increase the tendency towards oligopoly;

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

Similarly, there are factors in a given market that may limit collusion. These include product heterogeneity, inter-firm cost differences, cyclical business conditions, the degree of sophistication among customers, technological change, infrequent product purchases,

differing expectations of firms, and incentives to apply secretly price cuts and increase market share.

By virtue of its conspiratorial nature, collusion between firms to raise or fix prices and reduce output is typically viewed by most authorities as the most serious violation of competition laws. But even here exemptions and exceptions apply. In almost all countries, associations of the learned professions (medicine, law, etc.) have affected “social contracts” that require them to supervise compliance by their members via professional codes. In exchange, the associations are permitted to determine entry and exit terms and even, limited rights to fix prices. There are also, in some countries, exemptions for agricultural cartels and those that involve co-operatives or small and medium sized enterprises. In many countries export cartels are not only tolerated but also encouraged. Indeed the EC and the United States have operated export subsidy mechanisms, which have been fiercely criticized by other countries because of their disruptive effects. This had been a major sticking point in the WTO negotiations until agreement in late 2015. In several countries, import cartels operate with impunity. Crucially, it should be considered, when comparing competition authority actions with regard to cartels and to abuse of dominance, that there is frequently a presumption of illegality in the case of cartels that does not exist in the case of a dominant position.¹⁰⁶

7.3.3 Mergers and acquisitions

A merger is an amalgamation or joining of two or more firms into an existing firm or to form a new firm. It is a method by which firms can increase their size and expand into existing or new economic activities and markets. An acquisition differs slightly – generally it is the purchase of one company by another business entity. Here, the acquired company no longer retains its own identity. The motive for merging and acquiring may be any of these: to increase economic efficiency, to acquire market power, to diversify, to expand into different geographic markets, and to pursue financial and other synergies.

Mergers and acquisitions are obviously not objectionable per se. In many developing countries,

Governments encourage or even force mergers because it is considered that firms in a particular area are too many and inefficient (the ‘efficiency defence’). This is considered particularly urgent given the liberalisation of markets and the impending entry of foreign players, something which can have different effects in different markets. The financial sector (banking, insurance, stock brokering, etc.), the non-fixed line telecommunications sector, and shipping have been of special focus with Governments even specifying the number of firms that would be permitted to operate after specified time periods.

Competition regulators have to contend with an array of considerations in arriving at decisions. In many instances, the final decisions may not, in practice, be theirs to make. Governments see competition regulation as part of the policy mix for economic management. Changes in Government therefore often result in a change in policies and can lead to competition policy being followed with less vigour.

7.4 Institutional architecture for competition

The competition-consumer protection interface is now very much emphasized, and a number of developments have provided for this impetus. One relates to the entrenchment of the free market concept. In the 1980s and particularly the 1990s, many developing countries underwent far-reaching market oriented reforms, leading to a considerable whittling down of the role of the State in economic activity through widespread privatisation, deregulation, internal and external financial liberalisation. However, privatisation could in practice often mean replacing a public monopoly with a private one. Competition policy and law thus came to be seen as an additional tool of consumer protection, notably in the emerging market economies of Eastern and central Europe, for example where consumer protection was often entrusted to ‘Anti-Monopoly’ offices, as outlined in chapter 4.

The OECD good practice round table in 2015 noted the gradual change in institutional architecture for competition authorities and the tendency

¹⁰⁶ Alison Jones and Albertina Albers-Llorens, *A Landscape of Diversity: The Consumer in Competition Law*, Paper for Conference: ‘The Images of the Consumer,’ Oxford University, March 2014.

for competition, sectoral regulation and public procurement to move together.¹⁰⁷ For example, the South Korean Fair Trading Commission took over consumer protection from the Ministry of Finance in 2008. The tendency has been particularly pronounced in Northern Europe in recent years: Finland, (where the Director General for consumer protection is also the consumer ombudsman), Ireland, Denmark, and the Netherlands all moved in this direction. The United States FTC has long housed consumer protection and competition directorates under the same roof but with different departments taking responsibility. For example in the recent instance of Facebook purchasing WhatsApp, the two parts of the house conducted separate investigations: the Consumer Protection Bureau looking primarily at safeguards for consumer privacy rather than competition issues, which were obviously the domain of the Competition Bureau. In the United Kingdom, the Office of Fair Trading and the Competition Authority have merged to become the Competition and Markets Authority, its powers concurrent with sectoral regulators. Policing the market

is the job of the Trading Standards service, which operates locally as departments of local authorities. There are however, exceptions. Iceland and Japan have moved the other way and in the Russian Federation, the Anti-Monopoly service remains separate from the consumer protection agency, Rospotrebnadzor. The South African Department of Trade and Industry is responsible for consumer protection, while the Competition Commission, a statutory body, handles competition regulation and enforcement.

Another factor affecting the institutional architecture is that an ever increasing number of international, as well as regional, agencies have made an explicit commitment to competition policy and law and in their effort to promote competition policy and law, have emphasized the role these can play in consumer protection. Consumer issues have thereby come to the forefront. Examples of these organizations are UNCTAD, the OECD, and the International Competition Network (ICN). Box 6 elaborates:

Box 6: International Organizations and Networks on competition policy

<p>1. United Nations Conference on Trade and Development (UNCTAD) www.unctad.org</p>	<p>Established in 1964, the United Nations Conference on Trade and Development (UNCTAD) aims at the development-friendly integration of developing countries into the world economy. UNCTAD is the focal point within the United Nations for the integrated treatment of trade and development and interrelated issues in the areas of trade, finance, technology, investment and sustainable development. It is also the focal point for competition and for consumer protection. UNCTAD is a forum for intergovernmental discussions and deliberations, supported by discussions with experts and exchanges of experience, aimed at consensus building. UNCTAD undertakes research, policy analysis and data collection in order to provide substantive inputs for the discussions of experts and Government representatives. UNCTAD, in cooperation with other organizations and donor countries, provides technical assistance tailored to the needs of the developing countries, with special attention being paid to the needs of the least developed countries, and countries with economies in transition. UNCTAD hosts an annual meeting of competition experts, including agencies and independent experts, namely the Intergovernmental group of experts on competition law and policy. These meetings take place back-to-back with those of the Intergovernmental group of experts on consumer protection law and policy.</p>
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¹⁰⁷ OECD Secretariat: Institutional Design DAF/COMP/M(2014)3/ANN4/Final, March 2015.

<p>2. Organization for Economic Cooperation and Development (OECD) www.oecd.org</p>	<p>OECD is an international organization helping Governments tackle the economic, social and governance challenges of a global economy. The OECD groups 34 member countries sharing a commitment to democratic Government and the market economy. With active relationships with many other countries (notably the BRICS), NGOs and civil society, it has a global reach. Best known for its publications and its statistics, its work covers economic and social issues from macroeconomics, to trade, education, development and science and innovation. The OECD plays a prominent role in fostering good governance in public service and in corporate activity. It helps Governments to ensure the responsiveness of key economic areas with sectoral monitoring. By deciphering emerging issues and identifying policies that work, it helps policy-makers adopt strategic orientations. It is well known for its individual country surveys and reviews. The OECD produces internationally agreed instruments, decisions and recommendations to promote good practice in areas where multilateral agreement is necessary for individual countries to make progress in a global economy. Sharing the benefits of growth is also crucial as shown in activities such as emerging economies, sustainable development, territorial economy and aid. Dialogue, consensus and peer review are at the very heart of OECD. The principle of consensus means that national Governments can and do block provisions in draft policy advice to which they object. Its governing body, the Council, is made up of representatives of member countries.</p>
<p>3. The International Competition Network (ICN) www.international-competitionnetwork.org</p>	<p>ICN is a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. ICN encourages the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. ICN's activities take place on a voluntary basis and rely on the high level of goodwill and cooperation among those jurisdictions involved. It builds on the many contacts that already exist among the organizations concerned. The work of ICN is project-driven and is not intended to replace or coordinate the work of other organizations, nor does it exercise any rule-making function. ICN provides the opportunity for its members to maintain regular contacts, in particular by means of annual conferences and progress meetings. Where ICN reaches consensus on recommendations arising from the projects, it is left to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate. The membership of ICN consists of 138 national or multinational competition agencies entrusted with the enforcement of antitrust laws. 119 jurisdictions are represented.</p>

7.5 A challenge for competition policy coherence: consumer resistance to switching

Consumer choice is the premise for and the goal of competition. For consumers to exercise that choice the options must be known to the consumer, who must be able to exercise choice. However, even if a substitute of a lower price is available, consumers do not always exercise their choice. This is seen among classical economists as a paradox and a problem. Recent interest has arisen in applying behavioural economics to consumers, in particular their search behaviour (i.e. how much consumers search and how many players they search amongst) and switching behaviour (i.e. how they respond to differences in prices between players in the industry). The sometimes unspoken conclusion is that consumers are stubbornly refusing to perceive their own interests.

Yet what if consumers are right to be cautious? The reliance on disclosure for consumer protection rather than upstream regulation may entail a transferred risk to consumers as was the case in the financial crisis. This is a considerable challenge for policy makers, for one should not swing to the other extreme of denying the advantages of switching. Policy makers therefore need to look at other measures, such as regulation of the behaviour of the providers, while making pricing behaviour more transparent, as was imposed on the French banking sector in 2010. A further example has been number portability in the telecoms sector, imposing acceptance by service providers of transfer of account numbers as a condition of licence. This is a good example of a regulatory intervention, easily understood by consumers and with beneficial results. There is thus an important role for policy measures to strengthen consumer protection, in particular by improving the information made available and rooting out prohibitive switching costs. The latter calls for, amongst others, an examination of the terms and

conditions contained in consumer contracts, or read into them because they have become “custom and practice” (for instance in banking, insurance, etc.) Relying on disclosure and transparency, to unleash competition and choice has sometimes proved to be ineffective.

7.6 Conclusion

Competition and consumer protection will probably always have a complex relationship; it may be a source of creative tension. In most cases, consumers have not campaigned for competition law and policy. Once in place, however, consumers and their representative organizations have come to see competition law and policy as a means of greater consumer protection. The traditional approach is, roughly speaking, for competition regulators to focus on the supply side

and consumer regulators to focus on the demand side. Such a dichotomous approach has led to narrow conceptions of what constitutes anti-competitive behaviour and limited approaches to address such behaviour.

As Professor Alan Fels expressed to an OECD Round table in 2015,¹⁰⁸ competition tends to the supply side, consumer protection to the demand side; competition tends to be unpopular with the public, consumer protection tends to be popular (‘watchdog for the underdog’); competition authorities proscribe (you must not), consumer protection authorities prescribe (you must); and competition tends to be ex post, while regulation tends to be ex ante. Although his juxtapositions are deliberately simplistic, and one could find exceptions to all, they do show the complementarity between the two spheres of policy.

¹⁰⁸ OECD, *Best Practice Round Table on Competition Policy 2015*; See also: A. Fels and H. Ergas, *Institutional Design of Competition Authorities*, OECD, December 2014, WD. 2014, 85.

CHAPTER 8

INTERNATIONAL COOPERATION

In this chapter the following issues are discussed:

- *International cooperation in the UNGCP*
- *Applicable law and jurisdiction*
- *Practical international cooperation*
- *International institutional machinery*

8.1 International cooperation in the United Nations Guidelines for Consumer Protection

The General Assembly resolution 70/186 on consumer protection of 22 December 2015 recognizes in the preamble, the value of international cooperation “coordination and partnership with established multilateral organizations”¹⁰⁹ and Guideline 1 lists among the objectives of the UNGCP the aim “to further international cooperation in the field of consumer protection.” Indeed, international cooperation is at the heart of the revised Guidelines.

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

national authority to investigate and share information should extend to cooperation on judicial and inter-agency enforcement with foreign counterparts.

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

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

The UNCTAD Implementation Report (2013) points to a wide variety of cooperation initiatives between member States.¹¹⁰ It lists several bilateral cooperation agreements, such as Chile–Peru, Chile–European Union, the Dominican Republic–Panama and Mexico–United States, usually comprising exchanges of information and capacity-building activities.

At the regional level, there are many initiatives: the Committee on Consumer Protection of the Association of Southeast Asian Nations (ASEAN), the Organization of American States and its Inter-American Rapid Alert System (SIAR), the Andean Community, the Competition and Consumer Protection American for Latin America Programme (COMPAL) of UNCTAD, the Central American Council on Consumer Protection, the Latin Forum of Government Consumer Protection Agencies (FIAGC), the Alianza del Pacífico, the Southern Common Market (MERCOSUR); the Union of South American Nations (UNASUR), The UNCTAD-MENA Programme for Middle East and Northern Africa;

¹⁰⁹ A/RES/70/186.

¹¹⁰ *Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013*, Note by UNCTAD secretariat.

Africomp of UNCTAD, African Consumer Dialogue, the Southern African Customs Union and the Southern African Development Community; the European Union Council on Consumer Protection Cooperation and European Commission initiatives, among others.

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

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

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

8.2 Applicable law and jurisdiction

The detail in which matters of international cooperation are set out in the UNGCP suggests an interest in overcoming the challenges to inter-agency cooperation. Resolution 70/186 mentioned above, refers explicitly to this issue when it declares “certain consumer protection issues, such as applicable law and jurisdiction, may be addressed most effectively through international consultation and cooperation”.

The term ‘applicable law and jurisdiction’ does not appear in the body of the actual Guidelines, although Guideline 39 calls for access to justice and redress mechanisms, particularly in cross-border disputes, to be enhanced. The OECD Guidelines on e-commerce paragraph 54ii, to which the UNGCP make reference, ask Governments to “consider the role of applicable law and jurisdiction in enhancing consumer trust in e-commerce”.¹¹¹

Guideline 90 of the OECD Guidelines for protecting consumers from fraudulent and deceptive commercial practices across borders refers to the possibility of jurisdictional conflict: “Member countries should improve their ability to co-operate in combating cross-border fraudulent and deceptive commercial practices recognizing that cooperation on particular investigations or cases remains within the discretion of the consumer protection enforcement agency being asked to cooperate. This agency may decline to cooperate on particular investigations or proceedings or limit or condition such cooperation, on the ground that it considers compliance with a request for cooperation to be inconsistent with its laws, interests or priorities, or resource constraints, or based on the absence of a mutual interest in the investigation or proceeding in question.”¹¹²

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

¹¹¹ OECD, *Consumer Protection in E-commerce*, OECD Recommendation, 2016.

¹¹² OECD, *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*, Recommendation of the Council, 2003

national laws, rules on special jurisdiction for cross border cases involving consumers, often using the judicial forum in the country of domicile for the consumer.

Attempts have been made to establish a general principle regarding which national agency should take the lead. For example, the International Law Association has developed the ‘most favourable protection’ principle, under which “it is desirable to develop standards and to apply rules of private international law that entitle consumers to take advantage of the most favourable consumer protection.”¹¹³ The question that this raises is who is to decide which is the most favourable law or jurisdiction? Again, these are issues that are currently left to the international private law of national jurisdictions.

Tourism

An obvious area for international cooperation is tourism. In the case of problems for international tourists, the country of domicile will often not be where the alleged infringement takes place. The revised UNGCP breaks new ground in dealing with the rights of tourists for the first time. Guideline 78 states “Member States should ensure that their consumer protection policies are adequate to address the marketing and the provision of goods and services related to tourism, including, but not limited to, travel, traveller accommodation and timeshares. Member States should, in particular, address the cross-border challenges raised by such activity, including enforcement cooperation and information sharing with other Member States, and should also cooperate with the relevant stakeholders in the tourism-travel sector”.

Tourism is one of the two largest sectors in the world on some criteria, only second to agriculture. Yet it has been somewhat ignored in consumer policy discussions. There are obvious vulnerabilities, which may require international cooperation, and it should not be overlooked that the Guidelines apply to the tourism as well as the travel sector. Thus, the

protections envisaged could stretch to include migrant workers as well.

In some respects the work involved in protecting tourists has become more difficult for two main reasons. The first is scale - the one billion mark was passed for arrivals in 2012 for the first time. Secondly, as online reservations have become more prevalent and tourist agencies have gone into decline, often there is no responsible service provider incorporated in the home country. For example, two thirds of foreign tourists to Brazil have no travel agency in their home country.¹¹⁴ The United Nations World Tourism Organization (UNWTO) has pointed to “the insufficiency of binding rules at the global level, governing the rights and obligations of tourists and tourist service providers”.

Two countries in particular, Brazil and China, have pressed for greater protections for tourists: Brazil partly because of the prospect of two global sporting events, the 2014 soccer World Cup and the 2016 Olympic Games; and China because of the sheer scale and sharp increase of both outward and inward tourism.¹¹⁵ The Brazilian Government is promoting the adoption of the draft International Convention on the Protection of Tourists and Visitors through the annual Hague conference on private international law.¹¹⁶ Professor Claudia Lima Marques, an advocate of reform in the sector, has indicated there is a need for ex ante rather than ex-post measures. In other words, in this context that means arrangements being made in the country of the destination rather than in the country of domicile so that as far as possible, cross-border litigation can be avoided. The draft Convention accordingly envisages a nominated authority in the contracting states, with the remit of providing advice, assistance and mediation services as well as small claims facilities if needed. This is essentially an institutional arrangement, what Professor Lima Marques describes as a “pragmatic comeback to private international law.”¹¹⁷

It is far from clear then, that there is a definitive answer to the questions of jurisdiction raised in Section VI

¹¹³ ILA Resolution no. 4, 2012, “Statement on the Development of International Principles on Consumer Protection” Sofia.

¹¹⁴ C. Lima Marques, *op. cit.*

¹¹⁵ According to OECD, Chinese tourists spent \$102 billion in 2012, a 37% increase over the previous year and more than any other country; L. Thompson, *Tourism’s Changing Profile*, OECD Observer no. 297, Q4, 2013.

¹¹⁶ Hague Conference on Private International Law; *Draft International Convention on the Protection of Tourists and Visitors*, 2013.

¹¹⁷ C. Lima Marques, *op. cit.*

of the UNGCP. The example of tourism shows how institutional arrangements, namely the presence of someone for tourists to turn to for help, may prove to be the most effective solution.

8.3 Practical international cooperation

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

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

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

ICPEN runs education campaigns, such as the annual Fraud Prevention Month, and carries out the annual Internet Sweep, which searches for web-sites that may be defrauding consumers. The sweep is described by the UNCTAD Implementation report as "parallel and coordinated law enforcement actions". Such actions signal the existence of a global law enforcement network, and enable pro-active enforcement. ICPEN aims to enable cross-border e-commerce complaints "through means other than formal legal action" and distributes incoming complaints to national consumer protection agencies.¹¹⁸

Another regional example of inter-agency cooperation is the European Commission's rapid alert system for dangerous non-food products, RAPEX. The Commission publishes a weekly overview of the alerts on products reported by national authorities. They include information on the dangerous products found, the identified risks and the measures taken in the notifying country in order to prevent or restrict their marketing or use. Measures can be ordered by national authorities ("compulsory measures") or be taken directly by producers and distributors ("voluntary measures"). Each alert also includes information of the countries where the same product was found and if further measures were taken. Such alerts are not specific to individual cases (although information is gleaned from them) and so do not raise the same issues of jurisdiction.¹¹⁹ The Organization of American States has also created a similar system to RAPEX, the SIAR (Inter-American Rapid Alert System), a new network to monitor safety problems in products and services in the Americas, effective since December 2014.

The EC has also developed the network of European Consumer Centres with a presence in all the EU 28 member states (plus Norway and Iceland), which do deal with individual consumers. The centres assist consumers with a free service offering cross-border mediation, advice, including on judicial procedures or dispute resolution and have the capacity to produce policy reports. Although often seen as a service for tourists, the remit of the centres applies to a far wider public, taking in all cross-border disputes between consumers and service providers. Over 10 years of operation as a network, they have received 650,000 direct contacts and by 2015 were running at 100,000 direct contacts per annum, including 40,000 complaints and with far more (three million) referred to national consumer protection agencies. Again, practical action, not necessarily requiring litigation, follows the institutional arrangements.¹²⁰

¹¹⁸ www.icpen.org

¹¹⁹ http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/main/?event=main.listNotifications

¹²⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A132048>
also www.ec.europa.eu/consumers/ecc/

8.4 International institutional machinery

The second context in which international cooperation is raised in the UNGCP is indicated by Section VII on International institutional machinery, an entirely new and substantial addition. The text sets out arrangements for the Intergovernmental Group of Experts (IGE) on consumer protection law and policy, which meets under the auspices of UNCTAD. Guideline 97 sets out the functions of the IGE:

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

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

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

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

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

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

One of the major innovations of the revised UNGCP is its dynamic update. Whereas in previous versions there was no institutionalized revision process foreseen, Guideline 97(i) asks the IGE to conduct a periodic review of the Guidelines, when mandated by

the United Nations Review Conference. This will allow new issues and developments to be duly discussed at the intergovernmental level and, when and if consensus arises, to be included in the Guidelines. This will serve to periodically update the UNGCP, ensuring their continued relevance. Indeed, the newly established IGE is set to become a very important forum to enhance cooperation and to push consumer protection issues forward in the global agenda.

8.5 Conclusion

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

arrangements between consumer protection agencies represents a great improvement in this regard.

However, the problems are more fundamental for consumers who are physically away from the domicile of businesses. The growth of transactions by internet has undermined traditional frontier controls that have always been applied to physical imports. Increasingly, international controls are regulatory rather than physical for both goods and services. Where a consumer orders a physical product from a foreign website, the goods may be delivered from a depot in the country of domicile where they were manufactured, or a digital product produced in country A may be downloaded from a website in country B to a consumer in country C.

Given such complexities, it is important that effective international legal instruments are designed to achieve effective cross-border consumer redress. Currently, the way is open for companies to gain market advantages by making public commitments to standards of conduct reinforced by certain codes of behaviour wherever they operate. That leads to increased focus on matters of business conduct, as discussed in chapter 6.

PART II: CONSUMER PROTECTION
IN THE MARKETPLACE

CHAPTER 9

PRODUCT SAFETY AND LIABILITY

In this chapter the following issues are discussed:

- *Product safety in the UNGCP*
- *Product safety laws*
- *Product liability*
- *Services as dangerous products*
- *Product safety in international law and policy*

9.1 Product safety in the United Nations Guidelines for Consumer Protection

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

- Guideline 16: Member States should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.
- Guideline 17: Appropriate policies should ensure that goods produced by manufacturers are safe for either intended or normally foreseeable use. Those responsible for bringing goods to the market, in particular suppliers, exporters, importers, retailers and the like (hereinafter referred to as "distributors"), should ensure that while in their care these goods are not rendered unsafe through improper handling or storage and that while in their care they do not become hazardous through improper handling or storage. Consumers should be instructed in

the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers by internationally understandable symbols wherever possible.

- Guideline 18: Appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities and, as appropriate, the public without delay. Member States should also consider ways of ensuring that consumers are properly informed of such hazards.
- Guideline 19: Member States should, where appropriate, adopt policies under which, if a product is found to be seriously defective and/or to constitute a substantial and severe hazard even when properly used, manufacturers and/or distributors should recall it and replace or modify it, or substitute another product for it; if it is not possible to do this within a reasonable period of time, the consumer should be adequately compensated.

The other main treatment of safety comes in Section V.D, Guidelines 33 to 35 on standards for the safety and quality of consumer goods and services:

- Guideline 33: Member states should, as appropriate, formulate or promote the elaboration and implementation of standards, voluntary and otherwise, at the national and international levels for the safety and quality of goods and services and give them appropriate publicity. National standards and regulations should be reviewed from time to time, in order that they conform, where possible, to generally

accepted international standards.

- Guideline 34: Where a standard lower than the generally accepted international standard is being applied because of local economic conditions, every effort should be made to raise that standard as soon as possible.
- Guideline 35: Member states should encourage and ensure the availability of facilities to test and certify the safety, quality and performance of essential consumer goods and services. The wording is notable in that it clearly allows for independent testing and verification.

Section V.K on measures relating to specific areas refers to safety as “product quality control” in relation to food, water, pharmaceuticals, pesticides and chemicals with reference on to relevant international bodies including Codex Alimentarius and WHO. The new wording on access to public utility services in Guideline 77 should have considerable significance for safety, as the lack of safe drinking water and sanitation and clean energy sources are all major threats to public health.

9.2 Product Safety Laws

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

9.2.1 The rationale for product safety laws

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

- Consumers need to be protected against unreasonable, unnecessary and preventable risks of injury from the foreseeable use of consumer products;
- Consumer products in the marketplace are increasing in complexity and sophistication. Reasonable examination of the product will not reveal the inherent defects or hazards in these products. The maxim ‘caveat emptor’ (‘let the buyer beware’) is particularly inadequate in the face of complex products;

- Consumers are often unable to foresee risks and protect themselves. This is particularly true with new products of which consumers had no previous experience, or products that contain components such as chemicals, which may not be apparent;
- To establish minimum and harmonized safety standards for products being sold to ensure that developing countries do not become dumping grounds for sub-standard products that would not meet the standards in the country of origin, or other potential importing countries (The problems raised by second hand goods are discussed later); and
- It is beneficial to have products that comply with international standards, as this will improve access to international markets, thus allowing greater consumer choice and raising the baseline for safety on a global basis.

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

9.2.2 Components of a comprehensive product safety policy

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

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

9.2.2.1 Pre-market design

Businesses should be encouraged to design in safety and to meet any applicable standards during the design and production of a product, with third party certification to assure safety before going to market. Many retailers require this before they will market a product in any case. In the United States, the Consumer Product Safety Commission also offers a service to industry to help with pre-market compliance.¹²¹ They also hold a

¹²¹ <http://www.cpsc.gov/en/Business--Manufacturing/Business-Education/>

public register of product safety issues.

9.2.2.2 Preparatory action

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

There are numerous international and regional initiatives, which provide valuable information on the safety of consumer products and the action taken by Governments throughout the world. Among the most significant of these is the 'Consolidated List of Products Whose Consumption and/or Sale Have Been Banned, Withdrawn, Severely Restricted, or Not Approved by Governments', issued by the Department of International Economic and Social Affairs of the United Nations. The Consolidated List enables Government agencies, which review applications for product registration, to easily ascertain the nature of regulatory decisions made in other countries and apply the permissible measures locally. The Consolidated List also complements and consolidates other information produced within the United Nations system and its networks. In the European Union, RAPEX¹²² is a rapid alert system for product safety between European Union Governments – a practice which is spreading to other regions of the world; and PROSAFE¹²³ links and advises market surveillance authorities and carries out training activities funded by the European Union.

9.2.2.3 Regulatory action and standards setting

The development of product safety standards is a pre-requisite for a sound product safety policy. Standards of product safety form part of the statutory machinery for regulating industry performance and so must be published. They may be enforced through a variety of sanctions such as criminal law, civil liability and withdrawal of license. The purpose of specifying standards is to make a clear statement of what society deems desirable and acceptable. Taking the example

of international trade law, one option is for legislation to refer to standards rather than directly to integrate them into legislation, as they need to be able to change with innovation.

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

- Standards setting is necessary to safeguard the interest of consumers, and involves the testing and certification of products to enable consumers to identify those that have been certified as conforming. There should be representation of the consumer interest in the development of standards. Governments do not usually produce standards. They may ask national standards bodies to develop standards which can then be referenced as mandatory or put into regulations;
- Information on product characteristics, use and warnings directed at both suppliers and consumers; and
- Restrictions on use including bans where the risks are exceptionally high.

9.2.2.4 Monitoring action

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

¹²² http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/main/?event=main.listNotifications

¹²³ <http://www.prosafe.org/>

¹²⁴ World Trade Organization Agreement on Technical Barriers to Trade; Annex 3: *Code of Good Practice for the Preparation, Adoption and Application of Standards*

equipment and expertise.

9.2.2.5 Corrective action

Pre-marketing controls minimize the likelihood of unsafe products entering the market. Unfortunately even the most stringent of such controls cannot ensure that all products will be safe. Manufacturing flaws may still occur or design flaws may manifest subsequently. A comprehensive product safety policy provides scope for regulating certain products after they have entered the market, and for the possibility of prohibiting certain types of products in extreme cases. With this comes the task of immediate intervention when hazards arise, regardless of whether the commodities involved are specifically regulated. The relevant authorities must be empowered to take urgent action when an unsafe product is on the market; steps ranging from warning notices, product recalls and required modification of products as a condition of sale, to prohibition of further sales, and ultimately destruction of stocks (as happened in the case of the ‘mad cow disease’ outbreak in cattle in the United Kingdom during the ‘90s, see Box 7).

9.2.2.6 Compensatory action

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

- An administrative scheme providing for persons who have suffered loss or damage from defective products to claim from a centrally administered fund. It could be paid from taxation revenue and be deemed the collective responsibility of all taxpayers and/or, by way of a premium paid by persons engaged in the manufacture and distribution of goods; and
- Private arrangements providing for the payment of compensation to the person who has suffered the loss or damage by those involved in the production and/or supply of the defective product. The usual causes of action for such a scheme would be pursuant to the law of contract, law of negligence, or strict liability provisions in consumer protection laws.

Compensation schemes serve not only to mitigate the loss of the injured party but also to provide incentives or deterrents to producers.

9.2.2.7 Legal and Institutional framework for product safety

The following approaches may be taken:

Legal

- General framework laws with general clauses forbidding the supply of unsafe products. These laws also provide additional powers to make safety regulations with regard to specific products or product groups;
- Regulations relating to specific product groups, e.g. drugs, food, motor vehicles, pesticides, etc.; and
- Safety requirements and technical specifications introduced in national laws as mandatory standards. This includes referencing of standards as mentioned above.

Institutional

- Institutions with overall responsibility for the safety of consumer products, for example a single Government body with a broad responsibility for the safety of consumer products. There are institutional variants of the model. A general consumer protection agency may have a product safety division such as Product Safety Australia within the Australian Competition and Consumer Commission (ACCC). An alternative model is the United States Consumer Product Safety Commission;¹²⁵ and
- Government departments and bodies dealing with specific product areas such as the United States Food and Drug Administration. In the European Union, many members have national food agencies with a high public profile, and the European Food Safety Authority has designated competent partners in all 28 jurisdictions.¹²⁶ In both of the above models (generic and

¹²⁵ United States Consumer Product Safety Commission, Strategic Plan 2011-2016.

¹²⁶ Article 36 of Regulation EC 178/2002 and Article 1 of Regulation EC 2230/2004.

sectoral), the agencies do not necessarily carry out detailed investigation and analysis themselves. For example, the competent partners listed in the European Union may be public health, nutrition or veterinary institutes often linked to universities. The OECD Working Party on Consumer Product Safety sums up: “third parties may be engaged to assist in performing product risk assessments. This can vary, from a simple outsourcing arrangement to acquire appropriate expertise and specialist knowledge in risk assessment, through to engaging an accredited test laboratory, conformity assessment body or certification body to assess the product.”¹²⁷

9.2.2.8 Essential elements of product safety laws

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

Goods must meet mandatory standards of safety, failing which they could be prohibited from entering the market. Safety requirements should be based on sound risk assessment criteria. These can vary according to national policy and jurisdictions may adopt good practices from each other. For example, the ACCC has updated the model of risk assessment by adopting the European Union RAPEX injury severity levels, applied to a model developed in New Zealand.¹²⁸

The authorities should have the following powers:

- Power to require that adequate information on the safe use of goods is provided along with the goods;
- Power to require the suppliers to publish warning notices if unsafe products are found to be available on the market;
- Power to require suppliers to recall hazardous products already sold to consumers; and
- Power to ban or suspend the supply and sale

of unsafe products and services.

9.2.2.9 Data Collection

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

9.3 Product Liability

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

9.3.1 Contractual liability

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

- Standard form contracts – In most cases, these are weighted to one side and consumers are faced with “take it or leave it” options;
- Privity of contract – This doctrine precludes third parties from suing under the contract. Members of the purchaser’s family, guests of the purchaser and bystanders may be excluded and thus have to seek their remedy under the tort of negligence; and

¹²⁷ OECD Product Risk Assessment Practices of Regulatory Agencies, *Summary of Discussions at Workshops and Meetings of the OECD Working Party on Consumer Product Safety*, 2016.

¹²⁸ OECD, *op. cit.*

- Evidentiary rules – Rules of evidence also limit consumers from claiming under a contract. Oral evidence as a general rule is not allowed to derogate from the terms of a written contract. Although all kinds of oral representations are made in most sales transactions, not all of these may form part of the written contract.

9.3.2 Tortious liability

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

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

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

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

9.3.3 Strict liability

Strict liability refers to liability of any or all parties along the chain of manufacture (the manufacturer of component parts, manufacturer who assembles the parts, wholesaler and retailer) for the whole damage caused by the product, without prejudice to the recovery action among responsible parties. Strict liability standards emerged in the second half of the 20th century and makes a party legally responsible for damages, regardless of culpability and without need to prove fault, negligence or intention. Strict liability was introduced into the European Union’s *acquis communautaire* (body of law) in 1985 through the Product Liability Directive. Although the term ‘strict liability’ is used, it does not suggest absolute liability. It evolved largely to avoid the privity restriction and other restrictions imposed by warranty standards. The concept of strict liability for defective products is now a widely accepted part of the legal regime for consumer protection and covers a range of liability systems with different degrees of strictness. The practical application of strict liability can be limited by the ‘state of the art defence’ (see below).

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

- The product is defective;
- There was a causal link between that defect and the injuries; and
- There are no defences available to the defendant (see below).

It is irrelevant that the manufacturer or supplier exercised sufficient care. Liability will arise if the defect in the product causes harm to the user. Some characteristics of strict liability are as follows:

- Most strict liability tests are based upon a standard of defectiveness that places some of the risks on the user of the product;
- The objective criteria are usually based on a consumer expectation; and
- Strict liability regimes tend to channel liability towards the person best placed to control the product and insure the risk involved.

9.3.4 Rationale for strict liability

The rationale for strict liability is:

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

9.3.5 What is a defect?

Generally, a product is defective if it does not provide the level of suitability that the consumer is entitled to expect. Liability is imposed against a supplier of a product if the product is supplied in a defective condition and results in injuries. However, in certain situations the law of product liability may still be applicable although there may be nothing wrong with the product itself. Determining defectiveness is one of the more difficult problems in product liability litigation. Generally there are a number of factors that the courts will take into account when deciding on the issue of 'defectiveness'. These include the following:

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

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

- **Manufacturing defect** is caused by an error in the manufacturing process or by the use of defective raw material. This type of defect occurs when a product is designed well but because of a flaw in the manufacturing process, or a sampling error in the testing

process, it does not meet the specifications contained in the design of the product. If the finished product is substandard by comparison to identical products in that product line, the producer may be held liable for causing the irregularity and failing to discover the defect before it was sold to the consumer. In such cases the definition of 'producer' of the defective product would also extend along the production chain from the manufacturer to the supplier of the product even when not directly involved in the manufacturing process.

- **Design defect** occurs when a whole product line or every product of a particular model is dangerously deficient. A product is defectively designed if the product is more dangerous than an ordinary consumer would expect or if the benefits of the product's design do not outweigh its risks. A manufacturer may be held liable if failing to take reasonable care to ensure that a product is designed to perform safely. Manufacturers must not only ensure that their products are safe when they are used in the intended way, but also in unintended, though foreseeable, ways. In determining product liability, the courts apply the "unreasonably dangerous" test or a combination of the consumer expectations and "risk-benefit" test to determine if the design is defective.
- **Warning defect:** a manufacturer has a duty to provide adequate instructions concerning the safe use of its product and must warn buyers of any dangers associated with the product. While the product design itself may not be inherently defective, the product can be rendered defective by the lack of such a warning. If such warnings are not present, the manufacturer may be liable for injuries caused by the product. Manufacturers have a duty to perform safety tests to determine what warning labels need to be put on a product. These tests should simulate conditions under which the products would ordinarily (or even plausibly) be used. The warning given must not only cover the likely uses and misuses of products but must also be clear and capable of being easily understood – use of symbols, pictures or multilingual warnings.

- **Instruction defect** is similar to a warning defect as it concerns the information provided to the consumer. However, it differs from a warning defect in that the defect is not a failure to warn of an inherent danger in the product. Here the defect involves the creation of danger by the failure to warn the consumer of how to use the product safely. What is required of the manufacturer is to provide instructions on how to use the product and for a warning of the dangers involved if instructions are not strictly complied with.
- **Development risk defect** is one that only comes to light after the product has been marketed. The risks associated with this category of defect were not known of at the time of marketing but if they had been known they would have prevented the product from being marketed according to the standards of safety current at the time of marketing. This category overlaps with that of 'State of the art' defects (below).
- **State of the art defect** is 'accepted' (in retrospective legal terms) when placed on the market (because unknown at the time within a given sector) but subsequently become less acceptable as general industry practice improves. These products are termed as 'defective' only because safer alternatives or replacements have emerged subsequently.
- **Post-marketing defect** concerns the failure to warn of dangers, to recall products or to take other remedial action after a danger has been detected. Manufacturers must seriously consider the nature and extent of warnings that must be issued when they become aware of dangers in the product after it has been sold. These involve hazards that are discovered after a sale, which the manufacturer did not know of or would not have reasonably been expected to know about, before it sold the product.

9.3.6 Standards for determining defectiveness

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

- **Consumer expectations:** requires that

the element of danger in a product must not extend beyond that which is contemplated by the ordinary consumer who purchases, or uses or comes into contact with the product (including children for example). It is crucial that the product must be fit for the ordinary purposes for which such product is used.

- **Presumed seller knowledge:** raises the question of whether the seller would be negligent in placing a product on the market if they had knowledge of its harmful or dangerous condition. This standard imputes general knowledge, rather than specific knowledge about each product. UNGCP Guidelines 17 and 18 are relevant here in terms of ensuring continuing safety while goods are in storage, and notification of any hazards.
- **Risk-benefit balancing:** (or risk-utility) involves the issue of whether the cost of making a safer product is greater or less than the risk or danger from the product in its present condition. In cases where the cost of making the change is deemed to be greater than the risk created by not making the change, then the benefit or utility of keeping the product outweighs the risk and the product is not defective. However, if the cost is deemed to be less than the risk, then the benefit or utility of not making the change is outweighed by the risk and the product is deemed defective in its unchanged condition.

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

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

manufacturer of spreading the risk of loss by pricing or insurance.

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

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

9.3.7 Defences against product liability

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

- **State of the Art:** may be defined as the level of pertinent scientific and technological knowledge existing at the time the injury-producing product was designed and/or manufactured. It may therefore exclude from liability, injuries from older goods and relies on the argument that the manufacturer had complied with the standard that was operative at the date of the manufacture. The defence was made available in the European Union under the 1985 Product Liability Directive,¹²⁹ which allowed a defendant to be absolved of liability if he could prove that "the state of technical and scientific knowledge, at the time when he put the product into circulation, was not such as to enable

the existence of the defect to be discovered". The Directive allowed Member States to derogate from the "state of the art" defence, but in practice few chose to do so. One significant exception to the possibility of derogation followed the outbreak of Bovine Spongiform Encephalopathy (BSE-'mad cow disease') in the United Kingdom, see Box 7. The Directive did not previously apply to agricultural produce but that exemption was repealed in 1993.¹³⁰

- **Disclaimer of liability:** is available to manufacturers, whether in advertising or in the labelling of the product. Generally, a manufacturer has the right to disclaim liability for defects in the product or at least to limit liability for damages to the replacement of parts. However, this defence will not be valid in situations where the manufacturer attaches a broad standard disclaimer with the intention of limiting legal responsibility for defects in the products. Statutes of limitations.

Old claims may be eliminated with the use of a statute of limitations. This will benefit a manufacturer of products who may find it difficult to track old records and mount a defence. An injured person is thus required to commence an action within a certain number of years after a personal injury. However, in some cases, this defence may pose a problem as to when the personal injury occurred i.e. the date of exposure and the manifestation of the injury. This is so in situations where there is a lapse of time between the victim's exposure to the product and the manifestation of the injury. For example very long time lapses occur in cases of asbestosis.

- **Product recall:** should occur where a product appears unreasonably dangerous or involves unexpected dangers or had an inadequate warning label. In simple terms, a defect would warrant a recall if there was a lack of something that is considered essential to the completeness of the product involved. The defect may

¹²⁹ Council Directive 85/374/EEC of July 25, 1985 on the, *Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, Article 7e.

¹³⁰ 1993/34/EC.

involve a physical characteristic or a functional performance and can arise from design, faulty manufacture or assembly, or inadequate or improper maintenance and repair. It can also be a voluntary withdrawal of the allegedly defective product from the marketplace, and thus, serve as a defence or limitation on liability for the product manufacturer.

- **Assumption of the risk, contributory negligence, and misuse:** generally, strict liability does not permit the defence of assumption of the risk and contributory negligence by the consumer. Under the doctrine of strict liability,

fault is irrelevant. However, in certain situations, defences based upon the consumer's conduct are recognized.

These are as follows:

- a) Negligent failure on the part of the consumer to discover the defective condition;
- b) Continued use of product after discovery of the defect; and
- c) Use of the product in a manner that could not reasonably have been foreseen by the product, using metal fork to extract toast from an electric toaster for example.

Box 7: The case of BSE (mad cow disease) in the United Kingdom

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

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

Lessons learnt:

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

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

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

Legacy:

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

Sources: Robin Simpson, responsible for the BSE dossier while working at the National Consumer Council of the United Kingdom during the crisis of the 1990s.

9.4 Services as dangerous products

The UNGCP deal with safety in terms of physical safety and this chapter has concentrated accordingly. Many services, such as medical services, electricians, gas-fitting, taxis, have an element of physical danger, which is frequently dealt with at the level of licensing and insurance, self-regulation and private litigation, rather than through product liability law. It should be noted however, in terms of regulatory intervention, that the onset of the financial crisis saw much discussion on whether the concept of dangerous products and their regulation, should be applied to services in terms of a wider range of dangers. Certain financial products were routinely described as 'toxic' and EC Commissioner Kuneva called for a product safety approach to be applied, drawing an explicit parallel with the trade in physical goods: "we do not rely on the good faith of the traders and the alleged vigilance of consumers but require that a regulator guarantees a satisfactory degree of safety. Doesn't the regulator have similar responsibilities in the market of retail financial services? I believe we must limit the risk in retail financial markets and exclude certain 'toxic' credit products from its retail shelves".¹³¹ For similar reasons, Elizabeth Warren, then the acting Head of the Consumer Finance Protection Bureau of the United States, called for a Financial Product Safety Commission.¹³² The main consequence of this debate would seem therefore to be a tilt back towards regulatory intervention rather than inter-party litigation.

9.5 Product safety in international law and policy

Chapter 5 previously outlined that consumer protection legislation should not be in conflict with international trade law, as is sometimes alleged on the grounds that consumer protection measures taken against imports are disallowed as barriers to trade. The 'Exceptions clause' (Article 20 of the GATT) stipulates that, in the event of a product posing a risk to human animal or plant health, import restrictions or barriers are allowable, 'provided they are not used as a means of arbitrary or unjustifiable discrimination between

countries or as disguised restrictions on international trade'.

Furthermore, the Sanitary and Phytosanitary (SPS) Agreement, whose status was upgraded by the World Trade Organization treaty in 1995 having previously been a code, recognizes in Article 5.7 that the state of scientific knowledge may be insufficient to make a definitive judgment whether or not to block a product, but that a precautionary approach can be taken in the meantime. The Article reads: 'In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information ...[but]... shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly'. This has come to be known as the 'precautionary principle' in some jurisdictions and the 'precautionary approach' in others. Either way the wording suggests that one should not be precautionary forever. Efforts have to be made for the risk level to be clarified.

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

Governments can choose to go beyond international standards where they can argue that a valid public policy objective can be served. In practice this is extremely difficult to determine as illustrated by the trade dispute regarding the introduction of the European Union aflatoxin standard, a dispute during the early years of the present century.¹³³ Aflatoxins are

¹³¹ Commissioner Meglena Kuneva, *Restoring Consumer Trust in Retail Financial Services*, Lisbon, April 27, 2009.

¹³² Elizabeth Warren, "Product Safety Regulation as a Model for Financial Services Regulation," *Journal of Consumer Affairs* 42, 2008, quoted in OECD, *Financial Consumer Protection, Progress Report*, DAF/CMF April 11, 2009.

especially prevalent in stored agricultural crops, and can cause liver cancer. International standards to raise and maintain the standard of storage conditions and other standards were already applied, borrowing from Codex Alimentarius or national standards.

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

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

Box 8: Are the highest standards always the best?

The question seems astonishing and the answer self-evident. The assumption that the strictest standards are always the best is assumed by Guideline 34 but high standards can be a very blunt instrument and may have a perverse effect, not including the trade effects mentioned above. Standards may cost a lot to implement and this 'opportunity cost' may be at the expense of other goals. For example, the EC Water Directives (which are generally considered to have been a success) set very high standards for drinking water. The standard on trace pesticides in drinking water was referred to by the United Kingdom Director General of the Office of Water Services (OFWAT) as "rather like dropping an aspirin into an Olympic swimming pool," and he pointed out that the standard was thousands of times more stringent than for pesticides for vegetables.¹³⁴ The point was not only the cost to consumers but also that the cost of implementing to such a high level was such as to detract from other expensive operations that also had an impact on human health, such as leakage repair – as much contamination results from leakage. To take an example from the same sector in a developing country, the Philippines had standards for water distribution that insisted on rigid metal pipes of fixed diameter. In practice this was almost physically impossible to operate in the slums of Manila, where flexible thin rubber pipes were in general use. The illegal rubber pipes allowed for water distribution to people who did not have any, while strict application of the legal standard made such progress impossible.¹³⁵

Source: UNCTAD

This is emphatically not to say that safety standards are not urgent. The WHO status report on Road Safety for 2015 found that only 46 countries adhere to the United Nations regulations on electronic stability control, of which the majority are high income countries.¹³⁶ Major efforts are needed to raise car safety standards to reduce the 1.2million deaths (and more injuries) sustained every year.¹³⁷ The United Nations World Forum for harmonisation of vehicle regulations is the primary global body for development of car safety standards.

9.6 Second hand goods

During the last generation, the issue of second hand goods has come to the fore, and also demonstrates the possibility that major principles of public policy may conflict. As the ISO standard on second hand goods indicates: "the cross-border movement of second-hand goods (SHG) has been in practice for many years and trade activity has increased exponentially. Most (traded) second-hand goods are sold or donated by developed countries to developing ones and the value of this market is estimated at billions of dollars. Consumers welcome having the choice of purchasing low cost, durable, and safe SHG as an alternative to

¹³³ T. Otsuki, J. Wilson, M. Sewadeh, *Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports*, Development Research Group (DECRG), The World Bank, 2001; See also Oxfam Supplementary Memorandum to United Kingdom Parliamentary Select Committee on International Development, 2004.

¹³⁴ The Independent, *Water Body Says Bills May Have to Double in Eight Years*, 13 August 1992.

¹³⁵ C. Brocklehurst et. al., *New Designs for Water and Sanitation* Transactions, Water and Sanitation Programme/PPIAF 2002.

¹³⁶ United Nations Regulation, 13H.

¹³⁷ WHO, *Global Status Report on Road Safety*, 2015; See also Global NCAP *Democratizing Car Safety: Road Map for Safer Cars 2020*, 2015.

higher priced new goods, and the demand for these products is robust". Re-use can reduce resort to landfill or other forms of disposal in the countries of export, but there are also dangers that products might be dangerous for consumers in use and safety standards may clash. One form of sustainability (reuse) can conflict with another (safety or even pollution in the country of destination) and even relatively non-toxic goods, such as clothing, raise issues. A majority of clothing imports are second hand in several African countries and this raises questions on the development of a domestic clothing industry and diminished customs revenue. In response, many African countries have introduced restrictions on second hand imports, such as bans on vehicles over three years old in Algeria and Tunisia, undergarments and mattresses in Ghana, all clothes in South Africa save for humanitarian interventions, and tyres in Kenya and Mozambique.

The ISO standard was established as a result of surveys of ISO's Consumer Policy Committee (COPOLCO) and Developing Countries Committee members, which revealed significant concerns about trade in second hand goods. It attempts to respond to the above concerns by providing a basis for in transit and port of entry screening and establishes measurable criteria against which second hand goods can be

evaluated with the objective of protecting consumers and the environment. The standard may be used by the importing, exporting parties or Governments as a means to establish confidence in the goods that are being traded or donated.

9.7 Conclusion

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

Public agencies are needed to protect consumers, as judicial redress for consumers in such cases is handicapped by the cost of litigation (time and money), which is usually (not always) disproportionate to the cost of the item and to most costs associated with harm. In other areas of consumer protection this dilemma lays behind the development of alternative dispute resolution (ADR) systems, but concerning product safety, ADR is more difficult because of the need for technical assessments. Furthermore, given the nature of 'batches' of products carrying the same defect, and the consequent risk of multiple harms, the need for a public policy input is clear.

CHAPTER 10

CONSUMER INFORMATION AND EDUCATION

In this chapter the following issues are discussed:

- *Relevant UNGCP provisions*
- *Concepts of consumer information and education*
- *The transfer of risk*
- *Consumer information*
- *Critical issues with respect to labelling*
- *Critical issues with respect to advertising*
- *Consumer education and its implementation*

10.1 Concepts of consumer information and education

In this chapter information and education are studied together, as they form a continuum in the panoply of devices for consumer protection. The two terms are often confused or even used synonymously. In fact, they have different meanings. Consumer education refers to the process of gaining the knowledge and skills to manage consumer resources and taking steps to increase the competence of consumer decision-making. It focuses on the development of understanding and skills, and the gaining of knowledge. Consumer information on the other hand, refers to the provision of data relating to particular products or transactions so as to enable decision making in relation to a purchase. It can further relate to data about applicable law or the agency charged with regulating a particular industry. Consumer information is thus 'situation bound' whilst consumer education is not. Consumer education, and of course education in general, is a pre-requisite for the effective use of consumer information.

In analysing the twin concepts and their application, we are fortunate in having to hand two relatively recent worldwide surveys of consumer protection generally, both taking place during the 2012-13 and showing results from similar numbers of countries. The 2013 UNCTAD survey was designed to feed into the UNGCP revision and received 58 sets of results, mainly from Governments.¹⁴⁰ Simultaneously, Consumers International surveyed its members worldwide and received responses from 72 consumer associations in

60 countries.¹⁴¹ Each survey has its own natural tendency: the governmental responses tend to be optimistic in terms of application of the UNGCP, while the CI member responses tend to be more critical.

10.2 Consumer information and education in the United Nations Guidelines for Consumer Protection

In the revised UNGCP, as in the previous version, education and information programmes form a single section (V.G). Information appears in the 'legitimate needs' (Guideline 5) where it is linked to choice, in Section IV Principles for good business practices, under Disclosure and transparency (Guideline 11(c)), under Section V.A on national policies for consumer protection (Guidelines 14(b) and (c)) as clear and timely information, Guideline 27 under promotional marketing and sales practices, and Guideline 28 on the free flow of accurate information on all aspects of consumer products. Guidelines 29 and 30 deal with environmental information. There are 'sectoral' mentions under Section V.J on financial services, (Guideline 66e) relating to conflicts of interest; Guideline 66h) relating to remittances, and Guideline 77 on public utilities.

Under education, the mentions are largely parallel to the above, under 'legitimate needs' Guideline 5(f), sections V.G (Guideline 11(d)), IV (Guideline 14(h)), under new section J on financial services in rather greater detail than for information, covering financial literacy,

¹⁴⁰ *Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013*. Note by the UNCTAD secretariat, 2013, TD/B/C.I/CLP 23.

¹⁴¹ Consumers International: *'The State of Consumer Protection Around the World,'* CI, 2013.

(Guideline 66d), financial education (Guideline 67) and Guideline 69 covering a range of specific sectors.

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

10.3 The transfer of risk

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

No matter what information or how much information is made available, there is no guarantee that the consumer will ultimately make a choice that is based on a full and rational assessment. Consumer education is often thought to increase consumer ability in obtaining and assessing information about goods and services. However, product variety is increasing not just as incomes have risen, but also as markets have come to embrace domains previously characterized by State-directed provision such as telecommunications, electricity, insurance and pensions. In parallel with the increasing extent of the market, information is migrating from that provided face to face-to-that which is made available online. As discussed in chapter 5 on consumer law, the response of many States has been to try to build up consumer expertise so that the market is balanced by the competence of the 'empowered consumer.'

The OECD Toolkit on Consumer Policy sets out a range of interventions by Governments and stakeholders to improve decision making by consumers.¹⁴² These include Australian telephone charges, Chilean Internet and TV services, French fuel bills, and United Kingdom credit card information presented in a summary box (a

concept in turn borrowed from the United States Truth in Lending legislation). While each initiative appears admirable, the more examples that are given, the more the question arises: can all consumers be experts on all of these domains, all of the time? The tentative answer which is reached below is: no, although many can become reasonably familiar when they need to be, even if such familiarity is likely to be of limited duration and, for some products, unlikely ever to be sufficient.

The policy of reliance on disclosure as a consumer protection principle has come under heavy criticism during the last decade partly as a result of the financial crisis, when it became clear that consumers had little understanding of the often significant financial commitments they had entered into when purchasing financial products. In the words of OECD in 2009: "the growing complexity of financial products over the past decade, coupled with financial innovations and the increasing transfer of financial risk to households have put enormous pressure and responsibilities on the shoulders of financial consumers in recent decades".¹⁴³ The same study concluded: "financial literacy [...] does not substitute for financial consumer protection and regulatory frameworks. In particular the importance of 'market conduct' supervision has been further exposed in light of the recent financial crisis, where uninformed consumers became easy targets for misspelling and purchased credit products that were clearly inappropriate for them".

10.4 Consumer information

Consumer information has become a necessity as a result of the increasing complexity and proliferation of goods and services. Ideally, it is meant to provide objective and impartial information to consumers at the point of purchase, in order for them to decide which of the many branded products and services available will best suit their own needs. As more and more purchases take place online with less personal interaction, and even less scope to examine physical goods, the quality of information provided becomes more important. The following are some of the forms in which information is made available to consumers:

- Personal experience with products and

¹⁴² OECD, *Consumer Policy Toolkit*, 2010.

¹⁴³ OECD, *Financial Literacy and Consumer Protection: Overlooked Aspects of the Crisis*, June 2009.

services or word of mouth from family and friends;

- Reports in the media (as opposed to paid advertising). Some of this information may be planted by public relations efforts of commercial companies and in consequence there is an ambiguity in distinguishing marketing from education or information. Some information will be independently generated by Government reports, consumer groups, journalists, specialist consumer broadcasts, and other non-commercial entities;
- Labels that are mandatory requirements such as those on food products, pesticides, tobacco products, therapeutic drugs, and, more recently energy efficiency;
- Voluntary labelling schemes devised by independent bodies for particular products for example furniture, textiles, electrical appliances, or for particular purposes such as eco-labelling schemes;
- Advertisements and promotional campaigns that may or may not be regulated by laws or voluntary codes of practice;
- Information provided on the Internet by companies engaged in electronic commerce;
- Comparative information provided by independent consumer associations in publications for their members (This has become far more prevalent during the last decade as areas of consumer choice have been expanded, for example to the retail energy sector and financial services). To command confidence, such information and advice should be independent and objective and should be presented in the consumer interest; and
- Peer-to-peer reviews, comparison sites, customer reviews all of which have ex-

panded recently, due to ease of access through the Internet.

Consumer information is especially needed where:

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

While efforts to improve disclosure have taken effect, there has emerged what the French call 'le paradoxe du formalisme' whereby excessive provision of information is made to abide by legal requirements, but 'blinds' the consumer. A South African study reports how demand for financial products can decrease with menu size: "Large menus can demotivate choice by creating feelings of conflict and indecision that lead to procrastination or total inaction."¹⁴⁴ For reasons such as this, it is increasingly recognized that reliance on bare disclosure and education alone does not suffice. The result in policy terms is that responsibility to advise is being re-emphasized in sectors selling complex products and this in turn raises the question of remuneration systems and incentives to give objective advice.¹⁴⁵

In some respects, the problems are becoming more intractable not only because the provision of information online does not lend itself to questions and explanation but also because the element of time renders much information ineffective. There are many surveys that show that faced with pressures of electronic 'time-out,' consumers do not read terms and conditions. The time taken to read the average Internet purchase agreement such as End User Licence Agreements is

¹⁴⁴ M. Bertrand, D. Karlan, S. Mullainathan, E. Shafir, J. Zinman, *What's Advertising Content Worth? Evidence from a Consumer Credit Marketing Field Experiment*, Quarterly Journal of Economics, Harvard/MIT, February 2010.

¹⁴⁵ G20/OECD, *High Level Principles Consumer Protection in Financial Services*, 2011.

¹⁴⁶ Personal Data Empowerment: *Time for a Fairer Data Deal?* Citizens Advice, 2015, <https://www.citizensadvice.org.uk/personal-data-empowerment-time-for-a-fairer-deal/>

usually a matter of seconds. The reality much of the time, is that consumers “tick, click and hope for the best.”¹⁴⁶

10.5 Critical issues with respect to labelling

10.5.1 Mandatory labelling

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

Food labelling is one of the priority areas where mandatory legal regulation is applicable. Apart from the usual requirements for date of manufacture, expiry date, name and address of manufacturer, weight, quantity and ingredients used, many countries have now gone on to the next stage of requiring compulsory nutrition labelling, based on the notion of recommended daily dietary intakes. Faced with difficulties of consumer comprehension of what may be complex information, many jurisdictions are now struggling with the concept of evaluating and summarising that information so that consumers may be able to make a simple and informed judgment. ‘Traffic light’ schemes (red, amber and green labels of flags) are under consideration, having been pioneered in the United States, where information on food labels has been reduced in order to simplify and focus.¹⁴⁷

10.5.2 Voluntary labelling

Many Governments are beginning to incorporate private standards into policy and legislation and to recognize them in a number of different ways. Although as

already noted, the WTO recognizes the validity of international standards in matters of labelling, the scope of standards applicable under WTO rules is limited by the scope of WTO jurisdiction which in this case is limited to product characteristics, not to process and production methods (PPMs). If labelling is to deal with PPMs, as is increasingly the case, the focus then shifts to voluntary measures, such as those forming a part of corporate social responsibility policy and the adoption of international standards, in particular those of ISO.¹⁴⁸

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

Early voluntary informative labelling schemes included the Swedish “VDN” system, created in 1951, adopted first by the Nordic countries the Japan Industrial Standards (JIS) mark for consumer products, the German ‘Der Blaue Engel’ (Blue Angel) mark which was assigned to products that were low in emissions and produced less waste than comparable products. A wide array of eco-label schemes has since developed with a gradual shift going wider than product characteristics and towards production methods. For example, ISEAL is an alliance of multi-stakeholder based standard-setters and accreditation bodies assessing sustainability using codes of good practice based on the ISEAL Credibility Principles.¹⁴⁹ The principles include sustainability, improvement, impartiality, transparency and accessibility. Despite the limitation on trade measures being taken against foreign exporters in relation to PPMs, Governments remain free to adopt standards for their own internal uses. China, for example, has recently adopted the ISEAL principles. The development of such principles is in line with UNGCP Guideline 30, which posits: “the development of ap-

¹⁴⁷ USFTC, *Marketing Food to Children and Adolescents*, 2008.

¹⁴⁸ One of the best known is ISO 26000, *Guidance on Social Responsibility*, 2012. It covers environment, labour conditions, human rights and consumer issues. The latter section refers to the UNGCP cross-referring to ‘the legitimate needs of consumers’, of which it says that: ‘These principles of consumer protection are elaborated and detailed throughout the text of the *UN Guidelines*, and are commonly referred to as the “consumer rights”.

¹⁴⁹ <http://www.isealliance.org/our-work/defining-credibility/credibility-principles>

appropriate advertising codes and standards for the regulation and verification of environmental claims should be encouraged” and that Governments “should take measures regarding misleading environmental claims or information in advertising and other marketing activities.”

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

10.5.3 Product information criteria

In theory, disclosure of information should be more feasible in 2016 than was the case in 1985 when the Guidelines were first adopted, as detailed information can be provided on websites. While it might be argued that online information might discriminate against consumers without access to the Internet, the fact that such details are available online should help regulatory authorities and indirectly protect consumers. Product information can thus be disclosed at greater length, although care may be needed to ensure that this does not produce a new version of the *paradoxe du formalisme*. In other words, the release of detailed information on to a website should not absolve distributors from the obligation to render it comprehensible. In addition to information about products, supply chain information can also be more readily made available, a factor which has become more salient as supply chains have lengthened.

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

- Information should comply with national and international codes of practice and laws. It should be noted that international standards (such as those set by Codex Alimentarius and ISO) have been recognized by the WTO Sanitary and Phytosanitary, and the Technical Barriers to Trade Agreements as a legitimate basis of product standards and thus of trade measures to protect consumers as necessary;
- Package and label disclosures should be clear, simple and to the point – this means avoiding information overload and confusing presentation;
- Information that identifies the producer and supplier must be provided – this means stating the accurate identity of the product by its common or usual name and the form the product takes;
- The net quantity of the contents must be disclosed;
- Information about the ingredients in the product should be disclosed – this means following applicable laws for disclosures on pre-packaged food products. This can extend to stating nutrient value, including salt and sugar content, calories, minimum daily recommended inputs on which nutrient value is calculated, disclosing chemical contents of non-food products and providing warnings and instructions for proper use and handling;
- Price Information should be displayed conspicuously and in an understandable form to facilitate product comparisons – this means affixing price information on packages and providing unit pricing information on shelves or display areas when appropriate and feasible, providing adequate price information to facilitate consumer purchasing decisions, Successful campaigns have been mounted by consumer associations in Malaysia, Australia, Germany and UK on these issues and there is an ISO standard on unit pricing; and
- All product claims on packages and labels must be substantiated in advance. All such claims must be truthful, clear and accurate – this is especially so for health claims on food or drug products. Terms like “natural” or “organic” should not be used to imply the product is of superior quality or nutritional value unless this can be substantiated.

10.6 Critical issues with respect to advertising

With globalization integrating consumer markets, the competition to sell to consumers worldwide has become increasingly aggressive. As a consequence, advertising expenditure has significantly increased. Furthermore, advertising has penetrated ever deeper into developing country societies with global brand recognition becoming almost universal in some cases, such as Coca Cola. This process that may be intensified by the spread of hand held devices and targeted with ever greater accuracy by the use of cookies.

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

There is a long tradition of self-regulation in the advertising industry. The International Chamber of Commerce (ICC) Code of Advertising and Marketing Communication Practice was developed in 1937 and is now in its 9th version having been consolidated in 2006. As a self-regulatory code it applies to all advertisements for any goods, services and facilities. It outlines broad principles for advertisements to be “legal, decent, honest and truthful” (Article 1) and has a special section on advertising directed at children.¹⁵⁰ This international code forms the basis of self-regulation practices by advertising standards authorities in many countries and regulates “all advertising and other marketing communication for the promotion of any kinds of goods and services, corporate and institutional promotion included.” It applies to advertisers, advertising agencies and the media who provide platforms for advertisements. Most individual complaints (and appropriate sanctions and enforcement) are dealt with at national level but there is also scope for cross-border complaints through for example, the European Adver-

tising Standards Alliance (EASA) whose charter was created in 1992, based on the ICC Code.

There may be the threat of governmental intervention to ensure that self-regulation maintains standards and guard against its own failures. For example, the United Kingdom’s Office of Communication (Ofcom) is the regulatory body responsible for advertising and broadcast media but has contracted out the responsibility for enforcing the broadcast advertising codes to the Advertising Standards Authority (ASA). Broadcasters are obliged by the condition of their Ofcom licences to comply with ASA rulings. If the ASA refers a broadcaster to Ofcom, the broadcaster can be fined or lose its licence. In 2013-14 the ASA considered 37,000 complaints about 17,000 cases. This led to 3,384 ads being changed or withdrawn. 71% of the cases were about misleading advertising and 36% of the cases were about Internet advertising which overtook TV adverts for the first time in 2014, showing a year on year increase of 35%.¹⁵¹

The argument for self-regulation is that it allows enforcement agencies to turn their attention to issues which the self-regulation scheme is not competent to judge such as mass scams and door-to-door abuses. At its best the system means that advertisers are judged by expert-peers, Government agencies are not left in the slip stream of events playing catch-up and they are free to concentrate their resources elsewhere, while the courts are not overloaded and consumers have somewhere to go.

However, as concerns about the power of advertising to promote consumption increase, and where that consumption comes into clearer conflict with the aim of a particular public policy (such as health), there are inevitably calls for control of advertising to be exercised by people who do not have vested interests in the industry. Where there are public policy objectives around particular products, the issues at stake are not about the adverts themselves but about the products being advertised. Current examples include the marketing of food to children, the promotion of pharmaceutical products and repeated calls for partial or total bans on tobacco advertising. The implementation of such a ban progressed somewhat in the EU and more

¹⁵⁰ ICC, *Consolidated Code of Advertising and Marketing Communication Practice*, 2011 version.

¹⁵¹ ASA, *Having More Input, Being More Proactive*, Annual Report, 2014.

recently, in the Russian Federation, which banned all tobacco advertising with effect from 2014. Many consumer associations, most recently in Mexico on sugary drinks, have taken part in campaigns to restrict advertising for certain products that are considered to be intrinsically harmful.

Such moves then mark a step beyond the activity of self-regulation in evaluating individual advertisements. For one can conceive 'correct' product information about a product for which advertising is banned (e.g. 'smoking kills' on cigarette packets) in contrast with misleading advertising of an innocuous product. Self-regulation would apply to the latter, whereas advertising in defiance of an advertising ban on that particular product would be a matter for regulatory enforcement.

Consumer associations have been involved in both kinds of activities set out above. For example, the first of the above categories clearly applies to advertisements for products proven to be addictive and unsafe such as cigarettes and alcohol. It is increasingly accepted that there is a role for measures around aggressive advertisements targeting children at a vulnerable age to consume foods high in fat, sugar, and salt and there is a WHO code to that effect.

Other campaigns involve judgments that are more context-based. They include:

- Advertisements for breastmilk substi-

tutes that mislead women in locations where they cannot use the product as intended (because of poor water supply for example) is an example of misleading advertising. The World Health Organization estimates that there are 1.5 million infant deaths each year in the developing world because babies are not adequately breastfed.

- Advertisements that target consumers at particularly vulnerable moments such as default and debt, such as pay day loans. The existence of abuse is proved beyond doubt, but to what extent it is a matter of banning advertising or ensuring that it is not misleading or regulating the actual product, is a more complex matter; and
- Advertisements for products that contain toxic chemicals for which there is as yet no consensus or conclusive scientific proof of safety levels, such as pesticides, monosodium glutamate, aspartame, etc.

The history of such campaigns has tended to be that consumer concerns have been raised at the international level at inter-government organizations such as the Codex Alimentarius Commission, World Health Organization, Food and Agriculture Organization. Consumer organizations have usually supported the advice of the international bodies, the opposition coming rather from Governments and from corporate lobbies.

Box 9 – Impact of advertisements on vulnerable communities

Some studies have reported that African women in remote rural villages believed that infant formula or soft drinks are better for their babies than breastmilk. In 1969, it was reported in Zambia that babies had become malnourished because their mothers fed them with Coke and Fanta in the belief that these drinks were best for their children. 54% of the seriously malnourished children admitted to a children's hospital there had "Fantababy" written on their progress charts. The Zambian Government subsequently banned Fanta advertisements "because of their influence on the poor". Similarly, in a study carried out at the Nutrition Institute in Rio de Janeiro on school children aged 6-14 years who consumed large quantities of Coke, Fanta and Pepsi, the children showed signs of vitamin deficiency. The poorest of them also showed protein/calorie malnutrition.

Source: Consumers Association of Penang, undated.

The following are criteria to assess whether advertisements are socially and legally responsible:

- Advertising should comply with national and international codes of practice and laws;
- Advertisements should be truthful and accurate in every respect and be neither deceptive nor misleading;
- All advertising claims (verbal and visual) should refrain from using vague statements, superlatives, exaggerations or comparisons which may be misunderstood or misconstrued, especially if the audience are less sophisticated consumers;
- All factual claims relating to the safety, performance, effectiveness and quality of the products and services should be substantiated in advance of their use, using expert testimonials and endorsements only when they are based on actual and normal use of the product or service and on the endorser's knowledge in the field;
- In comparative advertising, product comparisons which are meaningful to consumer expectations and product use should be portrayed accurately and clearly and be capable of substantiation;
- Advertisements should depict safe use of products and not suggest product uses which present unreasonable safety risk for the consumer in foreseeable use or misuse situations;
- Accepted community standards of good taste in both illustrations and text should be respected, not offending, downgrading or exploiting groups or discriminating against gender, age, religion, race, or sexual orientation – this means avoiding belittling any social group; and
- Claims that relate to meeting current public objectives such as energy conservation, environmental protection or public health should be substantiated, or at least substantiable and verifiable.

10.7 Implementation of consumer education

The earlier conceptions of consumer education emphasized its role in training consumers to act effectively, (i.e. safeguard their own interest and that of their families). The paradigm was essentially “value for money” and the focus primarily the household. The curriculum approach was to include it as a part of home economics.

This could be by way of incorporation of these concepts into existing subjects, ‘permeating the curriculum,’ or by teaching specific subjects or courses on consumer protection. By and large, at the primary and secondary level, the ‘permeation’ approach has been applied to subjects such as living skills or commerce. In tertiary institutions, consumer protection modules have been introduced as specific subjects for example in the law, social sciences or business schools. Additionally, apart from the formal curriculum, Consumer education has been incorporated as a co-curricular activity, for example through Consumer Clubs. The link with home economics is at the origin of many consumer associations particularly in Eastern Europe as noted in chapter 4.

With hindsight, some of the early teaching materials developed during the ‘90s now seem to be very ambitious. The ‘Six fields of content of Consumer Education’ as suggested by the Nordic Council of Ministers during the ‘90s,¹⁵² sets out the structure in admirably clear fashion: personal finance; rights and obligations of the consumers, commercial persuasion (advertising in particular) consumption, environment and ethics, food, safety. But the detailed objectives under ‘rights and obligations of the consumer’ such as: ‘know the content of the most important laws and other statutory provisions dealing with consumer rights and obligations; know how an increasingly unhindered free trade will affect their rights as consumers;’ are matters which exercise the finest academic and legal minds. Conversely, the objectives under commercial persuasion, such as:

- Learn to identify advertising and to under-

¹⁵² Grada Hellman-Tuiter, *Promoting Consumer Education in Schools*, 1999.

stand the difference between information and advertising, be able to analyse, interpret and critically examine the content of commercial images, communications and their use of language;

- Be familiar with the use of electronic media such as TV, video, computers, modems, CD-ROM and other important consumer technology for communicating information and entertainment;
- Understand the importance of advertising from a commercial and social perspective;
- Be able as a consumer to use electronic information services in a critical and dis-

criminating way; and

- Learn to understand how the media creates lifestyles that are reflected, inter alia, in particular gender roles and physical ideals;

All of these now seem far-sighted given the propensity for youngsters to adapt to new technologies and their fascination with social media and with advertising (and also a source of vulnerability). Box 10 contains the Body of contents for consumer education and sets out an agenda without entering into so much conceptual detail.

Box 10: A body of contents for consumer education

1. Living in a Household: Family and household, functions and structures, values and behaviour, needs and wants, lifestyles and cycles of life, resources and constraints, problem-solving and decision making, goods and services production.

2. Seeking Information and Advice: Mass-media and commercials, advertisements and independent consumer information, supply of tests and advice, information and communication technologies, assessing and judging, using information and institutions.

3. Managing Money: Money and currency, planning and budgeting, spending and saving, credits and debts, taxes and social contributions, private insurances and formation of wealth, banks and financial services.

4. Buying Goods and Services: Price and quality, supply and demand, market-competition and -power, shops and stores, selling and marketing.

5. Communicating Satisfaction and Dissatisfaction: Criticism and complaints, protests and boycotts, consumers' rights and duties, access to law and court, consumer protection.

6. Housing and Dwelling: Buying and renting, owning and sharing, size and furniture, costs and responsibilities contracts and tenant protection.

7. Caring for Health: Nutrition and eating, national and private health care, payments and repayments, sports and physical activities, diet and drugs, body images and self-reliance.

8. Coping with Problems: Poverty and unemployment, over-indebtedness and insolvency, separation and divorce, illness and disabilities, sex- and race-discrimination.

9. Influencing and Participating: Involvement with voluntary, official and community bodies, political parties concerned with consumer affairs.

10. Caring for the Future: Impacts of consumption on the natural resources and the environment, sustainable consumption and the ecological commodity basket, eco-balances and product-line analysis, eco-labels and other information systems, costs and benefits.

Source: Professor Heiko Steffens, Technische Universität Berlin

Consumer education has also been taught informally through specific events for target groups such as rural women, members of consumer organizations, school consumer clubs, consumer cooperatives, and residents' associations, among others. These initiatives have been undertaken by Government consumer protection agencies, consumer associations and business entities as part of the drive to educate consumers who would not otherwise have had the opportunity to learn these skills.

The efforts put into consumer education then have been considerable and not just from governmental education ministries. Nevertheless, there are conflicting versions of who is responsible. The UNCTAD Implementation report¹⁵⁵ found that "conducting educational and information consumer programmes is a core responsibility of consumer protection agencies. Most UNCTAD member States have adopted such programmes with the aim of creating discerning consumers. There is a multitude of interesting initiatives comprising information websites, online courses, online counselling (United Kingdom), workshops (Dominican Republic, El Salvador) and even consumer education in the curricula of ministries of education (Guideline 36 (new 42)). Notably, the United States has an extensive educational programme covering all mentioned areas, especially active across social media (Facebook, Twitter, Youtube and blogging). Some countries have specialized units to carry out these roles. Each country has set different priorities, most of which are found among recommendations in Guideline 37 (New 44)."

The report goes on to say that: "there are few examples of education and information campaigns undertaken by consumer organizations, businesses and media." In contradiction, the CI survey concludes that "an interesting picture emerges when figures (on Government integration of consumer education into the school curriculum) are viewed in conjunction with the prevalence of Government funding for consumer education (58%) and education carried out by consumer groups (94%). It would appear that despite the fact that consumer education is seen by many Governments as the key component...., Governments actually sponsor these activities in barely half of the countries surveyed ...falling short of the efforts of consumer organizations."

Despite the above evolution, which is generally positive as regards the recognition of consumer education, as time passed, new pressures on the consumer education model came from three directions, all of which required adaptation.

Another global event that led to ever more searching questions about consumer education was the financial crisis and its attribution to the deregulatory phase that had preceded it. How could it be that despite the growing recognition of consumer education, such catastrophic events that took place during the middle of the first decade of the 21st century could take place with such devastating effects for individual households? According to the 'empowered consumer' thesis, this was not meant to happen.

Indeed, the financial crisis exposed to scrutiny the notion of reliance on consumer education as a means to ensure consumer protection and illustrated the limits of education and the need for realism. For it became clear that many financial products were so complex that regulators and at times, even the sales forces that sold the products did not understand them. Worst of all, some products were virtually incomprehensible, having been designed for short term gain and to evade regulatory constraints. A study conducted on banking services commissioned by the EC found that in two-thirds of cases (an expert panel) were unable to disentangle the structure of bank tariffs in order to ascertain the true cost of a service. As the EU Consumer Affairs Commissioner Meglena Kuneva said in 2009: "if experts are unable to understand the fee structure, what chance is there for ordinary consumers?"¹⁵⁴

In some respects this is not new or surprising. Is it unreasonable to expect ordinary consumers to become financial experts; after all one does not have to be an engineer to buy or to drive a car. Some academic studies have concluded that consumer education can make things worse by creating an illusion of understanding. The 'conventional wisdom' under challenge by this finding was eloquently described by Professor Lauren Willis who referred to a vision of: "responsible and empowered market players, motivated and competent to make financial decisions that increase their own welfare. The vision is of educated consumers

¹⁵⁵ *Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013*. Note by the UNCTAD secretariat, 2013, TD/B/C.I/CLP 23.

¹⁵⁴ Commissioner Meglena Kuneva, *Restoring Consumer Trust in Retail Financial Services*, DECO 35th Anniversary Seminar on Financial Services and the Consumer Interest, Lisbon April, 27, 2009.

handling their own credit, insurance, and retirement planning matters by confidently navigating the bountiful unrestricted marketplace.” The professor went on to warn that: “the belief is implausible, given the velocity of change in the financial marketplace, the gulf between current consumer skills and those needed to understand today’s complex non-standardized financial products, the persistence of biases in financial decision making, and the disparity between educators and financial services firms in resources with which to reach consumers.”

The above is reinforced by a ‘meta-analysis’ by Fernandes, Lynch and Netemeyer published in 2014, which tracked the relationship of financial education to financial behaviours in 168 papers covering 201 prior studies. The authors found that interventions to improve financial literacy explained only 0.1% of the variance in financial behaviours studied, with even weaker effects in low-income samples. They concluded that “like other education, financial education decays over time; even large interventions with many hours of instruction have negligible effects on behaviour 20 months or more from the time of intervention.”

In fairness, few financial experts have argued that consumer education would have avoided the financial crisis, although individual officials and bankers have been known to make such statements. There have always been balanced views. The 2005 OECD Recommendations on principles and good practices for financial education and awareness warned: “the promotion of financial education should not be substituted for financial regulation, which is essential to protect consumers (for instance against fraud) and which financial education is expected to complement.”¹⁵⁷ A World Bank study reinforced that view in 2010, especially in the context of transitional economies: “Financial education cannot substitute for adequate financial regulation.”¹⁵⁸

More recently, the OECD reached the following conclusion in its study on financial education and the crisis: “the lack of financial literacy has certainly contributed together with other factors, to the onset of the crisis and to the worsening of its consequences (paragraph

64)[...] Yet financial education is not a panacea and cannot by itself prevent the occurrence of major crises such as the one we are going through. As far as this crisis is concerned, on the one hand, its genuine causes are still difficult to delineate and weight, and, on the other hand, the lack of financial literacy is only one of the contributing factors and not the main one (paragraph 68)”.¹⁵⁹ These two passages may seem contradictory and yet both can be correct as neither is an absolute statement.

In fact the meta-analysis cited above provides a partial reconciliation of the different views, as it suggests “a real but narrower role for ‘just in time’ financial education tied to specific behaviours it intends to help.” The consumer’s attention is more easily focused when there is a specific activity under consideration. This in turn goes against the assumption that education in advance equips consumers for future challenges, but it does point to a more focused approach to be taken by consumer education. Incidentally, it also illustrates the importance of cooling off periods so that consumers can consider transactions having considered and consulted on their implications.

10.8 Conclusion

The complex debate about information, education and decision making has often been framed by theorists of ‘rational utility maximisation’ with behavioural economists recently pointing out that what people actually do may not accord with their ‘objective’ interests. The debate can even become patronising in regretting the failure of consumers to invest their time in money saving activities such as switching fuel suppliers or perusing price comparison sites. This indicates a very narrow view of real consumer behaviour for several reasons.

Firstly, the high error rate that has been found among consumers switching (for example) may actually mean that consumer conservatism is the more rational course of action and this is discussed in chapter 6. Furthermore the apparently regrettable failure of consumers to peruse in this way may mask a very healthy preference

¹⁵⁷ Recommendations on Principles and Good Practices for Financial Education and Awareness 2005, C(2005)55/REV1).

¹⁵⁸ S. Rutledge, N. Annamalai, R. Lester and R.L. Symonds, *Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A Diagnostic Tool*, World Bank, foreword, 2010.

¹⁵⁹ OECD, *Financial Education and the Crisis*, DAF/CMF(2009)10.

for activities that may bring no obvious short term financial benefit, while being in fact highly meritorious and a form of long term investment, like taking time for leisure. The rejoinder is doubtless that such a range of activities are not incompatible with each other. It is important to bear in mind that consumer choice is now expected in far more areas than was the case hitherto; and consumers have many competing activities calling for attention apart from informing themselves to make informed choices. Consumer education has an important role to play, but its limits should also be recognized.

CHAPTER 11

CONSUMER DISPUTE RESOLUTION AND REDRESS

In this chapter, the following issues are discussed:

- *UNGCP provisions*
- *The need for consumer dispute resolution and redress*
- *Pathways for delivering dispute resolution and redress*
- *Criteria for assessing ADR systems*

11.1 Consumer dispute resolution and redress in the United Nations Guidelines for Consumer Protection

Previous to the 2015 revision of the UNGCP, the principal references to redress were to be found in section E on measures enabling consumers to obtain redress (now section F on dispute resolution and redress (DRR)) and in Guideline 3(e), the legitimate needs (now Guideline 5(g)).

The revised UNGCP entail a notable shift in this domain. There is proliferation of references to dispute resolution (absent in the previous version) which now appears in the resolution itself, in the new section IV on good business practices, (Guideline 11(f)) and in section V.A on national policies for consumer protection (Guideline 14f), as well as in the expanded Section F, already mentioned. This suggests an intention to place greater emphasis on the development of alternative methods of resolving issues than ‘redress,’ which generally implies greater use of judicially obtained compensation. Even sections with little legal content (such as section V. G on education and information programmes, and Guideline 77 on public utilities now mention dispute resolution. Such change of emphasis follows the terminology of the OECD¹⁶⁰ and matches the evolution and proliferation, since the 1999 Guidelines, of a great variety of dispute resolution systems.

11.2 The need for consumer dispute resolution and redress

There are various strong reasons why mechanisms are needed that effectively deliver redress where consumers suffer detriment. First, a need for redress arises as a consequence of the supply of non-compliant or unfair goods or services, where there is a breach of contract or wrongful injury. Second, such breach constitutes unfair trading that will diminish consumers’ confidence in individual traders, the market and enforcers, and hence chill economic activity. Third, if it represents illegal trading by suppliers, the accumulation of illicit gains by them should not be retained. Fourth, unless the position is redressed, it represents an unfair, uneven and uncompetitive market place. Fifth, the damage suffered by consumers typically arises from individual incidents that are minor in significance and value,¹⁶¹ and which constitute a challenge for individuals to obtain redress, but which can collectively aggregate into significant market problems that need to be addressed.

The more the world evolves towards transaction-based economic relations, the more dispute resolution systems become necessary. This is partly the result of the sheer volume of transactions but also the trend for many areas, previously considered to be the domain of the State and provided through public services, to become the domain of consumer transactions. It

¹⁶⁰ *Recommendations Implementation of the OECD Recommendation on Consumer Dispute Resolution and Redress*, March 2014.

¹⁶¹ *Consumer Detriment; Assessing the Frequency and Impact of Consumer Problems with Goods and Services*, Office of Fair Trading, 2008, OFT992; *Consumer Detriment 2012*, Prepared for Consumer Focus by TNS BMRB April 2012 (Consumer Focus, 2012); *Help and Advice on your Purchases Abroad. The European Consumer Centres Network, 2012 Annual Report; Special Eurobarometer 342. Consumer Empowerment*, European Commission, 2011, available at: http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf 175; The Consumer Conditions Scoreboard 2013, available at http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf

¹⁶² *European Union Directive 2013/11/EU*, May 21, 2013, *Alternative Dispute Resolution for Consumer Disputes*, L/165/63.

is noteworthy in that context this the European Union Directive on Alternative Dispute Resolution excludes from its terms ‘non-economic services of general interest’ (in effect those public services for which no direct payment is made).¹⁶²

11.3 Pathways for delivering consumer redress

In recent years there has been significant innovation in the means by which consumers may achieve redress against traders, and a widened choice of such means. This section describes the main options, taking note of the tripartite division between individual dispute resolution and redress (DRR), collective DRR and statutory enforcement on behalf of consumers.¹⁶³

11.3.1 Courts

The ‘traditional’ means of upholding rights is for an individual to bring a private claim before the civil courts. However, this pathway usually presents significant barriers for consumers, in view of the cost, potential exposure to adverse costs if the consumer loses, lengthy duration of the procedure, inaccessibility of the process and of the court, complexity of the law or legal procedure, possible need for expert legal or other advice, problems over enforcement of a judgment, and, above all, disproportionality between the value of the dispute and the cost or time needed, and general non-user-friendliness of the system. The legal systems in most countries have not been able to cope adequately with the task of enforcement and consequently consumers have not been able to obtain justice.

Some countries, such as Germany, have predictable litigation costs and widely-available insurance for legal claims, but these might still not respond to small value consumer problems. The provision of legal aid is another option, and exists in various forms under which the services of a lawyer might be paid by the State or provided pro bono. Publicly funded legal aid is, however, coming under strain as many countries face fiscal tightening.

Many countries have introduced small claims procedures and courts, which may have low and fixed costs and may set aside the ‘loser pays’ rule, but they still tend to remain non-user friendly to consumers and so not popular.

11.3.2 Collective redress

Where multiple similar claims exist, aggregation into a class or collective action might provide a solution. The theoretical advantages of aggregation are achieving economies of scale and hence reducing individual and overall costs, whilst increasing bargaining power. Class actions have been used widely in the United States, spreading in recent decades particularly to Canada and Australia. Disadvantages have also been identified, not least in relation to consumer claims, in view of the commercial unattractiveness to funders (lawyers or investors) inherent in administering a mass of claims of small individual value (for example obtaining proof, verifying individual losses, or distributing damages).¹⁶⁴ Some other countries, notably in Europe, are less inclined to allow collective damages actions to enforce individuals’ rights without their consent (hence requiring an opt-in approach) and concern over potential conflicts of interest and abuse by intermediaries. This has prompted requirements for detailed safeguards against potential abuse,¹⁶⁵ which especially limit the financial incentives for intermediaries and impose various barriers that make collective actions generally unattractive to lawyers.

A major obstacle to public interest litigation is the requirement that the plaintiff must have ‘standing’ (locus) to sue, which usually relates to having a direct and personal interest in the matter to be litigated. However, in an increasing number of countries, the law on standing has been substantially modified. Consumer associations have been given the required standing and are permitted to bring public interest litigation, or even attempt substituted actions on behalf of a consumer. The Consumer Protection Acts of Thailand and India may be cited as early examples, and the United Kingdom Enterprise Act provision that standing be extended

¹⁶² European Union Directive 2013/11/EU, May 21, 2013, *Alternative Dispute Resolution for Consumer Disputes*, L/165/63.

¹⁶³ For further elaboration see OECD op. cit., *Implementation of the OECD Recommendation on Consumer Dispute Resolution and Redress*, March 2014.

¹⁶⁴ J. Coffee, *Entrepreneurial Litigation: Its Rise, Fall and Future*, Harvard University Press, 2015.

¹⁶⁵ See the Commission Recommendation of June 11, 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violations of rights granted under Union Law.

to consumer associations to bring ‘super-complaints’ has had the effect of bringing widespread consumer complaints to the attention of the relevant regulatory bodies who have then been required to take legal action.

While many countries permit representative claims by consumer associations for injunctions to protect consumers’ collective interests, the use by associations of collective damages claims is less widespread. Chapter 5 notes how several European Union members and Brazil allow for the generic consumer interest to be represented in court as distinct from the individual consumers concerned.¹⁶⁶ Most recently, France has adopted legislation allowing consumers to obtain collective redress for the first time, accrediting several named consumer associations with standing to bring cases forward. A similar accreditation system has been adopted in Peru where associations can file complaints with the national consumer protection authority, INDECOPI.¹⁶⁷ The Chinese Consumer Association (closely linked to the State Administration for Industry and Commerce as discussed in chapter 3) has a similar accreditation before the courts.¹⁶⁸ Such accreditation builds a bridge between associations and consumer protection agencies but also between collective redress by consumers (or their representatives) and enforcement agencies. Guideline 40 addresses this issue quite accurately: “Member States should ensure that collective resolution procedures are expeditious, transparent, fair, inexpensive and accessible to both consumers and businesses.” Indeed one could say that the original 1985 UNGCP were ahead of their time in referring to enabling “consumers, or as appropriate relevant organizations, to obtain redress.”

11.3.3 Public regulatory and enforcement action

A technique that has proved to be highly effective, swift and efficient in delivering consumer redress in both individual and collective cases is ‘regulatory redress.’¹⁶⁹ Here, the public enforcement authority possesses as part of the enforcement toolbox the faculty to order, or seek a court order for, a trader to make redress to one

or more consumers. The Danish Consumer Ombudsman has used this power successfully (in the form of an opt-out class action that only she is able to initiate) since 2008, as have various regulatory authorities in the United Kingdom (financial services and energy consumer redress schemes).

A similar approach can be taken by the use, after criminal prosecutions, of Compensation Orders or follow-on civil damages actions (notably used in Belgium, where a requirement on courts to facilitate damages claims has been effective). The advantage of all these mechanisms is that costs are borne by the public authorities, but the disadvantage of using the criminal system is that redress requires there to be a criminal conviction of the target trader.

11.3.4 Alternative dispute resolution

Dissatisfaction with court procedures noted above has led in many countries to the spread of ‘alternative dispute resolution’ (ADR) techniques and systems. The principal ADR techniques are arbitration and mediation and conciliation. All of them use third party intermediaries other than judges, namely arbitrators, mediators or conciliators. In brief the distinction between them is that in arbitration the arbitrator decides, in mediation the parties decide on the basis of a settlement put forward by the mediator acting as go-between, and in conciliation, the conciliator guides the parties to a settlement.

Arbitration is generally a process in which the disputants agree to submit their dispute to an arbitration tribunal, and to be bound by the result found by the arbitrator(s). In other words, the arrangement for resolving the dispute is a contract between the parties, and the third party decider is an arbitrator rather than a judge. For commercial disputes, well-known arbitration ‘courts’ exist, but for consumer disputes a variety of systems exist. There can be permanent Consumer Dispute Boards (either State-sponsored or funded by sectoral trade associations or even individual companies: strong examples of both of these exist in all Nor-

¹⁶⁶ Diego Fernandez Arroyo, *Consumer Protection in International Private Relations-General Report*, In *The Global Financial Crisis and the Need for Consumer Regulation*, Eds. Claudia Lima Marques, Diego Fernandez Arroyo, Iain Ramsay, Gail Pearson, International Law Association.

¹⁶⁷ Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual, National Agency for the Defence of Competition and Intellectual Property.

¹⁶⁸ OECD, *op. cit.*

¹⁶⁹ C. Hodges, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques,’ 23, *European Review of Private Law*, 829-874, 2015.

dic states, the Netherlands, among many other countries) or far less formal and nebulous arrangements. Some leading examples are the Swedish National Board for Consumer Complaints (which operates alongside private sector Boards for some regulated industries,) the Tribunal for Consumer Complaints of Malaysia, the hierarchy of adjudicating bodies in India established under the Consumer Protection Act 1986, the multi-sectoral matrix of Geschillencommissie operated by a single foundation in the Netherlands.¹⁷⁰ Arbitration schemes vary on whether they are free to consumers (usually funded by business, but sometimes with State contributions) or require an access fee, which might or might not be refunded if the consumer wins. The Lisbon Arbitration Centre for Consumer Conflicts is an example of an autonomous non-profit private association, founded by the Municipality of Lisbon, the Portuguese Association for the Defence of Consumers (DECO), and the Union of Associations of Traders of the District of Lisbon. The National Network of State-endorsed arbitration centres was established for the whole of Portugal in 2011.

The 1991 Consumer Act of the Philippines introduced a permutation of statutory Ombudsman incorporating aspects of arbitration. Consumer arbitration officers are empowered to mediate, conciliate, hear and adjudicate all consumer complaints. The Consumer Arbitration Officers are required first to try to ensure that the contending parties come to a settlement of the case. In the event that a settlement has not been effected the officer may proceed to formally investigate and decide the case. Their powers include cease and desist orders, directions to recall, replace, repair or refund the money value of products and or services, restitution or rescission of the contract and the imposition of fines depending on the gravity of the offence.

The United States Supreme Court has upheld the use of arbitration clauses in standard consumer contracts, which has led to their wide use by traders and driven individual and class consumer claims out of courts and into arbitration schemes, which are unregulated and some of which have been said to have been of uncertain reliability.

11.3.5 Ombudsmen

ADR systems have developed into a more formal architecture of consumer or sectoral Ombudsmen in some States. The Ombudsman concept is of Nordic origin; Sweden set up such a post in 1809 although there were analogous bodies even further back in history such as the Chinese Qin Dynasty.¹⁷¹ Originally, it was a public office to which people could bring grievances connected with services provided by the Government – the Ombudsman stood between and represented the citizen before the Government. The findings of the Ombudsmen were not necessarily on points of law; the most common task was to identify instances of ‘maladministration,’ partly because in those days, public services often had ill-defined legal powers. This concept was transplanted in this original form to Latin America during the ‘90s, under the name of the *El Defensor del Pueblo* who dealt with complaints by consumers against public services, notably in Argentina and Peru.

In the 1970s, the institution of the Consumer Ombudsman was established in the four Nordic countries – Denmark, Finland, Norway and Sweden. The Consumer Ombudsman is a development of the existing concept beyond the public sector, a supervisory body with the task of ensuring that marketing methods used by a business when selling goods or providing services conform to the law. Ombudsmen can be statutory, underpinned by law (official recognition in return for meeting certain criteria), or voluntary.

The statutory Ombudsman does not act in a judicial capacity and usually has wide powers not only to weigh the merits of each party’s case but also to investigate the matter. The decision arrived at is not purely on legal points but also on “good industry practice” (echoes of maladministration in public services) and the need for change. Proceedings are usually informal and can include oral as well as written submissions. Legal representation is not usual, and the service is often free to consumers. The consumer is not required to refer the case to the Ombudsman and awards are not binding on the consumer though they often are on the other party.

¹⁷⁰ See C. Hodges, I. Benöhr and N. Creutzfeldt-Banda, *Consumer ADR in Europe*, Hart Publishing, 2012.

¹⁷¹ David Thomas, *The Role of Ombudsmen in Consumer Protection, Including in Financial Services*, Conference paper for International Forum on Justice and Consumer Rights, *United Nations Guidelines for Consumer Protection*, Wuhan, China, March 2013.

As shown above, Ombudsmen are widely known for resolving complaints by citizens of maladministration against public bodies and officials. However, for complaints on financial services, energy, communications, or any consumer-trader complaint, Ombudsmen are increasingly being developed in European States, not least because they can be designed to provide functions of consumer advice and of feeding back aggregated data on consumer issues to regulators, markets and consumers, and hence assist in a quasi-regulatory capacity. Current examples are the (statutory) Financial Ombudsman Service and the private not-for-profit Ombudsman Services (which services energy, communications, property, general consumer and other dispute) in the United Kingdom, and the Insurance Ombudsman and Transport Ombudsman in Germany. Regulatory bodies can also provide customer complaint and dispute resolution functions (Banca d'Italia is an example) although the trend appears to be that such functions are being outsourced to independent Ombudsmen. As models develop and as schemes seek recognition and official endorsement, the lines are becoming blurred.

In light of the evolution of many different schemes and indeed concern that the 'brand name' of the Ombudsman was in danger of becoming devalued, the European Union established in 2015, a regulatory system for any type of consumer ADR (or ombudsman) scheme, and required every member State to have a system that can handle any type of consumer-trader dispute.¹⁷² In 2016 it established an online portal for cross-border disputes clearly an appropriate role for the European Union in the context of the single market. Traders are required to provide information on which, if any, ADR scheme they belong to, and the system can in future be expected to extend by requiring traders to belong to ADR or ombudsmen schemes. Consumer ADR in the European Union is required to be free to consumers (which many schemes already are) or to involve minimal cost. This system has considerable potential and is clearly congruent with the relevant section of the UNGCP (Section F dispute resolution and redress Guidelines 37-41). The specific criteria are discussed below.

11.3.6 Business customer care and complaint functions

It should always be a requirement on traders to respond fairly, quickly and openly to customer feedback, queries and complaints, in line with Guideline 11(f). Many businesses have customer care departments that respond well in seeking customer satisfaction, especially where a competitive market requires them to maintain a high reputation. International standards (such as ISO) support customer care and complaint systems. Very many consumer contacts are enquiries that can be resolved in a few minutes – they may even not be disputes at all, but can turn into disputes if they are not handled sensitively and promptly. In-house care and complaint systems should not, however, be represented as being independent ADR or ombudsman schemes. The advantage of having effective independent complaint systems such as Boards and ombudsmen is that their presence and activities provide an incentive for traders to operate effective in-house consumer complaint functions. Having such functions is increasingly a regulatory requirement. Virtually all consumer ADR schemes require a consumer to contact the trader first before being able to access the ADR scheme, sometimes with a specific period for the trader to be able to resolve the issue.

11.3.7 Online dispute resolution

Many online traders have built-in 'online dispute resolution' (ODR) arrangements, which can vary between using panels of legally-qualified and verifiable individuals on an arbitration model, to algorithmic generation of automated proposals based on the statistically most likely sum that both parties would be most likely to accept, to crowd-based 'jury' decisions.¹⁷³ With the growth of e-commerce, it was natural that dispute resolution and redress would also move online. The United Nations Commission on International Trade Law (UNCITRAL) extended its earlier work on commercial arbitration and e-commerce¹⁷⁴ to help enable ODR systems for cross-border e-commerce. This raises the question as to whether ODR should be restricted to online transactions. While it is understandable that

¹⁷² Directive 2013/11/European Union, *op. cit.*

¹⁷³ http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm
<http://www.colinrule.com/writing/UALR2012.pdf>

¹⁷⁴ *Review of the Guide for the Incorporation of Domestic Law, New Version of UNCITRAL Model Law*, New York, June 25-July 7, 2012.

consumers who make online purchases might have an aptitude for ODR there is no a priori reason for such a restriction, providing the parties can communicate electronically.

One relatively early ODR platform was based on transactions through eBay and PayPal. The latter's ODR director, Colin Rule reports that having started from zero in 2003 by 2012 the platform was dealing with 60 million disputes per annum, compared with under 300,000 in the United States court system.¹⁷⁵ Faced with doubts about the cost-effectiveness for business of investing in ADR, and its research team using large data sets generated by the system, analysed ODR results and found, counter-intuitively, that: "users who reported a transaction and went through the ODR process increased their usage of the marketplace regardless of outcome." The biggest subsequent increase in market participation by consumers came from those consumers who settled their case amicably, slightly greater in fact than those whose cases were upheld. It is interesting to note that even those who lost registered increased subsequent involvement. The only group whose participation in the market decreased were those whose resolution process took a very long time – a result that echoes the long standing complaints about the 'hassle factor' of court proceedings. This confirms the familiar pattern that the worst possible response to discontented consumers is to ignore them.

Other ODR platforms are not restricted to online transactions. One early version was established by the Mexican consumer protection agency PROFECO (see chapter 3) whose *Concilianet* service opened for business in 2008. This followed amendment of the Federal Consumer Protection Law in 2004, enabling accepting and filing of cases electronically, and electronic (and telephonic) conduct of hearings. The service is open to the public, can be accessed from the PROFECO website and is free of charge. In reviewing the history of *Concilianet*, Gonzales-Martin makes the point that "one avenue to be explored is whether the principles of functional equivalence used to accept e-documents when the law requires them in writing might also be

valid in allowing virtual presence to substitute the physical presence of parties."¹⁷⁶ Recent experience suggests that this stage is being rapidly arrived at.

In early 2016, the European Commission set up a new *Online Dispute resolution ODR platform*. It was not restricted to online transactions and around 117 Alternative Dispute Resolution bodies from 17 Member States were connected from day one. The European Commissioner for Consumers reported: "One in three consumers experienced a problem when buying online in the past year. But a quarter of these consumers did not complain – mainly because they thought the procedure was too long or they were unlikely to get a solution."¹⁷⁷ The legal basis of the ODR platform builds on the ADR Directive already referred to elsewhere in this chapter. The initial complaint is sent to the trader, by the platform, which may prove to be an improvement on the more traditional ADRs which often stipulate that the initial complaint is taken directly to the trader. Time will tell if the new system is an improvement. According to the Commission traders may also find the system an improvement as many (60% is estimated) do not sell online to other countries because of difficulties in problem solving.

11.4 Criteria for assessing consumer redress systems

The diversification and spread of consumer ADR schemes has been accompanied in some countries by a demand for quality criteria against which ADR, ombudsmen or other consumer-trader dispute resolution schemes can be evaluated, and regulated. The criteria in Directive 2013/11/European Union, which were based on earlier and widely accepted Recommendations from 1998 and 2001, are (with summaries of some of the more detailed requirements in brackets):

- Access;
- Expertise, independence and impartiality (independent governance and individuals);
- Transparency (including rules of procedure);

¹⁷⁵ Colin Rule, *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, 2012.

¹⁷⁶ N. Gonzales-Martin, in *New Developments in Civil and Commercial Mediation*, eds. C. Esplugues Mota and L. Marquis, 2015.

¹⁷⁷ European Commission Daily News, Press Release, January 8, 2016; Also: *Solving Disputes Online: New Platform for Consumers and Traders* Press Release: February 15, 2016..

- Effectiveness (accessible online, able for a consumer to operate without a lawyer, free of charge or nominal cost to the consumer, prompt notification of the parties by the ADR entity, outcome within 90 days);
- Fairness (parties have a reasonable possibility of expressing their views, opportunity to withdraw);
- Liberty (an agreement to submit to ADR is not binding if concluded before the dispute has arisen (in contrast to United States practice), schemes that impose a solution may only be binding if the parties were informed of that fact in advance); and
- Legality (application of the law in cases of imposed solutions, rules on conflict of laws).

A further requirement of a well-designed consumer redress system is that it should be able to identify and address systemic problems, providing aggregated data that supports improvements in performance. This indeed is the growing trend in Ombudsmen systems, and has been particularly noticeable in the financial services sector.

The emergence of a strong consensus can be gauged by the fact that the above criteria are broadly consistent with those set out by the OECD in its Recommendation on Consumer Dispute resolution and redress in 2007.¹⁷⁸ That recommendation while less detailed than the European Union criteria nevertheless dealt with matters of access, cost and transparency. The UNG-CP Guidelines 37 to 41 include most of the above with less emphasis on the two legality principles (a major jurisdictional issue in Europe) and reference to impartiality rather than independence. On the one hand, they place more emphasis on the protection of vulnerable and disadvantaged consumers, as does the OECD recommendation. All three sets of criteria emphasize the need for cross-border cooperation, particularly as this remains a constant challenge.

11.5 Conclusion

The period of development and innovation in methods of delivering consumer redress is far from over. The arrival of new technologies and architectures has

opened up competition between options in place of the previous single court-based series of options. It is important to continue evaluating all options against criteria of cost, cost-proportionality, speed, number and quality of outcomes, and user-friendliness. The current empirical evidence appears to indicate that combinations of consumer ombudsmen and regulators using redress powers, but usually resolving problems by negotiation, can satisfy the criteria well.

And yet, the success of the Ombudsman/ADR model in numeric terms raises the question as to whether too many cases are now going to these institutions, which might be better settled upstream. Indeed should the cases exist at all? A case in point is the United Kingdom Financial Services Ombudsman, which is mentioned in chapter 14 on financial services where a vast number of remarkably similar cases concerning mis-selling of one particular financial product were eventually resolved by regulatory intervention (at huge cost to the financial institutions). The analogous institution from another jurisdiction, the Financial System Mediator of Armenia, was established in 2008 but by 2013 it was still recording a year on year doubling of case numbers, after several years of increases in excess of 50%.¹⁷⁹ The Armenia Financial Services Ombudsman's response has been to engage on a programme of consumer and industry education. Many cases that go to Ombudsmen would be more simply resolved by better internal management of enquiries. Guideline 41 makes appropriate, if tangential, reference to this issue in stating that: "Member States should cooperate with businesses and consumer groups in furthering consumer and business understanding of how to avoid disputes, of dispute resolution and redress mechanisms available to consumers, and of where consumers can file complaints." The scale of case in the financial services sector and doubtless elsewhere, gives rise to at least consideration of a twin-track approach: internal management in efficient management of enquiries and upstream reform of internal procedures on the one hand and external conduct regulation on the other.

¹⁷⁸ OECD, *op. cit.*

¹⁷⁹ Financial System Mediator, *Annual Report 2013*, Yerevan Armenia..

CHAPTER 12

ELECTRONIC COMMERCE

In this chapter the following issues are discussed:

- UNGCP provisions on e-commerce
- The scope and extent of e-commerce
- Consumer problems and consumer protection
- Guidelines for regulation of e-commerce
- The need for a legal framework

12.1 Electronic commerce in the United Nations Guidelines on Consumer Protection

From the start of the revision process, there was never much doubt that electronic commerce (e-commerce) would be included, and there was no opposition to its inclusion. Nevertheless, it now seems hard to believe that one searches in vain for any reference to e-commerce in the 1999 version of the UNGCP. That forms a very simple illustration of the way in which the consumer protection landscape has been transformed during the 16 year gap, for e-commerce is now the subject of an entire section (V.I) as well as two paragraphs in the resolution and a new 'legitimate need' (Guideline 5j). It features in Guideline 44g under education and information and by implication in the new section IV "Principles for Good Business Practices" which are clearly stated as applying to online and offline transactions and which also cover protection of privacy. Similarly, Section V.A: "National Policies for Consumer Protection" refers to web-sites, e-mail and 'consumer privacy and data security.'

The above Section V.I on e-commerce is the most substantive, Guidelines 63-65 and Guideline 63 in effect restates the 'legitimate need' from Guideline 5j which reads: "a level of protection for consumers using

e-commerce that is not less than that afforded in other forms of commerce."¹⁸⁰ Guideline 64 requests Member States "to accommodate the special features of electronic commerce," and emphasizes awareness of rights and obligations; in effect, a statement of the disclosure principle. Guideline 65 calls for collaboration across borders and suggests that Member States scrutinize the OECD E-Commerce Guidelines, which having first been produced in 1999, have been revised and re-issued in 2016.¹⁸¹

12.2 The scope and extent of e-commerce

E-commerce originally referred to transactions for sale and purchase of goods and services via the Internet, via 'classical' computers.¹⁸² It now has a wider context, covering transactions effected via mobile phones (m-commerce) and other devices such as tablets. It includes purchases using applications (Apps) and platforms. It also should include the purchase of digital content, which is not easily categorized as either goods or services. E-commerce and the use of the Internet have implications for the entire spectrum of consumer protection. Goods that are not safe may be bought online, and unfair or criminal commercial practices can take place via the use of distance communications (e.g. phishing emails).¹⁸³ The section of the

¹⁸⁰ Strictly speaking this is not "a principle of equivalence," for in both forms, the wording only requires that CP as enjoyed by e-commerce should be 'not less than that afforded in other forms of commerce' and does not specify the converse. Whether this is used to justify discrimination against other forms of commerce in future years is too early to tell.

¹⁸¹ OECD, *Consumer Protection in E-commerce: OECD Recommendation*, Paris 2016.

¹⁸² The OECD defines e-commerce transactions as: "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, Governments, and other public or private organizations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail." Available at: <https://stats.oecd.org/glossary/detail.asp?ID=4721>

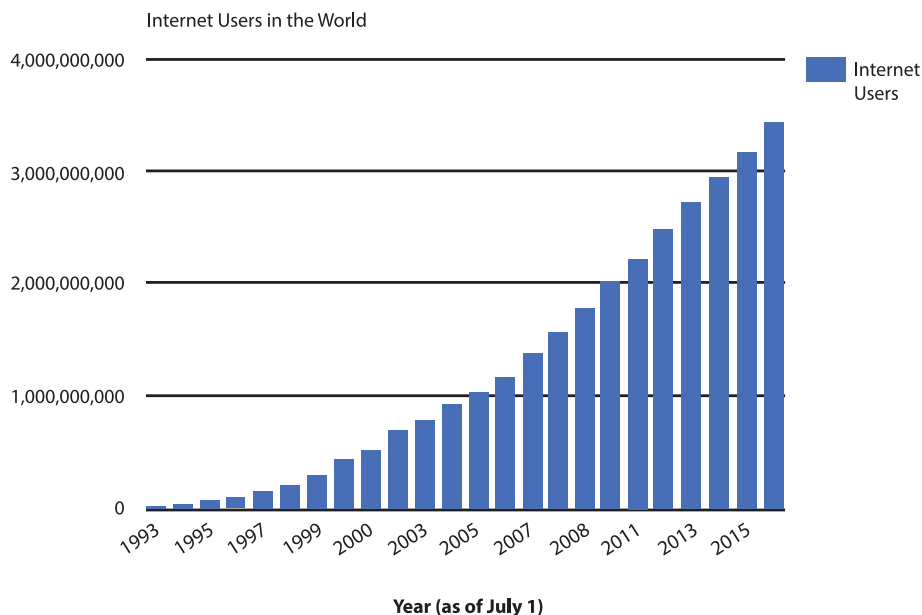
¹⁸³ Phishing emails typically direct the user to visit a website where they are asked to update personal information, such as passwords, credit card details, bank account numbers, in effect impersonating a legitimate organization that already has such data.

UNGCP that deals with e-commerce should therefore not be read in isolation.

E-commerce is normally thought of in consumer protection terms in relation to “Business to Consumer” transactions (B2C,) but it is important to note that the Internet has facilitated the emergence of the ‘Sharing Economy’ where many paying transactions now occur between two consumers (C2C). E-commerce online auction giant eBay¹⁸⁴ was a precursor in this area but platforms such as AirBnB and Uber are making notable progress in recent years alongside platforms such as the Google App store or the Apple App store.¹⁸⁵ Platforms also facilitate business-to-business (B2B)

as well as business-to-consumer (B2C) transactions, blurring the lines between all forms of e-commerce. Peer to peer loans are also developing on-line and regulation is under development under several jurisdictions.

Precise estimates vary, but the percentage of world population with access to the Internet has grown from 1 % in 1995 to over 40 % by 2015. The number of Internet users increased tenfold from 1999 to 2013. The first billion was reached in 2005, the second billion in 2010 and the third billion in 2014. The chart below shows the number of global Internet users per year since 1993:¹⁸⁶



Source: Internet live stats: <http://www.internetlivestats.com/internet-users/>

Such increases in the number of people being able to access the Internet has contributed to the development of e-commerce – the two are not identical of course. According to UNCTAD Information Economy Report 2015,¹⁸⁷ B2C e-commerce is forecast to double from US\$ 1.2 trillion in 2013 to US\$ 2.4 trillion in 2018 (eMarketer). The fastest growth is expected in the Asia and Oceania region, the market share of which is set to grow from 28 % to 37 %. The only other region that is forecast to increase its share of the global

market is the Middle East and Africa: from 2.2 % to 2.5 %. Conversely, the combined share of Western Europe and North America is expected to fall from 61 % to 53 %. It is reported that 40% of worldwide Internet users (over 1 billion people) have bought goods or services online via a variety of platforms and devices.¹⁸⁸ Those figures are set to continue to grow as mobile commerce develops and reliable digital payment systems become more accessible.

¹⁸⁴ For more on the regulation of this form of commerce, see Christine Riefa, *Consumer Protection and Online Auction Platforms - Towards a Safer Legal Framework*, Ashgate/Routledge, 2015.

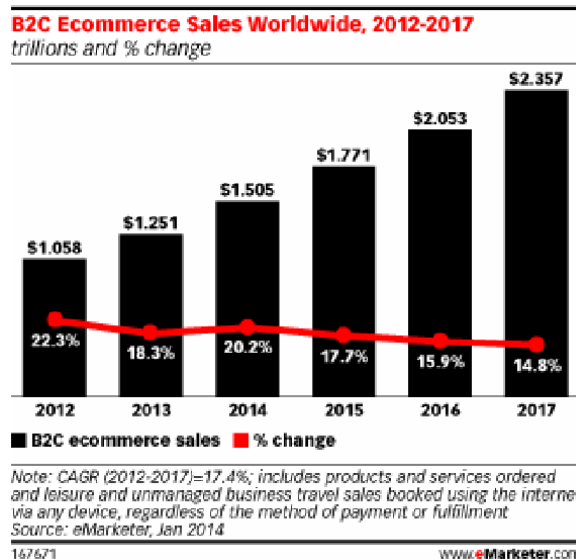
¹⁸⁵ For more on the role of platforms in electronic commerce and the latest trends, see special issue: *The Rise of the Platform Economy*, *Journal of European Consumer and Market Law (EuCML)*, Volume 5, 1-72, 1/2016.

¹⁸⁶ <http://www.internetlivestats.com/internet-users/>

¹⁸⁷ UNCTAD, *Information Economy Report*, 2015.

¹⁸⁸ <http://www.statista.com/markets/413/e-commerce/> accessed March 8, 2016.

The table below suggests that the annual rate of increase is starting to diminish. In other words, while volumes continue to rise, the rate at which they are doing so is moderating, in the same way as the rate of uptake of mobile phones is now approaching a plateau.



Nevertheless, there is still plenty of upward trend left in this market. For example, only 32% of customers place a second order in their first year as a customer; familiarity will then generate further business.¹⁸⁹

According to the International Telecommunications Union (ITU,) between 2000 and 2015, Internet penetration has increased almost seven-fold from 6.5 to 43 % of the global population. ITU figures also indicate that four billion people in the developing world remain offline. Out of the nearly one billion people living in the Least Developing Countries (LDCs), 851 million do not use the Internet. For example, in Africa 28.6% of the population has now access to the Internet, an increase of over 7,000% in the period 2000-2015. Asia's penetration rate increased by over 1,000% over the same period and Asian users now represent nearly half of the worldwide population having access to the Internet. Other regions have also witnessed exponential growth in penetration rates.¹⁹¹ For example, in one year alone (2010-2011) Brazil saw an increase of 26% in the value of online sales, while China saw an increase of 500% between 2008 and 2011.¹⁹²

Clearly, such spectacular trends have taken off from some kind of base. UNCTAD launched in 2015 a B2C E-commerce Index that explains the variations between countries. It is not just a matter of access to the Internet, but a matter of all-round readiness, setting the pre-conditions for such development.¹⁹³

Box 11: Readiness for E-commerce

The UNCTAD B2C E-commerce Index is composed of four indicators: a) Internet use penetration, b) secure servers per million inhabitants, c) credit card penetration and d) a postal reliability score. The 2016 Index is based on a survey of 137 economies accounting for 96% of the world population and 99 % of world GDP. The 2016 Index follows on from that first introduced by UNCTAD in the Information Economy Report 2015: Unlocking the Potential of Ecommerce for Developing Countries.

The Index measures the readiness of countries to engage in online commerce. Among the top 10 economies in that regard, 6 are European, 3 are from the Asia-Pacific region and 1 is from North America. Among developing economies, three high-income economies – Republic of Korea, Hong Kong (China) and Singapore – rank the highest, followed by several Gulf States. Uruguay is the top performer in Latin America and the Caribbean. At 61st place in the Index, South Africa is the front-runner in E-commerce readiness on the African continent.

The report of the Index shows e-commerce readiness variation by region. For example, just over a fifth of the population in Africa uses the Internet compared to two thirds in Western Asia. While Western Asia and the transition economies fare well on most indicators, credit card availability is thought to be holding back further development of E-commerce. Asia as a whole needs to boost Internet penetration, which currently stands at just over a third of the population, as well as the number of secure servers. In Latin America and the Caribbean, the main barriers appear to be low credit card penetration and relatively poor postal reliability. This last factor tends to be overlooked, but of course if physical products are ordered online they need to be delivered. Africa ranks the lowest in all the indicators and the report concludes that “unless there is improvement in the underlying transaction and logistics processes, African online shopping is likely to remain confined to wealthier populations in urban areas.” It is interesting to bear this finding in mind in the light of the rapid take up of mobile payment systems in Africa, to be discussed later.

Some countries reach ‘take off’ in specific domains. Uruguay and the Russian Federation have seen sizable improvement in their share of individuals with credit cards which jumped in one year by 13 percentage points in Uruguay (from 27% to 40%) and by 11 percentage points in the Russian Federation (from 10% to 21%). While improvements in secure Internet servers per million people are slower to take place, this indicator moved up especially for Guinea, Lesotho and Liberia. But none of those three countries improved their overall ranking, and Guinea’s improvement was accompanied by a significant fall in the overall rankings from 126 to 136; the penultimate position. Where readiness is multi-factorial, progress has to be maintained on several fronts.

Source: UNCTAD B2C E-commerce Index 2016 ¹⁹⁴

The two largest populations in the world both make an important contribution to the growth trends. India has been reported by The Economist to be the world’s fastest-growing e-commerce market at the time of this writing, with three more Indians experiencing the internet for the first time every second and with one billion consumers expected to be on line by 2030.¹⁹⁵ Its online retail market has been estimated as being about to grow seven times over between 2015 and 2020.

But while India has 32% of its population online as of 2015, the figure for China is 52%. Of the US\$ 1.3 million spent online every 30 seconds, one fifth of that goes through the world’s biggest e-retailer, the Chinese company Alibaba.¹⁹⁶ The story of Alibaba is of global importance not only because of its size but because of what it tells us about consumer behaviour in taking up e-commerce. The cornerstone of Alibaba’s success is the third party guarantee system, Alipay which accounts for half of all online payment transactions in China.¹⁹⁷ Yu and Shen observe: “it is ironic that Alipay, which represents the height of modernity, is achieving its prominence by use of the escrow system, a third party guarantee system that has been used for centuries in common law systems.” Launched at the end of 2003, it accounted for 84% of third party online platform use by 2013, (40% of Chinese Internet users

are frequent users of third party payment systems).

By any account, this is a remarkable increase but the reason is far deeper than simply the rise of ‘consumerism’ in China. It relates to consumer trust. Yu and Sheng conclude that: “the lack of effective consumer protection law and the unwillingness of China’s banks to offer any payment protection of online transactions, has led to Alipay’s dominance of the online payment industry.” Chinese banks do not make available chargeback protection to Chinese consumers, but Alipay guarantees the transaction. Furthermore, unlike, Paypal, which forwards the consumer payment to the seller before the product is delivered, Alipay holds the payment by the consumer until goods purchased online have been delivered. By withholding payment until delivery of the goods, it provides greater security than that which chargeback mechanisms can provide to credit cardholders outside of China. It also provides an Online Dispute

Resolution service available to both parties financed by the revenue generated by the funds held in escrow. It is appropriate then, that one of the amendments to the newly issued OECD Guidelines on E-commerce is the recognition of escrow services in paragraph 41.¹⁹⁸

Box 12: Mobile banking

The UNGCP and the OECD/G20 HLPs both pay tribute to the benefits of innovation in their preambles and the HLPs also warn of its dangers and make the point that regulation needs to be “responsive to new products, designs, technologies and delivery mechanisms” (Paragraph 1). Legislation must allow for innovation in the design of financial services products to ensure that service providers respond constructively to the changing needs of consumers. But while raising some issues, it is also clear that even basic services such as SMS money transfer have brought benefits to the large number of poor consumers in developing countries who do not have bank accounts but who do have mobile phones (a figure that had already reached one billion in 2010).¹⁹⁹

¹⁹⁴ Available at: http://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d07_en.pdf

¹⁹⁵ <http://www.economist.com/news/leaders/21693925-battle-indias-e-commerce-market-about-much-more-retailing-india-online>

¹⁹⁶ <http://growwithtrellis.com/blog/top-10-ecommerce-markets-by-country/>

¹⁹⁷ Y. Yu and M. Shen, *Consumer Protection as the ‘Open Sesame’ that Allows Alibaba to Crush the Forty Thieves*, Journal of Antitrust Enforcement, Oxford University Press, 2015.

¹⁹⁸ OECD 2016, *op. cit.*, paragraph 16.

¹⁹⁹ Access through innovation sub-group of the G20 Financial Inclusion Experts Group, *Innovative Financial Inclusion: Principles and Report*, 2010.

Africa has led this technological revolution. Three quarters of the countries that use mobile money most frequently are in Africa. The Kenyan example illustrates the potential of mobile phone technology to support the extension of access to financial services. The mobile phone money transfer service M-Pesa operated by Safaricom was launched in 2007 and by just 2009, had over eight million registered users or 40% of the adult population. In contrast, access to formal banks in Kenya only rose from 18.9% to 22.6% of adults between 2006 and 2009. The G20 Financial Inclusion Expert Group attributes the increase in non-bank financial access to M-Pesa. This chain reaction indicates that mobile telephony and mobile transfer of money is a catalyst for other financial services. Further benefits downstream are showing up in East Africa, where payment by mobile phone is being introduced for public utilities such as water and electricity. For example, Kenya Power has introduced a system of payment through M-Pesa. (The use of such payment systems for utilities is cross-referred in the ISO standard 14452 on Network Services Billing). Such systems can help to avoid transitional problems such as those when poor consumers are connected to such services for the first time. For low cost payments by mobile phone at short intervals, this may not only save consumers the time and expense associated with old-fashioned queuing systems, but can also improve payment levels and reduce arrears. This improved payment technology brings potential benefits to sectors far removed from financial services.

Mobile payments are still only expected to be 3% of E-commerce payments by 2017. However, it is already important in countries 'characterized by limited Internet use but well-functioning mobile money systems. In several African countries mobile solutions represent the most viable infrastructure for E-services.' The UNCTAD Information Economy Report 2015 states that in Kenya, online purchase payments from mobile phones accounted for 19% of total e-commerce transaction value in 2012. This was less than cash on delivery but more than credit cards. The aptitude and enthusiasm of Kenyans for payment using household devices suggest that it will continue to grow.

Source: UNCTAD.

12.3 Consumer trust in the digital market

E-commerce has flourished due to a number of factors, including a wider range of products to choose from, easier access to more complete product information than is typically available offline, round-the-clock opening hours and the convenience of shopping from home. E-commerce also enables consumers to experience individually tailored and personalized treatment from businesses. But increasingly targeted advertising and buying experiences are not without their dangers and drawbacks, some of which may hamper consumer confidence. Mixed up orders, problems with refunds, unanswered complaints and Internet scams are just some of the problems associated with online shopping. A European Commission survey found that consumer confidence in cross-border Internet purchases within the EU dropped between 2008 and 2011.²⁰⁰ Even basic 'delivery issues' matter. According to a European Union study, consumers reported problems in Poland, Romania, Bulgaria and

the United Kingdom in terms of long delivery times for online shopping from other European Union countries. This concern featured in 40% to 50% of responses mentioned above.²⁰¹ As discussed in Box 11, UNCTAD lists postal reliability as one of four indicators of internet-readiness and it reports that International postal deliveries of small packets have seen rapid growth, which it attributes mainly due to e-commerce, the volume having risen 48% between 2011 and 2014.²⁰² The growth of e-commerce, while undoubtedly having an impact on letter post may well bring new in revenue into the postal delivery service.

As the Chinese experience shows, the trust-building imperative is as compelling today as it was in the early days of e-commerce. It is worth noting that, even in the rich European market, 50% of households use the Internet every day, while 30% have never used it at all; a stark reminder of the 'digital divide'.²⁰³

²⁰⁰ EC 2012a Consumers' Attitude Towards Cross-Border Trade and Consumer Protection; http://ec.europa.eu/public_opinion/flash/fl_en.pdf

²⁰¹ Civic Consulting Consumer, *Market Study on the Functioning of E-commerce and Internet Marketing and Selling Techniques in the Retail of Goods*, 2011; http://ec.europa.eu/consumers/consumer_research/market_studies/docs/study_ecommerce_goods_en.pdf

²⁰² UNCTAD, *The Information Economy Report 2015: Unlocking the Potential of Ecommerce for Developing Countries*, 2015.

²⁰³ C. Riefa, *Study on Electronic Commerce and the Protection of the Digital Consumers in Serbia*, EuropAid/129680/C/SER/RS, Belgrade, 2014.

12.4 Guidelines from the Organization for Economic Cooperation and Development

Among international organizations, the Organization for Economic Cooperation and Development (OECD) has been engaged since the early days of e-commerce in promoting policies aimed at helping to build trust. The Guidelines created by the OECD in 1999 reflected existing legal protection available to consumers in more traditional forms of commerce, encouraged private sector initiatives including participation by consumer representatives and emphasized the need for cooperation among Governments, businesses and consumers.²⁰⁴ They aimed to encourage:

- Fair business practices;
- Advertising and marketing practises;
- Clear information about an online business identity;
- The goods or services it offers and the terms and conditions of any transaction;
- A transparent process for the confirmation of transactions;
- Secure payment mechanisms, fair, timely and affordable dispute resolution and redress;
- Privacy protection; and
- Consumer and business education;

These guidelines have carried weight, which will doubtlessly have been increased by the expansion of the OECD Membership since 1999 and the participation of non-OECD countries in the revision process terminating in 2016.²⁰⁵

The reference to the OECD Guidelines in the UNGCP is a reference to more than the Guidelines themselves. For in turn the E-commerce Guidelines reference a set of other OECD documents, concerned with fraud, dispute resolution, privacy, risk management and Internet policy making.²⁰⁶

12.4.1 Applicable law for cross-border redress

As suggested above, the lack of effective consumer redress when the parties are in different countries remains a major barrier to consumer confidence and the problems of consumer redress in the event of cross-border disputes, which thus need to be resolved. But the problem of applicable law and its enforcement in the context of an increasing number of cross border transactions is proving to be very intractable.

While both appeal to Governments to cooperate, neither the OECD Guidelines, nor the United Nations Guidelines have come up with a definitive solution in jurisdictional terms. The OECD Guidelines in paragraph 54.vi ask Governments to “consider the role of applicable law and jurisdiction in enhancing consumer trust in e-commerce” and the same phrase “applicable law and jurisdiction” is used in the resolution part of the UNGCP with a similar plea for “special attention.” This lack of clarity is likely to increase the salience of such mechanisms as Alipay and chargeback which are ‘proprietary’ rather than jurisdiction based.

12.4.2 Identification of the provider

Consumers can be faced with the difficulty of establishing the identity and location of the provider with whom they are dealing, although this may be the most important issue that contributes to establishing confidence in the consumer’s mind. The OECD Guidelines set out in Paragraphs 28-30 detailed requirements for ‘Information about the business’ including “appropriate domain name registration information for websites that are promoting or engaging in commercial transactions with consumers.” Paragraph 30 makes the link to self-regulation schemes and the need for consumers to be able to verify membership. This provision is backed up by the UNGCP Guideline 14b under national policies for consumer protection (except for the mention of domain name registration).

²⁰⁴ Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, OECD, 1999.

²⁰⁵ OECD, *op. cit.*, 2016.

²⁰⁶ Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (C92003)116); Recommendation of the Council on Consumer Dispute Resolution and Redress (C(2007)76); Declaration for the Future of the Internet Economy (The Seoul Declaration) (C(2008)99); Recommendation of the Council on Principles for Internet Policy Making (C(2011)154); Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data (“Privacy Guidelines”) (C(80)58/final as amended); Recommendation of the Council on Digital Security Risk Management for Economic and Social Prosperity (“Security Risk Recommendation”)(C(2015)115).

12.4.3 Authentication of the consumer

Faced with the growing awareness of the risk of identity theft, the European Union's Payment Services Directive defines 'strong customer identification.' Article 4(30) PSD2 states: "an authentication based on the use of two or more elements categorized as knowledge (something only the user knows,) possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data."

The OECD Guidelines are silent on the specifics of authentication, although it might be argued that the issue is present in spirit in paragraph 41 under payment mechanisms or section G on privacy and security. It does however have a specific meaning as the EU text indicates. The UNGCP are then, by extension equally indirect, the Section on Financial Services V.J calling on Member States to "establish or encourage as appropriate controls to protect consumer financial data, including from fraud and abuse."

12.4.4 Privacy issues

The growth of e-commerce and rapid development of networking technologies have revolutionized the way in which data can be stored, accessed, and processed. Consumers are not likely to participate in the global marketplace without assurances that their personal data exchanged during a transaction will be protected. However, the development of 'data mining' in recent years has led to concerns about the sheer volume of data collected and a strengthening of the requirements for consent. These issues are discussed in chapter 13 on data protection.

12.4.5 Security issues

Security concerns emerge at two stages: first, during transfer of the payment information over the network; secondly, the storage of the payment data, where data transmitted should not be accessible to unauthorized third parties. Such concerns are recognized for example by Recital 7 of the European Union Payment Services Directive 2, which notes that: "in recent years,

the security risks relating to electronic payments have increased. This is due to the growing technical complexity of electronic payments, the continuously growing volumes of electronic payments worldwide and emerging types of payment services." In addition to concerns about security in transactions (involving as they so often do, credit card numbers, expiry dates, etc.) is the danger of post-transaction data breaches, such as those associated with phishing.

In the OECD Guidelines, paragraph 49 is the most relevant to security and it is extremely brief: "businesses should manage digital security risk and implement security measures for reducing or mitigating adverse effects relating to consumer participation in e-commerce." Much more substantive is the reference to security in Section E on Payment which refers in paragraph 40 to: "security measures...commensurate with payment related risks, including those resulting from unauthorized access or use of personal data, fraud and identity theft.' Paragraph 41 goes on to restate the pre-existing (i.e. 1999) reference to chargeback and to repeat the endorsement of limitation of liability for consumers: "Governments and stakeholders should work together to develop minimum levels of consumer protection for e-commerce payments, regardless of the payment mechanism used. Such protection should include regulatory or industry-led limitations on consumer liability for unauthorized or fraudulent charges, as well as chargeback mechanisms, when appropriate." As a practical example of the measures envisaged, the European Union Payment Services Directive reduces consumer liability for non-authorized payments to 50 euro (from the previous 150 euro threshold).²⁰⁷ The Directive also tightens the security measures that need to be applied to all electronic payment requiring in particular the use of strong customer identification.²⁰⁸

The Guidelines go on to widen the scope of guarantee beyond chargeback: 'The development of other payment arrangements that may enhance consumer confidence in E-commerce, such as escrow services, should also be encouraged.' The reference to escrow is significant in the context of the Chinese experience, although it is worth noting that escrow is also used in other varied jurisdictions including Argentina and California. But the issue is not which particular method is used – escrow in China, (which was unknown

²⁰⁷ EU Payment Services Directive 2, Article 74.

²⁰⁸ C. Riefa, *The Control of Electronic Payments in the EU: Payment Services Directives and Electronic Money Directive 2009/110/EC*, 2015.

when introduced and may even not have been legal)²⁰⁹ was a response to entirely understandable consumer concerns which were not being met by the existing banking regime. Indeed, this is being taken even further by systems which require both email and delivery addresses only, thus involving lower levels of electronic risk.²¹⁰ This issue is rapidly evolving.

12.4.6 Electronic contracting

Different legal and private sector rules may apply to B2C transactions. The global nature of e-commerce poses questions about what requirements are necessary for writing, carrying out, and enforcing contracts and jurisdiction. The development of 'cloud computing' raises new issues about contracts. Cloud computing uses a network of remote servers hosted on the Internet to store, manage, and process data, rather than a local server or a personal computer. It offers great economies of scale, allowing users to store and process data in third party data centres using a 'pay as you go' metered charging structure using otherwise redundant server time and network storage in response to user demand. Computing capabilities can be flexibly commissioned and released. Cloud computing may be used to store and lease copyright products to consumers for a certain period of time. The ephemeral nature of such digital 'products' and the periods during which they 'belong' to consumers could well turn out to be a source of contractual confusion while the varying levels of security around public or private clouds can also be an issue.

The OECD Guidelines open by restating, in slightly different language in Paragraph A.1 the principle set out in the UNGCP 'legitimate needs' GL5j, namely: "consumers who participate in e-commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce." This strong statement of principle is not however, followed up by consideration of the enforcement issues which are peculiar to E-commerce, namely the potential for contractual issues to be dealt with electronically and company sanctions against consumers to be applied direct-

ly without passing through judicial processes as described in chapter 3.

The provisions of part B relating to fair business, advertising and marketing practices are in many ways the same fair trading principles that have long applied to off-line transactions. For example, unfair contracts are mentioned in paragraph 7: "if contract terms stipulate monetary remedies in the case of consumer's breach of contract, such remedies should be proportionate to the damage likely to be caused." This principle of proportionality is important, for example, in the financial services domain where it can apply to the disproportionate bank charges which can be executed directly through electronic means as happens for example with payday loans, or conventional current account charges (see chapter 14). The stipulation of 'monetary remedies' (for example, financial penalties against consumers) means that the non-financial penalties such as 'technical protection measures' which might damage the functionality of consumers' computers are not dealt with and are not constrained by any principle of proportionality. The only envisaged safeguard for consumers is the requirement of advance disclosure of such measures (which unfortunately many consumers may find hard to understand).

12.4.7 Other issues

Other issues covered by the OECD Guidelines include dispute resolution and redress, (dealt with in chapter 11,) pricing transparency, dealt with in the OECD/G20 High Level Principles for Consumer Protection in Financial Services (and by extension in chapter 14,) and consumer education dealt with in chapter 10. In all these cases, the OECD Guidelines are entirely consistent with the UNGCP.²¹¹

12.5 Other international guidelines for the regulation of e-commerce

As explained in UNCTAD's Global Cyberlaw Tracker, there are four main areas of regulation in e-commerce: e-transaction laws, data protection and privacy laws;

²⁰⁹ Yu and Shen, *op. cit.*

²¹⁰ *Economist Klarna: Getting More Ambitious*, February 6, 2016.

²¹¹ OECD/G20, *High Level Principles for Consumer Protection in Financial Services*, OECD, 2011.

cyber-crime laws; and consumer protection laws.²¹² In order to enhance cross-border e-commerce, and consumers' trust therein, there needs to be compatibility of e-transaction laws. Two organizations have done extensive work in this regard:

12.5.1 The United Nations Commission on International Trade Law

In 1996, the United Nations Commission on International Trade Law (UNCITRAL) developed a Model Law on Electronic Commerce, which was superseded by the 2005 United Nations Convention on electronic communications in international contracts,²¹³ establishing:

- Rules and accepted practices that define the characteristics of a valid electronic contract;
- Guidelines for the acceptable use of digital signatures for legal and commercial purposes; and
- Supports the use of computer evidence in legal disputes over the validity of a contract.

In addition, the Convention defines the default rules for contract formation and the governance of contract performance. Many countries have already used the Model Law to update their commercial laws to accommodate the electronic medium and at the time of writing, UNICITRAL reports that legislation based on or influenced by the Model Law has been adopted in 66 States (and more individual jurisdictions) at various levels of development. This also discussed in the context of redress and dispute resolution in chapter 11.

12.5.2 UNCTAD's e-commerce and law reform project

UNCTAD has been running since 2002 a capacity-building programme on e-commerce and law reform. The programme assists developing countries of Africa, Asia and Latin America in the development of e-commerce legislation at both regional and national

levels.²¹⁴ Relevant laws should ensure trust in online transactions, ease the conduct of domestic and international trade online, and offer legal protection for users and providers of e-commerce and e-government services. Assistance includes capacity building workshops, reviews of draft or existing legislation; drafting of legislation harmonized with regional and international legal frameworks, and comparative reviews of e-commerce legislation harmonization such as those undertaken in cooperation with the Association of South East Nations (ASEAN) published in 2013, the Community of West African states (2015) and Latin America (2016).²¹⁶

Under the programme, the East African Community established a Task Force on Cyberlaws in 2007, which prepared and endorsed two Cyberlaw frameworks.

In 2015, UNCTAD launched its Cyberlaw Tracker, a global mapping of e-commerce laws in the area of e-transactions, the protection of consumers online, cybercrime and data protection.²¹⁶ While legislation covering those areas is already in place in developed countries, developing ones are lagging behind. The share of countries that have adopted a law is generally highest for E-transactions and lowest for the protection of consumers online." For example, in Central America 7 out of 10 countries have consumer protection laws in place but more than half do not have a law on data protection and cybercrime. In Middle Africa, out of 9 countries, only 2 have laws relating to E-transactions, consumer protection and data protection and only 1 adopted cyber-legislation.

12.6 Conclusion

E-commerce shows staggering growth rates and yet, the electronic environment continues to pose new challenges for the consumer and new strategies are needed to protect consumers shopping online and to foster consumer confidence in e-commerce, especially cross border e-commerce. Many of the issues are common to all forms of commerce; e-commerce simply provides a new context, particularly, in the issues of

²¹² UNCTAD, Global Cyberlaw Tracker: http://unctad.org/en/Pages/DTL/STL_and_ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx

²¹³ http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf

²¹⁴ UNCTAD, *Information Economy Report*, op. cit., 2015.

²¹⁵ ASEAN: http://unctad.org/en/PublicationsLibrary/dtlstict2013d1_en.pdf

ECOWAS http://unctad.org/en/PublicationsLibrary/dtlstict2015d2_en.pdf

²¹⁶ UNCTAD *Information Economy Report 2015: Unlocking the Potential of E-commerce for Developing Countries*

data security and cross-border electronic trade. Professor Christine Riefa sets out a clear definition of the legal framework needed for e-commerce composed of two sets of provisions:²¹⁷

- a) Vertical legislation focussing on the particularities of the medium. This includes legislation creating a framework for electronic transactions (enabling electronic contracts and signatures, framing intermediaries' liability) and specific consumer rights for distance sales (including information, right to withdraw, etc.). These would form the backbone of an efficient e-commerce legal framework; and
- b) Horizontal legislation applicable regardless of the medium used and typically including provisions on unfair contract terms, unfair commercial practices, misleading and comparative advertising, payment protection, data protection, market surveillance and enforcement, dispute resolution and conflicts of laws and jurisdiction, criminal sanctions. These are largely traditional measures many pre-dating e-commerce.

Seen from this point of view, the OECD Guidelines have focussed on the more traditional horizontal dimensions. Even the innovatory introduction of escrow draws upon a device which has existed quite independently of E-commerce for centuries.

Certain consumers are always vulnerable but e-commerce risks exposing that vulnerability in new ways:

- a) The access of children to computers is an issue, especially as the latter have become more miniaturized and personalized. This issue poses additional concerns regarding irresponsible advertisement or sales to minors without parental control; and
- b) Miniaturization and increased access has been accompanied by introduction of mobile devices and mobile Apps which are now accessible to vulnerable populations that may be unfamiliar with commercial transactions may have limited literacy and

are less able to identify potential hidden costs or fraud.

The impersonality of e-commerce can be a problem. On the other hand it could also be seen as an improvement from high pressure face-to-face sales. But new forms of pressure have emerged:

- a) Speed of transaction in the face of computer time-outs is one reason why consumers may hasten to accept a transaction because they have spent so long on the computer which keeps timing out; and
- b) Additional pressures to make a purchase online comes from the price changing during the course of a consumer inquiry, eg. 'last 2 or 3 tickets available at this price.'

These pressures increase the importance of the now well-established concept of the 'cooling off period.' This is a good example of a 'traditional' consumer protection measure (originally introduced to deal with high pressure sales in person) which has increased in salience as a result of the new pressures brought about by e-commerce. However, it is suggested here that the issue of cross-border jurisdiction has shown such lack of progress (and both sets of OECD Guidelines in 1999 and 2016 record in effect an inability to resolve the issue,) that the obstacle of consumer mistrust requires innovative action outside of Government.

Liability for breach of security is proving to be a major commercial factor as the Alipay story demonstrates. It is also demonstrated by the history of chargeback under which the consumer has the right to pursue a claim against the card issuer as well as the Internet trader. This means, for example, that if goods do not arrive, a claim for a refund of the cost can be lodged against the card issuer in the event of no response from the Internet trader. When this was initiated under consumer credit legislation during the '70s and '80s, it was strongly resisted as a regulatory imposition. As cross-border purchases, have taken off, it has come to be seen as market advantage, an incentive for the consumer to use credit cards.

So, limiting consumer liability could prove to be a

²¹⁷ C. Riefa, *Belgrade 2014, op. cit.*

business opportunity, despite having been seen as an imposition. When negotiations have taken place around mobile payments as has been the case within ISO for example, in the five years up to 2015, industry has pushed back against the 'limited liability' concept endorsed, for example, for the second time in Article 41 of the OECD E-commerce Guidelines 2016.²¹⁸ The problem which industry faces it cannot argue that the burden of limited consumer liability would be too great as it would suggest that the risks to consumers are high as well. Were businesses to accept liability they would send a signal to consumers about their confidence, and they would also build in strong incentives to maximize security.

There are already innovative adaptations to escrow available in the marketplace under which shoppers do not have to share credit-card details or remember a new password. Instead, consumers can simply give an e-mail and a delivery address, and leave the payment to be sorted out later.²¹⁹ Customers who have previously used such escrow checkouts can be electronically recognized when they visit another online business, further reducing the need to fill out online forms. This not only allows the firm to bear the risk that customers fail to pay when invoiced, but also to offer them extended payment plans, for a fee. These loans have higher margins than the competitive on-line-payment business and present a new regulatory challenge to Governments.

²¹⁸ OECD, *op. cit.*, 1999 and 2016.

²¹⁹ <http://www.economist.com/news/finance-and-economics/21690106-payments-unicorn-seeks-become-dray-horse-bank-getting-more-ambitious>

CHAPTER 13

PRIVACY AND DATA PROTECTION

In this chapter the following issues are discussed:

- *Privacy, security and the UNGCP*
- *The right to privacy*
- *The data dimension*
- *Regulating the digital age*
- *International regulation*
- *Technology challenges and responses*

13.1 Privacy in the United Nations Guidelines for Consumer Protection

The revised Guidelines incorporate matters of privacy for the first time. The General Assembly Resolution 70/186 recognizes that: “Member States have a common interest in promoting and protecting consumer privacy and the global free flow of information,” while the substantive Guidelines establish both a new ‘legitimate need’ (Guideline 5k) around ‘the protection of consumer privacy and the global free flow of information,’ and a new section IV containing ‘principles for good business practice,’ that seek to require business to protect privacy through: “a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of their personal data’ . While the term of art ‘data protection’ does not appear in the UNGCP, new Section V.A on National Policies For Consumer Protection contains in

Guideline 14g) an exhortation to members to establish policies that envisage: ‘consumer privacy and data security.’”

New section I on E-commerce does not mention data protection or privacy but does suggest that Member States study the OECD Guidelines on e-commerce (described in chapter 12). These in turn contain two very brief paragraphs on privacy and security (paragraphs 48 and 49) but also refer on to the OECD’s revised Privacy guidelines, which is quite a long chain of referral.²²⁰

13.2 Is privacy a right?

The following list is collated by Privacy International, but also corresponds with the relevant content of UNCTAD’s 2016 publication: Data protection regulation and international data flows: Implications for Trade and Development, on which this chapter draws.²²¹

Box 13: Privacy as a human right

Privacy is a qualified, fundamental human right. The right to privacy is articulated in all of the major international and regional human rights instruments, including:

United Nations Declaration of Human Rights (UDHR) 1948, Article 12: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

International Covenant on Civil and Political Rights (ICCPR) 1966, Article 17: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”

The right to privacy is also included in:

- Article 14 of the United Nations Convention on Migrant Workers;
- Article 16 of the UN Convention on the Rights of the Child;

²²⁰ OECD 2013b, *Revised Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, OECD, Paris, 2013, www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf

²²¹ UNCTAD, *Data Protection Regulation and International Data Flows; Implications for Trade and Development*, 2016 available at unctad.org/Data-Protection-Study

- Article 10 of the African Charter on the Rights and Welfare of the Child;
- Article 4 of the African Union Principles on Freedom of Expression (the right of access to information);
- Article 11 of the American Convention on Human Rights;
- Article 5 of the American Declaration of the Rights and Duties of Man,
- Articles 16 and 21 of the Arab Charter on Human Rights;
- Article 21 of the ASEAN Human Rights Declaration; and
- Article 8 of the European Convention on Human Rights.

Sources: UNCTAD *Cyber law Tracker*,²²² *Privacy International*,²²³

13.3 Understanding the data dimension from a consumer perspective

Data is as critical to facilitating an online transaction as making a payment; indeed in some cases (for example social media platforms) it replaces financial payment. Sensitive information such as delivery address and payment details is provided by consumers, but the extent to which wider data is gathered by the vendor is often unclear. Search habits, purchase history, location and internet service provider address are collected in ways that can be difficult for consumers to understand or prevent. When this is aggregated with other data, companies and third parties can develop an in-depth picture of people's preferences and likely purchasing intentions.

A significant proportion of this user-generated information consists of the data trail that consumers leave or that is observed by machines as consumers make their way across the Internet: what they search for, their preferences, the sites they visit, the locations and devices they visit them from, the friends they interact with, the causes they support and of course, the purchases they make and the apps they use. The volume of data is increasing as more people mediate more of their affairs through the Internet and the increasing number of 'things' it connects through the Internet of Things.

The data brokerage sector is an emerging multi-billion dollar industry that has grown to meet the ever-growing demand for data, harvesting multiple data points about consumers from multiple sources online

(and offline) and combining them into rich, if incomplete, profiles of individuals, segmented to meet the needs of their clients. For example, according to the MIR Technology Review Axcium,²²⁴ one of the world's largest data brokers "holds an average of 1,500 pieces of information on more than 500 million consumers around the world. [...] can analyze its data to predict 3,000 different propensities, such as how a person may respond to one brand over another. And through its partnership with Facebook, Axcium can: [link] real-world activities to those on the Web, [and link its data] to 90 %of United States social profiles."²²⁵

Research shows that concerns around personal data use and/or misuse are a central driver of trust in online markets as also discussed in chapter 12. Of course, personal data gathering is not limited to e-commerce; it is part of a much bigger digital experience of constant data collection. Through social media, personalized apps, wearable technology, sharing platforms, search and targeted products, people are continually exposed to the effects of data collection, aggregation and onward sharing. Concern about these effects varies between different countries but is consistently high, and rising – with an annual tracker of consumer online attitudes putting United States consumer worries about online privacy up 42%²²⁶ and those in the United Kingdom up by a third since 2014.²²⁷ According to the 2016 CIGI-Ipsos Global Survey on Internet Security and Trust, 57% of global citizens are more concerned about their online privacy compared to one year ago. Eight in ten are concerned that their information may be bought or sold, 83% of global citizens appear to have changed their online behaviour in an

²²² unctad.org/cyberlawtracker

²²³ <https://www.privacyinternational.org/privacy-101>

²²⁴ <https://www.technologyreview.com/business-report/big-data-gets-personal/download/?redirectTo=%2Fs%2F514351%2Fhas-big-data-made-anonymity-impossible%2F#/join/>

²²⁵ www.technologyreview.com/news/514351/has-big-data-made-anonymity-impossible

²²⁶ TRUSTe, 2015 United States Consumer Confidence Index; See: <http://bit.ly/1NIETKt>

²²⁷ TRUSTe, 2015 United Kingdom Consumer Confidence Index; See: <http://bit.ly/1e51fJX>

effort to control the amount of personal information that is being shared online.²²⁸

A 2014 global survey of 16,000 online consumers across 20 countries²²⁹ found that 74% were concerned about how companies use information collected online about them. Worldwide, 72% of respondents did not know what information is known about them by companies and 63% did not know what rights they have over companies handling their information. In terms of financial information, in Europe 55% fear becoming a victim of fraud via online transactions²³⁰ and 58% abandon a purchase because of fears over payment security.²³¹ These fears appear well founded, with a 2015 report claiming data breaches globally were up by 40% on the previous year.²³²

These levels of concern are in part due to consumers' sense that they have lost control over how data is collected and how companies utilize it once in their possession. Terms of use which purportedly detail company practices are opaque, long and complex²³³ - they are geared towards organizational compliance and liability limitation, not consumer comprehension.²³⁴ Consumers are faced with a 'take or leave it' choice when considering whether to use an online service, with limited opportunities to assert their own preferences. While it may be in the interests of many companies to interpret ongoing participation within the current set up as satisfaction or acceptance, research suggests a consumer resignation to having lost control,²³⁵ which adds to the loss of trust. Global research reflects a similar sense, with 72% agreeing it was inevitable that privacy will be lost because of new technology.²³⁶ A report for the World Economic Forum found:

"[there is]... a decline in trust among all stakeholders. Individuals are beginning to lose trust in how organizations and Governments are using data about them, organizations are losing trust in their ability to secure data and leverage it to create value."²³⁷ This mistrust, recognized by consumer advocates and businesses alike, is what national and international regulators are now contending with.

13.4 Regulating the digital age

The creation of effective regulation and policy to enable more trust in the digital economy is a pressing challenge. Networked platforms such as Facebook, Uber or AirBnB have shown how online services can achieve huge scale in a short space of time – showing how innovation can now outpace institutions responsible for consumer protection. Furthermore, these disruptive services have a transnational reach, hence requiring a response that is co-ordinated at the international level – something that adds further lag. Member associations of Consumers International have voiced their concern, with 80% feeling legislation, regulation and standards relating to redress is as ineffective at keeping pace with the digital economy, and 76 per cent doubting the efficacy of enforcement.²³⁸

To take data protection law as an example, prior to the recent spate of revisions, consumer privacy and data protection had scarcely been considered by Europe, the United Nations or the OECD since the last century. In 2016, members of the European Union were working to overhaul rules adopted before google.com was even registered as a domain name. In the intervening period, an unprecedented shift has taken place: not

²²⁸ <https://www.cigionline.org/internet-survey-2016>

²²⁹ Ipsos Mori, Global Trends Survey, 2014; See: <http://bit.ly/1RGHLvG>

²³⁰ European Commission, Special Eurobarometer, 359 - *Attitudes on Data Protection and Electronic Identity in the European Union*, 2011; See: <http://bit.ly/1TjkP5t>

²³¹ Econsultancy, *Why Do Consumers Abandon Online Purchases?* 2011; See: <http://bit.ly/1QOoSSE>

²³² Symantec, *Internet Security Threat Report*, 2015; See: <http://symc.ly/1Klmlm7>

²³³ MacDonald and Cranor, *The Cost of Reading Privacy Policies*, 2008. A Journal of Law and Policy for the Information Society 2008 Privacy Year in Review issue <http://www.is-journal.org> Analysis calculated that it would take 76 working days to read every privacy policy an internet user encounters in the course of a year.

²³⁴ United Kingdom analysis found 43% of the adult English population would not be able to understand Google's 2013 terms and conditions; See: E. Luger, T. Rodden, S. Moran, *Consent For All: Revealing the Hidden Complexity of Terms and Conditions*, proceedings of the SIGCHI Conference on Human Factors in Computing Systems, 2013; See: <http://bit.ly/1QhHv0C>

²³⁵ J. Turow, M. Hennessey, N. Draper, *The Trade-Off Fallacy - A Report from Annenberg School for Communication, University of Pennsylvania*, 2015; See: <http://bit.ly/1F4S958>

²³⁶ Ipsos Mori, Global Trends Survey 2014; See: <http://bit.ly/1RGHLvG>

²³⁷ World Economic Forum, *Rethinking Personal Data: Strengthening Trust*, 2012; See: <http://bit.ly/1XEMyMQ>

²³⁸ Consumers International, *State of Consumer Protection Survey, 2014-15*, CI 2015.

just in the amount of data collected at an individual level, but in the ways in which it used by companies and public organizations to identify large scale patterns in consumer and citizen behaviour, or to identify, tailor or target individuals.

In the context of the perpetual changes and challenges brought by technology and global data flows, consumer protection mechanisms need to be not just principled, but responsive and adaptable. It remains to be seen whether advances such as the UNGCP or the European Union's General Data Protection Regulation will be able to respond effectively if the pace of change over the next 20 years corresponds with that of the last two decades. The United States has already shifted from basing its privacy protection policies on its

'Fair Information Practice Principles' towards a 'harm based approach' designed to target harmful uses of information, in particular "those presenting risks to physical security or economic injury, or causing unwarranted intrusions in our daily lives, rather than imposing costly notice and choice for all uses of information."²³⁹ Such shifts reflect the conundrums for enforcement agencies faced by ever increasing volumes of business.

Box 14 sets out how UNCTAD drew up a list of a 'recognized set of core data protection principles' drawing from various agreements to provide a common set of principles and enable international cooperation.

Box 14: Core data protection principles

The core principles are:

1. **Openness:** Organizations must be open about their personal data practices.
2. **Collection limitation:** Collection of personal data must be limited, lawful and fair, usually with knowledge and/or consent.
3. **Purpose specification:** The purpose of collection and disclosure must be specified at the time of collection.
4. **Use limitation:** Use or disclosure must be limited to specific, or closely related, purposes.
5. **Security:** Personal data must be subject to appropriate security safeguards.
6. **Data quality:** Personal data must be relevant, accurate and up-to-date.
7. **Access and correction:** Data subjects must have appropriate rights to access and correct their personal data.
8. **Accountability:** Data controllers must take responsibility for ensuring compliance with the data protection principles.

UNCTAD find that these eight principles appear in some form in all of the key international and regional agreements and guidelines regarding data protection.²⁴⁰ They point to an additional principle – data minimization – which only appears in the European Union Data Protection Directive, but which they see as carrying considerable global influence.

Source: UNCTAD Study on Data Protection and International Data Flows (2016)²⁴¹

13.5 International regulation

Differing data protection laws in different jurisdictions have the capacity to inhibit international trade on-line. For example, a recent development is the emergence of data localization requirements, which are considered to have potentially significant trade implications. These require personal data to be retained within their original jurisdiction, either through a direct legal restric-

tion or through other prescriptive requirements (such as local business registration requirements) that have the same result. Data localization requirements are common in some specific sectors (notably the health sector and the financial services sector,) but they are less common for generic data.

There are several drivers for data localization requirements: a) concerns over the potential exposure of local

²³⁹ Michael Panzera, United States Federal Trade Commission, *Talking Points Regarding Data Security*, International Forum on Justice and Consumer Rights, UNGCP, Wuhan China, 2013. The principles are as follows: notice/awareness, choice/consent, access/participation, integrity/security, enforcement/redress.

²⁴⁰ UNCTAD 2016, op. cit. The principles are chiefly drawn from the European Union Data Protection Directive, the OECD Privacy Guidelines and the Council of Europe Convention 108. The 'order' and 'terminology' is a modified version of the work on this issue by Graham Greenleaf (see for example 'Standards by which to assess data privacy laws' in Greenleaf, G, *Asian Data Privacy Laws*, Oxford, 2014.

²⁴¹ http://unctad.org/en/PublicationsLibrary/dt1stict2016d1_en.pdf

data to increased security risks or surveillance in overseas jurisdictions; b) concerns about the dominance of foreign countries when it comes to services delivered via the Internet; and c) Government surveillance.

Two often cited examples of data localization requirements are Indonesia and the Russian Federation, which have adopted restrictions on the transfer of data abroad. Businesses face significant compliance requirements in both countries. Other countries considered imposing similar localization requirements (notably Brazil and the Republic of Korea), but after wide stakeholder consultation, they embraced a mixture of alternative approaches as discussed above.

In considering such policy divergences, it should be remembered that privacy and data protection are key consumer and human rights as set out in 13.2 above and recognized (without using the word 'rights') in the UNGCP. Measures to protect them may become trade barriers. However, Article XIV.c) of the General Agreement on Trade and Services (GATS) clearly permits trade restrictions that are necessary for "the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts," specifying that "such measures are not applied in a manner which would constitute a means of arbitrary or

unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services." UNCTAD comments on the transposition of some GATS wording to the Trans-Pacific Partnership in what it calls the 'most interesting rule' in the TPP. The TPP generally is reported as "not really imposing any significant positive requirements for data protection, but it does address the issue of balancing data protection laws against trade considerations. Specifically, it imposes limits on the extent of data protection regulation that signatories can provide in their national laws."²⁴²

UNCTAD's interpretation is that that any business affected by a cross-border transfer restriction can challenge the law as a "disguised restriction on trade," although it considers that this would be a difficult task for anything other than the most extreme restriction. This clause appears to establish a new balance between privacy protection and trade restrictions, and in the future this wording may become a common part of international agreements.

Box 15 sets out how the European Union-United States 'Safe Harbour' Agreement was an attempt to avoid differences in data protection regimes from becoming a trade barrier.

Box 15: From Safe Harbour to Privacy Shield

Among the 34 OECD member countries, 32 had implemented comprehensive data protection laws as of early 2016. At the time of writing, the Turkish parliament has passed a data protection bill that is meant to harmonize the Turkish regime with that of the EU. That will leave the United States as the only exception (it uses a sectoral approach to data protection rather than a single law).

The European Commission's Directive 95/46 on Data Protection, which took effect in 1998, prohibits the transfer of personal data to non-European Union countries that do not meet the European Union's "adequacy" standard for privacy protection. The European Union requires other receiving countries to create independent Government data protection agencies and to register databases with those agencies. In order to bridge the gap between their respective jurisdictions, the United States and the European Union agreed in 2000, the 'Safe Harbour Framework,' that certified United States businesses as meeting EU requirements. Breach of the rules could trigger intervention by the United States FTC, which could in turn result in companies being struck off the approved list held by the United States Department of Commerce.

²⁴² UNCTAD, 2016, *op. cit.*

After a complaint from an EU citizen that his data was not protected to EU standards upon transfer to the United States, the European Court of Justice (ECJ) found in October 2015 that the presumption of adequacy under Safe Harbour Principles did not prevent EU citizens from challenging the initial 2000 Decision 520 on the basis of enforcing their personal rights and freedoms. Furthermore, the court went further and actually invalidated the Safe Harbour adequacy decision which was found to have been adopted without sufficient limits to the access to personal data by governmental authorities. The court found that Safe Harbour did not ensure processing that was “strictly necessary” and “proportionate” as demanded by the EU Data Protection Directive. As a result, Safe Harbour members no longer enjoy a presumption of adequacy that allowed for the movement of data from the European Union to the United States.

One important result of the case was the renegotiation of the Safe Harbour agreement, now to be known as the European Union-United States Privacy Shield in February 2016. The new arrangement includes a commitment to stronger enforcement and monitoring, and also includes new limitations and conditions on surveillance. In April 2016, however, the grouping of European Data Protection authorities, pointed to several deficiencies in the newly negotiated Privacy Shield despite its being seen as an improvement over the preceding Safe Harbour framework. The Article 29 of the Working Party asked for the European Commission to resolve their concerns in order to ensure that: “the protection offered by the privacy Shield is indeed essentially equivalent to that of the EU.”²⁴³ At the time of writing the matter was yet to be resolved.

The Transatlantic Consumer Dialogue whose members are consumer organizations from the United States and the EU and have been persistent critics of Safe Harbour and the new Privacy Shield have urged a relatively simple move which is that the United States could: Become a full party, without undue reservations, to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108) and its Additional Protocol regarding supervisory authorities and trans-border data flows (CETS No. 181), which are both open to non-European states and provide the widest internationally-agreed data protection standards.²⁴⁴

Sources: UNCTAD Study on Data Protection and International Data Flows (2016).²⁴⁵ TACD Resolution on the European-Union Privacy shield proposal April 7 2016. Susan Aaronson, *The digital trade imbalance and its implications for internet governance*. Global Commission on Internet Governance, Chatham House, paper 25, 2016.

13.6 Can technology respond to the challenges that technology creates?

Given the limitations that are becoming apparent in conventional approaches, it may be that new innovation will provide solutions to some of the challenges that prior innovation has created. E-commerce has a history of developing innovative solutions, and the emergence of new personal data empowerment tools and services which return some direct control over data to consumers suggests a response to data concerns that could build on regulation and legislation. Given this propensity of innovation to develop tools that enable consumers to play a role in managing concerns related to trust and confidence in other areas of ecommerce, what is the potential for it to deliver greater confidence in data use?

Traditional protection remedies concentrate on controlling how businesses collect, store and use personal data, and are reliant on regulators and business making the system work, and leaving the consumer as a passive ‘data subject’ in the system with little room for manoeuvre. Yet this classic conception of legislation and regulation may not be able to provide full reassurance. In the European Union, for example, with one of the strictest data protection regimes in the world, confidence in data handling remains low.²⁴⁶

The prospect of low cost, personalized technology to deliver consumers’ individual privacy and data sharing preferences is resulting in the emergence of a number of new tools and services that help individuals assert more control over how their data is collected and used, by whom and for what purposes.²⁴⁷ These emerging personal data empowerment tools put the individual consumer preferences back into the equation in a way that traditional regulation does not, and move beyond

²⁴³ Article 29, Data Protection Working Party, 16/EN 238 Opinion 1/2016 on the EU-US Privacy Shield Draft Adequacy Decision, April 13 2016. http://ec.europa.eu/justice/data-protection/index_en.htm

²⁴⁴ Transatlantic Consumer Dialogue, *Resolution on the EU-US Privacy Shield Proposal*, April 7, 2016.

²⁴⁵ UNCTAD, 2016, *op. cit.*

²⁴⁶ The European Commission’s Special Eurobarometer 431 on Data Protection (2015), found that Europeans have widespread concerns about the consequences of their data being misused. More than two thirds of respondents who feel that they do not have complete control over their personal data say they are concerned about this lack of control; See: <http://bit.ly/1HjvAil>

²⁴⁷ For more examples, see *Personal Data Empowerment: Time for a Fairer Data Deal?* Citizens Advice, United Kingdom, 2015; See: <http://bit.ly/1XtrfBG>

informed consent tick boxes and onerous terms and conditions. Examples are apps on a smartphone that can alert users when their data is being accessed outside of a persons' set preferences, or tools that give a 'behind the scenes' view of what data is being collected by whom. Such services effectively take on the role

of data intermediary between suppliers and customers, working on behalf of the consumer to ensure their sharing and usage preferences are met.

Box 16 Examples of personal data empowerment tools and systems

- Personal data stores: secure storage of data, which are authorized to transact and share data with chosen businesses or State services according to terms set by consumers. Stores would also audit use and alert or fix when not meeting criteria;
- Person-centred permissions: dashboards where consumers can set and change data sharing privileges, invoke time stamped permissions which expire when consumers chose, and view what data is going where; and
- Trust networks: simplifying sharing choices through the creation of a network of accredited, trusted providers who commit to using consumer data on individual consumers' terms.²⁴⁸

Source: UNCTAD.

Personal data empowerment tools and services demonstrate a new, additional way of responding to risks and concerns around data and privacy - one that can build on regulation, whilst not negating need for it. This is a nascent market, but one which could potentially achieve higher levels of trust and confidence by involving consumers and empowering them to regulate the way companies use their personal data. However, in much the same way that shared information obligations or common returns policies help underpin confidence in cross-border ecommerce, there is a role for co-ordinated international regulatory systems to support their development and enable them to flourish in the following areas:

- **Upholding protections and rights:** agreed and enforced protocols on data breach notifications and remedies would give consumers more clarity on how their rights would be upheld. If things went wrong, dispute resolution protocols that can operate at a global scale could be developed;
- **Establishing minimum standards:** agreed standards on privacy by design could see a higher level of privacy as a default setting of services. Encryption requirements could be used to increase security of data;
- **Incentivising good practice:** operators of personal data stores or trust frameworks would be held to high standards of transparency and

audit, with easily recognisable credentials to help consumers choose between providers; and

- **Creating a competitive market** for services that offer consumers a way to easily control and manage their privacy and sharing preferences. Crucial to this will be establishing rights to data portability and agreed specifications on interoperability between platforms, so that individual privacy and sharing preferences could be aggregated around a person and easily transported between services. This has the potential to give consumers a share in the utility value of their data and increase their leverage in the marketplace.

Other elements of elective flexibility such as 'cookies' and 'ad-blockers' are developing allowing individual consumer choice, both negative and positive. Reliance on individual initiatives or choices can be a fragile underpinning. Elsewhere in this manual the principle of consumer consent has been discussed and found to be weak in practice (chapter 14 on financial services, for example). Despite moves towards increasing use of customer mandates as outlined above, the danger is that consent mechanisms may prove too taxing for all but the most assiduous consumers. UNCTAD indicates how the 'consent' approach examines whether individual consumers are able to consent to the transfer of their data to a foreign country. This approach is

²⁴⁸ Personal Data Empowerment: Time for a Fairer Data Deal? Citizens Advice, United Kingdom, 2015; See: <http://bit.ly/1XtrfBG>

available in the EU and some other jurisdictions, but is subject to further conditions regarding the nature of the consent. UNCTAD concludes that “consent can be hard to demonstrate and cumbersome for both businesses and consumers, and often gives no guarantee of protection.”²⁴⁹

There is still much progress to be made. UNCTAD has set out what it summarizes as seven key challenges towards achieving balanced and internationally compatible legal frameworks. These are set out in Box 17.

Box 17: Key challenges for data protection

1. Addressing gaps in coverage: there is no single global agreement on data protection. The three key gaps in national coverage are:

- a) A significant number of countries have no data protection law at all;
- b) A significant number of countries have only partial laws, or laws that contain broad exemptions; and
- c) In some circumstances individual companies can limit the scope of their privacy promises (usually in the fine print of privacy policies).

2. Addressing new technologies:

- a) Cloud computing;
- b) The Internet of Things; and
- c) Big Data analytics.

3. Managing cross-border data transfer restrictions: Numerous options and arrangements are in place for managing the data flows in a way that still protects the rights of citizens. The most common mechanisms are:

- a) Allowing one-off data transfers that meet common derogations or ‘tests’ (for example, requirements to fulfil a contract, emergency situations, valid law enforcement requests and others);
- b) Allowing ongoing data transfers where the target jurisdiction ensures an equivalent level of protection (as with Safe Harbour/Privacy shield and other jurisdictions, including Israel and Japan);
- c) Allowing data transfers where the original company agrees to be held accountable for any breaches (this is an emerging approach that appears in the APEC Privacy Framework and to a limited degree in the laws of Australia and Japan);
- d) Allowing data transfers where the company is bound by a set of corporate rules that apply across all its activities (this approach is used in the European Union and to a limited degree in national laws of, for example, Colombia and Japan);
- e) Allowing data transfers subject to a very specific legal agreement between jurisdictions (e.g. European Union/U.S. agreements on transfer of airline passenger data and financial services data); and/or
- f) Some combination of the options above.

4. Balancing surveillance and data protection: Most laws and regulations are silent on this issue, which needs since the revelation of the extent of surveillance. The broad extent, scope and purpose of surveillance should be open, even if some operational details remain secret.

- a) Surveillance should be limited to specific national security and law enforcement objectives;
- b) Personal data collection during surveillance should be ‘necessary and proportionate’ to the purpose of the surveillance;
- c) Surveillance activities should be subject to strong oversight and governance;
- d) All individual data subjects should have the right to effective dispute resolution and legal redress regarding surveillance (irrespective of their nationality);
- e) Private sector involvement in surveillance should be limited to appropriate assistance in responding to a specific request; and
- f) Private sector organizations should be able to disclose (in broad terms) the nature and frequency of request for personal data that they receive from Government, law enforcement and security agencies.

²⁴⁹ UNCTAD, 2016, *op. cit.*

5. **Strengthening enforcement:** There is a trend towards strengthening enforcement powers and sanctions in the data protection field. Strengthening enforcement has been a major theme in amending and updating laws (notably in Australia, the European Union, Hong Kong (China) and Japan).
6. **Determining jurisdiction:** has become a prominent issue in data protection regulation, partly due to the widespread data flows across borders, and partly due to the lack of a single global agreement on data protection (and the consequent fragmentation of data protection regulation).
7. **Managing the compliance burden:** Some data protection regulation is being criticized for being overly cumbersome or expensive to comply with, or that it creates specific compliance burdens for smaller businesses.

Source: UNCTAD Study on Data Protection and International Data Flows (2016).²⁵⁰

13.7 Conclusion

The increased use of personal data is an inevitable consequence of transiting towards online consumer relations. This applies to developing countries as well as developed countries, as mobile commerce takes off round the world. Some personal data collection has been advocated by consumer associations and consumer protection agencies in the context of responsible lending for example, to enable credit referencing as a safeguard against consumers taking on excessive commitments (see chapter 14). But such data is sensitive by definition, and so it requires strong safeguards such as those introduced by the United States Consumer Financial Protection Board in 2011 under which entities using data must provide initial and annual privacy notices to customers, informing them of the type of non-public personal information collected and disclosed, the categories of affiliates and other third parties to whom disclosure takes place and any rights to opt-out of disclosure. Brazil instituted similar regulations in 2010, including the prohibition of harvesting data irrelevant to the purpose. Generally, such data

use is viewed as promoting responsible behaviour in the market, especially if there is a regulatory authority to keep watch.

As seen above, it is in cross-border transactions that consumers are particularly concerned. A number of other factors deter consumers from participating in cross-border trade too, but worries that consumers have with online data use in wider digital interactions are among the major issues. For e-commerce to grow within and between countries, regulators must think not just about aligning regimes and rules across borders, but about how to create the space for the sorts of innovative approaches described above to build trust in data use. User friendly mechanisms that enable control and choice over who sees or stores their data and who it is shared with, and transparency and understanding about what it is used for (backed up by internationally agreed requirements) will be part of the solution to creating a trusted environment in which consumers can make the most of the opportunity of global ecommerce.

²⁵⁰ UNCTAD, 2016, *op. cit.*

PART III: CONSUMER PROTECTION AND BASIC GOODS
AND SERVICES

CHAPTER 14

FINANCIAL SERVICES

In this chapter, the following issues are discussed:

- *Financial services in UNGCP*
- *Common forms of consumer credit*
- *Common forms of insurance*
- *Regulation of financial services legislation*
- *Prospects for reform*

14.1 Financial services in the United Nations Guidelines for Consumer Protection

Along with electronic commerce, the explicit inclusion of financial services in the revised UNGCP was one of the most expected novelties. Indeed, to proceed otherwise would have been strange in the light of the financial crisis and its repercussion on consumers around the world. The resolution adopting the UNGCP refers to the crisis and the resultant “renewed focus on consumer protection” clearly envisages regulatory and enforcement action. New section V.J on financial services (Guidelines 66-68) uses similar language to the resolution listing regulation, enforcement and oversight, consumer education and literacy, disclosure, responsible business conduct, data protection and financial inclusion.

Certain details stand out. The responsibility of firms for their authorized agents is dealt with in Guideline 66c) and ‘responsible lending’ and the sale of ‘suitable’ products (both Guideline 66f)) are two linked issues emerging from the financial crisis. Remittances, in particular the transparency of charging, (Guideline 66h)) are included for the first time, a major issue for developing countries and for migrant workers.

Other details are mentioned elsewhere in the revised UNGCP. Guideline 40 deals with ‘collective resolution procedures’ and specifically mentions over-indebtedness and bankruptcy. Financial services are added to Guideline 44h) which lists subjects requiring consumer education.

The pre-existing UNGCP already contained references to consumer credit. They are currently to be found in Guideline 26 which requires that: “Consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers,” while Guideline 44 calls for consumer education and information to “cover such important aspects of consumer protection as e) credit conditions.”

Insurance, on the other hand is hardly mentioned at all in the UNGCP the one explicit mention coming in Guideline 66c) in the section on financial services, where Member States are asked to encourage: “appropriate controls and insurance mechanisms to protect consumer assets, including deposits.” But this is in effect a reference to safeguarding deposits against the risk of institutional collapse, rather than to insurance of consumers’ household effects. Given the increasing overlap between insurance and other financial services and the much more fluid sales patterns, this is a significant matter. Some of the abuses that took place during the last 15 years have been where banks have become sellers of insurance.

Insurance is not directly addressed in the UNGCP. Guideline 68 references other relevant documents as sources of inspiration for Member States, in particular the G20/OECD High Level Principles (HLPs) for consumer protection in financial services, the principles for financial inclusion emanating from the G20 and the Good practice guidelines of the World Bank.²⁵¹ The G20 HLPs do not mention insurance by name but they do cover all retail financial products. The World Bank Good Practices contain an entire chapter devoted to insurance. The ‘referencing out’ widens the

²⁵¹ OECD, G20 High-Level Principles on Financial Consumer Protection, October 2011; *Good Practices for Financial Consumer Protection*, World Bank, 2012.

scope of the UNGCP but extends them to documents which in aggregate are more copious than the UNGCP themselves. Conversely, the UNGCP take in some issues, including remittances, responsible lending and bank deposit insurance, which are not covered in the OECD/G20 HLPs. In aggregate then the ensemble acts as a reasonable check list for a very large sector, albeit not concentrated in one document. This chapter pays most attention to credit and insurance.

14.2 Function and forms of consumer credit

Many consumer transactions are financed either in part or completely by credit; it greatly contributes to the purchase of goods and services. Without such a financial service, many transactions would simply not take place. Thus, accessible consumer credit can make a major contribution to the welfare of consumers stimulate the growth of the economy, and promote financial inclusion. However, unfettered growth of consumer debt can destabilize the credit industry and the economy in general. Such growth can cause market bubbles and subsequent busts which leave many consumers over-indebted and hamper economic recovery. Consumer credit regulation can contribute therefore to the stability of the financial system.

The most difficult issue pertaining to the extension of credit is to strike a balance between making credit accessible to those in need of it and denying it to those who will not be able to or not willing to meet their ob-

ligation to repay their debt. Over-exposure to credit leads to serious problems, including individual consumers being enticed to enter into burdensome and unrealisable commitments. There is a need to ensure that lenders do not 'hawk' credit irresponsibly and that individuals do not borrow to an extent that there might be an inevitable default. The availability and intensive marketing of easy credit can pose distinct disadvantages to consumers. First, there is the temptation to buy on impulse or to overspend. Second, credit costs money, ties up future income and thus raises the real price of a product. Third, in the event of a dispute with creditors or failure to meet credit obligations, consumers may lose their merchandise, or property held as collateral, as well as their eligibility to obtain further credit.

The term 'consumer credit' is generally used to refer to credit provided to an individual, predominantly for personal, domestic or household purposes. It does not involve credit extended for commercial or business purposes. In many countries consumer and business credit may be intertwined where for example an individual uses a credit card to finance a business. One problem that is not noticed as often as it should be is that many small businesses fail because they are unable to keep up with their obligations as borrowers of consumer credit.²⁵² Many micro-finance products sold in developing countries for consumption expenditure are designed with production in mind, although their record in that regard appears mixed in both the short and medium term.

Box 18: Microcredit and microfinance

Microfinance gained its current worldwide prominence following developments in South Asia during the last quarter of the last century. In India, the movement gathered momentum with the establishment of the National Bank for Agriculture and Rural Development in 1982 providing financial and development policy support to microfinance initiatives through a Bank-linked Programme in 1992.²⁵³ The peak of public recognition came with the award of a Nobel Prize to the founder of Grameen Bank in Bangladesh, Muhammad Yunus. The concept of micro-credit and micro-finance took off around the world, extending to Africa and Latin America and in due course to developed countries too. However, having been widely praised, microfinance underwent something of a moral crisis as it expanded and in 2008, Mr Yunus singled out for criticism newly commercialized Micro-finance institutions (MFIs) and warned against "new loan sharks created in the name of micro-credit."²⁵⁴

²⁵² I. Ramsay, *Changing Policy Paradigms of EU Consumer Credit and Debt Regulation*, in *The Image of the Consumer in EU Law*, eds.: D. Leczykiewicz and S. Weatherill, Hart, Oxford, 2016.

²⁵³ For a consumer view see: George Cheriyan, CUTS International, *Crisis of Lending to the Poor in India: Challenges and the Possible Way Forward*, 2013.

²⁵⁴ Steve Hamm, *Setting Standards for Microfinance*, Banking, July 28 2008; Hamm, op. cit.; Interview in Bloomberg Business Week; *In Depth*, December 2007; Both available at www.mftransparency.org

Several factors explained this change in reputation. The industry moved from the rural to the urban market and ‘client overlap’ set in whereby consumers juggle micro-credits from multiple MFIs – quite possibly using one loan to pay another. Some undesirable practices emerged, such as ‘forced savings.’ For example, an MFI would grant a loan of US\$ 100, but retain US\$ 25 in a ‘savings account’ on which it did not pay interest to the consumer. On the contrary, the borrower would continue to pay interest on the full amount borrowed, thus rendering calculations such as rates of charge even more complex than usual. Other worrying practices that emerged include: not giving the client a copy of the loan agreement; inappropriate practices with regard to collateralisation such as asking for collateral valued at 300-400% of the loan amount; not utilising legal registration procedures, and selling collaterals without the consent of the borrower and without due process.

The reputation of micro-credit took a big hit in 2010 in Andhra Pradesh, India, where about 120 poor borrowers reportedly committed suicide because of financial duress linked to MFIs charging high interest rates, using aggressive, even coercive, money collection practices, and over-lending to the destitute. Based on the calculation of the amount deducted upfront from the loan by the MFIs, the effective rate of interest reported was between 35 and 65% per annum in some cases. The incidents resulted in the Andhra Pradesh Government passing the Andhra Pradesh Microfinance Institutions Act (Regulation of Money Lending) 2010, which greatly restricted MFI’s operations. The Reserve Bank of India also issued guidelines by the end of 2011, capping interest rates at 10 to 12% points above their own borrowing costs, limiting the interest rate in the range of 23-27% per annum.

Not all central banks took such action in the face of abuse. In the absence of imposed standards, some microfinance providers developed their own standards. Client protection principles were developed as a code of ethics by Accion and other industry investors who established the Smart Campaign.²⁵⁵ Microfinance Transparency guidelines were developed and endorsed by various NGOs, development agencies and service providers. Examples are the Ugandan Association of Microfinance Institutions which developed a code of practice for consumer protection with a focus on disclosure, and Principles for client protection in Microfinance were drawn up by CGAP (Consultative Group to Advise the Poor – a trust fund of the World Bank).²⁵⁶

The Indian consumer association CUTS points out: “MFIs operating in Andhra Pradesh have ceased issuing fresh loans due to the growing non-performing assets, and the limited scope of recovery. The direct effect has been to deny millions of India’s poorest citizens’ access to basic financial services. Studies show that the ban imposed by the Andhra Pradesh Government, without much research and evidence, resulted in a largely negative impact on the micro-finance industry, without significantly benefiting poor consumers.”

CUTS points to the work of Bandhan Financial Services which “has proved itself with over a decade of experience serving the poor since its inception in 2001.” With low operational expenses around 80 per cent of its total lending is rural. As of July 2013, Bandhan served more than 4.7 million poor people through its network of 1,816 branches spread across 19 States.²⁵⁷ An impact evaluation study observed that the average annual net income of West Bengal households under Bandhan’s business witnessed a 13.8% increase of income from all sources. Furthermore, unlike other institutions, Bandhan was not affected by the multiple lending that caused the crisis in Andhra Pradesh. The problem is that bad practices provoke counter-actions, which may themselves bring about new problems.²⁵⁸ Poor consumers, desperate for finance, may well bypass the mechanisms set up in theory to protect them. Such is the conundrum of financial service regulation – it operates in a wider context.

Source: UNCTAD.

²⁵⁵ <http://www.smartcampaign.org/about-the-campaign/campaign-sponsors>

²⁵⁶ Corinne Riquet, *Promoting Financial Capability and Consumer Protection: Les Principes de la Protection de la Clientele en Microfinance*, Accra, CGAP, 2009.

²⁵⁷ Cheriyan, *op. cit.*

²⁵⁸ C. S. Doga, *Why Micro-Finance is Becoming a Bad Word All Over Again*, The Wire, January 15, 2016. <http://thewire.in/2016/01/15/why-microfinance-is-becoming-a-bad-word-all-over-again-18937/>

14.2.1 The poor pay more

Low-income families may face particularly severe problems in relation to credit. They may be either ineligible for, or, if eligible, pay more for their credit, in excess of what is paid by better-off borrowers. They may end up purchasing shoddy goods at high prices. This adds to the cost and is a particularly clear example of the poor pay more syndrome as identified by David Caplovitz.²⁵⁹ In his definitive study of poor households in New York during the 1960s, he concluded that the cost of credit and of consumer durables was higher for the poor than for other social strata. Over forty years later, similar conclusions are still reached in financial services.²⁶⁰ Some fear that during recessionary times, the temptation is for credit to be used by families on modest incomes to maintain routine consumption, food rent, etc., as incomes fall – the ‘let them eat cred-

it’ syndrome.²⁶¹ In situations of urgency, that can drive consumers into the short term, high interest sub-sector, such as payday lending.

14.2.2 Common forms of consumer credit

Consumer credit is provided by many types of lenders including banks, finance companies, insurers, co-operatives, pawnbrokers, moneylenders, and the vendors of goods and services. The law and the contractual agreements governing such transactions, and consequently the rights and obligations of the lender and borrower in each category of these transactions, vary greatly. The availability of the numerous forms of consumer credit differs from country to country depending on the development of the financial system. The terminology may itself differ from country to country.

Box 19: Common forms of consumer credit	
Bank – personal loan	A lump sum amount is borrowed at a fixed or variable rate of interest based upon the time frame. Often there are requirements as to securitisation.
Bank overdraft	The bank agrees to honour transactions unless the account is overdrawn beyond a fixed ceiling. Interest is payable on the amount overdrawn with penalty fees for exceeding the overdraft limit.
Budget accounts	Budget accounts are often offered by department stores. This arrangement involves the consumer paying the shop a regular amount per month for example, and thereafter the consumer is allowed credit to buy goods up to a pre-arranged maximum limit.
Credit cards	A credit card allows the cardholder to make purchases for which he/she is billed later, usually carrying a balance from one billing cycle to the next.
Credit co-operatives/credit unions	A self-help way of providing credit for members usually based on a specific community or ‘common bond’ as is the term used for credit unions. Credit unions are very widespread in the Caribbean, where they have often started as church based, and in South Africa where the stokvell is a village based union. In Kenya the SACCOs: (Savings and Credit Cooperatives) are regulated by SASRA: (Sacco Societies Regulatory Authority of Kenya).
Credit sale	The sale of goods paid for by a fixed number of instalments. Ownership of the goods passes immediately to the purchaser.
Finance company personal loans	Normally arranged from a finance company by car dealers, or other vendors of expensive items. Although the credit and goods may come from the same dealer, the arrangement is regarded as two separate deals – the consumer buys from the dealer and borrows from the finance company.
Hire-purchase	A long standing method of financing the purchase of goods bought on credit under which ownership to the goods does not pass until all instalments are paid. Hire purchase has tended to be replaced by finance company loans and credit sales (see above) over the last 25 years. A variant is conditional sale with further conditions

²⁵⁹ I. D. Caplovitz, *The Poor Pay More*, New York, 1963.

²⁶⁰ R. Bates, S. Thomas, et. al., *Poor Choices: The Limits of Competitive Markets in the Provision of Essential Services to Low Income Consumers*, Energywatch, 2008.

²⁶¹ R. Rajan, *Fault Lines: How Hidden Fractures Still Threaten the World Economy*, Princeton, 2010.

Micro-credit	In theory this refers to lending of small sums of money at low interest rates, to low income consumers, usually for purposes of setting up small businesses. In practice, as the sector has grown, the interest rates have turned out not to be so low and many micro-loans are used for household items, for example, smoke hoods. In Anglophone Africa, micro-credit clubs based on fixed periodic payments by members are often known as 'merry-go-rounds' and may be the main source of consumer credit in informal settlements. ²⁶⁵
Moneylending; (Short term high cost credit including payday lending)	The practice of giving cash loans with or without security generally repaid at a high level of interest over a short period of time. 'Short term high cost credit' sometimes takes the form of a payday or SMS loan which will normally last say, 30 days but may be renewable. It involves minimum checks by the lender on the ability of the consumer to repay. Roll-overs of such debt are a common practice and have been subject to more regulation recently in developed economies. High default charges may also be payable.
Mortgage	A contract by which a person binds property in favour of a lender, to secure the payment of the loan. It is often used for purchase of a house or land. Second mortgages involve the borrowing of a lump sum amount using property with a first mortgage as security. In such transactions, interest rates are generally very high.
Option accounts	Some retail outlets provide option accounts. It is an alternative method of payment, which eliminates the need to carry cash or cheques. It is a personal account that enables the consumer to spread payments to suit financial circumstances. There is no requirement to settle the entire outstanding amount at the end of the month, although there is usually a minimum amount that has to be settled. Interest is charged on the outstanding amount.
Pawnbroking	It involves a simple and fast way of raising money on the basis of security of valuables deposited with the pawnbroker. It is sometimes known as 'cash-on-items' credit in Anglophone Africa for example.
Sub-prime lending	Sub-prime lending is lending to individuals with generally poor or blemished credit records who are unable to access the mainstream lending market. These loans came to prominence in the run up to the financial crisis in the United States.

As a result of the financial crisis international bodies have attempted to promote good practice in the consumer credit sector. In 2011, reporting under a G20 mandate, the Financial Stability Board concluded that consumer protection in financial services would be helped by more work being done to: "strengthen supervisory tools by identifying gaps and weaknesses." They suggested that "a broad range of regulatory and supervisory tools" be used, "promoting responsible lending practices and providing disclosure guidelines." They recommended a twin track approach involving the "necessary supervisory tools while at the same time ensuring that sufficient information is being provided to consumers." More specifically, they pointed to the need for work on:

- Establishing indicators of unsuitable product features;
- Aligning and disclosing incentive compensation arrangements; and
- Evaluating the benefits of offering consumers

and providers with benchmarks for financial products that can be used safely by a wide variety of unsophisticated users.²⁶³

While carefully worded, this suggests a more active and evaluative stance by regulators and the reference to incentives corresponds with the increasing interest being shown in remuneration structures within the financial services sectors generally, discussed below.

14.3 Function and forms of insurance

Insurance is a broad generic term for an array of institutions that help manage risk by the device of sharing, and transfer of risks from one individual to a group. Losses of the individual are then shared on some equitable basis by all members of the group.

²⁶² 'Merry-Go-Round Micro-Finance Keeps Slum Residents Fed in Kibera,' The Global Urbanist, April 13, 2010.

²⁶³ 'Merry-Go-Rounds Become Powerful Investment Tools in Kenya,' Bedah Mengo, Kenya English News, June 16, 2012.

²⁶³ Consumer Finance Protection with Particular Focus on Credit, Financial Stability Board, October 2011.

Classifications of insurance abound. A primary distinction is between social insurance and private insurance. Nevertheless, private insurance is often predicated on the assumption that social insurance will provide a safety net for all citizens. Decent social insurance has the function of keeping consumers away from the ‘let them eat credit’ syndrome mentioned above and was set up for that purpose of avoiding family budget collapse during times of economic disturbance. In the nineteenth and twentieth centuries, it developed first in Bismarckian Germany, New Zealand, the United Kingdom and France, where it formed a key part of the post-war settlement.

The defining characteristics of private insurance are that:

- It is usually voluntary; in the event that it is com-

pulsory (such as car insurance,) the consumer should have a choice of providers and possibly a choice of risks covered; and

- The transfer of risk is normally accomplished by means of a contract and thus the legal framework is that of contract law.

It is beyond the scope of this manual to address the very many technical aspects of insurance law. Suffice it to note that the consumer cannot be expected to understand many of the common terms, which are in use because of the applicable law (either by statute or custom) through which they form part of standard contracts.

Box 20: Private insurance products	
Life Insurance	<p>These policies provide risk cover either for the entire life or for a fixed term. Some policies also combine risk cover with other financial returns. For example, proceeds from a life insurance policy can also help supplement retirement income. It can be an important tool in the following ways:</p> <p>Income replacement</p> <p>Pay outstanding debts and long-term obligations</p> <p>Estate planning including legacy contributions</p>
Health Insurance	<p>There are essentially two kinds of health insurance – Fee-for-Service and Managed Care. Although these plans differ, they both cover an array of medical, surgical and hospital expenses. Most cover prescription drugs and some also offer dental coverage.</p> <p>Fee-for-Service</p> <p>Managed Care</p> <p>Managed Care plans provide comprehensive health services to their members and offer financial incentives to patients who use providers named in the plan.</p> <p>Disability Insurance</p>
Auto Insurance	<p>Auto insurance protects against financial loss in the event of an accident or theft of a vehicle. Auto insurance products are a good example of cover from all three categories of insurance, i.e. insurance of the person, property and liability:</p> <ol style="list-style-type: none"> 1. Property coverage for damage to or theft of the motor vehicle. 2. Liability coverage for legal responsibility to others for bodily injury or property damage. 3. Medical coverage for the cost of treating injuries, rehabilitation and sometimes lost wages and funeral expenses. <p>An auto insurance policy itself can be: ‘Fault-based’ or ‘No Fault’ – This may depend on the applicable law.</p> <p>Most countries require some, but not all, of these risks to be covered. If the purchase of the car is financed by credit, the lender may also have requirements.</p>
Home Insurance	<p>Homeowners insurance provides financial protection against disasters. A standard policy would insure the home itself and its contents.</p>

Travel Insurance	<p>There are three major types of travel insurance:</p> <ul style="list-style-type: none"> Trip Cancellation Insurance Baggage Insurance or Personal Effects Coverage Emergency Medical Assistance
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14.4 Areas of regulation for financial services and prospects for reform

Following up its 2012 recommendations, the World Bank carried out a survey of regulators involved in financial consumer protection in 114 jurisdictions.²⁶⁴ It found that “some form of legal framework is in place in 112 out of the 114 jurisdictions” but it also concluded that: “fewer economies have provisions specific to financial industry such as restrictions on predatory lending (59 %,) bundling and tying of services (49 %) and abusive collections (45 %).” It concluded that: “the function of financial consumer protection supervision is far behind prudential supervision in terms of available methodologies for compliance monitoring, range and nature of enforcement actions, and supervisory skills.” Clearly there is some way to go even after the talk of post-crisis reform.

Well-designed financial services legislation can promote efficient and fair markets. This can be achieved by enhancing the competitive environment relevant for the provision of financial services and ensuring the fair treatment of consumers. The most common areas of regulation include:

- Licensing and supervision of suppliers (including intermediaries), agencies (such as credit referencing) and financial services products responsible business conduct including responsible lending;
- Control of advertising;
- Provision of information to consumers (comprehensible and comprehensive on charges);
- Fair contract terms, including reopening of contracts considered unfair;
- Regulation of charges;

- Treatment of customers in arrears; and
- Financial education (not to be confused with information, see chapter 10).

Many of the above issues could be described as widely supported good practice, but still in need of legislation and improvement in many countries. In that respect the UNGCP and the cited OECD/G20 HLPs, and the World Bank Good Practices all contain much that can be used by a Government that seeks to reform the sector. The Financial Stability Board credit proposals on consumer credit, having been part of the same mandate as the OECD/G20 HLPs could also claim to be implicitly cited. Our analysis below takes in proposals that are already widely supported and those that are more future oriented or react to recent developments where legislation is yet to catch up.

14.4.1 Cooling off periods: a success to be built upon

The World Bank guidance sets out several applications of ‘cooling off periods,’ which may be one of the most effective methods of allowing second thoughts to consumers who may have been pressured. This consumer safeguard has been introduced by legislation more widely in recent years. Cooling off periods are established in the United States and the EU. The EU Directive on Credit Agreements of 2011 lays down a 14 day period after contract without having to give a reason. In Mexico, consumer credit providers are required to supply an offer binding on the provider for 20 days, so that the consumer has time to study and compare the offer before making a decision. Cooling-off periods are also required in South Africa.

There is a danger, however, that this very important safeguard against aggressive marketing could be undermined by the use of ‘processing fees,’ which were

²⁶⁴ Global Survey on Consumer Protection and Financial Literacy: Oversight Frameworks and Practices in 114 Economies, World Bank, 2014.

envisaged by the World Bank in its 2012 report. In effect, such fees would penalize cancellation during a cooling off period. This rather negates the concept and could make service providers careless about the offers that they make. In the event that such a provision is adopted, there needs also to be a test of the reasonableness of processing fees. In practice they could be indistinguishable from penalties and be tantamount to an unfair contract term.

14.4.2 Contract terms, transparency and comprehensibility

There is debate about whether financial services legislation should provide for certain built-in contractual rights laid out in statute without possibility of exclusion. It is becoming clearer that legislation or regulation must restrict contractual provisions that are harsh or likely to cause undue hardship, such as unauthorized bank charges, disproportionate penalties, nil refunds on single premium insurance policies, and terms applied retrospectively without notification in the contract. Disproportionate early debt settlement fees which may not be clearly set out at the time of the loan agreement are also under challenge. In that respect, the interpretation of context of sale is coming further to the fore. For example, courts in the United Kingdom may use the 'unfair relationship test,' which takes into account the overall context of a consumer credit agreement, to judge whether or not a particular consumer has been exploited by virtue of incapacity or illiteracy. The courts have wide-ranging powers in such circumstances, including the setting aside of the existing agreement.²⁶⁵

The UNGCP contain a brief but powerful reference to contract terms in Guideline 14d), by which national policies should encourage "clear, concise and easy to understand contract terms that are not unfair." Many unfair contract terms relate to information or its obscurity. It is often said that problems arise from the inability of consumers to comprehend financial documents such as those illustrating methods of calculation. The information is often daunting and is clearly outside the competence of an average consumer. Implicitly blaming consumers for their own ignorance is surely unde-

sirable, and it may even underestimate the problem. As the World Bank suggest in the earlier quote, the complexity may be a cover for unfairness and sometimes for downright fraud. Research by the European Commission using expert advisers has shown that even people familiar with the financial products may not be able to fully understand the terms.²⁶⁶ As the United Nations Commission of Experts on reforms of the international monetary and financial system, chaired by Joseph Stiglitz, reported: "even if there had been full disclosure of derivative positions, their complexity was so great as to make an evaluation of the balance sheet of the financial institutions extraordinarily difficult."²⁶⁷ In other words, the problem goes beyond consumer comprehension; certain products may simply be incomprehensible, even to regulators and sales staff.²⁶⁸ So transparency and disclosure are not just matters of consumer information, they are a vital part of the regulatory process. For that reason, transparency and disclosure are not to be written off as unrealistic objectives. Some people have a responsibility to be well informed and service providers have an obligation to set out their stall publicly and clearly.

The danger of information overload, as discussed in chapter 10, suggests the importance of 'key facts' documents being provided before an individual enters an agreement. The World Bank recommends accordingly for the insurance sector for example.²⁶⁹ The continuing nature of many relationships mean that disclosures may be required to alert individuals to potential payment issues during the initial transaction and subsequent 'product life.' Annual statements of amounts paid in charges on revolving credit may be effective in making consumers change their credit behaviour. Imaginative techniques might target consumers with information at the time of borrowing on revolving credit rather than the time of entering the contract.

As part of the package of banking reforms, the Australian Government has mandated the introduction of fact sheets for major financial products. The Home Loan Fact Sheet was introduced in 2012 (variable rate loans) and the Credit Card Fact Sheet was made mandatory the same year. However, the legislation requires a

²⁶⁵ Office of Fair Trading, *Unfair Relationships: Enforcement Action Under Part 8 of the Enterprise Act 2002*, OFT Guidance 2008.

²⁶⁶ *Restoring Consumer Trust in Retail Financial Services*, Commissioner Meglena Kuneva, DECO 35th Anniversary Seminar on Financial Services and the Consumer Interest, Lisbon, April 27, 2009.

²⁶⁷ Joseph Stiglitz, Chair United Nations Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System; *Recommendations 63rd Session Agenda Item 48 United Nations*, para 40, 2009.

²⁶⁸ Gillian Tett, *Fool's Gold*, 2009.

²⁶⁹ World Bank, *op. cit.*, 2012.

lender to provide the customer with a fact sheet only when the customer asks for one and it was found by the Australian consumer association 'Choice,' that lenders are adopting a very narrow view of what constitutes 'asking.'²⁷⁰

Box 21: Transparency in consumer financial relations

Transparency focuses on the following elements:

- **Accuracy:** There is a need for accuracy in the information provided to consumers. This will enable them to form clear conclusions about the total cost of credit. The United States led this field with the 'Schumer Box' imposing obligations regarding information and format in consumer credit and mortgage loans under the Truth in Lending Act 1968, covering such matters as: annual percentage rates, total charge for credit, charges included and excluded, calculation of extortionate credit and remedies. Similar provisions exist in Canada
- **Comparability:** Transparency calls for comparable information. It is necessary that the information provided by different lenders should be comparable so as to ensure that consumers can make meaningful choices between competing offers. In 2011 the French Minister of Finance, Christine Lagarde, in the face of opposition from the profession, obliged French banks to produce tariffs in comparable form for 10 major banking services
- **Conciseness:** Documents provided to consumers must be in a concise form, such as Key Fact statements as promoted by the World Bank. This will ensure that the documents are likely to be read and understood by consumers.
- **Clarity:** The information must be presented clearly as required by the OECD/G20 High-level principles on financial consumer protection, 2011 referred in the UNGCP Guideline 68.
- **Timing:** There is a need to ensure consumers receive all relevant information before they commit to a particular credit transaction. Under the French Loi Murcef, of 2001, banks are compelled to publish their tariffs, three months before they took effect.

Source: UNCTAD.

14.4.3 Transparency and remittances

One relatively straightforward way in which transparency can promote consumer protection in financial services is in the remittance sector, especially given the improvements in mobile transactions which have the potential to increase competition in this sub-sector. The UNGCP make explicit reference in Guideline 66h), while the OECD/G20 HLPs do not.

There need to be clear signals about what happens at both ends of the transaction (eg. exchange rates in country of despatch and country of receipt). Consumers International have pointed out: "The consumer is charged an initial fee to transfer funds, and is effectively charged a second time because the foreign exchange rate used generates a 'bonus profit' for the service provider who is not obligated to communicate this information to the consumer. Payout locations in some countries are also charging recipients to collect the remittances."²⁷¹ CI also argues that the 'spread'

of rates also needs to be referenced in comparable format. Guideline 66h) lists the information as to be provided: price and delivery of the funds to be transferred, exchange rates, all fees and any other costs associated with the money transfers offered, as well as remedies if transfers fail.

14.4.4 Control of advertising

The World Bank recommends a tough stance on misleading advertising and, for example, in Ukraine recommended that the Regulator for financial services markets should have the legal authority to order withdrawal of any advertising that breached truth in lending rules.²⁷² The consumer may be not so much misled as distracted by imagery, which may not be illegal but may simply be irrelevant. For example, a South African study provides a salutary reminder of the difficulties of focussing the attention of consumers on what really matters in credit contracts. A study by Bertrand, et al. found that: "showing fewer example loans, not

²⁷⁰ Elizabeth McNess, Choice, Australia, The Australian Responsible Lending Act: The Verdict is Cautiously Optimistic for the Consumer, CI, 2013.

²⁷¹ CI, *The Remittances Game of Chance: Playing with Loaded Dice*, 2012.

²⁷² World Bank, *Conference on Consumer Protection and Financial Services*, Kiev, March 22, 2012. *Strategy for Financial Services Consumer Protection and Financial Literacy*, 2012-17, 2012.

suggesting a particular use for the loan, or including a photo of an attractive woman increases loan demand by about as much as a 25% reduction in the interest rate.”²⁷³

14.4.5 Prescribed limits on interest rates?

The issue of interest rate caps stretches back to historic usury laws and the debate continues. It is even difficult to obtain agreement on establishing prescribed methods of calculating interest charges, both to ensure that consumers can compare effectively and also to inform the regulatory debate. Discussions on finance rates will necessarily require some understanding of financial mathematics.

Many countries employ interest-rate ceilings. This is often justified as a means of protecting lower income consumers from the risks of high cost credit and of providing credit at fair prices. Ceilings may take many forms from a single ceiling, through different ceilings for different types of loans. They may be linked to market prices or established as a fixed rate. They may include only interest charges or all costs associated with credit, in order to avoid diverting costs elsewhere such as administrative fees. There will be costs and benefits associated with ceilings. Some consumers will be protected from the dangers of high cost credit while other consumers may see their access limited and resort to the black market. Policymakers should attempt to quantify these costs and benefits before introducing ceilings.

In South Africa the ‘usury ceiling’ was lifted in 1992 since when cash lenders have been regulated by the Micro-Finance Regulatory Council.²⁷⁴ The regulation requires that monthly repayment should not exceed a proportion of monthly income, an indirect way of imposing a duty of assessing ‘affordability’ on lenders. One problem concerning interest rate caps is that they can incite companies to recoup the implicit cost of the rate caps through administrative charges. This tendency can be, to some extent at least, limited by applying the principle of proportionality. For example, the main United States federal consumer law that does contain such a requirement is the CARD Act 2009, which

adopts a standard of reasonableness and proportionality against which all credit card penalty fees must be assessed.²⁷⁵ Essentially, the CARD Act requires that the amount of any penalty fee or charge that a card issuer could impose for violation of the credit card contract “shall be reasonable and proportional to such omission or violation.” The United States Consumer Protection Financial Bureau has issued regulations expanding on this concept, and at the time of writing, has proposed similar “reasonable and proportional” requirements for various types of prepaid cards in new regulations.

14.4.6 Payday lending

Among the more extreme manifestations of abusive lending during the past years is pay day lending, which is found in many jurisdictions as far apart as Australia and the Russian Federation, having been accelerated by the use of online sales. As Internet access moves down the income scale this method of lending might spread. Although the stereotype of payday lending is one of loans offered at the moment of consumer liquidity (payday) at extortionate rates and subsequently enforced through violence and other threats, the approach of many lenders is in practice much more subtle, especially as the sub-sector has become more corporatized. Many contracts are designed to fail so that consumers, having defaulted on the first loan, are offered a second loan to clear the first one, with friendly sales staff disarming consumers who already feel guilty because of the first default.

In 2013, the Australian Government introduced a national tiered maximum cap on payday loan charges, (not applied to banks and credit unions, which lend at far lower rates). The overall cap was 48% per annum (including interest and fees) with additional ‘set up costs’ allowed for smaller loans and a ban on small amounts where the term is 15 days or less. In the United Kingdom, where the Competition and Markets Authority concluded that the major payday loan companies made supra-normal profits,²⁷⁶ the Financial Conduct Authority introduced a price cap in 2015 on daily interest rates of 0.8% per day and capped default fees, setting an overall repayment cap at twice

²⁷³ M. Bertrand, D. Karlan, S. Mullainathan, E. Shafir, J. Zinman, *What's Advertising Content Worth? Evidence From a Consumer Credit Marketing Field Experiment*, Quarterly Journal of Economics, Harvard/MIT, February 2010.

²⁷⁶ Bertrand, et. al., *op. cit.*, 2010.

²⁷⁷ Credit Card Accountability and Disclosure Act, 2009.

²⁷⁸ CMA, *Payday Lending Market Investigation*, Provisional Findings Report, 2014.

the value of the original loan. Other limits were set on 'roll-over' lending and stronger affordability checks were imposed in 2014.²⁷⁷ In consequence, 2015 saw a massive decline in the volume of payday lending. It is worth noting that the approach was a twin track one, aimed at lending practices as well as mathematical rates. The same is relevant to the micro-credit market in developing countries.

14.4.7 Regulation of credit-related insurance

Consumer credit insurance can also be used to ensure that repayments for a particular credit contract will continue to be made if the borrower dies, becomes unemployed or becomes ill. Home finance lenders may require a borrower to take out a life insurance policy with the value of the policy being assigned to the lender. Consumer credit related insurance can be a detriment to consumers and in some countries has resulted in systematic consumer detriment through misselling practices. Credit insurance is often sold at point of sale when consumers are not in a good position to compare prices and is added to the cost of credit. Common problems include consumers having to pay excessive premiums for insurance, or paying for policies which they do not need because they are already covered by other insurance, policies of the insurance not being fully disclosed to the consumer, and inappropriate insurance cover. It may be appropriate to ban the sale of credit insurance at point of sale.

14.5 Emerging issues

14.5.1 Remuneration structures and conflicts of interest

Lindley makes the point that: "inappropriate remuneration and sales incentive schemes were an important root cause of PPI misselling – frontline staff were given strong incentives to sell the product regardless of whether it was appropriate for the consumer." Both the G20 HLPs and the UNGCP, raise matters around the

behaviour of retail sellers, whether direct or through authorized agents. G20/OECD²⁷⁸ paragraph 4 states that: "financial services providers and authorized agents should provide consumers with information on conflicts of interest associated with the authorized agent through which the product is sold." The UNG-CP as well as referring to the HLPs also recommend in Guideline 66e) that: "financial institutions are also responsible and accountable for the actions of their authorized agents. Financial services providers should have a written policy on conflict of interest, to help detect potential conflicts of interest. When the possibility of a conflict of interest arises between the provider and a third party, this should be disclosed to the consumer to ensure that potential consumer detriment generated by conflict of interest be avoided."

The EU Directive 2014/17/EU of February 2014 describes 'appropriate management of conflicts of interest' as a key element of consumer confidence, and requires that advice be given in the 'best interest of the consumer.' It also specifically requires measures to avoid conflicts as a result of numerical targets (such as bonuses).

'Disclosure' now relates to two areas, the terms of contracts and rates of charge, on the one hand, and the disclosure of commissions and bonuses paid to the sales staff on the other. This second form of disclosure is still relatively rare. It is required in Australia and South Africa and Japan has voluntary guidelines for the disclosure of incentives. The Financial Stability Board has said that the use of sales targets and remuneration structures rewarding sales are counter-productive to the aim of providing consumers with accurate and trustworthy information and increase the risk that products are being sold to customers who do not have the capacity to repay.²⁷⁹ Sometimes the conflict of interest is not just at staff remuneration level but institutional as shown by the case of the Spanish preferred shares of Box 22.

²⁷⁸ OECD, G20, *High Level Principles on Financial Consumer Protection*, OECD, 2011.

²⁷⁹ Financial Stability Board, *op. cit.*

Box 22: The Spanish preferred shares case

Before the financial crisis, banks in Spain raised money to increase their level of capital through the sell 'hybrid securities' to their retail customers. These complex products known as 'Preferred shares' (Participaciones Preferentes), offered an income in the form of an annual payment. While they were sold to consumers as substitutes for simple deposits, the income paid by these hybrid securities was variable and the consumers were at risk of losing their capital if the bank which issued and sold the product should run short of capital. The preferred shares were converted into ordinary shares when the savings banks were recapitalized in the midst of the financial crises of 2008, following a decision by the stock-market regulator. As the financial situation of these savings banks deteriorated consumers found that they were facing significant losses. Many of the customers affected were over retirement age and lost much of their savings as a result. After a campaign by the Spanish consumer group Organización de Consumidores y Usuarios (OCU) Santander Bank was fined US\$ 16.9 million in 2014, for inappropriately selling such bonds to its customers.

Source: Dominic Lindley, Risky business: the case for reform of sales incentives schemes in bank. CI 2014, op. cit.

14.5.2 Responsible lending

The UNGCP make reference to responsible lending in Guideline 66f). Given the contribution made by consumer default to the inception of the financial crisis, a consensus is emerging around responsible lending which requires ensuring that consumers can repay a debt in a sustainable manner without incurring financial difficulties and that lenders treat borrowers fairly and consider their interests throughout the transaction.

Measures used to prevent over-indebtedness include compensation and fines. In Australia, under the National Consumer Credit Protection Act 2009, if a consumer has been sold an unsuitable product, the consumer can seek injunction against the provider from collecting more interest payments, and seek compensation for the loss or damage due. In a number of jurisdictions (China, Germany, Hong Kong (China), Singapore) consumer credit providers are also required to conduct checks with credit registers to assess the credit worthiness of borrowers. Credit Reference Bureaux are in increasing use in Kenya too, and it is a requirement by Government that the credit history of individuals be kept and made available when accessing credit.

Assessment of consumers' ability to repay loans is increasingly common, often through credit reference agencies or bureau, both public and private. In some jurisdictions, such as France, Belgium and South Africa, such credit checks are mandatory. The practice of credit referencing sometimes relies on reporting of default. For example with the setting up of the Credit Information Bureau of India, the banks provide the credit rating of customers who are defaulters, to the

bureau and lenders use this information before sanctioning the loan.

Credit reference agencies or 'bureaux' can play an important role in screening for creditworthiness. The introduction of a credit bureau in a country may expand credit by reducing lender costs and in some countries may compensate for inefficiencies in the court enforcement system. They can promote competition by reducing the advantages of market incumbents. Credit bureaux often provide credit scores to lenders which are used to screen consumers and may include both negative and positive information, which may permit the deepening of the market to include more low income consumers with good records.

One of the more comprehensive databases is that established by the People's Bank of China during the '90s. It features a personal credit information system connecting all commercial banks and some rural credit co-ops, and helps lenders with risk assessment (and thus indirectly consumers, whose consent is required before data is disclosed). It includes such basic information as previous defaults or whether a property loan was granted to first or second-time buyers. The introduction of this database resulted in a 10% refusal rate in applications for credit. While this will have left some consumers unable to borrow, it is argued that reasonable constraints on credit granting are advisable in order to avoid the recent fate of less risk-averse markets, such as the United States.

China is at one end of the spectrum with positive and negative information together and centralized. As a safeguard, consumers should have the right to check and challenge the data which is held about them. In

Belgium, such access is free of charge, in the United Kingdom for a nominal charge. In the United States, one credit report per year is free. These rights of consumers and obligations of credit bureaux must be subject to strict oversight and enforcement. Consumer advocates in the United States have documented serious problems in getting credit report errors fixed despite clear statutory mandate. Where there are multiple credit bureaux, it is difficult for consumers to challenge them all at once.

14.5.3 Treatment of over indebtedness

The UNGCP also mention over-indebtedness in Guideline 40. Practice is also developing to allow individuals to write down their debts when they are unable to repay and have a fresh start. Conditions need be included to ensure that access to such a facility is not abused.

Legislation for personal bankruptcy has been adopted in Greece in 2010. After its introduction there were almost 35,000 applications during 2011 and 2012, and during 2013, the number of applications doubled. The law hinges on the determination of a “decent minimum amount for the cost of living” and attempts to put into practice the Greek constitutional provision for participation in social and economic life and development of personal life.²⁸⁰ The ‘decent minimum amount’ however, is not defined and is based on the interpretation by the courts.

14.5.4 Institutional structure: agency for regulation and enforcement

The UNGCP is understandably silent on the matter of detailed institutional structure for financial services, although Guideline 66b) calls for: oversight bodies with the necessary authority and resources to carry out their mission. Whatever the structure, an optimal agency should be well funded (Guideline 15,) able to obtain information at a low cost on emerging market practices, assess accurately those practices creating the greatest risks for consumers, be able to move quickly to regulate emerging problems, and be structured to avoid the dangers of capture by industry. Ideally credit

regulation should be carried out by a dedicated financial consumer protection agency that can oversee the whole market. Regulation should be evidence based and take into account its impact on financial exclusion.

Several international organizations recommend that consumer credit be regulated as part of a dedicated consumer finance authority or agency. The response to the financial crisis has been for the United States Financial Consumer Protection Bureau to be established and in the EU, the new European Banking Authority has been given a consumer protection mandate. In a hybrid version in Chile, SERNAC Financiero is a specialized agency within the national consumer protection agency, SERNAC, with a mandate to address financial services.

There are several advantages of establishing a specialist enforcement agency to handle consumer credit issues for example, including specialist expertise in the complexities of credit law and being able to group together actions on behalf of a number of consumers who have each suffered a small loss and are unlikely to take any action individually. However, as banking, lending and insurance have moved out of their silos, the regulatory structure needs to evolve likewise and govern generic financial institutions in a way that picks up abuses that take place in all sub-sectors. The agency should be able to enforce legislation proactively (by stopping certain behaviour before it causes more harm) as well as reactively (by providing redress for the harm and punishing whoever caused the harm). The scope of the agency should not be limited to acting on consumer complaints alone. It should actively monitor industry actions and developments.

In the meantime, different products have varying and sometimes unique consumer protection needs and may be regulated differently as a result. For instance, in Kenya, commercial banks and Deposit Taking Micro-Finance Institutions are regulated by the Central Bank of Kenya (CBK) with the Kenya Bankers Association (KBA) responsible for promoting good conduct and self-regulation. SACCOS, (Savings and Credit Cooperatives) are regulated by another Government agency (Sacco Societies Regulatory Authority of Ken-

²⁸⁰ Law 3869/2010. A. Angelousi and M. Pliatsika, C. Tsekeri, *A Constitutional Right to Debt Relief: The Greek Approach to Alleviating Over-Indebtedness*, New INKA, 2013.

ya) within a different Act and policy.

14.6 Conclusion

As a result of the traumas of the financial crisis, some have advocated a product safety approach to regulation. “Consumers can enter the market to buy physical products confident they won’t be tricked into buying exploding toasters and other unreasonably dangerous products. Consumers entering the market to buy financial products should enjoy the same protection.”²⁸¹ When one compares law imposing strict liability for physical products as described in chapter 9 on product safety with the emphasis on responsibility rather than blame, it is understandable that some will seek a similar protection in the field of financial services.

After the years of deregulation were followed by financial crisis, there is a perceptible interest in a more interventionist stance being taken by financial services regulators. For example, while the original EU Consumer Credit Directive of 1987 concentrated on information and minimal protection against unfair contract terms, the more recent Mortgage Credit Directive imposes far higher standards of responsible lending, while making reference to the OECD/G20 HLPs.²⁸² It is significant that greater interest is being shown in financial services remuneration structures with their potential for perverse results. The consumer credit sector has seen successful interventions to rein back the most abusive

practices, and to enforce a regime of credit checks in advance of loan agreements. Such safeguards are spreading to developing and transitional economies, including South Africa and China.

Turning to the reform agenda, the profile of consumer protection in financial services is rising and stronger safeguards are emerging in the availability and enforcement of cooling off periods, a safeguard which becomes arguably even more important as online sales increase. Some jurisdictions apply pre-market approval mechanisms and, faced with the failures of disclosure and information obligations, stricter standards are being applied through mandatory Fact Sheets and Summary Boxes. Some particular sectors where services are intrinsically simple, such as remittances, could see progress through the ‘classical’ approach of disclosure and competition.

Innovation in financial service products can be genuinely creative when responding to consumer needs. Unfortunately, too often innovation has been used to less positive effect, in effect spurious innovation to avoid regulatory constraints. To quote the Stiglitz committee again: “while there has been innovation, too much innovation was aimed at regulatory, tax and accounting arbitrage, and too little at meeting the real needs of ordinary citizens, [...] financial regulation must be designed so as to enhance meaningful innovation that improves risk management and capital allocation.”²⁸³

²⁸¹ Elizabeth Warren, *Unsafe At Any Rate*, Democracy, Summer 2007.

²⁸² Ramsay, *op. cit.*

²⁸³ Stiglitz, United Nations, *op. cit.*

CHAPTER 15

CONSUMER PROTECTION IN THE PROVISION OF UTILITIES

In this module, the following are discussed:

- *Public utilities in the UNGCP*
- *The nature of utilities provision*
- *Issues relating to regulation and performance of public utilities*
- *Safeguarding the consumer interest.*

15.1 Public utilities in the United Nations Guidelines for Consumer Protection

The revised UNGCP represent a breakthrough in this very important field for they put into place a new 'legitimate need' in Guideline 5a): "Access by consumers to essential goods and services," immediately followed at 5b) by "the protection of vulnerable and disadvantaged consumers." Of equal relevance to utilities is that for the first time, the UNGCP apply, in Guideline 2, to 'State-owned enterprises.' Section V.E on the distribution facilities for essential consumer goods and services is also applicable and notable for Guideline 36b)'s encouragement of "the establishment of consumer co-operatives and related trading activities, as well as information about them, especially in rural areas." Also relevant is the reference in the resolution to the Millennium Development Goals (MDGs) and Sustainable Development Goals (SDGs), the latter having just been agreed at the time of adoption of the new UNGCP.

The most directly applicable section is V.K. 'Measures relating to specific areas' in which Guideline 69 exhorts member States to: "give priority to areas of essential concern for the health of the consumer, such as water, energy, and public utilities." Guideline 72 asks Member States to: "formulate, maintain or strengthen national policies to improve the supply, distribution and quality of water for drinking. Due regard should be paid to the choice of appropriate levels of service, quality and technology, the need for education programmes and the importance of community participation." The continued absence of a commitment to sanitation is frustrating for advocates of this neglected sector, although there is a now obsolete reference to the International Drinking Water Supply and Sanitation Decade which can serve as a marker and sanitation is explicitly included in the SDGs.

Guideline 76 advocates the promotion of universal access to clean energy, and Member States are asked to "strengthen national policies to improve the supply, distribution and quality of affordable energy to consumers according to their economic circumstances." Guideline 77 advocates the promotion of "universal access to public utilities," plus the incorporation of many elements of customer relations. It refers to "late payment fees" by consumers but contains no evident measure for compensation for non-service (such as interrupted service) by utilities, which is a major problem world-wide.

15.2 The nature of utilities provision

Article 21 of the Universal Declaration of Human Rights states that everyone has the right of equal access to public service. The United Nations General Assembly proclaims this as a common standard of achievement for all peoples and all nations, and must be observed by all. Unfortunately though, this is not what is happening around the world and the definition of public service is far less clear than hitherto.

The conventionally defined utility industries, i.e. suppliers of water, sanitation, energy and communication services, among others, present special challenges to consumer protection. Not only do these industries provide very basic and essential services, but they also have peculiar economic characteristics that often make it difficult to open their services up for competition. There have been attempts within the European Union to redefine them as Services of General Economic Interest (SGEI,) characterized by identifiable public policy goals, such as universal service, leaving States to precise the list of services included in the definition.

The European Union concept is that SGEIs are subject to duties other than purely commercial ones even

though they may be run with a substantial commercial element and usually in return for payment. Such duties are summed up by the concept of public service obligations. A European Commission Eurostat publication explained in 2007: “SGEIs can be defined as collective or social goods in the sense that they are different from ordinary services. [...] Public authorities can lay down a number of specific obligations for the provider. The fulfilment of these obligations may trigger the granting of special or exclusive rights, or the provision for specific funding mechanisms. The classic case is the universal service obligation i.e. the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations.”²⁸⁴ While the SGEI nomenclature has not spread much further afield, the concept remains widely accepted.

Most of the utility industries rely on some sort of network to deliver their services. The economics of these fixed networks mean that it is cheaper for a single firm to supply an entire market than for several firms to do so. Once a distribution network is in place, it makes no economic sense to duplicate it by laying a second connection between the same points. The ‘natural monopoly’ produced by these distribution systems leaves consumers ‘tied in’ to particular supply companies.

However, this assumption is less valid now than a generation ago. Many aspects of natural monopoly are dissolving and since the move of telecommunications to mobile individualized service, it has become a competitive service with fewer network effects as its inexpensive capital assets can overlap in the same territory. There are new issues about Internet capacity which could recreate network problems in the future and there remain issues of spectrum availability which are not explored here. But for most purposes telephone services are competitive and subject to individual contracts which require supervision of a ‘fair trading’ nature, checking for transparency, unfair contract terms and anti-competitive practices such as ‘lock in’ contracts. Given the above, in this chapter we concentrate on water/sanitation and electricity.

15.3 Regulation

As natural monopolies were initially recognized as

inevitable, many public policies concentrated on formalising and regulating the monopolies through Government control of profits, prices and other aspects of supply. This is sometimes known as the ‘regulatory bargain’ and an effective rate cap is seen as balancing the need for affordable prices with the requirement for cost recovery and revenue. If the two goals cannot be reconciled, the subsidy may come into operation, in order to achieve specific objectives such as universal service. Regulation has taken different forms with publicly owned utilities often the least regulated in legal terms, but with more direct governmental control.

There are broadly four regulatory models identified by Eberhard:²⁸⁵

- **Regulation by Government:** a particular challenge here is the ability of Governments to understand the costs and revenue requirements of individual utilities (necessary for economic regulation). There is an evident conflict-of-interest presented by Governments both managing and regulating State-owned utilities;
- **Independent regulation:** embodying principles of independence of decision-making, institutional/management independence and financial independence (as practiced at State or municipal level in the United States and national level in England and Wales) There are sub-variants such as price cap regulation (as in the United Kingdom) or rate of return regulation (as in United States) and operational profits in the Russian Federation;
- **Regulation by contract:** as in France; and
- **Outsourced regulation to third parties:** for example: tariff reviews, benchmarking, dispute resolution. Chile, Senegal and Romania have all applied such review mechanisms.

There is however a problem of scale. Under the traditional utility model, as water and sanitation services tend to be regulated at municipal level, it is very difficult for a national agency to regulate such a large number of providers. In contrast, in electricity where the number of suppliers tends to be smaller and the territories larger, the national regulatory model has been more feasible.

²⁸⁴ Eurostat, *Consumers in Europe, Facts and Figures on Services of General Interest*, EC, 2007.

²⁸⁵ A. Eberhard, *Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models*, PPIAF Working Paper, 4, 2007.

15.4 Ownership

Public ownership of utilities providing water sanitation and energy remains dominant. And yet the issue of ownership is contested. There was a high level of interest in privatisation at the end of the twentieth century and this was often seen at the time as unprecedented. In fact there have been private operators of utilities for many generations, as well as municipal counterparts with services at times passing between public and private control and sometimes back again in several European cities in the nineteenth and twentieth centuries.²⁸⁶

The binary contrast of public and private can be very

misleading in countries with the tradition of regulation by contract as in France, where for example, the Compagnie Générale des Eaux was established in the 1850s and still continues today. Table 1 illustrates the variety of contractual models originating under the French water services. French communes have had responsibility for drinking water since 1789, but the service is commonly provided by a private operator under contract.²⁸⁷ National legislation sets standards (such as non-discrimination between customers, financial probity of operators, etc.). The various forms of contract have been elaborated around the world, often using the French variants as options for local implementation, with the municipalities as contractors and the private operators as contractees.

Table 1. The PSP spectrum

Option	Asset owners	Investment	Revenue collection	Operation	Length	Risk
Management contract	public	public	public	private	3-5 yrs	pub.
Lease or affermage	public	shared	private	private	8-15	shared
Concession	public	private	private	private	25-30	private
BOT	shared	private	private	private	20-30	private
Divestiture	private	private	private	private	indefinite	private

Notes:

1. BOT is a particular form of concession, (Build-Operate-Transfer) in which ownership of a constructed operating asset effectively remains with the operator for a fixed term and is then transferred to the public authority for an agreed sum. In the short- to medium-term, it has the character of a privatisation.

2. The main difference between leases and affermages is that under leases, the operator's remuneration depends on the customer tariff, while with affermages, the operator tariff is divorced from the customer tariff, even though the operator may be charged with collecting payments.

3. Across the whole spectrum including divestiture, it is usual for there to be Government controls on tariffs.

4. 'Traditional' outsourcing has similar features to management contracts, although the latter tend to be more comprehensive.

Sources: principally Foster et al., cited below, 2004, also Guasch, cited below 2004.

Interest in privatisation reached its peak around the turn of the millennium. A study by OECD of private sector participation in the water sector completed in 2009, distinguished two purposes for the trend towards the private sector: "private sector involvement was seen as a way to improve the often poor performance of

publicly run utilities, and/or to inject much-needed investment capital. However, experience has not always matched expectations and the hoped for surge in private investment flows has not materialized."²⁸⁸

The turn of the millennium saw a shift in the pattern of

²⁸⁶ P.S. Juuti and T.S. Katko, *Water, Time and European Cities: History Matters for the Futures*, Watertime, EC, 2005; See also by same authors: *From a Few to All: Long Term Development of Water and Environmental Services in Finland*, 2004.

²⁸⁷ S. Trémolet, D. Binder, *La régulation des services d'eau et d'assainissement dans les pays en développement*, AFD, 2010.

²⁸⁸ OECD, *Financing and Pricing Water: The Roles of Government Policies, the Private Sector and Civil Society*, ENV/EPOC/GF/SD 2008, Dec 2008.

participants in the water sector in particular. By 2000, just five international companies accounted for 80% of the population served by private operators. From 1990-97, the same five won 53% of all contracts awarded to private water operators. In 2002 their share fell to 23% with a greater prevalence of local and regional actors and hybrids, for example, public companies operating abroad as private companies.²⁸⁹ By 2007, private water operators from developing countries were serving more than 40% of the developing country urban market (not including China, where there were hybrid contracts). By the end of 2007, some of the most active private operators had 'significantly retreated from developing countries' according to Philippe Marin's study of the sector for the World Bank.²⁹⁰

Marin and Izaguirre argued at the time that the enthusiasm, particularly for concessions, that characterized the 1990s had faded: "contracts often reflected excessive optimism by both private investors and Governments, and the socio-political difficulties of raising tariffs to levels covering costs were often underestimated. Financial markets were hesitant to provide nonrecourse financing for water projects, often requiring that financing be backed by the sponsors' balance sheets."²⁹¹ By 2005, 34% of investment commitments made since 1990 (11% in number) were either cancelled or under distress, i.e. under request for cancellation or in international arbitration.²⁹²

One of the reasons for the unpopularity of private sector operators was the frequency of renegotiations of contracts before their due date. This was particularly frequent in Latin America during the closing years of the last century.²⁹³ Another reason was a function not of the operator's performance but of the contracts that they were given which focused heavily on price as opposed to coverage. The contracts for the two zones of Manila for example, saw bids which set price levels of only 26% and 57 % of pre-bid levels. This meant that the connected populations, which were of course the better off, received a windfall, while the non-connected poor gained nothing.²⁹⁴

The decline of concessions was particularly interesting from the point of view of capital finance, for it is concessions that bring private finance capital, hence the long term nature of the contracts. Their decline indicated a shift to a more flexible involvement of the private sector, through leases, affermagés, or simple management contracts as set out in Table 1.

15.5 The performance of public utilities

What gave rise to the vogue for the private sector was a widespread failure of some incumbents in developing countries to provide the level of service that was in their mandate. Essentially this was a problem of connectivity arising from revenue starvation.

By the mid-2000s, surveys by Global Water Intelligence of over 100 cities at all levels of development found that about two fifths (and nine tenths in low income countries) did not recover even operations and maintenance costs. 30% paid some contribution to capital costs, but in low income countries this was very rare, only 3%.²⁹⁵ For electricity, the picture was more sustainable. Out of 84 countries surveyed by a World Bank team, almost a third of low income countries, did not cover operation and management costs. Globally 41% made a contribution to capital costs.²⁹⁶

The above shortfalls had either to be made up by Governments or costs were reduced by failure to maintain thus allowing the networks to deteriorate. So the consequences were even worse than the balance sheets demonstrated. First of all, below cost prices encouraged over consumption among customers (or at best discouraged conservation) often contributing to shortages. Secondly and most importantly, artificially low prices for both the poor and wealthy meant that no revenue could be generated to fund extensions to the networks.

Those who paid the price in terms of their daily lives were therefore the non-connected and unserved. But

²⁸⁹ OECD, *op. cit.*, 2008.

²⁹⁰ P. Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*. World Bank, 2009.

²⁹¹ Philippe Marin and Ada Karina Izaguirre, *Private Participation in Water, Toward a New Generation of Projects?* Gridlines, PPIAF, World Bank, Washington, September 2006.

²⁹² Marin and Izaguirre, *op. cit.*

²⁹³ J. Guasch, *Granting and Renegotiating Infrastructure Concessions*, World Bank Institute, 2004.

²⁹⁴ Marin, *op. cit.*

²⁹⁵ *Tariffs: Half Way There*, Global Water Intelligence, Oxford, 2004

²⁹⁶ K. Komives, V. Foster, J. Halpern, Q. Wodon, *Water, Electricity and the Poor: Who Benefits from Utility Subsidies?* World Bank, 2005

private sector participation did not solve this problem either, especially as contracts did not always specify network extension. It is questionable whether it will ever be more profitable to connect a new consumer than to just take profits from the existing network, or at least not incur losses by extending to the less profitable customers, unless a company is given an explicit requirement to increase coverage. In the absence of such requirements, or without the finance to implement them, the incumbents proved unable to meet the challenges of demography and urbanization. This was most vividly demonstrated by the development of peri-urban settlements in developing countries. It is such places that are the focus of the MDGs and the SDGs and by extension the UNGCP.

Given that energy, water and sanitation are essential services, and going without was not an option, the populations of unserved areas often had to make other less formal arrangements.²⁹⁷ The scale of this has often been underestimated partly because the informality (even illegality) itself, makes the service difficult to estimate, and partly because informal settlements grew so quickly and were sometimes seen as embarrassing or even viewed with hostility. The same was true of the small scale independent providers (SSIPs) that sprung up all over the world. They could be small piped or wired networks, sometimes running supplies illegally from the official networks; they could be point sources such as standpipes or battery chargers, or mobile distributors such as water vendors on bicycles or trucks, wood sellers, often gathering their own fuel sources. They could also be ‘frogmen’ operating often illegally in the absence of a sanitation system. Sometimes high proportions of populations in cities are served by drinking water SSIPs. During the first decade of this century the levels reached 44% in Jakarta, 60% in Nairobi, 66% in Conakry, 80% in Kartoum. Conversely, better served cities like Dakar (21%) saw lower proportions.²⁹⁸

One way of describing SSIPs is as being present by ‘default or design.’ There has been some shift towards

the latter as SSIPs are increasingly being seen as operating small public systems that need to expand or improve. A well-known example is that of the aguateros in Asunción/Ciudad del Este, Paraguay.²⁹⁹ Little by little, the informal services have been recognized and sometimes operate under licence, even as regulated sub-contractors within private concession contracts as was the case with Inpart Engineering in Manila.

15.6 Pricing and subsidies

Two of the main causes for of the underfunding of the utilities are affordability and the fear of consumer’s reaction to unaffordability. There are many estimates of an affordable percentage of disposable income. (such estimates are often theoretical, for the most expensive service is that which does not exist at all because it drives consumers towards the more expensive informal sector). At various times, the United Nations Development Programme has recommended a 3% limit of household income for drinking water, 5% has been commonly used in Latin America for both water and electricity.³⁰⁰ Energy poverty has been deemed to be above a 10% threshold in United Kingdom and that concept was been widely used in other European Union members. In fact, arbitrary limits can close down options. Where families spend far higher proportions, well in excess of 10% is widely reported in developing countries, as well as incur vast amounts of time fetching and carrying, then even 8% say for drinking water would be an improvement on the present situation, especially if the service were provided on site. The Africa Infrastructure Country Diagnostic (AICD) found that a monthly power and water bill of US\$ 10 would be enough to meet full cost recovery for typical household consumption in Africa and would absorb 1 to 4% of the incomes of higher income customers who currently enjoy those services. However, the same utility bill would absorb 7 to 15% of the household budget of the poor.³⁰¹ Cost recovery tariffs may well be beyond the means of the poorest and there is some evidence that if tariffs rise too far too fast then consumers ‘self-disconnect.’

²⁹⁷ D. Mitlin and D. Satterthwaite, *Urban Poverty in the Global South*, 2013.

²⁹⁸ M. Kariuki, J. Shwartz and M. Schur, *Reaching Unserved Communities in Africa with Basic Services*, Gridlines no. 9, PPIAF, June 2006.

²⁹⁹ B. Dardenne, *The Role of the Private Sector in Peri-Urban or Rural Water Services in Emerging Countries*, Global Forum for Sustainable Development, OECD, Paris, Nov. 2006.

³⁰⁰ Henri Smets, *Access to Drinking Water at Affordable Prices in Developing Countries*, Options Mediterraennes 2009. M. Fay and M. Morrison, *Infrastructure in Latin America and the Caribbean*, World Bank/PPIAF, 2007.

³⁰¹ S. G. Bannerjee and E. Morella, *Africa’s Water and Sanitation Infrastructure: Access, Affordability and Alternatives*, World Bank, 2011.

What are the unserved poor already paying for? AICD reported that: “in the largest African cities, alternatives to piped water supply are priced from 1.3 times as high for small piped networks to 10 to 20 times as high for mobile distributors.” For energy, non-connected consumers use more costly sources such as candles, kerosene, car batteries, wood or charcoal. In Mali, these sources cost ten times more per kilowatt hour than supply from the grid which only went to 13% of the population.³⁰²

This adds up to a clear example of the ‘poor pay more syndrome’ which has been described several times in this manual. It has several dimensions:

- The poor pay more per unit because they depend on high cost small scale independent providers;
- The better-off receive a subsidy from below cost network prices from which the poor are excluded;
- The poor may pay for those subsidies as taxpayers;
- Connection charges go up to recoup revenue when network running costs are below costs thus making it even more difficult for the poor to gain access;
- The non-connected poor waste time fetching and carrying; and
- The quality of alternative services to the poor will often be low and even dangerous.

Given that the poor are paying high unit prices it gives some sort of clue for eventually moving away from the present pattern of regressive subsidy to the better off and no service for the poorest. The AICD concludes: “If provided with access to utility networks, even at cost recovery prices, poor households would still be better off than they are today using alternative service. This suggests that ultimately, subsidisation of connection costs may be a more equitable and cost-effective way of targeting public resources.”³⁰³ Subsidising consumption rather than connection would then seem to be the wrong strategy. There are two approaches to move away from consumption subsidies while extending the networks and ensuring that the poor can

afford the cost: through ‘social’ tariffs or through direct subsidies to individual householders.

15.6.1 Tariff-based measures

Tariff-based measures provided by service providers to help low income consumers usually take the form of an initial tranche of consumption charged below cost price (or even sometimes at zero price) in a increasing/rising block tariff structure (IBTs or RBTs). One of the common criticisms of RBTs has been that they tend to be indiscriminate, in that all consumers receive them for their first tranche of consumption. For this reason, raising the threshold too high erodes the revenue base of the service.

Tariff based measures have been severely criticized for ‘errors of inclusion’ (subsidies going to people who are not defined as needy), and ‘errors of exclusion’ (needy consumers not receiving benefits to which they are entitled).³⁰⁴ For example, according to the Global Monitoring Report of the World Bank for 2014/15: “in low and middle income countries, blanket subsidies for energy (except for kerosene in low income countries) benefit the richest 20% of households six times more than the poorest 20%.”³⁰⁵ However, it is worth noting that are many families that hover on the brink of poverty, and for whom exposure to full cost recovery might thrust them back again.

There are examples of well targeted RBT thresholds which have sheltered poor consumers from the problem of rising tariffs without undermining the revenue of the service provider. For example, until recently, the Serbian electricity service provided a general low cost tranche below 350kWh per month that went to all users of the system, a classic RBT such as is found in many countries. During price increases in 2011, the consumption discounts shielded the poor, and the increase in electricity tariffs by 13.5 percent had only a small impact on electricity poverty.³⁰⁶ This is due partly to the fact that tariffs for the bottom consumption block remained unchanged, showing that the threshold was well chosen. Households that are below the poverty line in Serbia have particularly low electricity consumption, around 300kWh per month, much be-

³⁰² AICD V. Foster and C. Bricenio-Garmendia, *Africa's Infrastructure: A Time for Transformation, Summary of Main Findings*, World Bank, 2010.

³⁰³ AICD Foster, *et. al.*, *op. cit.*

³⁰⁴ For the most thorough analysis, see K. Komives, *et. al.*, *op. cit.*, World Bank, 2005.

³⁰⁵ *Global Monitoring Report*, World Bank, 2014/15.

³⁰⁶ A. Cojocar and C. Ruggeri Laderchi, *Balancing Act: Cutting Subsidies, Protecting Affordability, and Investing in the Energy Sector in Eastern Europe and Central Asia*, World Bank, 2012.

low the national average. So holding the bottom block tariff constant helped protect households at the bottom of the income distribution during a very difficult period for the Serbian society.

It is fair to argue that the RBT threshold is best situated somewhere around average consumption for poor households. Setting it at a higher level makes it more difficult to recoup revenue from consumers whose consumption may be above the threshold but who may nevertheless be hard-pressed.

15.6.2 Means tested assistance

An alternative to attempting to assist poorer households through prices is to do so through their incomes, a practice favoured by many World Bank and other experts, who prefer a neat differentiation between service provision on the one hand, and income support on the other.

The problem with this apparently simple logic is consumer resistance. Means tested benefits are invasive, expensive to administer and suffer from widespread failures of take up, usually only going to a minority of those eligible, even among much admired schemes such as the water and energy direct subsidies in Chile.³⁰⁷ Such subsidies often do not work partly because people dislike applying for them because they find them humiliating, and partly because of the sheer volume of documentation required. To reach a percentage figure of household income, there has to be a definition of that income, which is not a simple matter. Income needs to be defined over a given period to avoid a misleading picture. How long should that period be? Whose incomes should be assessed? The individual, parents, other household members? Should savings be taken into account?

Particularly ineffective have been sector-specific social assistance mechanisms payable by public authorities, often from social assistance offices, as they usually only deal with a relatively small proportion of a consumer's disposable income. If fuel poverty is the result of the inefficiency of the appliances and the quality of the housing, means tested social assistance bears little impact on this fundamental problem and puts the burden on the public purse to continue to pay for the in-

come support, while it lets inefficient household energy consumption continue. One efficient and sustainable way of proceeding would be to charge cost recovery tariffs and reducing energy consumption (and therefore holding bills steady) while shielding the poor. The Government of Hong Kong (China) offers assistance to certain categories of consumers to invest in energy saving. The great virtue of energy saving schemes is that, even if they have a wider 'trawl' in social terms than direct assistance through incomes or tariffs, there is a benefit to all in terms of reduced consumption and hence reduced pollution.³⁰⁸ And the better appliances and more energy efficient housing can be passed on for future use.

15.7 Access at the MDG/SDG interface

According to the United Nations' Millennium Development Goals Report 2015, 1.4 billion people in the world do not have access to commercial energy supply. About 660 million people use unimproved water sources and 2.4 billion do not have access to acceptable sanitation facilities. But the situation regarding telecommunications has transformed since the last manual. There are now 7 billion mobile phones in use, taking on ever more sophisticated functions. Partly as a result of this, the Internet is now emerging as the new public utility.

Progress has been made in correcting one of the greatest failures, namely integrating informal settlements. According to the United Nations MDG report 2015, over 880 million people are estimated to be living in slum-like conditions in the developing world's cities, compared to 792 million reported in 2000 and 689 million in 1990. The proportion of urban population living in slums in the developing regions fell from approximately 39 per cent in 2000 to 30 per cent in 2014. That sounds like progress and indeed, the corresponding MDG target has been met, but absolute numbers of urban residents living in slums continue to grow, partly due to accelerating urbanization, population growth and the lack of appropriate land and housing policies. Sub-Saharan Africa continues to have the highest prevalence of slum conditions of all regions, estimated at 55 per cent in 2014. Nevertheless, this

³⁰⁷ Komives *et. al.*, *op. cit.*, 2005.

³⁰⁸ See analysis for Hong Kong (China) Consumer Council, *Searching for New Directions: A Study of HK Electricity Market*, 2014.

represents a decline of almost 10 percentage points in prevalence since 2000. This is a case of 'running fast to stand still' and there are setbacks due to local or regional conflicts which have increased the prevalence of slum settlements. Iraq, for example, has experienced an increase of more than 60 per cent between 2000 and 2014.

15.8 Safeguarding the consumer interest

The above difficulties and proposals to solve them may overlook some rather basic issues around quality of service and customer care. Some of these have been taken up by ISO 24510 (2007) 'Activities relating to drinking water and wastewater services- Guidelines for assessment and improvement of service to users' which attempts to improve customer care. The hope underpinning the standard is that this will improve customer compliance including payment rates and set in train a virtuous circle of rising standards and widening networks. The objectives adopted by the consumer representatives for incorporation into ISO 24510 are worth spelling out for the standard has been widely adopted in Latin America and an analogous standard for energy services is under discussion at the time of writing.³⁰⁹

- The standard should be applied to '**non-reticulated**' systems, i.e. to those systems which are not necessarily physically connected and fully integrated. So it should cover services such as those drinking water services delivered by trucks or distribution of bottles, or systems of dry latrines and cess-pit emptying services. Furthermore if people are not served they should have the right to know when they will be served;
- The principle of **equitable distribution of service**. If the existing networks are subject, as many are, to cuts in supply then such cuts should be managed in an equitable manner, avoiding discrimination against poor districts which is common in many countries;
- There should be **contractual rights to service**. The contracts should be 'implicit,' that is not necessarily in the form of individualized

paper contracts for individual households. Of course contractual rights need to be written down in order for people to exercise their rights but the individual should be able to assert rights when not in possession of a written contract. This is of particular importance to the significant proportion of the world's adults that are illiterate;

- There needs to be **public participation in the regulation of the service**, not necessarily in its internal management, although that should not be ruled out where such models are developed such as cooperatives. This requires the development of forums for such participation and the release of relevant information in comprehensible form;
- **Payment methods should be developed to help those on low incomes**. For example it is well established that consumers on low incomes much prefer to make frequent small payments, and in doing so often prove to be no less willing to pay than more wealthy consumers; and
- **Prices need to be set in function of a range of factors including capacity to pay of the population, costs of production, historic prices and rate of return on capital** (regardless of public or private). There is no fixed answer as to which factor should predominate that is a matter for local political decision.

One very basic improvement which can mitigate the pressure for tariff improvements is raising collection rates. Extremely low levels of payment have been reported from many developing and transitional economies, some as low as 35%.³¹⁰ Raising tariffs can be very provocative when it is widely known that many consumers choose not to pay, so improved collection both raises revenue and, by moderating tariffs, diminishes the incentive to avoid payment. In East Africa, the rise of the M-Pesa system has allowed service providers such as Kenya Light and Power to introduce payment from mobile phones, which will bring with it the benefit of avoiding lengthy queues at offices. If revenue is to be improved, it is essential that payment is made easier.

³⁰⁹ R. Simpson, *The ISO Draft Standard for Water and Waste Water Services*, World Bank Institute, Kampala, Uganda, 2007

³¹⁰ AICD, *op. cit.*, 2011.

Further innovations, controversial to some involve a choice of service levels (such as hours of service, voltage of electricity,) which might enable some service to be provided when otherwise none is on offer. This option has been offered on the basis of with village level consultation in remote areas of Eastern Senegal for example.³¹¹ This is open to the charge of double standards but at least provides service to disadvantaged consumers. The UNGCP envisage different levels of service in Guidelines 72 and 76 covering water and energy.

Steps regarding service levels may be taken in consultation with consumers, or rather with potential consumers and there is a rich tradition of consumer participation in the governance of these sectors, which the UNGCP acknowledge, again in Guidelines 72 and 76. A comprehensive study by van Ginneken, et al. sets out the various gradations of consumer involvement in the water sector,³¹² including information; consultation; participation; and redress or recourse. Some participatory schemes have been a great success in Porto Alegre in Brazil is often cited. On the other hand, one of the greatest public sector success story, that of Phnom Penh water sanitation, did not use the participatory model at all, instead it was “lead from the front.”³¹³

15.9 Introducing competition in utility services.

The policy innovations that have been adopted in recent years, for example competing networks, common carriage and retail competition plus new ownership models (the separation of assets from operations wherein supply and distribution are separated and managed by different firms,) have been put forward as the means of bringing market efficiency to publicly owned assets. It has been questioned in chapter 7 how successful the introduction of competition has been in the utilities sector, partly because of the emphasis on price at the expense of coverage, which this chapter has clearly seen as a crucial issue.

The clear exception to these doubts is telecoms where

the astonishing development of mobile telephony under a more liberalized regime than the old fixed line networks has been an extraordinary success, and has spun off, particularly in East Africa into further successes such as the development of mobile banking and other financial services. This is largely, perhaps almost entirely due to the technological development which has reduced the need for large upfront investment and low entry costs both for service providers and for consumers too. It's worth bearing in mind that the vast majority of African mobile phones have been based on pre-payment of SIM cards which has greatly reduced the commercial risk for the providers.³¹⁴ In other words, the telecommunications sector has become less and less of a natural monopoly. There are however, risks that new monopolies may emerge where there are tie-ins of financial services and telecommunications within the same holding companies and this is now raising concerns in Kenya and even in Somalia where remittances are a major source of income operating through telephone transmission. These issues will require attention in the coming years and competition principles will need to be brought to bear.

15.9.1 Retail competition

Retail choice is a recent policy which emanated from the United Kingdom at the end of the last century and that has been adopted by the European Union through the energy directives. So far most consumers have chosen to stay with regulated prices where these have been on offer, notably in France. The European Commission staff paper of 2011 reports that: “the switching rate is generally low especially at household level with very few exceptions. This can be ascribed to the fact that the prices offered by different suppliers are not sufficiently attractive in economic terms to justify the consumers’ effort to move to a new supplier... This analysis is also confirmed by the fact that the switching rates based on volume are higher than the ones calculated by meter points therefore indicating that at higher levels of consumption the convenience to switch to a new supplier is a bigger stimulus.”³¹⁵ In other words, the main beneficiaries of consumer choice are likely to

³¹¹ Agence Senegalaise d’électrification, *Etude du plan d’électrification de la concession de Matam-Ranerou-Bakel*. 2010.

³¹² M. van Ginneken, et al., *Ways to Improve Water Services by Making Utilities More Accountable to Their Users*, World Bank Water Working Notes, no. 15, 2008.

³¹³ Ek Sonn Chan, et al., *Sharing the Reform Process: Learning from the Phnom Penh Water Supply Authority*, Mekong Water Dialogues, Publication no. 3, 2010.

³¹⁴ AICD, *op. cit.*

³¹⁵ 2009-2010 *Report on Progress in Creating the Internal Gas and Electricity Market*, Commission Staff Document, June 9, 2011, p. 10.

be the large industrial or commercial consumers. Furthermore, the cost of setting up switching operations is very high. In 1990 before retail competition for small customers was allowed in the United Kingdom, only 5% of domestic consumers bills went to meet supply costs such as billing and meter reading. By mid-way through the last decade the level was 30%.³¹⁶ Effectively, those who stay with their existing suppliers are cross-subsidizing those who switch and gain.

Retail competition has sparked interest in a new role for consumer associations, as collective purchasers in energy auctions. Recent examples are the Spanish *Organización de Consumidores y Usuarios* and the French *Union fédérale des consommateurs*. The associations register interested consumers and then negotiate collectively on their behalf obtaining lower tariffs and better conditions that would be available to isolated consumers.³¹⁷ The number of final contracts is rather smaller than the registers of interest (about half in the case of France significantly less than that in Spain,) but the savings for those who enter into contracts can be significant: 196 euros per annum in the first round of auctions in France in 2013. Such collective activities can work well for members, but can they benefit non-members too? The associations argue that the pressure they bring to bear puts downward pressure on companies so all consumers can gain. However, given that retail competition seems to be bringing with it considerable (though largely hidden) administrative costs, the overall gains for all consumers are yet uncertain.

15.9.2 Exclusivity

The failures of competition policy as applied to utilities do not necessarily mean that the solution is to maintain exclusivity. A dramatic case from the slums of Dar es Salaam in Tanzania³¹⁸ shows that opening markets and accepting a plurality of service providers (including informal ones) is crucial for the wellbeing of con-

sumers. Indeed, imposing exclusivity could have the perverse effect of reducing standards. The service in question in this case was latrine and cesspit emptying, where the city had a monopoly. As the service was unable to keep up with demand, richer clients operated a system of 'express' payments for the pits to be emptied with vacuum equipment while the poor would employ informal 'frogmen' to empty the pits manually and they would then dump the ordure illegally, which led to protests from those nearby. At times the frogmen were attacked, and their already unpleasant and dangerous work often had to be done under cover of darkness. One of the authors studying this case, Mukame Kariuki, advocated that municipalities should relinquish their monopolies thus legalizing alternative provision through a legal framework, such as incorporating community-based organizations. In due course, her advice was partly followed (licensing, access to depots) and the situation improved to the extent that charges fell and the numbers served increase. Reliance on a legal monopoly backed up technical standards and formal procedures had in this case proved to be counter-productive and forced competent independent providers out of business.

15.10 Conclusion

Open markets for utilities are becoming more common in both developing and developed countries. As telephones have gone mobile and onsite energy production proliferates through decentralized power production, the relationship between supplier and consumer fundamentally changes. Where consumer choice has become feasible, as in the telecoms sector, consumer protection policy shifts from utility regulation towards trading standards and competition policy. This is still largely unknown in water and sanitation, while energy is starting to occupy an intermediate position as technology enables it to decentralize. The utility models are becoming ever more variable both between sectors and within each line.

³¹⁶ Prof. S. Thomas, *The Grin of the Cheshire Cat*, PSIRU, Business School University of Greenwich.

³¹⁷ http://cincodias.com/cincodias/2016/02/02/empresas/1454437568_774472.html

³¹⁸ UFC Que Chosir, *Gazmoinscherensemble.fr* presentation to World Consumer Congress Brasilia, 2015.

³¹⁹ PPIAF: Lessons Learned: *Small-Scale Service Providers have a Contribution to Make*, in series: *Lessons Learned from PPIAF Activities: Pricing and Affordability in Essential Services*, PPIAF, 2012.

CHAPTER 16 FOOD FOR ALL

In this module the following issues are discussed:

- *The right to food*
- *Food in the UNGCP*
- *Food security*
- *Consumer concerns with food safety*
- *Food standards mechanisms*
- *Consumer concerns with genetic engineering*
- *Food legislation*

16.1 The right to food

The right to food is recognized in international law, in particular Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). In 1999, the United Nations Committee on Economic, Social and Cultural Rights more clearly defined as “physical and economic access to food, including access to food of adequate quality and quantity, and having the means to obtain it.” As a human right, access to food constitutes an individual claim against the State, and generates individual entitlements and related State obligations that eventually may be enforceable in national and international courts.

16.2 Food in the United Nations Guidelines for Consumer Protection

Food’s most conspicuous presence in the UNGCP is in Section V. K on measures relating to specific areas where it is listed in Guideline 69 as requiring governmental priority and, along with other products needing: quality control, adequate and secure distribution facilities, standardized international labelling and information, as well as education and research programmes. Guideline 70 pointedly calls for Member States to take into account “the need of all consumers for food security” but the detail concentrates mainly on standards as issued by the Food and Agriculture Organization (FAO), the World Health Organization (WHO) and the international food standards body Codex Alimentarius, “or in their absence, other generally accepted interna-

tional food standards.” Guideline 5a) establishes a new ‘legitimate need’: “access by consumers to essential goods and services,” which should be read to include food; immediately followed at 5b) by “the protection of vulnerable and disadvantaged consumers.” Other references to food include Guideline 21: adulteration of foods, as a practice to be prevented and monitored, also mentioned in Guideline 44a) as an element of consumer education alongside food-borne diseases.

16.3 Malnutrition and food security

FAO defines food security as food that is safe, nutritious and culturally acceptable and is available, accessible and affordable to all people.

16.3.1 Hunger facts

According to the 2015 MDG report:²¹⁹

- In 2015, an estimated 825 million people still live in extreme poverty and 800 million still suffer from hunger;
- Over 160 million children under age five have inadequate height for their age due to insufficient food; and
- One in seven children worldwide is underweight, down from one in four in 1990.

This means that nearly one in nine individuals do not have enough to eat. The vast majority of them (780 million people) live in the developing regions. Startling though this might be, projections indicate a drop of almost half in the proportion of undernourished people

²¹⁹ Prof. [http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf)

in the developing regions, from 23.3% in 1990–1992 to 12.9% in 2014–2016, which is very close to the MDG hunger target.

China alone accounts for almost two thirds of the total reduction in the number of undernourished people in the developing regions since 1990. Northern Africa is close to eradicating severe food insecurity. In contrast, the pace of reduction in the Caribbean, Oceania, Southern Asia and sub-Saharan Africa has been too slow to achieve the target. Southern Asia faces the greatest hunger burden, with about 281 million undernourished people

In Western Asia, a starkly different pattern emerges. Despite a relatively low number of undernourished people and fast progress in reducing food insecurity in several countries, projections indicate that the prevalence of undernourishment will rise by 32% between 1990–1992 and 2014–2016 due to war, civil unrest and a rapidly growing number of refugees.

16.3.2 Obesity as malnutrition

A generation ago it would have seemed incongruous to follow the previous section with a discussion on obesity. But obesity has come to be seen as a form of malnutrition and is not confined to the most developed countries. High profile Government actions to apply sugar taxes in Mexico in particular³²⁰ and also the announcement by the United Kingdom Government in their future budget statement in 2016, of a proposed similar tax, have brought the issue into sharp relief. According to OECD health facts, in 2012 the most obese over 15 population in the OECD is Mexico, one of its less developed members, where over 70% of the over 15s are overweight or obese.³²¹ The Mexican level is just above the United States, but neighbouring Canada is 50%.

Worldwide obesity has nearly doubled since 1980. 44% of diabetes, 23% of ischaemic heart disease and up to 41% of certain cancers are attributable to over-

weight and obesity.³²² There are about 42 million children under 5 who are overweight or obese, of which 35 million are in developing countries. The WHO has issued recommendations on marketing of food and beverages to children, including self-regulatory measures which are not enforceable in judicial or regulatory terms.³²³ Consumer organizations and campaigners developed a draft Convention in 2014, explicitly modelled on the WHO Framework Convention on Tobacco Control, pointing out that unhealthy diets now rank above tobacco as the world's leading drivers of preventable non-communicable diseases (NCDs).³²⁴ The measures put forward are wide ranging, including education, information, advertising controls, nutritional standards in public institutions such as schools, and other economic measures including taxes and subsidies.

Although convention status is stronger than recommendations, the wording of the draft Convention suggests that requires measures such as taxation rather. The Mexican tax is case study for lobbying by civil society, using carefully marshalled evidence, resulting in an excise tax which will raise the price of SSBs (sugar sweetened beverages) by about 10%.³²⁵ The trajectory of the debate around obesity is one that clearly extends beyond the more developed countries.

16.3.3 Realising food security

Food security is often associated with food self-sufficiency and the need to produce more food. However in reality it has much stronger links with issues of poverty, employment and income generation. Consumers facing food insecurity are not confined to those who have deficient diets at a given point in time. They include those whose access to food is insecure or vulnerable, those who are in danger of inadequate diets.

Heavy reliance on food imports renders a country vulnerable to price and supply fluctuations, to political upheavals, and economic and financial manipulations by powerful Governments and transnational corpora-

³²⁰ See Elisabeth Donaldson, *Advocating for Sugar Sweetened Beverage Taxation: A Case Study of Mexico*, Johns Hopkins, 2015.

³²¹ Obese people are defined for these purposes as "inhabitants with excessive weight presenting health risks because of high proportions of body fat," OECD Health Facts, 2012.

³²² World Obesity, *Recommendations Towards a Global Convention to Protect and Promote Healthy Diets*, World Obesity/CI 2014.

³²³ WHO, *Set of Recommendations on the Marketing of Food and Non-Alcoholic Beverages to Children*, endorsed by WHO Member States at the Sixty-Third World Health Assembly, resolution WHA63.14, 2010.

³²⁴ World Obesity/CI, *op. cit.*

³²⁵ Donaldson, *op. cit.*

tions. With the diminution of import restrictions and lower tariffs, many imported and highly subsidized food crops are cheaper compared to locally grown varieties. Such an influx of cheaper imports may increase consumer choice, but may also undermine the livelihood of local producers who will not be in a position to compete. The issue of export subsidies by rich countries, overwhelmingly the United States and European Union, has been a sticking point in trade negotiations which stalled, among other issues, the WTO Doha Round negotiations. Export subsidies are often set in function of the gap between internal prices in the exporting countries and global prices so that when global prices are low the rich country exports remain competitive because of the subsidy. In November 2015, an agreement was reached in the WTO to phase export subsidies out with immediate effect, as they constitute a major impediment to the development of trade. It is expected that enhanced interdependence will encourage States to find common and shared solutions to food security.

16.4 Consumer concerns with food safety

Food safety is a critical public health issue and consumers must be protected against foods and food production processes that are hazardous to health or life. The growing movement of people, live animals and food products across national boundaries, as well as the rapid pace of urbanisation in developing countries, changes in food handling, dietary change and the emergence of new pathogens contribute to greater food safety risks. The relative importance of these risks varies according to climate, food practices, level of income and social infrastructure. Many of the risks are greater in developing countries where poor sanitation and unsafe water and associated food contamination are major causes of diarrhoeal diseases contributing to approximately 1.7 million child deaths. Diarrhoea is the second cause of death among children under five.³²⁶

Food safety risks related to modern agricultural methods are also on the increase. Pesticides pose health risks through both direct contact in farming communi-

ties from exposure through farm work and spray drifts and through toxic residues in food and drinking water. Hormones, veterinary drugs and antibiotics are used in animals to treat illnesses or promote growth but can leave residues in foods which end up on consumers' plates. Unhygienic practices in food production, processing, transport and storage can also result in contaminated foods.

New technologies have raised many valid concerns for consumers about safety for human consumption, implications for the environment and potential social and economic impact. Some new technologies benefit the health and economy of communities and contribute to sustainable development. However, countries should be provided with the results of objective, rigorous assessment of the potential risks associated with these technologies before being asked to accept them.

Two important safety issues plaguing food systems are:

- Microbiological hazards and foodborne diseases have been reported in many countries over the past few decades as a result of micro-organisms transmitted mainly by food, such as *Salmonella* spp. and *Campylobacter* spp; and
- Chemical hazards remain a potential source of food-borne illness. Chemical contaminants in food include natural toxins, such as mycotoxins and marine toxins, environmental contaminants, such as mercury and lead, and naturally occurring substances in plants. Food additives, micronutrients, pesticides and veterinary drugs are deliberately used in the food chain; however, assurance must first be obtained that all such uses are safe.

Building capacity in food safety is essential in most countries, especially in developing ones. Both positive and negative experiences from countries with well-developed food safety systems should be used as a means to improve systems globally. Food borne disease has a significant impact not only on health but also on development.

³²⁶ WHO, *Diarrhoeal Diseases*, Fact Sheet no. 330, 2013.

16.5 Food standards mechanisms

The Codex Alimentarius was established by FAO and WHO in 1962 in order to harmonize food standards between countries. Its purpose is to protect the health of consumers (through ensuring the provision of sound, wholesome food) and ensure fair practices in the food trade. Codex's membership includes the great majority of countries accounting for 98% of the world population. There are several committees within Codex: on meat and poultry hygiene; on food additives and contaminants; on pesticide residues; on residues of veterinary drugs in foods; on food hygiene; on animal feeding; on biotechnology; and on general principles.

The status of the Sanitary and Phytosanitary (SPS) Agreement was reinforced by the WTO treaty in 1995, having previously been a code. One of the key debates around the SPS and trade measures to protect food safety has been the 'precautionary principle,' also known as the 'precautionary approach.' It is recognized in Article 5.7 that the state of scientific knowledge may be insufficient to make a definitive judgment whether or not to block a product, but that a precautionary approach can be taken in the meantime. The article reads: "in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information but shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly." The wording indicates that the precautionary approach should be for a finite period and that efforts have to be made for the risk level to be clarified.

16.6 Consumer concerns with genetic engineering

Genetic Engineering (GE) is a revolutionary technology. The fundamental difference between conventional breeding and genetic manipulation is that conventional breeding involves transferring genetic material between similar or closely related species whereas with

genetic engineering, genetic material is transferred across species barriers (e.g. between various species of viruses, bacteria, plants and animals).

Fears have been expressed that large-scale monoculture of genetically modified (GM) crops may have serious adverse implications on the sustainability of biodiversity, the ecological balance of life support systems, wildlife, and the environment. GM foods could exacerbate health problems such as the proliferation of antibiotic resistance from the use of antibiotic-resistant gene markers. Controls were put in place in many jurisdictions to protect the consumer right to information, including labelling of GM foods and mandatory labelling and segregation by exporting countries of their export products. The multilateral Cartagena Protocol on Biosafety (2000) requires indication of 'living modified organisms' in the event of cross-border trade with scope for application of precautionary measures.

Jurisdictions that have implemented labelling legislation include Japan, Republic of Korea, Taiwan Province of China, New Zealand, Norway, Switzerland, Israel and the Russian Federation. The list also includes GM crop producing countries such as China, Australia and Brazil. In the European Union, labelling is required and sale is allowed, but the situation regarding production is complicated by national policy so that major agricultural producers as France, Germany, the Russian Federation, Italy, Hungary, ban the cultivation of GM crops, while others allow it, such as Spain and England. Notable absentees from the list of countries with labelling obligations are Argentina, all of North America, much of the Middle East (except Saudi Arabia) and most of Africa, (not including South Africa).³²⁷ Some 38 countries are reported as banning cultivation, including major agricultural producers the Russian Federation and Turkey.³²⁸ In contrast, 28 countries are reported as producing GM crops including such major agricultural producers as the United States, Argentina, Australia and Canada.³²⁹ These overlaps of production (or not,) labelling (or not,) and merchandising are extremely complex for consumers to make informed choices in a globalized marketplace.

³²⁷ <http://www.justlabelit.org/right-to-know-center/labeling-around-the-world/2016>

List derived from data gathered by the Centre for food safety.

³²⁸ <http://naturalrevolution.org/list-countries-banned-genetically-modified-food/2016>

<http://sustainablepulse.com/2015/10/22/gm-crops-now-banned-in-36-countries-worldwide-sustainable-pulse-research/#.VOGsgjMrLZu>

³²⁹ <http://www.genewatch.org/sub-532326> (October 2015).

16.7 Food legislation

In order to have a comprehensive, integrated approach, legislation must cover all aspects of the food production chain: primary production, processing, transport, distribution as well as sale and supply of food and animal feed. At all stages, the legal responsibility for ensuring safety should rest with the operator. Procedures for food safety should include a rapid alert system and identifying measures to be taken in emergencies and for crisis management.

There are several fundamental goals for a regulatory approach that covers the entire food chain. The European Union for example identifies the following as general objectives of its food law:

- To protect human life and health as well as consumer interests;
- To ensure fair trading;
- To achieve free movement of food in the Community; and
- To implement international standards.

Major components of a national food control system necessary for an effective national system can be summarized as:

- A modern food legislation;
- A co-ordinated central Government policy towards food law;
- An effective enforcement system; and
- Adequate supporting bodies.

Consumer concerns with processed animal and plant based food products are as follows:

- Safety;
- Conditions of production;
- Information provided to the consumer;
- Likely immediate or delayed effect on health (i.e. presence of additives, pesticides, antibiotics, growth hormones etc.); and

- Particular health sensitivities of a specific category of consumers (e.g. diabetics, heart patients, people with allergies, etc.).

Governments must thus regulate areas of food and feed to ensure the above concerns are addressed.

A vital part of the food legislation is the incorporation of labelling practices to inform and educate the consumer as discussed in chapter 10. Safety plays a particularly prominent role for consumers with specific requirements as a result of health concerns.

Gradually, food policy has shifted from food safety to 'diet safety,' particularly as concerns have grown about obesity. Globally, dietary patterns are changing as consumers prepare less food from raw ingredients and buy more processed, pre-packaged food. In the last decade global sales of pre-packaged foods have increased by 92%, reaching 2.2 trillion United States dollars in 2012. The increase in the production, promotion and consumption of those processed foods that are unhealthy - energy dense, nutrient poor and high in fat, salt or sugar- has become a global driver of unhealthy diets in high, middle and low-income countries. For consumers of pre-packaged foods who wish to make informed dietary choices - such as identifying which foods are high in fat, salt and sugar, or choosing the healthiest option from a range of packaged foods - the nutrition information provided on food packaging is key.³³⁰

Food labelling legislation must ensure the following information is available on labels:

- Ingredient list;
- Additives;
- Genetic modification;
- Minimum durability indication/ expiry date;
- Net content;
- Information of country of origin, manufacturers, packers and sole agent; and
- Nutrition labelling

³³⁰The Economist, 2012, *Food For Thought* [online], Available at: <http://www.economist.com/news/special-report/21568064-food-companies-play-ambivalent-part-fight-against-flab-food-thought>

R. Moodie, et al., *Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries*, The Lancet, 381, 9867, 2013.

D. Stuckler, et al., *Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco*, PLoS Medicine 9,(6): e1001235, 2012.

Consumers International, *Nutrition Labeling on Pre-Packaged Foods*, World Consumer Rights Day 2015, briefing no. 4.

16.8 Conclusion

Millions of people still go short of food or live at the risk of disruption to food supplies. Progress is being made towards removing the trade distortions which contributed to such insecurity, but there are other larger problems such as climate change which mean that the risks are always present. The debate around malnutrition has widened to include obesity, which is not restricted to the richest countries and this in turn means that the focus has shifted from safety of products to the balance of diets, a much more subtle concept which has led to issues around food marketing. Despite the growing complexity around the provision of food to consumers efforts should not distract towards ensuring that individual products are safe. Ultimately, the control of food systems in each country is dependent on their national food policy and legislation. Although efforts at the international level have been taken to introduce standards through the Codex Alimentarius Commission, the implementation and level of control differs widely within and between countries as a result of the level of development.

In summary, to protect consumers against food insecurity and against unsafe foods that threaten life or health, there is a need to:

- Assure access to clean and potable water and sanitation for all;
 - Ensure access to food supplies through maintenance of supply stocks in case of emergencies;
 - Apply the recent agreements on agricultural export subsidies;
 - Develop controls over marketing of food, particularly to children.
 - Develop policies to deter consumption of excessively sweetened beverages.
 - Support the development of national food control systems which are in line with international norms, both in the interests of local consumers and to facilitate participation in international food markets;
 - Ensure transparency, openness and participation of stakeholders in the risk analysis process to ensure an effective precautionary approach can be followed;
 - Encourage and enable consumer participation in setting national and international food standards;
 - Set up national Codex Alimentarius committees and hold public meetings in which all interested parties, including consumers, can feed into national positions on issues pending before Codex bodies;
 - Ensure that food is safe and presented and labelled in ways that do not deceive consumers;
 - Ensure that any food health claims should be clearly defined, easily understood, truthful and verifiable; and
 - Measures taken to combat food-borne disease should be effective, safe, cost-effective, environmentally sustainable and acceptable to consumer.
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CHAPTER 17

CONSUMER PROTECTION IN THE HEALTH CARE DELIVERY

In this chapter the following issues are discussed:

- *Health in the UNGCP*
- *Health as a basic human right*
- *Public health context*
- *Health care financing*
- *Essential medicines*
- *Patient rights*
- *Criteria for assessing health care delivery*
- *Health and consumption*

17.1 Health care delivery in the United Nations Guidelines for Consumer Protection

The link between consumers and their health is mentioned by the UNGCP in the context of dangers to consumer health from goods and services rather than consumers' use of health services. Resolution 70/186 recognizes: "the importance of combating substandard, falsely labelled, and counterfeit products that pose threats to the health and safety of consumers and to the environment," and Guideline 5c) lists as a legitimate need: "the protection of consumers from hazards to their health and safety." Guideline 44 lists health as an element of consumer education, and Guideline 53 refers to: "the development and use of national and international environmental health and safety standards for products and services." Guideline 56, which is part of Section H on 'promotion of sustainable consumption,' is far-sighted where it encourages Member States to: "promote awareness of the health-related benefits of sustainable consumption and production patterns, bearing in mind both direct effects on individual health and collective effects through environmental protection." Finally, Section V.K on measures relating to specific areas refers to issues of concern for health, such as food, public utilities, and pesticides. The nearest that the UNGCP get to health services is the inclusion of pharmaceuticals but even there, in Guideline 74, the text concentrates on

pharmaceutical products and 'integrated national drug policies' rather than the context of health services, on which the Guidelines are silent.

17.2 Health as a basic human right

The right to health is recognized in numerous international instruments, including Article 25.1 of the Universal Declaration of Human Rights which affirms: "everyone has the right to a standard of living adequate for the health of himself and his family, including food, clothing, housing, and medical care and necessary social services." The International Covenant on Economic, Social and Cultural Rights provides in Article 12.1 the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

The right to health is also recognized, *inter alia* in:

- Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1963;
- Articles 11.1(f) and 12 of the Convention on the Elimination of all Forms of Discrimination against Women of 1979;
- Article 24 of the Convention on the Rights of the Child of 1989; and
- Article 25 of the Convention on the rights of persons with disabilities of 2006.

Box 23 - Scope of the right to health care

The right to health and the right to health care are distinct, and both are important.

The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee on Economic, Social and Cultural Rights interpreted the right to health as an inclusive right to:

- timely and appropriate health care;
- safe and potable water;
- adequate sanitation;
- adequate supply of safe and nutritious food;
- housing;
- healthy occupational and environmental conditions;
- education and health-related information, including on sexual and reproductive health;
- participation in all health-related decision-making at the community, national and international levels.

Source: Committee on Economic, Social and Cultural Rights Twenty-second session Geneva, 25 April-12 May 2000 General Comment No. 14 (2000) The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights).

The State is seen as bearing the ultimate responsibility to deliver the basic services to promote health, prevent illnesses and to provide the necessary environment to cure illness and rehabilitate the sick. Individual consumers also have moral responsibilities to promote and protect their own health, although not to the extent this can or should be translated into a precondition for treatment. The ECOSOC interpretation cited above occupies common ground with the UNGCP in including not only health services, but also areas of context affecting public health such as utilities supplying water sanitation and energy. The importance of the wider context is discussed in chapter 16 on food as regards nutrition.

17.3 Public health context

The wider public health context is well known: for example, investment in water and sanitation in particular can pay huge dividends in terms of public health. The WHO commissioned cost-effectiveness studies from the Swiss Tropical Institute and estimated that each USD invested would give an economic return of between US\$ 3 and US\$ 34, depending on the region.³³¹

Even the best health services find it difficult to com-

pete with a poor public health environment, such as air pollution, cross-contamination of water and sewage, access to clean energy and food security. Many of the world's health services could be run more economically if greater attention were paid to public health as a generic issue not simply as a medical service.

All coherent national health policies will direct the allocation of limited resources to the health care which is best delivered to the people. The WHO describes a national health policy framework as:

- Identifying objectives and addressing major policy issues;
- Defining respective roles of the public and private sectors in financing the provision of health care;
- Identifying policy instruments and organizational arrangements required in both public and private sectors to meet system objectives;
- Overseeing the agenda for capacity building and organizational development; and
- Providing guidance for prioritising expenditure, thus linking analysis of problems to decisions about resource allocation.

³³¹ Costs and Benefits of Water and Sanitation Improvements at Global Level, WHO, 2004

Many of the complex and often intractable problems faced by health care systems in developing countries are a result of piece-meal policies. The above issues tend to be outside of the remit of most consumer protection agencies and fall within the Ministries of Health. But they are of concern to consumer associations and above all, to consumers themselves.

17.4 Health care financing

The WHO World Health Report 2015 showed how resources allocated to health systems are highly unequal to the distribution of health financing. Low income countries (LICs) reported annual expenditure per capita in 2012 of only US\$ 32 compared with a global average of US\$ 1,025 on health spending, and US\$ 4,632 in high income countries (HICs). The Health and Development research centre HLSP extrapolates estimates the cost of essential health packages for 2013 of about US\$ 40 per capita, not including specific 'upgrades' such as anti-retroviral therapy (ART) for HIV/AIDS.³³² The LIC figure of US\$ 32 then looks worrying low. Even within the OECD expenditure figures per capita per annum vary greatly, with the United States spending almost US\$ 9,000 per capita per year, Norway and Switzerland just under US\$ 6,000 and the OECD average US\$ 3,500. Among the BRICS, the Russian Federation spends about US\$ 1,800 and Brazil US\$ 1,600.

Mechanisms to finance health care delivery vary greatly. They range from general taxation, (including donor funded public health programmes in the LICs,) compulsory social insurance, private health insurance and simple direct payment out of pocket. The WHO World Health Report indicates clearly the importance of social security payments in health systems of those countries that can afford to set them up. The global percentage is 59%, demonstrating the pivotal role of social security and two thirds (66%) of Government expenditure on health comes from social security budgets in the HICs. But it only accounts for 3% in the LICs. Generally speaking, the correlation of national income and resources spent on health far outweighs the differences in methodology of funding. So the central Government

contribution to health spending (58%) is notably higher in the HICs at 61% than in the LICs and LMICs both below 40%. Conversely the LIC and LMICs both exceed 60% for private outlays.³³³

There is clearly a need to ensure that those who cannot pay are not denied access to care. But means tests are likely to face the problems discussed in chapter 15 on utility services, including high administrative costs. The MDGs have seen successful achievement (for example malaria) and would appear to be based on systematic programmes rather than individual entitlements. As with public utilities, a relatively successful model from the welfare States cannot simply be transferred, at least not quickly. In the poorest countries, general programmes and 'contextual' public health measures are essential.

17.5 Essential medicines

17.5.1 Access to medicines

To uphold access to affordable, quality medicines, laws pertaining to pharmaceuticals, including intellectual property rights and rational drug treatment, should be made consistent with the promotion and realisation of public health objectives. As already noted, the UN-GCP cover pharmaceutical products in Section V.K.

It is the case that a good number of health care systems are failing to meet the target 8e) set out in the MDGs of providing access to affordable drugs. For low income countries, pharmaceuticals represent around 30% of their health budget,³³⁴ but the WHO estimates that the poorest 71% of the world's people across LICs and LMICs, benefit from only 11% of the medicine expenditure. (Conversely, HICs account for 79% of global pharmaceutical expenditure). There is only availability of affordable essential drugs for one third of people in the public sectors and two thirds in the private sector, where prices may vary from 2.5 to 6.5 times the international reference price.

The problem of lack of access is particularly acute in least developed countries that do not have the pro-

³³² C. Waddington, *Essential Health Packages: What Are They For? What Do They Change?* HLSP Institute, 2013.

³³³ *World Health Report*, WHO, 2015.

³³⁴ *Access to Affordable Essential Medicines*, WHO; Access indicators developed by the World Health Organization are available from <http://www.un.org/esa/policy/mdggap/appendix.pdf>

fessional, financial and technological resources to undertake the manufacturing of medicines. Lack of an adequate domestic market size compounds the problem. All of the LDCs and the vast majority of the developing countries do not have the capacity to produce therapeutic ingredients for the manufacture of pharmaceutical products. Most of these are also unable to even produce finished products from chemical intermediates.

17.5.2 Drug prices and intellectual property

The UNGCP Guideline 74 refers to 'licensing arrangements' as part of the range of instruments available for the development of 'integrated national drug policies' and recommends that: "measures should also be taken, as appropriate, to promote the use of international non-proprietary names (INNs) for drugs, drawing on the work done by the World Health Organization."

One of the obstacles to universal access to medicines is the high price of patented medicines compared with their generic equivalents. The protection of intellectual property rights in the pharmaceutical field falls under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of 1995.

The TRIPS agreement was based largely on existing intellectual property law but its inclusion in the GATT negotiations (which preceded the establishment of the WTO) brought to bear the possibility of trade sanctions under the dispute settlement machinery.

At the time of Doha negotiations in 2001, the world was going through a health emergency with the epidemic of HIV/AIDS. Article 31 of the TRIPS allows for compulsory licensing³³⁵ authorized by Government, but only where the party applying for a licence has tried to negotiate a voluntary licence with the patent holder on reasonable commercial terms. Only if that fails can a compulsory licence be issued, and even when a compulsory licence has been issued, the patent owner has to receive 'adequate remuneration.' In extreme emergencies, the voluntary negotiation phase can be by-passed and compulsory licensing instigated

from the outset, while still requiring adequate remuneration to be paid.

The Doha declaration on TRIPS and public health, which evolved into an agreement at the Hong Kong (China) WTO summit in 2005, clarified the flexibility of WTO members to define the occasions of need for compulsory licenses. This included the following provisions:

- Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted;
- Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency; and
- WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.

The position of the WHO is that regardless of whether or not they are used frequently, provisions for compulsory licensing are needed, because they will encourage the patent owner to behave correctly.³³⁶ They give a sign to the patent owner that in the case of abuse of rights and/or non-availability of the product, a third party could be allowed to use the invention; this prevents malpractice and misuse of the monopoly rights. In fact, one of the most important aspects of a compulsory license system is its impact on the actual behaviour of the patent owner, it is therefore a necessary element in any intellectual property law. In order to ensure the system can be used effectively, it is important to carefully state the grounds and conditions for its use in the national legislation; these should include its use for reasons related to public health.

³³⁵ The WTO defines "compulsory licensing" as taking place "When a Government allows someone else to produce the patented product or process without the consent of the patent owner."

³³⁶ *Essential Medicines and Health Products Information Portal*; Last checked 2016.

Thailand, Brazil, Malaysia, Indonesia and India have all granted compulsory licenses.³³⁷ India has also prohibited patents where the year of first global filing was before 1995.

The idea has been advanced that patents could be bought out by an international body such as the WHO or a Foundation, so that the drug can then be distributed without legal issues and without limitation to a single drug in a single country.³³⁸ The vast majority of patented drugs are made in OECD countries (OECD estimates that just 9 countries account for 80% of global value) and the top ten pharmaceutical companies account for nearly half of global sales. Conversely, the vast majority of the world population that suffers from chronic and infectious diseases lives in non-OECD countries, comprising greater than 84% of the population. Generics currently account for only about 14% of global value, (although they amount to 45% of products sold in the United States, Germany and the United Kingdom).³³⁹ The current mismatch of supply and (unmet) demand suggests that by selling drugs to non-OECD countries at production cost or generic prices, the public health benefit and extra sales, would substantially outweigh the lost revenue so as not to reduce incentives for pharmaceutical innovation.

17.5.3 Rational drug use

WHO's view is that "rational drug use depends heavily on selecting essential medicines that reflect the best combination of efficacy, safety and comparative cost-effectiveness."³⁴⁰ The selection of essential medicines should be evidence-based and free from commercial influence.

Following the model introduced by Sri Lanka for a national formulary, which the State Pharmaceutical Corporation used to buy drugs on bulk order, the WHO encouraged the development at national level of Essential Medicines Lists. Most responded by 2000 and at the time of writing, 95% of developing countries have published lists, 86% of which have been reviewed within five years. The initial model WHO list:

- Focuses on pharmaceutical efforts on priority

conditions and quality medicines that are the most cost-effective, safe and affordable possible;

- Is a model for national Governments and institutions, to be used as a basis for creating their own national formularies; and
- Is relevant for developing countries, where commercial and promotional materials are the only available source of drug information for health workers, prescribers and patients.

The selection process is directly tied to treatment guidelines, with systematic review of the clinical evidence for proposed choices. The evidences are publicly available in advance for decision-making meetings, allowing all stakeholders (including consumer organizations and patient advocacy groups) to comment on the List and the proposed changes. The UNGCP Guideline 74 refers to the work and recommendations of the WHO such as certification and information systems.

17.5.4 Adverse Drug Reaction (ADR) monitoring system

It is estimated in some countries that 10% of hospital admissions are due to ADRs. Consumers and health authorities need to arrive at similar views on concepts of "safety," "quality," and "rational use" of drugs. For this there is a need to chronicle and gain more knowledge about the quality, safety and cost-effectiveness of medicines made available in the country. It is therefore necessary to put up a system to monitor and examine adverse drug reactions. This is crucial in improving consumer protection as far as medicines are concerned.

The ADR Monitoring System should:

- Be accessible to everybody; and
- Involve the end-user, the consumer, of medicinal products both as a reporter of adverse effects and as a partner in the work for safe and rational use of medicines.

Unfortunately, many developing countries, in particular the least developed countries, do not have in place such a system. One way to overcome this is to use

³³⁷ Sivaramjani Thambisetty, *Compulsory Licences for Pharmaceuticals, An Inconvenient Truth*, LSE, South India 2013. K. Shadklen and B. Sampat, LSE, South India, 2015.

³³⁸ Do Hyung Kim, *Access to Innovative Pharmaceuticals for Least Developed Countries in Research Guide on TRIPS and Compulsory Licensing*, 2009.

³³⁹ OECD, *Pharmaceutical Pricing Policies in a Global Market*, 2008.

³⁴⁰ WHO, *Essential Drugs Monitor No 32.*, apps.who.int/medicinedocs/en/d/Js4940e/17.html

the databank maintained by the World Health Organization (WHO).

17.6 Patient rights

Part of improving the relationship between health care providers and users of the services has been the development of Charters of Patients' Rights. For patients, such charters can provide a valuable instrument in their campaigns for greater equality and participation in the care of their health. For health workers, a charter serves as a guideline to further strengthen professional codes of ethics and conduct.

The disparities that exist within and without the health care industry make it necessary for patients to be able to rely on such instruments. At an individual level, notwithstanding the fact that socially and economically, patients may not be disadvantaged, they approach the health care industry from an inferior position in terms of power and knowledge. Patient's charters can play an important role in empowering patients by making them aware of their entitlements as individuals and consumers. The key issues that need to be addressed in any declaration of patients' rights are reasonably well established internationally and include:

- Right to Health Care and Humane Treatment;
- Right to Choice of Care;
- Right to Acceptable Safety;
- Right to Adequate Information and Consent;
- Right to Redress of Grievances;
- Right to Participation and Representation;
- Right to Health Education; and
- Right to a Healthy Environment.

Properly informed and educated patients/consumers, in partnership with health care providers, can make an essential contribution to the quality of health care and to better health. Such a partnership is only truly effective when it involves feedback mechanisms to enable health care providers and health care systems to constantly improve.

17.7 Criteria for assessing health care delivery

Many countries are making changes to the manner in which they deliver health care. The following is a set of desired goals that may be used as criteria to evaluate

proposed changes to health care systems.

17.7.1 Comprehensibility

An important criterion, indeed a pre-requisite to any proposed change, is that it be presented in a manner that the proposal and its major effects can be readily comprehended by consumers in two respects:

- a) The proposals must be clear in terms of the proposed changes, their effects and costs. Vague terms like "more equity", "contributing to better health," and "expanding options" must be translated into details which are easily understood; and
- b) When a proposal is finally implemented, the consumer must be able to understand what rights and benefits, choice of services, and recourse in case of dispute are available.

17.7.2 Consumer participation and control

This relates to the role of patients and communities in the setting of policies and standards for health care and ascertaining that these are met.

Consumer participation needs to be at all levels. At the national level, representatives of the consumer interest must participate in the development decisions, and in setting standards and guidelines for regional and local consumer participation. At the local level, consumer input must be facilitated on the style and substance for the delivery of care, the maintenance of its quality and the types of services that are to receive preference.

17.7.3 Eligibility

The basic principle is that the nation must assure all its citizens that their health care will at no time be compromised. This principle, however, does not preclude the requirement that private employers contribute to any health care fund or even that individuals obtain extra-cover from private insurance arrangements. Public facilities must continue to be made available to all persons, but especially weighted to benefit those individuals and families who cannot afford private coverage. Age, sex and sexual orientation, race, religion, politics or place of residence should not be factors limiting access to the required level of medical care. No pre-existing medical condition should limit a person's eligibility in any proposed health care plan.

17.7.4 Comprehensiveness and continuity of services

Public provision of health services should be comprehensive in the range of services provided. The fundamental guiding principle should be that lack of ability to pay should be eliminated as a barrier to required/necessary health care. Special and heavy emphasis must be placed on preventive care and on health maintenance programmes, particularly those which focus on health education and formulation of good health habits, on early reporting of remediable symptomatic diseases and screening for prompt treatment of diseases.

17.7.5 Accessibility and availability of services

Eligibility and coverage are in many ways legal concepts, because a person eligible for coverage may in practice be excluded from the benefits for various reasons, including distance to the required facilities. There are a number of aspects regarding accessibility and availability of services that must be taken into account. First, there has to be an equitable geographic distribution of health care facilities. Second, there must be efforts to minimize the institutional and personnel barriers that preclude optimal utilisation of facilities. Large complexes and dehumanized institutions turn patients away. Personnel barriers, which create economic, cultural or ethnic chasms between health professionals and their patients, hamper effective communication.

17.7.6 Quality control

Any national health programme must have built into it systems of quality control. This is necessary, both for efficiency (i.e. the economy with which inputs are used to produce specified outputs) and for effectiveness (i.e. the degree to which specified goals are reached) that health services are periodically evaluated. Any national health programme must therefore specify the authority entrusted to effect quality control, and also the methods that will be employed to ensure that the said authority is effective.

17.8 Health and consumption

Following from patient's rights, many will say, there are also some patient's responsibilities and that includes

consumption patterns. That in turn reflects marketing especially to children. The UNGCP do not include provisions for control of marketing of particular products.³⁴¹ However, the WHO guidance on tobacco or alcohol advertising is relevant here, just as the increasing concern about 'junk food' and the massive and worldwide increases in obesity.

17.8.1 Non-communicable diseases

According to the WHO World Health report 2015, global prevalence of obesity (excluding non-obese overweight) was almost 11% for men and 15% for women.³⁴² There is some truth in the perception that this is mainly a developed country problem for the figures are far higher in the HICs (23% men and 24% women). But obesity is far from absent in MICs (especially UMICs – 10.5% and 16% men and women) and even in LICs, 2.2% for men and 7.3% for women gross up to large numbers. There are doubtless factors of a cultural nature in play as there are variations between countries with similar income level (see chapter 16 on food) for example the massive difference in overweight between the United States (70%) and Japan (23%). The Pacific islands are an outlier in being not HICs but having among the highest levels of obesity in the world – 47% for men in the Cook Islands and 55% for women.

Prevalence of tobacco use is more uniform across country groups the global figure for 15 years and over being 36% male and 7% female.³⁴³ The UMIC male levels are 43% with LMICs and HICs about the same at 32-33% with LICs at 30.5%. One interesting detail is that adolescent girls of 13-15 smoke more than women over 15 an indication perhaps that concerns about the effects on child-bearing and rearing have an effect on consumption. Prevalence is relatively high among the countries of the former Soviet Union and it will be interesting therefore to see the effects of the recent advertising ban and other restrictions on smoking in the Russian Federation.

For alcohol consumption, there is a straight correlation between country income level and consumption. The global average of 6.2 litres of pure alcohol per capita over 15 per year is exceeded by HICs (10.3 litres) with

³⁴¹ Connie Lau, Geneva, 2013.

³⁴² *World Health Report*, WHO, 2015.

³⁴³ *World Health Report*, WHO, *op. cit.*

declining levels down the income scale to 3.1 in the LICs.

Ever greater attention is being paid to tackling non-communicable diseases (NCDs). According to the WHO Action Plan,³⁴⁴ more than 36 million people die annually from NCDs (63% of global deaths), including more than 14 million people who die between the ages of 30 and 70. Low- and middle-income countries already bear 86% of the burden of these premature deaths. WHO Action Plan targets include:

- 25% reductions in mortality from cardiovascular and respiratory diseases, cancer and diabetes;
- 10% reduction in the harmful use of alcohol;
- 10% reduction in harmful inactivity;
- 30% reduction in salt intake;
- 30% reduction in prevalence of tobacco use in the over 15 population;
- 25% reduction in prevalence of high blood pressure;
- A halt in the rise of diabetes and obesity; (involving reductions in energy intake from saturated fatty acids, increase in fruit and vegetable consumption, and reductions in cholesterol);
- 50% eligibility for drug therapy to prevent heart attacks and strokes; and
- 80% availability of basic technologies and essential medicines (including generics) required to treat NCDs.

The list of measures suggested include advertising and marketing bans on alcohol and tobacco as well as taxation expressly intended to reduce affordability, health environment measures such as legal enforcement of smoke free areas, food taxes and subsidies to promote healthier foods, screening for cervical cancer, prevention of liver cancer through hepatitis B immunisation. Tobacco has been subject to controls on marketing for some time now and the Framework Convention has a higher legal status than the Action plan. Legal measures are recommended for consideration and it is notable that measures such as taxation are now under way for sweetened beverages where a 10% tax has already taken effect in Mexico and plans

to do so have been announced in the United Kingdom as discussed in chapter 16.

17.8.2 Antibiotic resistance

Antibiotic resistance is another issue where over-consumption is involved and needs to be reined back. This is even more complex than the examples above. On the occasion of the release of its report *Anti-microbial resistance: report on surveillance*, WHO stated in April 2014: “this serious threat is no longer a prediction for the future, it is happening right now in every region of the world and has the potential to affect anyone, of any age, in any country. Antibiotic resistance—when bacteria change so antibiotics no longer work in people who need them to treat infections—is now a major threat to public health.”³⁴⁵ The summary of the report states: “antimicrobial resistance develops when an organism (bacteria, fungus, virus or parasite) no longer responds to a drug to which it was originally sensitive. This means that standard treatments no longer work.”³⁴⁶ The spread of resistance is already under way as certain diseases are already untreatable with older antibiotics and resistance can spread between similar types of medicines. For example, the report continues: “globally, 3.6% of new tuberculosis cases and 20% of previously treated cases are estimated to have multidrug resistant tuberculosis with much higher rates in Eastern Europe and Central Asia. Among multidrug resistant tuberculosis patients who started treatment in 2010, only 48% were cured after completion of treatment.”

Disquiet about the issue is spreading from scientific experts to a wider public. Consumers International made antibiotics their theme for World Consumer Rights Day 2016 targeting the global restaurant chains, and WHO Director General Margaret Chan has asked consumer groups and civil society to play an active role in combating antibiotic resistance.³⁴⁷

In May 2015, the World Health Assembly endorsed the WHO’s Global Action plan containing the following strategic objectives:³⁴⁸

- Improving awareness of anti-microbial resistance;

³⁴⁴ WHO Global Action Plan for the Prevention and Control of NCDs, 2013-2020.

³⁴⁵ www.who.int/mediacentre/releases/2014/amr-report/en/

³⁴⁶ *Antimicrobial Resistance: Global Report on Surveillance*, WHO, Summary 2014.

³⁴⁷ M. Chan Speech to the G7, 2015.

³⁴⁸ WHO, Global Action Plan on Anti-Microbial Resistance, 2015.

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- Strengthened surveillance and research;
 - Reduction of infections requiring treatment;
 - Optimisation of use of anti-microbial agents; and
 - Investment in new medicines, diagnostic tools and vaccines;

The Plan suggests stronger accreditation for dispensing, as well as the development of standards through Codex Alimentarius, and further development of Essential Medicines lists.

17.9 Conclusion

The above plans drawn up by WHO recommend that States take an aggressive stance such as has been

seen twenty years earlier vis-à-vis tobacco. Faced with the prospect of large scale public health emergencies and deepening concerns about NCDs arising out of consumption patterns, stronger measures by Governments can be envisaged.

Consumer organizations have a key role to play in campaigns to alter consumption patterns. They may be less liable than Governments to be accused of paternalism in urging on consumers healthier patterns of consumption. Given the public health problems caused by alcohol, tobacco and sweetened foods and beverages, it could be argued that the State has not just the right to be 'paternalistic' in constraining marketing, but a duty to be so.

CHAPTER 18

SUSTAINABLE CONSUMPTION

In this chapter the following issues are discussed:

- *The concept of sustainable consumption*
- *Sustainable consumption in the UNGCP*
- *The implementation by Governments*
- *The contribution of businesses*
- *The responsibilities of consumers*
- *The role of consumer policy in meeting the Sustainable Development Goals*

18.1 The concept of sustainable consumption

The term 'sustainable consumption' derives from the term 'sustainable development.' The most often quoted definition of sustainable development is that of the Brundtland Report: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁴⁹

The United Nations Conference on Environment and Development (the Earth Summit) Rio Declaration on Environment and Development (1992) made the link between sustainable development and consumption in its Principle 8: "to achieve sustainable development and a higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."

Chapter 4 of Agenda 21 (the blueprint for sustainable development produced at the Earth Summit) also identified that: "the major cause of continued deterioration of the global environment is the unsustainable patterns of consumption and production, particularly in the industrialized countries," and stated that: "achieving sustainable development will require both efficiency in production processes as well as changes in consumption patterns [...] in many instances, this will require a reorientation of existing production processes and consumption patterns, which have predominantly emerged from developed countries and which are being increasingly emulated in much of the

world, including developing countries."

18.2 Sustainable consumption in the United Nations Guidelines for Consumer Protection

In 1999 the UNGCP were expanded to include a section on sustainable consumption, and Guideline 49 took a step towards defining sustainable consumption: "sustainable consumption includes meeting the needs of present and future generations for goods and services in ways that are economically, socially and environmentally sustainable."

Section V.H addresses the promotion of sustainable consumption, some 13 paragraphs long. Guideline 50 is very inclusive of consumer associations, environmental bodies and business, with great emphasis on the development of new patterns of consumption and production. Guideline 51 calls for: information programmes to raise awareness of the impact of consumption patterns; removal of subsidies that promote unsustainable patterns of consumption and production; (on which more later). Guidelines 52 and 57, deal with product design and life cycle impacts, Guideline 53 with standards, Guideline 54 with impartial testing, Guideline 55 with hazardous substances, Guideline 56 the impact on health both individual and collective, Guideline 58 with integration of sustainable consumption into Consumer Protection. Guideline 62 calls for research and Guideline 60 calls for improved methodologies and databases, (without naming the Aarhus convention which is very relevant to this recommendation in the light of its application to 'access to envi-

³⁴⁹ Report of the World Commission on Environment and Development: *Our Common Future*, Brundtland Report, 1987.

ronmental information.)³⁵⁰ States are called upon to apply sustainable consumption principles to their own operations and of course this is a very valid point in terms of public utility provisions still publicly owned.

Indeed, it is a very detailed section and there are two other important mentions of sustainable consumption namely, the 'legitimate needs' Guideline 5i) and Guideline 44 (consumer education) which refers to both: environmental protection; and to efficient use of materials, energy and water. Along with the above mention of subsidy reduction, Guideline 59 calls for a range of economic instruments, such as fiscal instruments and internalization of environmental costs, while avoiding new trade barriers, a very live concern at the time of the 1999 revision.

In summary, the ideas incorporated within the concept of sustainable consumption are as follows:

- Satisfaction of basic needs to improve quality of life;
- Improving efficiency in resource use;
- Minimising emissions of wastes taking into consideration the carrying capacity of the Earth to assimilate such wastes;
- Adopting equitable consumption patterns that will not jeopardize the needs of current and future generations; and
- Ensuring equity in consumption within countries and between countries.

18.3 The implementation by Governments

The UNCTAD survey on the implementation of the UN-GCP of 2013 ³⁵¹ points out that "although this issue is a core objective of many governmental policies, in most cases it falls outside the mandate of consumer protection agencies [...] most national legislations reserve powers concerning sustainable consumption for environment ministries" (or other dedicated institutions). The report points out that the European Union has been active in this field through various initiatives, inter alia: eco-label, European eco-management and audit scheme, green public procurement, eco-design, energy labelling, multi-stakeholder dialogue on envi-

ronmental claims, product environmental footprint and organization environmental footprint methodologies, car labelling Directive, retail forum for sustainability, food sustainable consumption and production round table, organic farming and activities against food waste. The United States FTC also has Guides for the use of environmental marketing claims. The development of labelling schemes is discussed in chapter 10 on information and education.

There seems to be a gap between environmental 'consciousness raising' and practical activities. The member survey published by Consumers International around the same time as UNCTAD, ³⁵² found that barely half (53%) of the responding countries (similar in number to those who responded to UNCTAD) required the disclosure of energy consumption of home appliances, even though 62% of countries ran programmes on sustainable consumption and/or production. Although high-income countries (HICs) reported positively on the presence of many general environmental protection provisions, 27% of countries in this group had no energy consumption disclosure requirements, although more than 90% did provide guidelines of some kind.

A clear majority of low-income country (LIC) Governments recognized the importance of disclosure, while stopping short of making it mandatory. CI concluded that "overall, globally there is clearly much progress yet to be made in terms of supporting consumers and producers to reduce the environmental impact of consumption."

The two surveys give the impression of there being still a long way to go. They also give the impression that the environmental dimension of consumption is seen largely through the lens of information and credibility around products that consumers may purchase.

18.4 The contribution of businesses

Corporations have had to deal with the challenges posed by the environmental movement. The increased visibility of environmental issues, calls for disclosure of environmental performance, shareholder activism for

³⁵⁰ Aarhus Convention, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, The United Nations Economic Commission for Europe (UNECE), 1998.

³⁵¹ *Implementation Report on the United Nations Guidelines on Consumer Protection, 1985–2013*, UNCTAD secretariat, April 2013.

³⁵² *Consumers International, The State of Consumer Protection Around the World*, April 2013.

socially responsible investing, increased standards and incentives by Governments, requirements for extended product responsibility, and enlightened leadership have all led corporations to address the issue of sustainable development.

There are also business opportunities as companies have realized a wide range of both tangible and intangible benefits from taking into account environmental considerations. These benefits include:

- **Improved Financial Performance:** Studies have shown a positive correlation between superior environmental performance and superior financial performance. Winning contracts and investment have been occasioned by better environmental performance;
- **Decreased Costs:** through waste reduction, energy efficiency and resource productivity; and
- **Innovation:** applying environmental principles to design and production.

The corporate response was initially focused on the production side, that is, in reducing waste and improving process and product design through eco-efficiency. In due course, companies used environmental responsibility as a means of enhancing their reputation or brand image. The role played by consumer magazines which provide comparative information on energy consumption, recyclability and reduced use of hazardous materials of the products they evaluate and changing consumer behaviour no doubt serve to spur developments in this direction.

The establishment of the World Business Council for Sustainable Development (WBCSD) coincided with the Rio Earth summit of 1992. It put forward the concept of 'eco-efficiency' as the key to sustainable production and the WBCSD has contributed studies ever since based on its members' experiences.³⁵³

WBCSD positions are summarized in the publication "Catalyzing Change: A Short History of the WBCSD" as '10 messages by which to operate:'

- a) **Business is good for sustainable development and sustainable development is**

good for business. Business is part of the sustainable development solution, while sustainable development is an effective long-term business growth strategy;

- b) **Business cannot succeed in societies that fail.** There is no future for successful business if the societies that surround it are not working. Governments and business must create partnerships to deliver essential societal services like energy, water, health care and infrastructure;
- c) **Poverty is a key enemy to stable societies.** Poverty creates political and economic instability, a big threat to business and sustainable development. By contrast, businesses can lift living standards and eradicate poverty;
- d) **Access to markets for all supports sustainable development.** Sustainable development is best achieved through open, transparent and competitive global markets;
- e) **Good governance is needed to make business a part of the solution.** Supportive frameworks and regulations are needed for business to contribute fully to sustainable development;
- f) **Business has to earn its licence to operate, innovate and grow.** The way business acts and is perceived is crucial to its success. Accountability, ethics, transparency, social and environmental responsibility and trust are basic prerequisites for successful business and sustainable development;
- g) **Innovation and technology development are crucial to sustainable development.** They provide key solutions to many of the problems that threaten sustainable development. Business has always been, and will continue to be, the main contributor to technological development;
- h) **Eco-efficiency – doing more with less - is at the core of the business case for sustainable development.** Combining environmental and economic operational excellence to deliver goods and services with lower external impacts and higher quality-of-life benefits is a key sustainable development strategy for business;
- i) **Ecosystems in balance – a prerequisite for**

³⁵³ 'Changing Course,' WBCSD, 1992.

business. Business cannot function if ecosystems and the services they deliver, such as water, biodiversity, food, fibre and climate, are degraded; and

- j) **Cooperation beats confrontation.** Sustainable development challenges are huge and require contributions from all parties — Governments, business, civil societies and international bodies. Confrontation puts the solutions at risk. Cooperation and creative partnerships foster sustainable development.

Technology based companies are increasingly emphasising their environmental credentials. In 2014, AirBnb released a study based on 8,000 hosts and guests, quantifying the environmental benefits of home sharing for travellers, claiming reductions in energy and water use, reduced greenhouse gas emissions and waste and greater use of public transport.³⁵⁴ Google, through Googlegreen, monitors its environmental footprint, buying energy from windfarms to furnish its energy hungry servers and claiming a 50% energy reduction compared with other servers. It uses solar energy in California, rainwater harvesting in Ireland and LEED certification for its buildings.³⁵⁵ These initiatives could be described as good business practice in the general interest, and Google aims to send its carbon footprint ‘beyond zero’ by investing in US\$ 2.5 billion in renewable energy projects that will produce far more than their own needs.³⁵⁶

18.5 The responsibilities of consumers

Some of the issues around labelling are discussed in chapter 10 about information and education. Many of the labelling initiatives are appealing to consumers to prefer fair trade prices and pay higher prices for green energy. While entirely laudable on the part of the individuals concerned, it is somewhat perverse that ‘doing the right thing’ should in effect attract a surcharge. To put it another way, polluting products and services such as energy should be more expensive not less if the right price signals are to be harnessed to pursue environmental objectives.

So the debate has shifted and is no longer just about consumers ‘voting with their pockets’ for products deemed to be environmentally friendly, thus rewarding good behaviour by producers. Consumers themselves also have behavioural responsibilities towards the environment which go beyond purchasing green goods. For example, they include responsible consumption of water and energy directly by households, not just as factors of production in the products that consumers buy. It calls into question the below cost (i.e. subsidized) prices of these vital services which have a direct impact on the environment; thus setting up a whole series of dilemmas on how to shelter the poor from price increases in vital services – a dilemma which will become more acute as connectivity increases. Thus the more sustainable position, as discussed in chapter 15 seems to advocate connection subsidy instead of consumption subsidy, as it is connection that in practice is the biggest obstacle.

This has been a particularly difficult conflict for consumer associations to resolve, when they have traditionally fought to ensure that consumers get the best value for their money. They may find it contradictory to argue that the best energy-conserving policy is to let fuel and water prices rise. For low-income consumers, even a small increase in prices would impact adversely on their living standards as the OECD study on Greening household behaviour mentioned at the start concludes: “many environmental policies are likely to have adverse distributional effects” especially for low income households.³⁵⁷

The OECD concluded that environmental awareness and civic duty did contribute to consumer decisions; but supply side measures were also needed, such as provision of public transport or energy efficiency measures, especially where “environment-friendly decisions were only weakly driven by household demand.” For instance few households were ready to spend more than 5% over their current electricity bills to use green energy and half were not willing to pay anything. Paradoxically, this finding is contradicted by the willingness to pay substantially higher tariffs than the prevailing ones in poor countries among those consumers who do not have any supply at all.³⁵⁸ Once they be-

³⁵⁴ <https://www.airbnb.co.uk/press/news/new-study-reveals-a-greener-way-to-travel-airbnb-community-shows-environmental-benefits-of-home-sharing>

³⁵⁵ LEED- Leadership in Energy and Environment design – a third party certification system.

³⁵⁶ www.google.co.uk/green/efficiency

³⁵⁷ OECD, Greening Household Behaviour: The Role of Public Policy, 2011, *op. cit.*

³⁵⁸ PPIAF, Willingness to Pay, Note 9 in series: Pricing and Affordability in Essential Services, 2012.

come customers, there may be a 'hardening' of their view as such services are integrated into daily expenses. So rather than appeal to altruism, it may be better to search for win-win solutions such as reducing consumption by energy efficiency measures incentivized by cost recovery tariffs. If total bills remain the same as a consequence, the unit tariff is not a problem. Altruism would seem to be an insufficient basis for public policy for all that one can appeal for civic mindedness at the margin.

18.6 Future generations

One of the problems in appealing to consumers to be sparing in their use of products in order to save the environment is that it is difficult to make the connection between turning off the TV standby switch and improving life for people thousands of kilometres distant and at some undetermined date in the future. It is relatively rare that future generations are 'institutionalized' as a party at the negotiation table.

This Hungarian Office of the Hungarian Ombudsman for Future Generations institution was established in 1996, as a body to protect citizens against maladministration and as a defender of fundamental human rights.³⁵⁹ In 2007 a bill was adopted that formally established with independent status, the Parliamentary Commissioner (or Ombudsman) for Future Generations, working separately from the other Ombudsman staff, with strong competences to investigate all issues that may affect a citizen's constitutional right to a healthy environment, or which have a likely impact on the long-term sustainability of the environment in the broadest sense. The functions of the Ombudsman are reinforced by, and appeal can be made to, the Hungarian Fundamental law which gives constitutional protection to natural resources.³⁶⁰

Investigations are based on ex officio interventions, as well as on public complaints and petitions. The Om-

budsman has intervened on matters as diverse as traffic noise pollution and waste burning, and has raised his voice for the protection of water resources, drawing attention to the necessity of enforcement of the "polluter/user pays principle," in particular for the efficient use of water resources. He has argued in several cases that everyone is entitled to the right of access to healthy drinking water due to its nature as a human right. The Ombudsman recently put forward its view that "the institutions that are to serve the protection of fundamental human rights, should take into account the inter-generational specificities of these issues, and should draw them to the attention of society and decision-makers."³⁶¹

18.7 The role of consumer policy in meeting the Sustainable Development Goals

Consumer policy is an important means through which countries can support the implementation of many, if not all, of the 17 United Nations Sustainable Development Goals, which together form the outcome of the United Nations Summit for the adoption of the post-2015 development agenda, "Transforming our world: the 2030 Agenda for Sustainable Development." This demonstrates how implementation of the UNGCP can help to deliver the SDGs and makes reference to relevant targets and back to the MDGs which were followed on by the SDGs. Reference is also made to the appropriate chapters of this volume.

18.7.1 Goal 1: end poverty in all its forms everywhere

Although poverty is most commonly understood as a lack of income, it has a number of dimensions including lack of access to basic goods and services and which are characterized by the 'poor pay more syndrome' that we have seen in sectors as varied as utilities (chapter 15) and financial services (chapter 14). These dimensions interact with each other to keep

³⁵⁹ The Office of the Hungarian Ombudsman for Future Generations on Methods to Promote the Implementation of Human Rights Obligations Relating to the Environment.

³⁶⁰ The Ombudsman primarily investigates environmental issues, applying the following means:

- investigations at Governmental and municipal levels;
- provision of opinions to various authorities regarding matters of environmental protection;
- use of the Constitutional Court or other courts, in cases where there is strong evidence that a national or local piece of legislation is in violation of the Fundamental Law;
- intervention in public administrative court cases regarding environmental matters;
- monitoring of policy developments and legislative proposals; and
- involvement in the elaboration of non-binding statements and proposals to any public authority, including the Government.

³⁶¹ *Report on the Activities of the Commissioner for Fundamental Rights and His Deputies*, Budapest, 2013.

people poor. Poverty in turn can contribute to environmental degradation and pollution.

The UNGCP state in Guideline 8 that “special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly people living in poverty” and in Guideline 7: “policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic needs of all members of society and reducing inequality within and between countries.” The moral philosophy then of the UNGCP is both universalist and egalitarian and this is reinforced by legitimate needs 5a) and b) which list: a) Access by consumers to essential goods and services; and b) the protection of vulnerable and disadvantaged consumers.

SDG 1 Targets emphasize basic services (chapter 15) including ‘appropriate new technology and financial services including microfinance’ and the implementation of nationally appropriate social protection systems (both in chapter 14).

18.7.2 Goal 2: end hunger, achieve food security and improved nutrition and promote sustainable agriculture

Ensuring that nutritious food is available and affordable is a basic need for all. Yet, food security is threatened by agricultural dumping and is also often linked to safety as veterinary diseases have impacted on both production and consumer health. Overuse of antibiotics in agriculture is a danger to human and animal health (chapter 17).

Consumer programmes including consumer awareness can promote availability of food, food safety and nutrition. Action to safeguard consumers against poor diets such as excessively sweetened drinks can be taken through legislation governing marketing and taxation (chapter 16).

The UNGCP calls in Guideline 70, on Governments to recognize the need of all consumers for food security, and calls on them to develop policies and plans and support international standards for food safety. Cross cutting recommendations on safety and quality, distribution and consumer education and information support Governments’ responsibilities in this area and consumers’ ability to influence the market.

SDG 2 Targets aim to end hunger by 2030 concentrating particularly on stunting and wasting among children under 5, (chapters 16 and 17) increasing productivity of small scale farmers, maintain genetic diversity, (chapter 16) improving rural infrastructure (chapter 15) stopping agricultural dumping (chapter 16) and limiting food price volatility.

18.7.3 Goal 3: Ensure healthy lives and promote well-being for all at all ages

Issues of product safety (chapter 9) and access to medicine and health care (chapter 17) are core consumer concerns. Consumer protection is also central to the prevention of non-communicable diseases linked to smoking, excess alcohol consumption and poor diets (chapters 16 and 17). These diseases now claim more lives than infectious diseases, with rates rising fastest in developing countries.

The UNGCP call in Section V.B on Governments to develop and adopt safety standards (Guideline 53) and systems to protect physical safety. The section on pharmaceutical products (Guideline 74) requires Governments to take action to ensure their quality and appropriate use.

SDG 3 Targets include many issues dealt with in the manual, including an end to preventable deaths of newborns and infants and the reduction of neo-natal and maternal mortality, the ending of epidemics of malaria, AIDS, tuberculosis, ‘neglected tropical diseases’ and water-borne diseases. There are targets covering traffic accidents, treatment and prevention of harmful alcohol use, and strengthened implementation of the WHO Framework Directive on Tobacco Control. The targets emphasize universal health care including access to medicines in line with the Doha declaration on TRIPS and public health, reduction of deaths from hazardous chemicals and pollution and the development of health risk warning systems. (Most of the above are discussed in chapter 17).

18.7.4 Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

Consumer education should be an important part of the education and lifelong learning that all people receive (chapter 10). By giving consumers the skills and knowledge they require to be active participants in the

market place it can also play an important role in challenging the marginalization of poor people.

Consumer education campaigns have been critical to promoting healthy products and consumption practices that helped fight HIV/AIDS, reduced malaria transmission, and promoted breastfeeding over infant formula (chapter 16). It has also been a key to building markets for fair trade products.

Section G of the UNGCP calls on Governments to develop or encourage the development of general consumer education and information campaigns. In developing these programmes special attention should be given to the needs of disadvantaged consumers, in both rural and urban areas including low income consumers and those with low or non-existent literacy levels.

SDG 4 Targets include universal primary and secondary education, universal access to pre-school education and equal access to technical and tertiary education. All learners should be able to acquire skills for human rights and sustainable lifestyles, hence consumer education.

18.7.5 Goal 5: Gender equality and empower all women and girls

Persistent failure to remedy the gulf between the life experience and expectations of men and women is among the greatest of the Millennium Development Goals' (MDGs) shortfalls. Available data on education, health and economic status of women—particularly in the developing world—shows how far there is to go.

As the primary shoppers in most cultures, women have a particular role as consumers. It is through this unique position that consumer policy has been successful in enhancing the status of women and helping to realize development goals. For example, their role in microcredit (chapter 14) has been widely recognized. Of particular importance are the infrastructure services such as water and energy which can save their time spent fetching and carrying and delivering health benefits in the home such as reduced smoke pollution (see chapters 15 and 17).

The UNGCP seek to redress the imbalance that often exists between consumers and producers. Where women are responsible for purchases, this improves

their access and power in the market place. The UNGCP also directs Governments to pay particular attention to vulnerable consumers who in many cases are more likely to be women.

SDG 5 Targets aim to achieve recognition of unpaid and domestic work through provisions of public services, infrastructure and social protection policies (chapter 14). Promotion of enabling Information and Communication Technologies (chapters 15 and 12) will be of particular help to women.

18.7.6 Goal 6: Ensure availability and sustainable management of water and sanitation for all

Despite strong calls for action and considerable efforts at local, national and international levels, the world is still off track with respect to the MDG sanitation target at global level, although the drinking water target was generally achieved. Poor people often rely on unsafe water or pay more in unit price terms, for their supply of water. As water is essential to life, even the poorest will spend money to obtain it if they do not have a supply system nearby (chapter 15). The development of water and sanitation services brings many benefits to public health (chapter 17).

The UNGCP call in Guideline 72 for Governments to formulate, maintain or strengthen national policies to support the supply, distribution and quality of water for drinking. Due regard should be paid to the choice of appropriate levels of service, quality and technology and the need for relevant education (Guideline 69). In addition Guideline 77 calls for universal access to public utility services to be promoted including improved customer care.

SDG 6 Targets are designed to ensure universal access to safe drinking water and adequate sanitation, paying particular attention to the needs of women and girls, water sources are to be protected by reducing pollution and halving the proportion of untreated waste water, improving water use efficiency and water resource management and protecting water-related ecosystems. International cooperation is to be built for technology exchanges and for international river basin management. The need for community participation in water and sanitation to be supported and strengthened is recognized.

18.7.7 Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all

Energy constitutes a worldwide challenge both in terms of the management of available resources and the provision of access to sustainable energy. As with water, poor people tend to pay more per unit of energy and are likely to degrade the environment and endanger their health where they forage for traditional, local resources. For this reason subsidies for connection rather than consumption are likely to be more sustainable in financial and environmental terms (chapter 15 and 18).

The UNGCP gives Governments guidance in Section V.H to support the efficient use of energy through the design of products and services as well as education campaigns (Guideline 44). Guideline 76 calls for the promotion of universal access to clean energy with due care for affordability and community participation. Guideline 77 calls for improved customer care.

SDG 7 Targets aims for universal access to affordable, reliable and modern energy services are a clear target, as are increased share of renewable energy in the global energy mix, doubling the rate of improvement in energy efficiency, international cooperation for technology exchange and investment especially in clean energy. The need to expand and upgrade infrastructure and thus improve access and reliability is recognized.

18.7.8 Goal 8: Promote sustained inclusive and sustainable economic growth, full and productive employment and decent work for all

The relationship between consumption and production is central to any strong economy. The ability of consumers to exercise informed choice, reward good suppliers and seek redress when standards have not been met drives a more responsive and efficient economy. There are many examples of where consumers have taken action to support decent working conditions (chapter 5) from the consumer leagues of the late 19th century to the fair trade movement of today.

The promotion and protection of consumers' economic interests forms a major section (V.C) in the UNGCP. It calls for Governments to take action to ensure that consumers realize optimum benefit from their resources, through support and promotion of distribution methods, fair business practices, informative market-

ing and effective protection.

SDG 8 Targets aim to improve resource efficiency in consumption and production and decouple economic growth from environmental degradation in accordance with the 10 year framework of programmes of sustainable consumption and production.

18.7.9 Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation

This is largely dealt with in the sections on water (SDG 6) and energy (SDG 7) above. In general, infrastructure supports the accessibility, affordability and availability of goods and services and is therefore an important issue for consumers. Consumer associations can play an important part in providing these distribution channels, for example through the formation of consumer co-operatives. There is also a long history of consumer associations participating in the regulatory process through consultation with service providers, sectoral regulators and local Governments (chapter 15).

Infrastructure is an important theme of the UNGCP. Guideline 36 refers specifically to distribution facilities, storage and retail – of which infrastructure plays an important part and also to the development of consumer cooperatives. As mentioned earlier, Guideline 77 on public utilities refers to improved customer care in public utilities and the Guidelines on energy (76) and water (72) refer to community participation.

According to the MDG report, 95% of the world's population is covered by a mobile-cellular signal. The number of mobile-cellular subscriptions has grown almost tenfold in the last 15 years, from 738 million in 2000 to over 7 billion in 2015. Internet penetration has grown from just over 6 per cent of the world's population in 2000 to 43% in 2015. As a result, 3.2 billion people are linked to a global network of content and applications, and are needy of protection as consumers.

SDG 9 Targets focus on affordability and equitable access for all, increased access to affordable credit, increase resource use efficiency, facilitating resilient and sustainable infrastructure in LDCs, increasing access to information and communication technologies and the need to 'strive to provide' universal and affordable access to the Internet.

18.7.10 Goal 10: Reduce inequality within and among countries

Consumer policy has long promoted the extension of services to the poorest consumers, not only basic goods and services as noted but also more recently, basic financial services such as credit and remittances (chapter 14).

The UNGCP state in their opening paragraph (Guideline 1) that one of their objectives is to promote “just, equitable and sustainable economic and social development.” Taking into account “the interests and needs of consumers in all countries, particularly those in developing countries” and recognizing “that consumers often face imbalances in economic terms, educational levels and bargaining power.”

To this end the UNGCP supports the development of legislation, regulation, standards and policies that protect all consumers while promoting policies to meet the particular needs of vulnerable and disadvantaged consumers (Guideline 5b).

SDG 10 Targets include the need to adopt social protection policies and to: ‘improve the regulation of monitoring of global financial marketing and institution’ and strengthen the implementation of such regulations.’ A highly specific target is to: “reduce to 3% the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5%” (chapter 14).

18.7.11 Goal 11: Make cities and human settlements inclusive, safe, resilient and sustainable

The growth of cities creates particular challenges, from congestion and air pollution to housing and services. The contribution of consumer associations to planning of basic services and in some cases to their provision, has been considerable in many countries including in some of the poorest settlements (chapter 15).

The revision of the UNGCP has resulted in Guideline 5a) (the legitimate needs) listing access by consumers to essential goods and services; alongside 5b) The protection of vulnerable and disadvantaged consumers. The application of the UNGCP to ‘state-owned enterprises’ (Guideline 2) is also significant in this regard. As already noted above with regard to SDGs 6 and 7, the UNGCP call for universal access to public

utilities, in particular water and electricity.

SDG 11 Targets include adequate safe and affordable housing and slum upgrades, improved access to basic services, participatory settlement planning, protection from disasters (especially water related), improved air quality and waste management, financial and technical assistance to LDCs.

18.8.12 Goal 12: Ensure sustainable consumption and production patterns

There is widespread consensus that changes in consumption and production patterns are urgently needed. Alongside Government and industry, consumers obviously need to be a fundamental force in this change. Initiatives to mobilize consumers behind sustainable consumption have multiplied over the past few years.

Ensuring consumers are supported, informed and educated to consume sustainably is central to achieving the SDGs. Consumers need to understand how their consumption choices, use and disposal of products and services can reduce environmental impact and contribute to sustainability and trust that the information they are given is reliable and accurate.

SDG 12 Targets aim to implement the 10 year framework of programmes on sustainable production and consumption, halve global food waste at retail and consumer level and in supply chains, improve chemical management and waste management generally, improve corporate management of sustainability and its reporting, including public procurement processes, develop tools for sustainable tourism and rationalize fossil fuel subsidies while protecting the poor.

18.8.13 Goals 13, (climate change,) 14 (marine conservation,) and 15 (terrestrial biodiversity)

The UNGCP contains a dedicated section H Promotion of sustainable consumption and further provisions for Governments, business, consumer and environmental organizations, and other concerned groups to promote and address this need. Action to this end will, in turn, have a positive impact on the achievement of Goals 13, (climate change,) 14 (marine conservation) and 15 (terrestrial biodiversity). These are not dealt with in detail here as the most direct consumer input to their achievement comes through practical measures

described already. The SDG 13 on climate change defers expressly to the UN Framework Convention on climate change and major consumer contributions to its goals come through SDG 7 (chapter 15 in this manual). SDG 14 on marine conservation raises consumer issues pertaining to subsidies that contribute to over-fishing, to sustainability labelling and to the development of sustainable tourism (chapters 8 and 18). SDG 15 on biodiversity raises analogous issues in a different context.

As contained in the MDG report, ozone-depleting substances have been virtually eliminated since 1990, and the ozone layer is expected to recover by the middle of this century. Terrestrial and marine protected areas in many regions have increased substantially since 1990. In Latin America and the Caribbean, coverage of terrestrial protected areas rose from 8.8% to 23.4% between 1990 and 2014.

18.8.14 Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

Unfortunately, there are many examples of market injustices that have led to discord and even violence. Effective consumer input helps to ensure that policy, law and administration is carried out in the interests of all. For example, consumer associations have a long record in taking part in dispute resolution mechanisms which now form a part of the spectrum of legal and para-legal interventions (chapter 11).

Consumer participation in governance, especially in the utility and other regulated industries, balances producers' input into public policy and administration and helps to ensure that consumers' needs are put across (chapter 15).

The UNGCP call in the legitimate needs of Guideline 5h to ensure 'freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them.' Guideline 5g) calls for Availability of effective consumer dispute resolution and redress; which is elaborated in Section V. F on dispute resolution and redress.

SDG 16 Targets pinpoint some major issues for consumer such as bribery and corruption, transparency

of institutions, access to information and 'participatory and representative decision –making at all levels.' These have been highlighted by consumer campaigns in the regulated monopoly industries (chapter 15).

18.8.15 Goal 17: Strengthen the means of implementation and revitalize the global partnership for sustainable development

Consumer protection is a cross cutting issue that supports the implementation of many of the proposed SDGs. The UNGCP represent both international consensus and a tried and tested structure, which Governments can follow to ensure that the consumer needs and perspectives on each of the UN SDGs is adequately addressed.

SDG 17 Targets are relatively high level grouped under the headings of Finance, Technology, Capacity building, Trade and Systemic issues. These are touched on this manual in particular civil society and multi-stakeholder partnerships, which are referred to under systemic issues and Trade policy which have been discussed as playing a vital role in agriculture policy and pharmaceuticals (chapters 3, 16 and 17).

18.7 Conclusion

In the last analysis there is a common consumer and environmental interest despite the tensions. And there have been policy successes. The virtual elimination of ozone-depleting substances represents an unequivocal success of an intergovernmental effort. The Montreal Protocol on Substances that Deplete the Ozone Layer, agreed in 1987, has been universally ratified and as a result, the ozone layer is projected to recover by the middle of this century, preventing up to 2 million cases of skin cancer annually by 2030.

On the negative side of the balance, between 1990 and 2012, global emissions of carbon dioxide increased by over 50%. Data collected over two decades show that the growth in global emissions has accelerated, rising 10 per cent from 1990 to 2000 and 38 per cent from 2000 to 2012, driven mostly by growth in the developing regions a shift from previous trends.

Narrowing the consumption gap between rich and poor is obviously a key global priority as is recognized by SDG 10. There is also a growing consensus that developing countries need not follow the unsustain-

able path taken by the developed ones in the past. There is a real opportunity for the developing world to leapfrog to growth patterns that are good for the environment and rise from poverty. At the same time, the sustainable consumption debate needs to shift onto the unsustainability of affluent lifestyles in both the developed and developing world. The SDGs provide an excellent framework for the UNGCP to be successfully implemented.

