

# **Cross-border enforcement of consumer law: Looking to the future**

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# **Cross-border enforcement of consumer law: Looking to the future**

A report to UNCTAD's Working group on e-commerce,  
sub-working group 3: cross-border enforcement cooperation

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## EXECUTIVE SUMMARY

The United Nations Guidelines for Consumer Protection from 2016 (UNGCP)<sup>1</sup> emphasise the benefits of international cooperation laying out a number of principles to facilitate cross-border cooperation. However, too often, enforcers and consumers find it difficult to take action across borders. This report investigates the reasons behind those difficulties and seeks to make recommendations to facilitate and improve the international enforcement of consumer law.

The report distinguishes between substantive and procedural consumer law, noting that the development of the infrastructures and powers necessary to enforce substantive rights is lagging behind when compared with substantive consumer law that has greatly expanded in recent years. With the expansion of electronic commerce, enforcement frameworks developed in the analogue era are no longer sufficient. They are ill-placed to cater for the legitimatisation of unfair practices online, a change in market structures and business models (notably based on mass collection of data), resource asymmetry and the quasi-anonymity of market participants. Enforcement frameworks, where they exist, need modernisation, transcending the geographical borders along which they were built. The report takes stock of the current obstacles to cross-border enforcement which include:

- Diversity in both substantive and procedural consumer laws
- Diversity in systems of governance
- Limitations of private enforcement
- Obstacles to public enforcement across-borders.

In the absence of any binding international instrument that could cut through those difficulties and acknowledging that if such system were to develop it would be the result of a slow procedure, the report investigates a number of solutions already in place to bolster cross-border enforcement. For example, it reflects on how the exercise in regionalisation of substantive and procedural consumer law provides some help in bridging the national with the international. However, the report guards against the impulse of harmonisation and looks instead for a way to ensure that diversity in legal systems and cultures can remain yet be harnessed to protect consumers, identifying coherence as a guide. In addition, the report identifies how pursuing formalised cooperation mechanisms while making use of coordination harnessing existing tools, can provide a short-term solution. In this regard, the report highlights the good results that can be obtained via participation in ICPEN activities, in engaging in MoUs or contributing to information exchange databases. The report also highlights how the consumer movement has made good use of coordination coming together to fight consumer detriment via collective actions using national procedures.

The report also takes position for two more novel approaches to cross-border enforcement. One is to advocate for a technological approach to enforcement (which has also relevance at national and regional level) and thus explores the merits of the use of technology in enforcement while warning of the pitfalls. The other is to encourage the pursuit of an international standard as a way to go beyond the current initiatives of developing a toolkit and leading the way to the development of a procedural soft law instrument.

The report makes the following recommendations to UNCTAD and more specifically sub-group 3:

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<sup>1</sup> <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-for-consumer-protection>

- Continue efforts to build up the legal and institutional frameworks (substantive and procedural law) to facilitate cross-border enforcement
- Continue work on the sub-group 3 mapping exercise to find a means to recognise that solutions have to be thought out beyond geographical borders
- Explore the use of enforcement technology (EnfTech) in consumer enforcement and investigate the common development of tech tools for cross-border enforcement
- Use databases to best effect for information sharing and help cross-border enforcement response
- Look at the development of international standards as part of the solution
- Pursue the development of private means of cross-border redress for consumers as part of a mix of mechanisms
- Beware that the best should not be the enemy of the good. Small solutions can yield big results.

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## Introduction

**Cross-border enforcement and co-operation is the way forward. It is no longer sustainable to expect to enforce consumer laws in national and disciplinary silos.**<sup>2</sup> Counterfeit goods, unsafe products and many sub-standards goods and services are sold online to consumers regardless of where they are situated in the world. Greenwashing<sup>3</sup>, dark patterns<sup>4</sup> and other unfair commercial practices are preying on vulnerable and unsuspecting consumers. Online platforms (social media and retail platforms) play an important role in facilitating cross-border e-commerce (helped by increasingly efficient physical delivery infrastructures) and enable sales with sellers that are not established in the same jurisdiction consumers, or subject to their local laws. Cross-border unfair practices are not only detrimental for consumers, they are also undermining trust in electronic commerce<sup>5</sup> and damaging competition<sup>6</sup> as they advantage the businesses that do not respect the legislation in place. The current legal framework, while offering, in a number of regions, a high level of consumer protection, has not quite come to terms with an increase in cross-border e-commerce trade, the development of digital products and new business models, all contributing factors to cross-border consumer detriment.

**The United Nations Guidelines for Consumer Protection from 2016 (UNGCP)<sup>7</sup> emphasise the benefits of international cooperation** laying out a number of principles to facilitate cross-border cooperation. However, too often, enforcers and consumers find it difficult to take action across borders and this despite the fact that online purchasing processes are now readily available to consumers from anywhere in the world and rapidly becoming the norm.<sup>8</sup> **This report investigates the reasons behind those difficulties and seeks to make**

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<sup>2</sup> Traditionally, enforcers have been limited in their reach. For example, consumer law enforcement would deal with unfair commercial practices, and data protection enforcers would deal with breaches of data protection law without any crossover.

<sup>3</sup> Greenwashing can be defined as a method to promote products using misleading environmental claims to attract consumers.

<sup>4</sup> Dark patterns can be defined as misleading or deceptive user interface (UI) or user experience (UX) designed to actively exploit human psychology and behaviour to persuade consumers to do things they would not have done otherwise, which are not in their best interests and which benefit the company involved. For more information, see: Harry Brignull, 'Types of Dark Patterns' (2020) <[www.darkpatterns.org](http://www.darkpatterns.org)> or JP Zagal, S Bjork, C Lewis, 'Dark Patterns in the Design of Games' <https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1043332&dsid=4129> ; John Brownlee, "Why Dark Patterns Won't Go Away" <https://www.fastcompany.com/3060553/why-dark-patterns-wont-go-away>.

<sup>5</sup> See for example, Recital 1 of the Collective Redress Directive 2020/1828, which states: '*Globalisation and digitalisation have increased the risk of a large number of consumers being harmed by the same unlawful practice. Infringements of Union law can cause consumer detriment. Without effective means to bring unlawful practices to an end and to obtain redress for consumers, consumer confidence in the internal market is reduced*'.

<sup>6</sup> See for example, Recital 2 of Directive 2020/1818: '*The lack of effective means for the enforcement of Union law protecting consumers could also result in the distortion of fair competition between infringing and compliant traders that operate domestically or across borders. Such distortions can hamper the smooth functioning of the internal market*'.

<sup>7</sup> <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-for-consumer-protection>

<sup>8</sup> According to UNCTAD figures, cross-border B2C transactions amounted to \$440 billion in 2019 (<https://unctad.org/press-material/global-e-commerce-jumps-267-trillion-covid-19-boosts-online-retail-sales>). This number is expected to rise in the future years, as borderless e-commerce is becoming a viable business model for traders thanks to the role of platforms in facilitating trade and performant logistics enabling fast deliveries. For an idea of scale, note that almost two thirds of the global population have access to the internet in some form (<https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>). As of 2020, 27% of the world's population has shopped online, up 7% from 2018 UNCTAD B2C E-commerce Index 2020.

## **recommendations to facilitate and improve the international enforcement of consumer law.**

This report considers enforcement primarily from a public enforcement standpoint, but also acknowledges the merits of effective cross-border private enforcement mechanisms. The report focuses on electronic commerce although many principles apply to transactions on and off-line, in line with UNGCP Guideline 5 j) which recognises a level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce as a legitimate need of consumers.

**UNCTAD's Working group on e-commerce, sub-working group 3: cross-border enforcement cooperation, started work** under the chairmanship of the Competition and Markets Authority in the UK (CMA) and the Federal Trade Commission in the USA (FTC) **to develop a cross-border enforcement toolkit for consumer authorities and legislators.**<sup>9</sup> **Further work** is also currently underway at UNCTAD centred around a 'mapping' exercise **of the different consumer law protection systems in effect across the world and their enforcement mechanisms.** Sweden proposed a survey of existing e-commerce rules (rules, landscape, systems) in October 2021 and surveys were sent by the Secretariat in February 2022. At the time of writing, results are awaiting discussions by Sub-group 3. These efforts tally up with work carried out at the OECD notably with the publication of a legislative toolkit for cross-border enforcement.<sup>10</sup>

**The present report is the result of an academic project** funded by the policy support fund at UKRI and the University of Reading. The project is **led by Prof. Christine Riefa** and benefits from the work of a multi-disciplinary and international team.<sup>11</sup> The report is feeding into the work of the above sub-working group 3: Cross-border enforcement cooperation.

Tackling the issue of cross-border enforcement of consumer law first requires acknowledging the way consumer protection is currently organised and given effect. **Consumer law can be described as broadly organised alongside two main axes: substantive consumer law and procedural consumer law,** a distinction used throughout this report.

Substantive consumer law includes the body of rules determining the way in which traders are expected to behave in their relationships with consumers. This includes rules concerning the conclusion of contracts (which may sit outside the realm of consumer law in some jurisdictions) such as contract law and specific rules on consumer information, withdrawal from distance sales, payments, etc. It also includes rules concerning the fairness of relationships notably with legislative provisions on unfair contract terms and unfair commercial practices. Some rules concerning the safety of products or on the apportionment of liability when a product is defective can also sit within the realm of consumer law. In many countries, laws may have developed in specific fields or sectors in the way that essential utilities or financial services

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<sup>9</sup> FTC, CMA, *Cross-Border Enforcement Toolkit for Consumer Authorities and Legislators* (Intergovernmental Group of Experts on Consumer Law and Policy, 4<sup>th</sup> Session, 8-9 July 2019), [https://unctad.org/meetings/en/SessionalDocuments/cicplp\\_Toolkit.pdf](https://unctad.org/meetings/en/SessionalDocuments/cicplp_Toolkit.pdf).

<sup>10</sup> OECD (2021), "Implementation toolkit on legislative actions for consumer protection enforcement co-operation", OECD Digital Economy Papers, No. 310, OECD Publishing, Paris, <https://doi.org/10.1787/20716826>.

<sup>11</sup> For more on the project team, see [www.crossborderenforcement.com](http://www.crossborderenforcement.com).



destined to consumers may also be carved out and reserved under a separate legislative apparatus.<sup>12</sup>

Substantive consumer law is the component that defines the rights granted to consumers and thus calibrates the protection that can be expected. Procedural law concerns the way in which substantive law is enforced and applied. Procedural law, in the way we use the expression in this report, encompasses all avenues leading to a remedy. This includes private and public enforcement of consumer law. Private enforcement is normally understood as the body of rules that will govern the way in which consumers may claim their rights: small claims and other procedural rules on access to courts; access to ADR or ODR; rules governing collective actions by consumers or their representatives. Public enforcement tends to be conceptualised as what an enforcement agency can do. It links to the powers an enforcement or regulatory agency is granted by law or other source, to intervene in consumer markets to the benefit of consumers.

In addition to the ‘substantive/procedural’ spectrum, rules pertaining to the protection of consumers are also organised along a ‘horizontal/vertical’ spectrum. Theoretically, the laws can be transversal (or horizontal) when applied across all commercial sectors (eg unfair contract terms, disclosure of terms and conditions, unfair commercial practices) or they can be sectoral (or vertical) when applied to a specific sector under a ‘carve out’ provision as mentioned above. In practice, ‘carve outs’ are seldom absolute. Sectors will usually adopt general consumer principles for transactions with consumers (for example, clarity of prices), while consumer protection agencies will often leave supervision to sectoral regulators (such as rules governing disconnection of services). At national level such pragmatic arrangements can be worked out between national agencies, but if there are transborder arrangements to be made, there may be gaps in governance.

**The UN Guidelines for Consumer Protection (UNGCP) provide both substantive and procedural guidelines in the elaboration of systems of consumer protection.** Consumer protection policies are defined broadly by UNGCP (II.2 Scope of application) and may include not only laws, regulations and rules but also frameworks, procedures, decisions, mechanisms and programmes of Member States, as well as private sector standards and recommendations that protect consumer rights and interests and promote consumer welfare. The UNGCP covers the broad spectrum of consumer rights and includes generic matters such as safety, as well as some specific sectors such as financial services and essential utilities. They adopt specific rules relating to electronic commerce.<sup>13</sup>

This report first reflects on the **process of internationalisation of consumer law** and explores if there is a need for an international system of consumer law where both substantive rights and procedural powers of enforcement are harmonised (part 1). Consumer law started out as a national concern before becoming increasingly a regional and now international in scope, mainly as a result of globalisation and the democratisation of electronic commerce. Yet, while there are examples of successful processes of regionalisation, consumer law remains devoid of any international treaty as a legal basis (as may be the case with international trade with the GATT, or international human rights with the Universal Declaration of Human Rights and

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<sup>12</sup> In the UNGCP, all those fields are part of the guidelines and thus, the international governance of consumer law is one of inclusivity.

<sup>13</sup> By contrast, the OECD Recommendations normally focus on particular segments. For example, the OECD Recommendations on this topic focus solely on electronic commerce but include a recommendation (Rec 59) on cross-border cooperation. Other Recommendations concerning other sectors and aspects exist.

allied treaties<sup>14</sup>). Therefore, its international operation, for the time being at least, rests on soft law and there are no international enforcement structures<sup>15</sup> transcending geographical borders. Rather than advocating harmonisation, the report advocates the merits of coherence as a yardstick for the internationalisation of consumer law.

**However, the need for the elaboration of supra-national rules stems from a number of structural challenges to cross-border enforcement** (part 2). For example, the inadequacy of jurisdiction rules as well as the diversity in substantive and procedural consumer laws across the world form important obstacles. Those are compounded by limitations and impediments of both public and private enforcement of consumer law and the specific challenges that cross-border e-commerce raises. The report surveys the UNCTAD Cyberlaw tracker's reliability and tests out the assumption that procedural laws are lagging behind the adoption and roll out of substantive consumer rights. It reviews the development of collective actions and ADR but note the gaps that still exist in those mechanisms becoming reliable cross-border enforcement tools. The report also reviews the progress made in the development of public cross-border enforcement mechanisms but notes that it often falls at the first hurdle with a fairly widespread lack of legal basis to effect any cross-border enforcement, alongside gaps in institutional set ups, resources and powers as well as rules on privacy and confidentiality.

**As the process leading to the adoption of a formal international instrument with binding force, providing it may be desirable, is likely to be long, this report reflects on the adoption of solutions that can come to mitigate for the lack of an effective supra national framework in the short to medium term** (part 3). The report delves into already existing solutions and encourages the **pursuit of formalised cooperation mechanisms** (such as the Consumer Protection Cooperation Network in the EU, the use of toolkits or bilateral and multi-lateral agreements) **alongside informal ones**. Informal mechanisms have proven effective as information sharing through databases, the adoption of MoUs between enforcers and coordination through IPCEN have showed. Similarly, coordination of actions by consumer associations has yielded good results, notably in the Diesel Gate scandal, which prompted the first truly co-ordinated and global collective action. The role of platform in cross-border enforcement is also considered in this part of the report.

As the report is resolutely looking to the future of cross-border consumer law enforcement, the report also **explores emerging solutions**, which include **enforcement through platforms** (see above), the **use of technology in consumer law enforcement** (part 4) and the **merits for a broader use of international standards in enforcement** (part 5).

Part 4 of the report seeks to explore technology as a way to go further than information exchange. It **takes stock of how technology is used to identify, monitor and redress detriment and elaborate on how it could be used in the future to improve the enforcement of consumer law across borders** (although much of the remarks made will also be pertinent in a national and regional context). Notably the report reviews how a technological approach to consumer enforcement (EnfTech) could be rolled out to prevent and detect, survey and minimise risks to consumers, and ensure curtailment of practices alongside effective reparation of harm. The report assesses the merits of technological tools and warn of pitfalls.

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<sup>14</sup> <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>15</sup> The only international institution catered for by the UNGCP is the intergovernmental group of expert as mandated by GL VII A 95 (institutional international machinery; institutional arrangements) and whose functions are defined in GL97 to 99.

Part 5 reflects on how international standards can be harnessed to build convergence in cross-border enforcement, going beyond toolkits, and offering a path to a more formalised cooperation framework in the future.

In Part 6, the report concludes and makes recommendations for the improvement of cross-border enforcement of consumer law.

## Part 1: Towards the supra-nationality of consumer law?

The elaboration of modern consumer laws (both substantive and procedural) started out as a national endeavour. Today, the process of regionalisation and internationalisation of consumer law and policy is intensifying. Consumer law and consumer protection is becoming a supranational phenomenon.<sup>16</sup> Concerns for consumer protection beyond the borders of a state are growing out of globalisation and digitalisation. Regionalisation of consumer protection concerns has also been largely driven by economic integration and benefited from broader programmes of legal harmonisation. A process of regionalisation of substantive consumer law alongside some regionalisation of procedural enforcement structures, may help in the challenge of ensuring consumers are effectively protected when they engage in the digital sphere. In this domain some regionalisation processes have been successful in reinforcing the enforcement structures to facilitate and, in some cases, mandate cross-border collaborations (eg: Consumer Protection Cooperation Network in the EU and strengthening of rules in neighbouring disciplines such as product safety or competition law). But each regional grouping will need to take actions so that consumers across the world can ultimately be protected regardless of which entity they contract or interact with. Regionalisation has many advantages in as much as it helps bridge the sometime wide gap that exists between national and international enforcement, but it is not sufficient overall and may create more entrenched positions.

It is therefore useful to also reflect on the need for the internationalisation of consumer law and policy and a process of harmonisation at international level. In doing so one has to acknowledge that international enforcement can be difficult as it requires different socio-legal cultures colliding to find compromises. As a result, the process of international agreement is normally long and protracted. One key issue is often agreeing the level of protection that ought to be universally granted. Harmonisation of legislative frameworks can be seen as a threat to cultural identity and national sovereignty. It also may require a dilution of standards to reach agreement.

Harmonisation as a process is not necessarily well adapted to an international set up such as that of UNCTAD. Therefore, in this report, we prefer to talk not of achieving harmonisation, but instead, of finding a way to ensure that diversity in legal systems and cultures can remain yet be harnessed to protect consumers. As a result, this report explores coherence in consumer law making and enforcement, the idea that what legal systems ought to strive for is convergence<sup>17</sup>, not uniformity.<sup>18</sup> This is particularly important in the context of cross-border enforcement as this process needs to be accommodated within enforcement frameworks already in place and cannot wait for an international instrument mandating uniformity to be adopted. That is not to say that such an instrument could not be pursued but pragmatic solutions which can be rolled out in a much shorter time frame are necessary.<sup>19</sup> This report thus focusses

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<sup>16</sup> Hans-W Micklitz and Mateja Durovic, *Internationalization of Consumer Law* (Springer International Publishing 2017) 1.

<sup>17</sup> Note that convergence seems to be terminology used at the WTO notably in the context of negotiations on electronic commerce. See for eg: [https://www.wto.org/english/news\\_e/news22\\_e/jsec\\_04feb22\\_e.htm](https://www.wto.org/english/news_e/news22_e/jsec_04feb22_e.htm)

<sup>18</sup> Note however that this terminology also has limitation and, when it has been used, it is possible the use is not intended to be a legal construct.

<sup>19</sup> Note that the same concern for convergence and coherence ought to apply to bridging disciplines that are relevant to protecting consumers in the digital age. Notably, those seeking enforcement solutions in data protection or competition for example, ought to consider the role of consumer law and vice-versa. At national level more cross-fertilisation and sharing of enforcement functions (eg: data protection/consumer protection) may also need to be developed. This report however does not delve into this interaction.

on this more pragmatic approach rather than seek to elaborate on the merits of an international instrument and institutional set up of enforcement.

Part 1 explores the regional (1.1) and international (1.2) sources of consumer law and elaborate on the concept of coherence in consumer law in an international setting (1.3).

## **1. Regional sources of consumer law**

Consumer protection is a concern in a number of regional instruments. This is the case for example in the European Union (EU), the Association of Southeast Asian Nations (ASEAN), the Caribbean Community (CARICOM), the Southern Common Market (MERCOSUR), Organisation of American States (OAS), the Common Market for Eastern and Southern Africa (COMESA) or the Gulf Cooperation Council. The UNGCP GL79 supports regional and sub-regional cooperation notably via mechanisms for exchange of information and implementation of consumer protection policies to achieve greater results within existing resources (which may include joint elaboration of regulations).

Regional systems normally work towards the substantive harmonisation of national laws and can have common institutions (procedural). Where it exists, consumer law enforcement remains procedurally largely national in nature although it may be complemented with more informal collaboration.

This is for example the case in the African Consumer Protection Dialogue (“African Dialogue”), which is an informal multinational network playing a key role in promoting the dialogue and coordination in the enforcement of consumer law in the region coordinating national enforcement frameworks. The African Dialogue has set out principles for the cross-border enforcement of consumer law, including cooperation, strategy and confidentiality between agencies operating in different countries. The Livingstone Principles provide for four key principles, namely enforcement, investigations, information sharing and capacity building.<sup>20</sup> It also facilitates and organizes an annual African Consumer Protection Dialogue Conference – 11th occasion held in 2020.<sup>21</sup> These meetings are also intended to be a forum for the identification and discussion of cross-border trade and commercial practices that may undermine consumer protection in the region and globally.

In the EU however, the revised Consumer Protection Cooperation Regulation 2017/2394 (CPC) offers much closer collaboration channels than in other regions of the world at the time of writing. The adoption of the CPC is directly linked to cross-border enforcement issues. Indeed, Recital 3 states:

*‘The ineffective enforcement in cases of cross-border infringements, including infringements in the digital environment, enables traders to evade enforcement by relocating within the Union. It also gives rise to a distortion of competition for law-abiding traders operating either domestically or cross-border, online or offline, and thus directly harms consumers and undermines consumer confidence in cross-border transactions and the internal market. An increased level of harmonisation that includes effective and efficient enforcement cooperation among competent public enforcement*

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<sup>20</sup> [https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/african\\_dialogue\\_principles\\_on\\_cooperation\\_in\\_consumer\\_protection\\_enforcement\\_-\\_zambia\\_september.pdf](https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/african_dialogue_principles_on_cooperation_in_consumer_protection_enforcement_-_zambia_september.pdf)

<sup>21</sup> <https://www.ftc.gov/news-events/events-calendar/elevanth-annual-african-consumer-protection-dialogue-conference>

*authorities is therefore necessary to detect, to investigate and to order the cessation or prohibition of infringements covered by this Regulation.'*

The CPC creates new rules to tighten collaboration of enforcement authorities for intra-community infringements (although it builds upon the pre-existing network of enforcement authorities<sup>22</sup>). For example, effective cooperation between authorities is mandated by Article 6 of the CPC, alongside taking all necessary measures available under national law to bring about the cessation or prohibition of infringements covered by this Regulation upon request by another authority. The CPC also imposes a number of minimum powers that need to be granted to all authorities and creates a mutual assistance mechanism (art 11) concerning requests for information as well as requests for enforcement measures. Refusal to comply with a request for mutual assistance is tightly controlled under Art 14 CPC. The Regulation also makes provisions for coordinated investigations and enforcement where violations span more than two Member States (Chap IV). Some rules regarding disclosure of information and professional and commercial secrecy are also in place (Art 33). The CPC however, does not address cross-border enforcement issues that go beyond the borders of the EU. While it is limited in its scope, it represents a major step towards convergence in the world's largest single market (for more, see Part 3, para 1.1).

## **2. International sources of consumer law**

At international level, there is to date no harmonised system of substantive consumer law in operation nor any supra-national system of consumer enforcement or harmonised system of procedural laws. Instead, the international system relies broadly on soft law and goodwill of the enforcers to cooperate and assist each other.

The main instruments in this regard are the United Nations Guidelines for consumer protection and a number of OECD Recommendations, notably the OECD Recommendations on electronic commerce.<sup>23</sup> The former offers a set of principles agreed by the UN General Assembly.<sup>24</sup> The original UNGCP were revised in by the UN General Assembly Resolution 70/186 adopted on 22 December 2015 and so took into account the impact that digital technologies have on consumer protection.<sup>25</sup> Both are complementary texts. The UNGCP Guideline 65 cites the OECD E-commerce Recommendations from 1999 as reference materials.<sup>26</sup> The UNGCP Guideline 90 also cites the 2003 OECD guidelines for protecting consumers from fraudulent and deceptive commercial practices across borders. The OECD E-commerce Recommendations from 1999 were also revised (shortly after the UNGCP) adding a new para 54 vi asking governments 'to consider the role of applicable law and jurisdiction in enhancing consumer trust in e-commerce'.

The scope of the OECD recommendations from 2016 is limited but is complemented by other OECD instruments covering specialised issues (see table in the Annexe). The work of the

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<sup>22</sup> See Regulation (EC) No 2006/2004 which established a network of competent public enforcement authorities throughout the Union.

<sup>23</sup> United Nations Guidelines for Consumer Protection (2016), [https://unctad.org/system/files/official-document/ditceplpmisc2016d1\\_en.pdf](https://unctad.org/system/files/official-document/ditceplpmisc2016d1_en.pdf); OECD (2016), *Consumer Protection in E-commerce: OECD Recommendation*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264255258-en>.

<sup>24</sup> Adopted by the General Assembly in its resolution 70/186 of 22 December 2015, A/RES/70/186.

<sup>25</sup> UNCTAD, Consumer Protection in electronic commerce, Note by the UNCTAD Secretariat (TD/B/C.I/CPLP/7) April 2017, 2.

<sup>26</sup> OECD (2016), *Consumer Protection in E-commerce: OECD Recommendation*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264255258-en>.

OECD Committee on Consumer Policy began with the adoption of the 2003 OECD Cross-Border Fraud Guidelines, which aims to establish a common framework to combat fraudulent practices by fostering cooperation among consumer protection enforcement agencies.<sup>27</sup> Since then, a number of guidelines and recommendations were adopted touching upon the importance of cross-border enforcement such as the 2007 OECD Policy Guidance on Consumer Dispute Resolution and Redress,<sup>28</sup> the 2006 OECD Recommendation on Cross-Border Co-Operation in the Enforcement of Laws against Spam,<sup>29</sup> and the 2008 OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce.<sup>30</sup> The OECD recently touched upon cross border enforcement, publishing an implementation toolkit on legislative actions for consumer enforcement cooperation.<sup>31</sup>

There is to date no international body overseeing the application of consumer law worldwide. While at UNCTAD, the competition and consumer policies branch offer a focal point for consumer policy within the UN system and act as a custodian for the UNCTAD Guidelines for consumer protection, it does not have any law making or enforcement powers. As a result, there is no supra-national enforcement structure in place per se, and cooperation (as promoted by the UNGCP) will remain the main avenue to seek international solutions in enforcement for the foreseeable future. However, regionalisation may help streamline solutions by bringing more uniformity within regions.

Other inter-governmental organisations also work on developing consumer protection at a supra-national level. For example, the G20 periodically reflects on consumer protection. This was for example the case in 2011 with a task force on financial consumer protection convened by the OECD<sup>32</sup> which produced ‘High Level Principles’ which are cited in the 2015 revision of the UNGCP in Guideline 68.<sup>33</sup> Further work followed in 2017 with a focus on building a digital world that consumers can trust.<sup>34</sup>

The Japan G20 summit in 2019 launched the Osaka Track, a ‘process which demonstrates commitment to promote international policy discussions, inter alia, international rule making on trade-related aspects of electronic commerce at the WTO’.<sup>35</sup> Within the remit of those discussions, consumer representatives were included in discussions for the first time.<sup>36</sup> In 2021, the WTO had made progress on the text of an article on consumer protection: ‘The online consumer protection article requires members to adopt or maintain measures that proscribe misleading, fraudulent and deceptive commercial activities that cause harm, or potential harm, to consumers engaged in electronic commerce. Members are required to endeavour to adopt or maintain measures that aim to ensure suppliers deal fairly and honestly with consumers and provide complete and accurate information on goods and services and to ensure the safety of

<sup>27</sup> <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0317>

<sup>28</sup> <https://www.oecd.org/sti/consumer/oecdrecommendationonconsumerdisputeresolutionandredress.htm>

<sup>29</sup> <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0344>

<sup>30</sup> <https://www.oecd.org/sti/consumer/40879177.pdf>

<sup>31</sup> <https://www.oecd.org/digital/implementation-toolkit-on-legislative-actions-for-consumer-protection-enforcement-co-operation-eddc57-en.htm>

<sup>32</sup> <https://www.oecd.org/finance/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>

<sup>33</sup> OECD, G20 High Level Principles on Financial Consumer Protection (OECD 2011) <https://www.oecd.org/finance/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>

<sup>34</sup> [https://www.bmfv.de/G20/EN/ConsumerSummit/G20\\_node.html](https://www.bmfv.de/G20/EN/ConsumerSummit/G20_node.html).

<sup>35</sup> Osaka Declaration on the Digital Economy, [https://www.g20.org/pdf/special\\_event/en/special\\_event\\_01.pdf](https://www.g20.org/pdf/special_event/en/special_event_01.pdf)

<sup>36</sup> <https://www.consumersinternational.org/news-resources/news/releases/first-ever-consumer-trade-dialogue-held-at-the-wto/>



goods and, where applicable, services during normal or reasonably foreseeable use. The article also requires members to promote consumer redress or recourse mechanisms.<sup>37</sup>

The European Bureau of Consumer Unions (BEUC) commented that this article would not create new rights for consumers but shows that governments understand the need to better protect consumers in a global online market. Monique Goyens, Director-General of BEUC comments: 'This bold move by the EU and its trading partners from across the globe sets a precedent that trade policy must underpin and not harm domestic efforts to better protect consumers'.<sup>38</sup> While the inclusion of consumer protection concerns at the WTO signals a move towards the internationalisation of consumer rights, and may offer an avenue for international rule making, it comes with a number of potential caveats.<sup>39</sup>

Rulemaking at the WTO is focussed on achieving consensus on trade agreements. Improving consumer welfare is not a declared goal, although for example the GATT (General Agreement on Tariffs and Trade 1948) led to eight rounds of reductions in tariffs that brought benefits to consumers in the form of lower prices before the GATT was subsumed into the newly created WTO in 1995. It is also possible to take into account concerns for consumers through maintaining some national rules that may act as barriers to trade, for example to protect consumers, prevent the spread of disease or protect the environment'.<sup>40</sup> There are however no derogations for the protection of economic rights. The WTO system may not thus be a natural place to agree minimum levels of consumer protection and enforcement mechanisms, in particular because any WTO rules would not be directly enforceable by consumers or national enforcers (or businesses for that matter).<sup>41</sup> The WTO dispute resolution mechanism is only the purview of States. The WTO enforcement system may therefore remain of little practical significance in cross-border enforcement cases. Worse, developing rules of consumer protection at the WTO may enshrine a level of protection that would not evolve easily if fuller rules were developed, because it could stop member states from altering protection for fear that such a move may be construed as a barrier to trade. However, under the WTO system Member States can alter levels of protection as long as they do so without discriminating between domestic producers and importers, hence retaining some flexibility.

In other international non-governmental fora, consumer protection is also being highlighted as a concern. ISO, the International Standards Organisation, is an independent, non-governmental organisation which brings experts to develop voluntary standards. Those are consensus based

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<sup>37</sup> [https://www.wto.org/english/news\\_e/news21\\_e/jsec\\_12sep21\\_e.htm](https://www.wto.org/english/news_e/news21_e/jsec_12sep21_e.htm)

<sup>38</sup> BEUC, Over 80 countries show political will to protect consumers in future e-commerce deal, <https://www.beuc.eu/publications/over-80-countries-show-political-will-protect-consumers-future-e-commerce-deal/html>

<sup>39</sup> BEUC notes that their overall position on the agreement would be reserved until more details emerge. The concern being that 'the agreement, which would prevail over EU law, should under no circumstance limit how the EU regulates such topics now or in the future'. See BEUC, Over 80 countries show political will to protect consumers in future e-commerce deal, <https://www.beuc.eu/publications/over-80-countries-show-political-will-protect-consumers-future-e-commerce-deal/html>

<sup>40</sup> [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm) 'Under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international, and are otherwise in accordance with the provisions of the WTO Agreements' (see Para 6 [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).)

<sup>41</sup> National enforcers can however work as part of government and for example food standard agencies have played a role in disputes at the WTO.



and market relevant. They aim to support innovation and provide solutions for global challenges.<sup>42</sup> ISO hosts a committee on consumer policy (COPOLCO) which works on ensuring that consumer interests are represented in the adoption of standards. ISO has issued a number of relevant standard on B2C e-commerce (ISO 10008:2013)<sup>43</sup> and on online customer reviews (ISO 20488)<sup>44</sup> and is working on the development of a standard on digital privacy by design for consumer goods and services (ISO/PC317).<sup>45</sup> A new ISO international workshop agreement provides the foundation to address the challenges presented by the ‘sharing economy’.<sup>46</sup> Standards can be a powerful ally for consumer protection as part 5 of this report demonstrates.

In addition, concerns for consumer protection have been highlighted at the World Economic Forum with a White paper on the Global Governance of Online Consumer Protection and E-Commerce, also focussing on the need to build trust in cross-border exchanges.<sup>47</sup> The WEF regularly features topics of discussions that impact consumers’ lives.<sup>48</sup>

### 3. Coherence in consumer law (rather than uniformity)

Many Regional systems aspire to harmonisation of their national consumer laws (and laws in general). Harmonisation can be defined as the process of creating common standards. Harmonisation is in theory quite deep and can affect the form as well as content of national legislation.

In the EU, Article 114 TFEU confers the competence to enact measures for the approximation of laws, a process more commonly referred to as harmonisation.<sup>49</sup> Under Article 114 TFEU, substantive harmonisation may only be used when there is a legal basis to enact EU legislation and only if there is a genuine link between the adopted measure and the removal of existing obstacles within the internal market.<sup>50</sup> Harmonisation is thus ‘instrumentalised’ as a process to achieve an economic goal.<sup>51</sup> The temptation is therefore to unify as much as possible the substantive and procedural laws in place to ensure frictionless trading within the region. However, harmonisation is a difficult process and the EU experience shows that having started by defining a floor of substantive protection (minimum harmonisation) the direction was taken to increasingly impose a ceiling of protection<sup>52</sup> as divergence in levels of protection do create problems of so-called fragmentation. In addition, in a region where courts continue to have a large remit for interpretation, divergence in application showed some cracks in the pursuit of a minimum and maximum harmonisation policy. As a result, the EU has made more regular use

<sup>42</sup> <https://www.iso.org/about-us.html>.

<sup>43</sup> <https://www.iso.org/standard/54081.html>. The standard was reviewed and confirmed in 2019.

<sup>44</sup> <https://www.iso.org/news/ref2295.html>.

<sup>45</sup> <https://www.iso.org/committee/6935430.html>

<sup>46</sup> <https://www.iso.org/news/ref2225.html>.

<sup>47</sup> [http://www3.weforum.org/docs/WEF\\_consumer\\_protection.pdf](http://www3.weforum.org/docs/WEF_consumer_protection.pdf).

<sup>48</sup> see for eg: <https://www.weforum.org/agenda/2021/04/responsible-data-collection-could-inspire-consumer-trust/>

<sup>49</sup> The difference in terminology is of little significance according to Leibel and Schroöder *EUV/AEUV*, ed. Rudolf Streinz (2nd ed., Beck 2012), 1455 para 19.

<sup>50</sup> Case C-376/98 *Germany v Parliament and Council*

<sup>51</sup> On the instrumentalisation of EU consumer law, see Micklitz, The consumer: marketised, fragmented, constitutionalised, in Leczykiewicz, Weatherhill, *The images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 21-41.

<sup>52</sup> Vanessa Mak, ‘Full Harmonization in European Private Law: A Two-Track Concept’, *European Review of Private Law*, 20 (2012) 213-236.

of so-called maximum harmonisation texts including Regulations (rather than directives) in the elaboration of laws in recent years. Regulations are directly applicable in Member States, whereas Directives need to be implemented in national law, giving some leeway into the form and the wording that can be used to enact laws.



From an international law-making standpoint, uniformity is normally achieved by adopting international treaties and Conventions.<sup>53</sup> In the area of consumer law, uniformity seems neither achievable at present (UNGCP G.I.1(a) only seeks adequate protection of consumers to be achieved) nor desirable in the immediate future. Too many legal traditions as well as economic set-ups have to work together to hope that a fully harmonious system could develop at pace. As a result, the prospect of an international treaty on consumer law may be a little far off.

However, some coherence is necessary today, for all States to be able to offer some protection for their consumers when they experience harm with a source located outside of their geographical border. There is agreement on this last point. The UNGCP (GVI.79(b)) indeed encourages cooperation and setting up of joint testing facilities, common testing procedures, exchange of consumer information and educational programmes, all consistent with the concept of coherence (at least as a tool of good governance rather than as a legal construct).

Coherence is defined by the Cambridge dictionary as the situation when the parts of something fit together in a natural or reasonable way. Coherence is a concept that is much explored in the context of legal reasoning.<sup>54</sup> According to MacCormick the coherence of a set of legal norms consists in their being related either by the realisation of some common value(s) or in fulfilling some common principle(s).<sup>55</sup>

Coherence is used in neighbouring disciplines to consumer law, notably competition law<sup>56</sup> and in international law. We notably find it in the work of the WTO<sup>57</sup> but also UNCTAD.<sup>58</sup> In many respect the UNGCP is a tool to achieve coherence rather than harmonisation as it provides a blueprint without being prescriptive about the content or methods.

To build some coherence in cross-border enforcement of consumer law, we can draw from best practices and characteristics of enforcement structures. It is important to also recognise the structural challenges faced by cross-border enforcement to design solutions that can fit around those challenges and/or bypass them. The process of regionalisation will help build bridges. But some countries may find themselves excluded from regional integration and the

<sup>53</sup> See for example, UN Convention on Contracts for the Sale of International Sale of Goods.

<sup>54</sup> Stanford Encyclopaedia of Philosophy, *Interpretation and Coherence in Legal Reasoning* (2010) para 3.1 <https://plato.stanford.edu/entries/legal-reas-interpret/#WhaConCoh>

<sup>55</sup> N. MacCormick, Coherence in legal justification, in A. Peczenik et al. (eds.), *Theory of Legal Science* (Reidel Publishing 1984).

<sup>56</sup> W. Saunter *Coherence in EU Competition Law* (OUP 2016). This book focuses on the historical development of EU competition law and coherence. Chapter II and III argues that competition as a whole is driven by the notion of coherence. For example, Article 101(3) TFEU expressly references Consumer Welfare as a pre-eminent value, which is the basis of Competition Law. From chapter IV to IX focuses on the impacts of coherence on specific sectors within EU competition such as telecommunication and energy.

<sup>57</sup> see for eg: WTO 'Declaration on the Contribution of the World trade Organisation to Achieving Greater Coherence in Global Economic Policymaking' (1994).

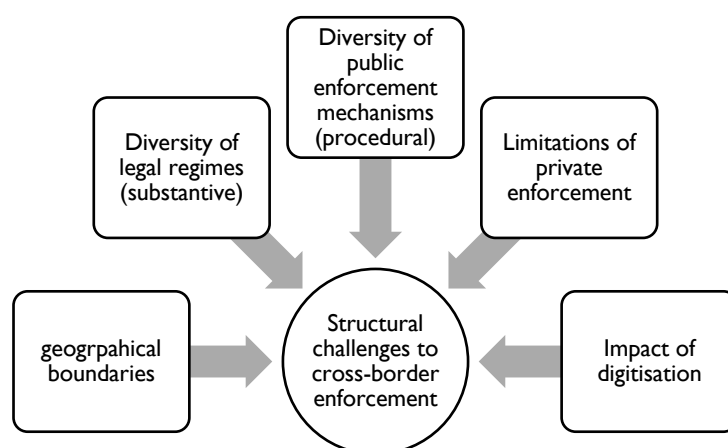
<sup>58</sup> eg: <https://unctad.org/project/strengthening-policy-coherence-and-integration-ensure-science-technology-and-innovation>.

development of e-commerce cross-border issues increasingly requires cooperation between countries in different regions with diverging legal traditions and architectures. Coherence building could therefore benefit from the creation and implementation of a set of international standards focused on the enforcement of consumer law across borders. This report thus explores the merits and technicalities of developing such a solution either in the form of toolkits (part 3, para 2) and/or as stand-alone international standards (part 5).

## Part 2: Structural challenges to cross-border enforcement

The UNGCP promotes international cooperation (section VI) in the enforcement of consumer protection policies. The OECD Recommendations on electronic commerce from 2016 do the same in Rec 54. The OECD also emphasises the importance of international cooperation in several documents, such as the 2016 E-Commerce Recommendation (Part III: Global Co-operation), the 2003 Cross-Border Fraud Guidelines (Part III: Principles for International Co-operation), and the 2006 Recommendation on Cross-Border Co-operation in the Enforcement of Laws Against Spam (Part B: Improving the Ability to Co-operate).

The necessity of cross border cooperation is not in question. Many consumer issues are now global in nature (eg sustainable consumption, environmental protection) and take place via channels that transcend national borders. But the road to smooth and efficient cross-border enforcement is full of challenges, many of which are structural in nature.



The structural challenges to cross-border enforcement are anchored in the fact that substantive and procedural consumer law developed ad hoc, and thus can be very diverse across the world. To some extent the development of cross-border enforcement is also hampered by the fact that there is no stable definition of scope of consumer law. In addition, concerns for effective enforcement are fairly recent in the history of the development of consumer policy and have yet to gain maturity. The diversity of designs in the consumer law governance system makes the task arduous, although not impossible. In addition, cross-border enforcement collides with the realities of national enforcement systems organised along geographical boundaries, where it in fact needs to service a largely dematerialised world. Cross-border enforcement is also limited by what enforcement mechanisms in place can do. Notably, it is constrained by the fact that consumers by and large are not always able to claim their rights and be the arbiters of markets<sup>59</sup>, leaving more need for public enforcement to intervene to preserve competition. Cross-border enforcement also needs to take account of sectoral practices which may render enforcement even more intricate where enforcement powers are shared with, or allocated to, sectoral enforcers rather than general enforcement agencies. In those situations, informal cooperation may need to be favoured pending the development of more formal avenues for cross-border and cross- sectoral collaboration.

<sup>59</sup> Siciliani, Riefa, Gamper, *Consumer Theories of Harm, for an economic approach to consumer enforcement and policy making* (Hart Publishing 2019).

## **1. Diversity in substantive consumer law**

The first wave of internationalisation of consumer law focussed on the creation of substantive national and/or regional rules protecting essential consumer rights. The adoption of consumer laws started at national level and is now developing at regional level. The creation of consumer law is well underway although it is far from complete.<sup>60</sup>

### **1.1. Survey of the UNCTAD Cyberlaw tracker**

The UNCTAD cyberlaw tracker offers a useful snapshot of substantive consumer laws. A cyberlaw tracker is a useful technical tool for enforcers to be informed of the legal framework in place in another country where cross-border enforcement needs may arise. As a result, this report sought to test out how reliable this tool may be and whether or not our assumptions about substantive law development and procedural laws lagging behind were well founded.

For the purpose of this report, we conducted a survey of 13 States featured in the UNCTAD Cyberlaw Tracker during the period Jan to March 2022. The analysis of the data collected showed that legislative development was continuing at pace, with an emphasis on substantive law rather than procedural law. However, it also showed that updates and improvements in the depth of data held were needed for the Cyberlaw Tracker to remain a reliable source and provide an accurate picture of the state of consumer protection around the world.

Out of the 13 countries surveyed, only one was accurately inventoried in the Cyberlaw tracker (Italy). This may be in part because consumer protection in this civil law country is predominantly contained in the Italian Consumer Code (Legislative Decree of 6 September 2005 No. 206) which is only revised where necessary to implement EU Directives, but without amending its overall architecture. In countries where the legislative landscape relies more on standalone legislation, amendments and changes may be more visible. In our sample, 12 countries had adopted new pieces of legislation related to the protection of their consumers since being last inventoried in the Cyberlaw Tracker. This finding highlights the evolving nature of consumer protection and is a marker of its growing importance over time.

Although the sample is small, it strongly suggests that the UNCTAD Cyberlaw Tracker data (last updated in 2019) is no longer sufficiently accurate and would require further updates. Besides, the Tracker has tended only to catalogue one single instrument destined for consumers, when in fact many countries find their consumer law contained in a multitude of instruments that are not listed. For example, in Canada the Tracker only lists Federal Law, when in fact each province also adopts legislation. In Greece, most of the protection granted finds its roots into the Law 2251/1995 on the Protection of Consumers, the latter being complemented by several other legislations. Similarly, South Africa does not have one single source of consumer protection. While the largest legislation is the Consumer Protection Act, it is supplemented by other instruments such as the Electronic Communications and Transactions

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<sup>60</sup> It took time to gather momentum possibly because differing approaches to consumer protection is typically seen as a non-tariff barrier to trade and billed as an impediment. However, ‘trade liberalisation, as a necessary prerequisite for globalisation, and the development of unified systems of consumer protection can be seen as complementary rather than conflicting goals. Saumier and Micklitz identified a number of recurrent challenges to the effectiveness of consumer protection at national level in their study of 37 countries back in 2016 (*Enforcement and effectiveness of Consumer Law* (Springer 2016)) but note that consumer protection has been a priority in many states and new legislation has been occupying legislators and policy makers.

Act, the National Credit Act and the Rental Housing Act. Although Turkey used to have all of its consumer protections contained in the Law No. 6502 on Consumer Protection, it has recently adopted the Law No. 7223 on Product Safety and Technical Regulations providing provisions on the responsibility and liability for product safety in the country.

However, it should be noted that the Cyberlaw Tracker original survey focussed on consumer protection laws, data protection law and e-commerce enabling laws. The survey for the purpose of this report only focussed on consumer law which therefore may explain the discrepancies between the depth of data and the cataloguing of only one main consumer protection instrument as opposed to reflecting the more varied and intricate state of consumer regulations.

Despite these differences, one common trend can be identified throughout the countries surveyed. Contemporary evolution of consumer law has focused on the creation of substantive laws, with a very limited number of procedural laws essential for enforcing consumer protection across borders being developed and adopted. We found very little trace of procedural law reforms. The survey however did not dig more specifically into general procedural laws which may well contain the required tools for enforcers. Further research is necessary on this point.

Outside of the remit of our study of 13 States, there is evidence of the continuing development of consumer law. Encouragingly, more recent consumer law reform projects seem to show an emerging trend in developing not only substantive but also procedural laws in tandem. For example, the development of new laws in Saudi Arabia caters not only for the creation of rights but also the development of infrastructures and procedural laws necessary for their enforcement.<sup>61</sup>

Given the diversity of substantive laws (with or without accompanying procedural laws), the question remains as to what the level should be of such consumer protection globally<sup>62</sup> and how best to facilitate coherence of those legal regimes. Here we see a wide variety of approaches and the level of protection of consumers also varies. The UNCTAD Guidelines provide some guidance for the matters that need to be included within the realm of consumer policy and the minimum expectations that ought to concern States conforming to the Guidelines. For example, the Guidelines set out as a general principle, to develop, strengthen or maintain a strong consumer protection policy and that the Guidelines should meet consumers' legitimate needs (UNGCP III.4 and 5). The Guidelines provide a minimum protection standard. Indeed, the UNGCP G1(a) states that one of the objectives of the guidelines is to 'assist countries in achieving or maintaining adequate protection for their population as consumers'. They are also not specific as to the content of the rights that may be granted.

## **1.2. Diversity in substantive law: case study on the use of the right to cancel in distance sales**

Just to illustrate the point, the table below shows the diversity in responses to the question of the ability for consumers to exercise a right to cancel in distance sales (ie the right to change

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<sup>61</sup> This is the case with the draft law on product safety and the draft of generic law on consumer protection, both in their final stage of approval. Th. Bourgoignie, R. Simpson, National Strategy for Consumer Protection 2022-2026, Ministry of commerce, Saudi Arabia, 2022.

<sup>62</sup> Hans-W Micklitz and Mateja Durovic, *Internationalization of Consumer Law* (Springer International Publishing 2017) 2.

their mind and return the goods after they had a chance to inspect them post-delivery). On this aspect, the UNGCP only requires that national policies for consumer protection encourage a transparent process for the confirmation, cancellation and return and refund of transactions (G V.A.14.(e)).

Country	Cooling-off period
United States	None (except 24 hours for airline tickets).
Brazil	Right to cancel within 7 days following receipt of goods.
China	Right to cancel within 7 days, following receipt of goods
Japan	Right to cancel within 8 days, following receipt of goods.
Switzerland	None – although 14 days for purchases made over the phone.
European Union	Right to cancel and return orders within 14 days of receiving goods.
Morocco	allow consumers, in certain cases, a withdrawal period of 7 days
Ivory Coast	10 business days to return from delivery.

Source: BEUC, The Challenge of protecting EU consumers in global online markets (2019) national legislative requirements compared (annex 3), p. 62-63 and own research

The UNCTAD Manual on Consumer Protection (revised in 2017) describes the spread of ‘cooling off periods’ as ‘*a success to be built upon*’.<sup>63</sup> The diversity of response by consumers can be seen in countries which have only recently adopted e-commerce at scale. In Morocco, such was the enthusiasm on the part of consumers for the right to retraction as a form of protection that the consumer protection agency had to issue warnings to consumers that it did not apply to across-the-counter transactions.<sup>64</sup> In Cote d’Ivoire, the UNCTAD evaluation of e-commerce readiness in 2020 reported that most e-commerce transactions were linked to payment by cash on delivery.<sup>65</sup> In both countries it is widely reported that the cooling off period and right of retraction are not only used by consumers as a ‘period of reflection’ but also as a form of security against non-delivery or of defective goods, the risk to consumers being mitigated by payment of cash on delivery. E-commerce is thus being transformed into a system of electronic ordering rather than payment. Although suppliers find it can be onerous for them, it nevertheless seems to have the effect of increasing custom, because of the guarantee effect.

## 2. Diversity in systems of governance

Within the systems of consumer protection in place at national and regional level, there does not appear to be a ‘one size fits all’ model. For example, the rules applicable to consumer protection may form a part of a predominantly private, public or a mixed system. A study in

<sup>63</sup> UNCTAD *Manual on Consumer Protection* (2017) ch XIV, p.117.

<sup>64</sup> UNCTAD *Voluntary Peer review of consumer protection law and policy: Morocco* (2018) p.14.

<sup>65</sup> UNCTAD, Cote d’Ivoire, *Evaluation de l’état de préparation au commerce électronique* (2021) p. 2,34,35,43.

37 countries on the enforcement and effectiveness of Consumer law reveals that there is ‘no miracle recipe’ but that some best practices are transferable despite legal systems, societies, cultures and traditions being different.<sup>66</sup>

For instance, some jurisdictions make greater use of industry self-regulation and rely more heavily on consumer associations to supervise markets.<sup>67</sup> In those types of regulatory environments, there is also normally a heavy reliance on consumers enforcing the rules themselves notably through collective/class actions. Other regimes, by contrast, may rely more heavily on government intervention, often through detailed legislation and administrative enforcement and market surveillance. Consumer regimes are a reflection of political and economic preferences of the State in which they operate or at least reflect their historical context. Nottage et al. conceptualise consumer regimes along an axis where the legal framework and enforcement cultures are organised as going from pro-business to pro-consumer. Closer to the pro-business side, this analysis places the regimes in force in the United States, followed by New Zealand, UK, Japan, Australia. At the far end, the European Union, is classified as the most pro-consumer.<sup>68</sup>

The political and economic heritage of States inevitably and heavily influences the way consumer protection may be enforced. At the operational level however, differences in approaches do not necessarily reflect drastic differences in the way public enforcement systems are set up. For example, the choice between multi-agencies or common agencies for the enforcement of consumer and competition law is found in pro-business countries as well as pro-consumer countries. Indeed, the Federal Trade Commission in the USA or the Competition and Markets Authority in the UK are responsible for both competition and consumer law enforcement. The French enforcer (DGCCRF) also has for a very long time, tackled both types of enforcement under the same roof. Some countries, however, also have enforcement models where competition law and consumer law are separate or where consumer law enforcement is grouped with other disciplines.<sup>69</sup> Factors such as the size of the country, the pre-existing (legacy) infrastructure, legal customs and heritage or budgetary concerns, resourcing and other practical matters normally influence the choices made regarding what models are adopted.

Protection of consumers engaged in electronic commerce does not normally give rise to the creation of specific agencies. Most countries seem to deal with the enforcement of electronic commerce matters within their existing enforcement frameworks. However, there is growing acknowledgement of the need to have staff with specific technical competence in order to be most effective. This has led to the creation of specialised units (within pre-existing structures)

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<sup>66</sup> H-W. Micklitz, G. Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (Cham, Springer 2019) 8. Note that half the states in the study are European, 2 are accession states and there is under-representation of Asia and Africa. Nevertheless, this is the most recent and comprehensive study to date. A number of the country reports were updated by their respective authors for the purpose of the present report. We are grateful for their contributions. The findings of the Micklitz study ought to also be complemented with the reading of OECD Digital Economy Papers, Consumer Protection Enforcement in a Global Marketplace (March 2018, No. 266). 25-32.

<sup>67</sup> International Trade Centre, *Bringing SMES Onto the E-commerce Highway* (2016) 50.

<sup>68</sup> L. Nottage, C. Riefa, K. Tokeley, ‘Comparative Consumer Law Reform and Economic Integration’ in J. Malbon, L. Nottage (eds) *Comparative Law & Policy in Australia and New Zealand* (Sydney, The Federation Press, 2013) 57. However, note that even in pro-consumer regimes, business interests are strongly represented. See P. Siciliani, C. Riefa, H. Gamper, *Consumer Theories of Harm, an Economic Approach to Consumer Law Enforcement and Policy Making* (Oxford, Hart 2019) who suggest that neo-liberalism is quite strongly embedded into European consumer law, notably in the concept of the ‘average consumer’ used as a reference point for the enforcement of unfair commercial practices.

<sup>69</sup> For example, in Peru, consumer law enforcement lies with intellectual property.



in several countries. Those specialised units are housed either within general enforcers<sup>70</sup> or within the structure of specialised or sectoral enforcers.

Enforcement mechanisms also differ. They are, according to the OECD (2006), organised around five main models that reflect the political and societal priorities of a state:

- Models of enforcement that rely on the criminal justice system for penalties,
- models where the administrative agencies may be primarily using the civil justice system to enforce (obtain sanctions and remedies).
- models where the administrative agencies have been equipped with powers to impose financial penalties.
- models that rely more heavily on complaints to the Ombudsman system
- models that emphasise self-regulatory arrangements as well as private enforcement by consumers or their representatives themselves.<sup>71</sup>

Within those models, the domestic and cross-border tools and powers available to enforcers varies across jurisdictions as the OCED (2017) report on *Consumer enforcement in a digital marketplace* shows.<sup>72</sup> This diversity is further confirmed in UNCTAD's latest survey of powers in cross border enforcement.<sup>73</sup>

### 3. Limitations of private enforcement set-ups

It has often been assumed that in acquiring rights, consumers would naturally seek to exercise them.<sup>74</sup> This was without accounting for the many obstacles that stand in the way of consumers seeking to claim rights at home and abroad in cross-border transactions. The development of substantive rights was also sometimes done without much thought given to the optimal distribution models between and within private and public enforcement. Concerns for the procedural efficiency of consumer law are more recent and thus many limitations have not yet been ironed out.

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<sup>70</sup> See for eg: In the UK, 3 specialist units: e-crime team is set up within Trading Standards. The team is highly skilled and includes forensic analysts and internet investigators (<http://www.tradingstandardscrime.org.uk>); see also the CMA setting up a Digital Market Unit (in shadow form at present but operational); and the DaTA unit (Data, Technology and Analytics) which help the CMA remain effective by pioneering the use of data engineering, machine learning and artificial intelligence. The unit is working on projects impacting consumers, notably developing machine learning tools to identify possible breaches of consumer law on digital platforms. The unit is working on projects impacting consumers, notably developing machine learning tools to identify possible breaches of consumer law on digital platforms <https://competitionandmarkets.blog.gov.uk/2019/05/28/the-cma-data-unit-were-growing/>. See also for eg: in France, the *Centre de surveillance du commerce électronique* (CSCE) is set up as a service of the DGCCRF <https://www.economie.gouv.fr/dgccrf/Consommation/Commerce-electronique>; in Morocco, electronic commerce is supervised by the Centre de Surveillance du commerce électronique, a new unit created in 2017 as part of the Consumer Protection Agency. See UNCTAD Peer Review Morocco (2017) 15. Also see, <http://www.khidmat-almostahlik.ma/portal/fr/actualites/d%C3%A9veloppement-de-la-cellule-de-contr%C3%B4le-des-sites-internet-marchands>; In the USA, Otech (Office of Technology Research and Investigation) is established as part of the FTC's Bureau of Consumer Protection (<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/office-technology-research-investigation>).

<sup>71</sup> OECD, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes* DSTI/CP (2006)21/Final (2006) 4. See also, Faure, Ogus, Philipsen, *Enforcement Practices for Breaches of Consumer Protection Legislation* 20 (2008) *Loyola Law Review* 4, 361.

<sup>72</sup> OECD, *Consumer Protection Enforcement in a Global Digital Marketplace* (2017) DSTI/CP(2017)10/REV1

<sup>73</sup> Report from the CMA to sub-working group 3 (forthcoming).

<sup>74</sup> C Riefa, S Saintier, *In search of (access to) justice for vulnerable consumers*, in C Riefa, S Saintier (eds.), *Vulnerable consumers and the law, consumer protection and access to justice* (Routledge 2021).

Private enforcement includes a number of key headings to explore. For example, cross-border enforcement can be facilitated by the recognition of consumer associations' 'on the ground' knowledge and their ability to coordinate simultaneous actions in different parts of the world, notably via the use of collective actions (although not uniformly developed and, where they exist, with wide variations as to what can be achieved). Cross-border enforcement can also be facilitated by ADR/ ODR, with a 'health warning' that this cannot be the only solution. Experience shows that unless ADR is carefully organised and controlled, it can quickly lead to many problems and a loss of substantive justice that could be damaging for trust in cross-border electronic commerce. Cross-border enforcement could also be dispensed with the help of private actors. This report does reflect on the role platforms can take in this regard.

Courts that, for the most part, were the bastion of consumer claims, have by and large lost their ability to assist consumers in meaningful ways. Supply chains have transformed, meaning that consumers who in the past would have bought from their local store are now commonly transacting with suppliers situated further afield and even outside of their jurisdiction of residence. Consumers also may contract with large global firms with extra-ordinary legal resources that cannot be easily matched.

While conflicts of law and jurisdiction rules remain on the menu of options for consumers to enforce rights across borders, the rules on conflicts appear almost devoid of any practical significance. Indeed, the rules regarding the competence of courts that are needed to access justice have not progressed much in recent years, meaning that it is quasi- impossible for consumers to pursue a claim across borders.<sup>75</sup> Save a recognition that tourists who have travelled to a foreign jurisdiction may require assistance (eg in the UNWTO Code) and some systems offering some default protection for consumers (eg EU Rome Regulation<sup>76</sup>), accessing courts from abroad remains difficult and can be quite expensive. Besides, the cost involved in pursuing a claim in courts abroad will likely be disproportionate to most consumer claim amounts that tend to be of fairly low value. Conversely, small claims are rarely easily accessible for foreign consumers experiencing problems with local traders for the same reasons.

The issue of conflicts of laws and conflicts of jurisdiction as it stands, is a conundrum unlikely to be solved. It thus begs the question as to how consumer law policy making and enforcement can transcend the geographical borders that have disappeared as far as the supply side of the market is concerned.

Because of the difficulties in seeking redress abroad (notably due to rules on conflicts of law and jurisdiction as well as costs and the risk of non-recognition of a foreign judgement leading to non-execution of a judgement), much activity has focused on developing:

- collective actions, where consumers can group their claims in front of the courts and
- ADR, and more recently, ODR solutions, as they can be more easily accessed remotely and also do not depend on the network of courts available.

States increasingly provide or encourage ADR and ODR because it involves fewer costs, delays, or unnecessary burdens.<sup>77</sup> This is particularly essential for cross-border consumer disputes, in which access to traditional dispute resolution and redress may be less effective.

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<sup>75</sup> Note however, the potential inclusion of international tourists within the scope of the Hague Conference, <https://www.hcch.net/en/projects/legislative-projects/protection-of-tourists>.

<sup>76</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>

<sup>77</sup> TD/RBP/CONF.9/4

However, The World Consumer Protection Map (using data collected in 2016) shows that approximately 55 percent of the 92 member States that responded to the UNCTAD questionnaire do not offer cross-border dispute resolution mechanisms.<sup>78</sup> ODR, on the other hand, is still in its infancy. According to Consumers International, 56% of their member organizations claim that digital providers in their country do not offer ODR methods and that there is no legal requirement to do so.<sup>79</sup>

Some recent developments show however a continued move towards the use of more ADR in consumer disputes. For example, in October 2021, the ASEAN ADR Guidelines for Consumer Protection were released.<sup>80</sup> Because of the constant expansion in cross-border trade within South-East Asia, ASEAN decided to take a united and harmonised approach to ADR.<sup>81</sup> The recommendations were created to evaluate various methods of ADR, their implementation in each ASEAN Member State, and the processes to build and implement the system. By 2025, the ASEAN Committee on Consumer Protection (ACCP) hopes to have developed the ASEAN Online Dispute Resolution Network.<sup>82</sup> In addition to establishing the rules, the committee has also conducted a pilot test of the ACCP Online Complaints Function, which is embedded in the ACCP website. Some countries with less experience of online-supported mediation services have recently demonstrated an interest in expanding their capacity to provide ODR. Pakistan<sup>83</sup>, Indonesia<sup>84</sup>, Malaysia<sup>85</sup>, Turkey<sup>86</sup> and India<sup>87</sup> have recognized the benefits of ODR and are investigating the adoption of ODR mechanisms suited for their respective cultural circumstances.

At international level, UNCITRAL in 2010 looked into the need for effective dispute resolution and the use of ODR in resolving cross-border disputes arising from e-commerce alongside the preparation of detailed rules of procedure related to ODR.<sup>88</sup> In 2015, in the absence of consensus as to the form ODR should take, UNCITRAL requested from Working Group III to prepare a non-binding text limiting itself to the basics of the ODR process.<sup>89</sup> Working Group III, acting under these instructions, prepared a guide document excluding the arbitration stage which had been considered as the final stage of ODR. The text was adopted at the 49th session

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<sup>78</sup> The World Consumer Protection Map (2021) <<https://unctad.org/topic/competition-and-consumer-protection/consumer-protection-map>> accessed 15 March 2022.

<sup>79</sup> TD/RBP/CONF.9/4

<sup>80</sup> ASEAN (2022) <<https://asean.org/asean-releases-alternative-dispute-resolution-guidelines/>> accessed 25 March 2022.

<sup>81</sup> ASEAN (2022) <<https://asean.org/asean-releases-alternative-dispute-resolution-guidelines/>> accessed 25 March 2022.

<sup>82</sup> TD/B/C.I/CPLP/11

<sup>83</sup> Muhammed Danyal Khan, Serkan Kaya, Habib RI Global trends of online dispute resolution (ODR) with reference to online trade in Pakistan (2018) *Rev Econ Dev Stud* 303–311.

<sup>84</sup> Dheka Ermelia Putri, Application of Online Dispute Resolution (ODR) in International and Indonesia Domain Names Disputes, (2019) *Lampung Journal of International Law*

<sup>85</sup> Umar A. Oseni and Sodiq O. Omoola "Prospects of an online dispute resolution framework for Islamic Banks in Malaysia: An empirical legal analysis", (2017), 25 (1) *Journal of Financial Regulation and Compliance*, 39-55

<sup>86</sup> Serkan Kaya, 'Access to Justice for Consumers in Turkey: The Need for Enhancing Consumer Dispute Resolution Through Online Dispute Resolution' (2022) 26 (1) *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*.

<sup>87</sup> Aamir Ali SM Online dispute resolution: an emerging tool of dispute resolution in contemporary era. (2019) 21 *J Gujarat Res Soc* ,480–487.

<sup>88</sup> United Nations Commission on International Trade Law, 44th session, 'Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session', A/CN.9/716 ,27 June-15 July 2011.

<sup>89</sup> United Nations Commission on International Trade Law.

of UNCITRAL in July 2016, under the name ‘UNCITRAL Technical Notes on ODR’.<sup>90</sup> Section 4 of these technical notes makes clear that the rules apply to disputes arising from cross-border, low-value e-commerce transactions, both B2C and B2B.<sup>91</sup>

More recently, UNCTAD is involved in the development of ADR/ODR in Thailand and Indonesia via the project entitled “Delivering Online Dispute Resolution for Consumer”.<sup>92</sup> This project, started in 2020 aims to deliver research and analysis, technical assistance, and policy recommendations on how to best implement ODR for consumers.<sup>93</sup> One of the main aims is to be the first step towards the implementation of ODR systems for consumers in Indonesia and Thailand and emerging economies using blockchain.<sup>94</sup> ODR is seen as a way to foster trust in international trade and cross-border electronic commerce.<sup>95</sup>

Some regional ODR services are set up to serve cross-border business with regard to consumer disputes but remain limited in scope. For example, the European Online Dispute Resolution (ODR) platform is an electronic case-management tool created by the European Commission under the Regulation No 524/2013.<sup>96</sup> It acts as a tool available in all the Member States of the EU (since February 2016), as well as Iceland, Norway and Liechtenstein.<sup>97</sup> The platform handles disputes occurring solely from transactions online, thus significantly reducing its use, although it can be used for purchases made domestically as well as cross-border. However, the platform does not cater for disputes where one of the parties is situated outside the listed jurisdictions. Following Brexit for example, consumers in the UK can no longer access the ODR platform and neither can businesses located in the UK even if they sell to consumers in the EU.<sup>98</sup> The platform therefore does not enable consumers established outside of the EU to seek redress through its use.

In any event, the platform is not a complaint-handling tool in itself but facilitates the transfer of cases to relevant ADR bodies without providing a settlement. The platform helps consumers to find a route to the available ADR entities by connecting them with alternative (i.e. out-of-court) dispute resolution bodies, which can deal with their disputes. In this sense, the ODR platform functions as a directory of available ADR services depending upon the type of complaint being pursued via the platform. The ODR platform also removes much of the prerequisite knowledge previously required for consumers to navigate the ODR/ADR process successfully, reducing the requirement for specialist legal assistance.<sup>99</sup> This is a major advantage of the ODR platform, as many countries in the EU have a very rich and diversified ADR landscape that consumers find very difficult to navigate.

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<sup>90</sup> United Nations Commission on International Trade Law.

<sup>91</sup> UNCITRAL Technical Notes on ODR, Section 4

<sup>92</sup> <https://unctad.org/project/delivering-digital-trading-infrastructure-and-online-dispute-resolution-consumers-means>

<sup>93</sup> UNCTAD <<https://unctad.org/project/delivering-digital-trading-infrastructure-and-online-dispute-resolution-consumers-means>> 25 March 2022.

<sup>94</sup> UNCTAD <<https://unctad.org/project/delivering-digital-trading-infrastructure-and-online-dispute-resolution-consumers-means>> 25 March 2022. For more on how blockchain is being utilised in this project, see: [https://unctad.org/system/files/non-official-document/tdrbpconf9\\_d47\\_Present\\_DTI\\_China\\_en.pdf](https://unctad.org/system/files/non-official-document/tdrbpconf9_d47_Present_DTI_China_en.pdf)

<sup>95</sup> [https://unctad.org/system/files/official-document/ser-rp-2021d15\\_en.pdf](https://unctad.org/system/files/official-document/ser-rp-2021d15_en.pdf)

<sup>96</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0524>.

<sup>97</sup> Following Brexit, it will no longer be available in the UK.

<sup>98</sup> Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (2018 Regulations); <https://www.lexology.com/library/detail.aspx?g=45f405f9-d6d4-4403-9560-30bc22354e6b>

<sup>99</sup> E Sciallis, Opinion: Online Dispute Resolution, The Resolver Winter 2016 (Feb 17, 2016), [https://issuu.com/redactive/docs/res\\_iss\\_1\\_16\\_cropped/8](https://issuu.com/redactive/docs/res_iss_1_16_cropped/8).

Another interesting development is the publication of a code of practice for the protection of tourists by the UN World Tourism Organisation in 2022. The International Code for the Protection of Tourists, in Chapter 4, section B.6. recommends equal access to ADR/ ODR schemes with protection equal to that of national tourists and with no requirements of physical presence to claim and at proceedings.<sup>100</sup> When implemented the code would thus require the offer access to ADR and ODR for foreign consumers in national and regional systems put in place.

#### 4. Obstacles to public enforcement across borders

From a public enforcement perspective, tangible efforts towards cross-border cooperation have developed most notably since the 2003 OECD Recommendation on cross-border fraud.<sup>101</sup> Cross-border enforcement became an even more salient concern, growing in significance, with the acceleration of electronic commerce. However, the internationalisation of the enforcement machinery is lagging (often in line with national experiences). An OECD review of the status of enforcement cooperation across borders regarding the Cross-border Fraud Recommendations in 2006<sup>102</sup> found that while many countries engaged in some type of cross-border cooperation, a number of challenges to effective cross-border enforcement cooperation remained.<sup>103</sup>

We note some commitment in principle to cross-border enforcement. For example, the European rules on Consumer Protection Cooperation (CPC) in 2004 revised in 2017<sup>104</sup>, the Livingstone Principles on cooperation in consumer enforcement from 2013 in Africa<sup>105</sup> and the 2015 revision of the UNGCP which substantially elaborated the section on international cooperation. At international level, it is now time to focus on the machinery that enables enforcement and respect of the rules in place. Good substantive law is only as good as its enforcement. If consumers cannot claim their rights, or enforcers cannot police markets, consumer law on the books is devoid of any efficacy.

There are 4 main components to consider for effective cross-border enforcement:

**Legal authority.**<sup>106</sup> This is for example, the existence of a legislative basis for intervention or an enabling text (can cross-border enforcement take place? What texts support or authorise it?); This is a recurrent problem. For example, in the OECD survey from 2006, 90% of countries identified insufficient legal authority as one of the main barriers including legal limitations on the types of information that could be shared, type of enforcement actions that can be taken

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<sup>100</sup> <https://www.e-unwto.org/doi/epdf/10.18111/9789284423361>

<sup>101</sup> Other subsequent OECD recommendations also feature international cooperation, including 2006 on spam and 2007 on privacy; See OECD Legislative toolkit (2021) 7.

<sup>102</sup> <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0317>.

<sup>103</sup> OECD Consumer protection enforcement in a global digital marketplace, OECD Digital Economy Paper (no. 266 (OECD 2018) [https://one.oecd.org/document/DSTI/CP\(2017\)10/FINAL/en/pdf](https://one.oecd.org/document/DSTI/CP(2017)10/FINAL/en/pdf)

<sup>104</sup> [https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-protection-cooperation-regulation\\_en](https://ec.europa.eu/info/law/law-topic/consumer-protection-law/consumer-protection-cooperation-regulation_en)

<sup>105</sup> [https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/african\\_dialogue\\_principles\\_on\\_cooperation\\_in\\_consumer\\_protection\\_enforcement\\_-\\_zambia\\_september.pdf](https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/african_dialogue_principles_on_cooperation_in_consumer_protection_enforcement_-_zambia_september.pdf)

<sup>106</sup> OECD Consumer protection enforcement in a global digital marketplace, OECD Digital Economy Paper no. 266 (OECD 2018) 6. This survey found that insufficient legal authority was a key challenge to effective cross-border enforcement.

against a foreign business and conditions under which such co-operation can take place.<sup>107</sup> A more recent survey found that the lack of legal power was cited by 44% of respondents. It was always a barrier for 25% of respondents and ‘frequently a barrier’ for a further 18%.<sup>108</sup>

**An effective institutional set up** (what institutions are needed to effect cross border enforcement? Should there be an international institution with oversight? Are regional mechanisms sufficient?);

**Adequate resources and powers** (what legal powers are necessary to detect, evidence and sanction wrong-doing?). Some countries may have administrative powers while others will require judicial approval for intervention. The role of consumer authorities to facilitate redress is for foreign consumers is quite low.<sup>109</sup> The most important barrier to cross-border co-operation was the lack of adequate resources, with around 70% of countries reporting that inadequate resources were frequently a barrier in 2006. In 2018, inadequate resources (47%) remained one of the main barriers highlighted in the OECD survey from 2018.<sup>110</sup>

**Privacy and confidentiality.** The obstacles in the way of cross-border enforcement also include privacy and data protection limitations, confidentiality rules and language issues.<sup>111</sup> The statistics from the OECD members’ survey on the implementation of their 2003 Cross-Border Fraud Recommendation, highlighted that Consumer authorities are generally equipped with the ability to share certain types of information with a foreign authority, particularly publicly available information (97%) and information on a specific domestic company (90%). However, a number of countries limit the sharing of consumer complaints information and information obtained through compulsory process due to the need to protect confidentiality.<sup>112</sup>

At international level, we notice a wider gap than noted in OECD countries. The First session of the Intergovernmental group of experts on consumer protection law and policy in 2016 requested the UNCTAD secretariat to prepare a study on the legal and institutional framework on consumer protection to provide a picture of consumer protection worldwide, identify trends and benchmarks as well as challenges and inform discussions on future work.<sup>113</sup> This survey found that out of 82 respondents, 47 did not have experience of cross-border enforcement (nearly 60%).

The discrepancy between the OECD figures and that of UNCTAD is easily explained by the fact OECD countries are more advanced in their development of consumer law and thus a higher proportion of engagement with cross-border enforcement would be expected. Since the

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<sup>107</sup> Report on the implementation of the 2003 OECD guidelines on cross-border fraud (2006), executive summary, <https://www.oecd.org/digital/ieconomy/37125994.pdf>.

<sup>108</sup> OECD Consumer protection enforcement in a global digital marketplace, OECD Digital Economy Paper (no. 266 (OECD 2018) p.6 and Fig 18.

<sup>109</sup> 50% of respondents reported having the ability to provide remedies to foreign consumers. Report on the implementation of the 2003 OECD guidelines on cross-border fraud, executive summary, <https://www.oecd.org/digital/ieconomy/37125994.pdf>.

<sup>110</sup> OECD Consumer protection enforcement in a global digital marketplace, OECD Digital Economy Paper (no. 266 (OECD 2018) p.6 and Fig 18.

<sup>111</sup> OECD Consumer protection enforcement in a global digital marketplace, OECD Digital Economy Paper no. 266 (OECD 2018) 6.

<sup>112</sup> Report on the implementation of the 2003 OECD guidelines on cross-border fraud, executive summary, <https://www.oecd.org/digital/ieconomy/37125994.pdf>

<sup>113</sup> [https://unctad.org/system/files/official-document/cicplpd4\\_en.pdf](https://unctad.org/system/files/official-document/cicplpd4_en.pdf)



adoption of the 2003 Cross-Border Fraud Recommendation and the 2016 E-Commerce Recommendation, a survey of OECD member states revealed that countries have made substantial efforts in the co-operation of consumer protection enforcement. 93% of the respondents implemented legal frameworks or other agreements with foreign authorities to facilitate the enforcement of consumer protection across borders.<sup>114</sup> The contrast between these two sets of survey results suggests a serious gap between OECD members and non-members.

At international level, soft law is the main source mandating cross-border cooperation but there is also evidence of national and regional texts supporting international cross-border cooperation (notably in the EU and USA, see below part 3, para 1.1 and 1.2).

The UNGCP contains recommendations for international cooperation between consumer protection agencies. (GLs 79-94). The need for collaboration between Member States in cross border cases is specifically mentioned in the new sections on electronic commerce (GL 65), a particularly critical sector in terms of cross-border sales which raise difficult problems of jurisdiction. The section of the UNGCP on *International Cooperation*, (Section VI), was significantly expanded as a result of the 2015 revision process.

- GL 79b) calls for cooperation for *'joint use of testing facilities, common testing procedures, exchange of consumer information and education programmes ... and joint elaboration of regulations.'*
- GL 79c) recommends that member states: *'Cooperate to improve the conditions under which essential goods are offered to consumers, giving due regard to both price and quality.'*
- GL 80 calls for strengthened information links regarding banned, withdrawn or restricted products, a vital matter for consumer safety.
- GL 82 calls for cooperation on cross-border fraud, while entering a caveat discussed below regarding the freedom of decision of national jurisdictions. This leads on to:
- GL 83: national CP agencies need to *'avoid interference'* in the work of CP agencies in other jurisdictions. To this end GL 84 recommends resolving disagreements around cooperation and GL 85 envisages bilateral or multilateral arrangements.
- GLs 86/87 envisage a *'leading role'* for mutually designated agencies on particular enforcement issues.
- GL 88 states that national authority to investigate and share information should extend to foreign counterparts, including cooperation in enforcement.

Much of the above list depends on goodwill. When it comes to legal enforcement across borders, there are perennial problems, which the Guidelines have not been able to resolve. These revolve around the issue of establishing the *'applicable law and jurisdiction'*.<sup>115</sup> GL 82 recognises that *'cooperation on particular investigations or cases...remains within the discretion of the consumer protection enforcement agency that is asked to cooperate'*. In other words, an agency cannot be forced to act by a sister agency in another jurisdiction.

In the meantime, as suggested by GL 88, considerable progress can be made by voluntary sharing and warning. OECD reported in 2018 that: *'Countries are generally active in some*

<sup>114</sup> See OECD, Consumer Enforcement in a global digital marketplace (2017), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2017\)10/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2017)10/FINAL&docLanguage=En)

<sup>115</sup> *'applicable law and jurisdiction'* is mentioned in the preamble to the UNGCP in the UN General Assembly resolution.

*form of cross-border co-operation. A majority of countries reported that their consumer protection enforcement authorities will notify foreign authorities if they receive information on businesses located in their country that cause economic damage to consumers’.*<sup>116</sup> Indeed, a survey for OECD reported that: *‘All but two countries.. have legal frameworks or other arrangements with foreign authorities to enable consumer protection enforcement co-operation across borders’* The survey reported *‘an increasing ability to cooperate’* including laws covering, *‘information sharing, investigative assistance, cross-border consumer redress and miscellaneous cooperation provisions’.*<sup>117</sup>

The OECD Recommendations support a slightly different approach in that it is underpinned by behavioural economics. OECD Recommendation 53 on implementation principles points to reliance on empirical data and behavioural insights, technology neutral laws, adequate powers of enforcement (including across borders), developing technology as a tool to protect and empower consumers, access to education, advice and to file complaints and effective dispute resolution mechanisms. Its scope includes B2C e-commerce, including ‘commercial practices through which businesses enable and facilitate consumer-to-consumer transactions’ (i.e. intermediaries are included). It also covers ‘commercial practices related to both monetary and non- monetary transactions for goods and services, which include digital content products’. The recommendation also elaborates on global co-operation principles (Rec 54).<sup>118</sup> Communication, co-ordination, co-operation should be developed including consensus-building, both at the national and international levels, on core consumer protections to further the goals of promoting consumer welfare and enhancing consumer trust, ensuring predictability for businesses, and protecting consumers. Emphasis is placed on the mutual recognition of judgments and considering the role of applicable law and jurisdiction to enhance trust in e-commerce.

International instruments	Cross-border enforcement rules
<b>2015 United Nations Guidelines for Consumer Protection</b>	<ul style="list-style-type: none"> <li>• Access to dispute resolution and redress mechanisms, including alternative dispute resolution, should be enhanced, particularly in cross-border disputes</li> <li>• The development of fair, effective, transparent and impartial mechanisms to address consumer complaints, including for cross-border cases, should be encouraged</li> <li>• Addressing cross-border challenges raised by tourism, including enforcement cooperation and information-sharing with other Member States, should be addressed, as should cooperation with relevant stakeholders.</li> <li>• Ability and capacity to cooperate in combating fraudulent and deceptive cross-border commercial practices should be improved.</li> <li>• Consumer protection enforcement agencies should be provided with the authority to investigate, pursue, obtain and share relevant information and evidence on matters relating to cross-border fraudulent and deceptive commercial practices.</li> </ul>

<sup>116</sup> OECD *Consumer protection enforcement in a global digital marketplace*, OECD Digital Economy Paper (no. 266 (2018) 6.

<sup>117</sup> OECD *Consumer protection enforcement in a global digital marketplace*, OECD Digital Economy Paper (no. 266 (2018), p. 22/23 While this is encouraging, it is important to remember that the membership of the OECD is much narrower than that of UNCTAD. At UNCTAD level it is estimated that cross-border cooperation is much less developed.

<sup>118</sup> This includes: Communication, co-ordination, co-operation should be developed including consensus-building, both at the national and international levels, on core consumer protections to further the goals of promoting consumer welfare and enhancing consumer trust, ensuring predictability for businesses, and protecting consumers. Emphasis is placed on the mutual recognition of judgments and considering the role of applicable law and jurisdiction to enhance trust in e-commerce.



	<ul style="list-style-type: none"> <li>• There should be participation in multilateral and bilateral arrangements to improve judicial and inter-agency cooperation in enforcement of decision in cross-border cases.</li> </ul>
<b>2003 OECD Cross-Border Fraud Guidelines</b>	<ul style="list-style-type: none"> <li>• Establishing a domestic system for combating cross-border fraudulent and deceptive commercial practices against consumers</li> <li>• Enhancing notification, information sharing and investigative assistance</li> <li>• Improving the ability to protect foreign consumers from domestic and foreign businesses engaged in fraudulent and deceptive commercial practices</li> <li>• Ensuring effective redress for victimised consumers</li> <li>• Co-operating with relevant private sector entities</li> </ul>
<b>2007 OECD Recommendation on Consumer Dispute Resolution and Redress</b>	<ul style="list-style-type: none"> <li>• Providing clear information to consumers and relevant consumer organisations on judicial and extra-judicial dispute resolution and redress mechanisms available within their countries</li> <li>• Participating, where possible, in international and regional consumer complaint, advice and referral networks</li> <li>• Expanding the awareness of justice system participants, including the judiciary, law enforcement officials, and other government officials, as to the needs of foreign consumers who have been harmed by domestic wrongdoers</li> <li>• Encouraging the greater use of technology, where practicable, to facilitate the dissemination of information, and the filing and management of cross-border disputes</li> <li>• Taking steps to minimise legal barriers to applicants from other countries having recourse to domestic consumer dispute resolution and redress mechanisms</li> <li>• Developing multi-lateral and bi-lateral arrangements to improve international judicial co-operation in the recovery of foreign assets and the enforcement of judgments in appropriate cross-border cases</li> </ul>
<b>2006 OECD Recommendation on Cross-Border Co-Operation in the Enforcement of Laws Against Spam</b>	<ul style="list-style-type: none"> <li>• Establishing a domestic framework (e.g. taking steps to ensure their effectiveness for cross-border co-operation in the enforcement of laws connected with spam)</li> <li>• Improving the ability to co-operate (e.g. providing their anti-spam enforcement authorities with mechanisms to share relevant information with foreign authorities)</li> <li>• Improving procedures for co-operation (e.g. prioritising requests for assistance)</li> <li>• Co-operating with relevant private sector entities</li> </ul>
<b>2016 OECD E-Commerce Recommendation</b>	<ul style="list-style-type: none"> <li>• Promoting joint initiatives at the international levels among governments and stakeholders</li> <li>• Improving consumer protection agency's abilities to co-operate and co-ordinate their investigations and enforcement activities</li> <li>• Using existing international networks and entering into bilateral and/or multilateral agreements</li> <li>• Developing mutual recognition and enforcement of judgments resulting from disputes</li> </ul>
<b>2008 OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce</b>	<ul style="list-style-type: none"> <li>• Providing consumers with accurate, clear and easily accessible information about themselves (including geographic locations) and ways to resolve disputes</li> </ul>

Examples of cross-border cooperation can include those between consumer protection agencies at the level of dubious retail health products, simple information exchange on chasing fraudsters, or discussing price manipulation by multinational companies. For example, it has recently been alleged that multinational companies have manipulated face mask delivery to raise prices.<sup>119</sup> Nevertheless, it remains relatively rare for a consumer authority to use its statutory authority (for example a court order) to obtain information from a domestic business in aid of a foreign investigation.

<sup>119</sup> UNESCWA webinar 16 July 2020, Beirut.

In any event, the OECD report indicates that there is still some way to go: *‘Despite improvements in frameworks for cross-border enforcement co-operation, only half of the authorities have taken joint or co-ordinated enforcement actions with their foreign counterparts’.*<sup>120</sup>

## 5. Enforcement challenges in the digital sphere

Regardless of the structures in place and powers available in any given State, all seem to struggle with responding to intensified digital activities. Structures thought out and developed in the analogue era require adjustments in countries where infrastructures are already in place and will no doubt require careful planning and attention in countries that are preparing to tackle these issues. As a result, it is essential to account for the challenges brought to the fore by the digital environment as it needs to guide the enforcement mix required to protect consumers effectively across borders. There are instances of countries showing signs of a move towards more reliance on public enforcement and private collective enforcement and actions of consumer associations.<sup>121</sup> Indeed, individual enforcement of consumer problems even at national level is unlikely in the digital economy, chiefly because many of the practices are covert. The need for more effective cross-border enforcement is also acute because much of the harm suffered by consumers in one jurisdiction is likely to also be suffered in others. Paradoxically, sometimes this could make the task of enforcement easier, because it may not be necessary to attempt a joint cross-jurisdictional activity but simply to run parallel operations where companies have a commercial presence in each of the countries concerned.

Virtual markets are made up of online retailers, gig economy services, peer to peer platforms, mobile and online banking, and new types of media and communications based on social networks and dependent on consumers relinquishing vast amounts of personal and transactional data to function. These innovations offer convenience, speed and low prices and have become (particularly since the pandemic) an essential lifeline to consumers. However, the online transition has made it difficult for consumers to resolve problems caused by purchasing unsafe, poor quality or counterfeit goods, unfair pricing, age-inappropriate goods and services and insecure digital devices. The nature of consumer interactions and market shape in digital markets has left consumers with few safeguards against practices of large, multi-national platform firms or smaller, anonymous traders.

Public enforcers are by and large better placed than consumers to uncover and pursue the cessation of harmful conducts in those markets. Riefa explains:

*In a dematerialised world, where unfair practices are hard to spot and even harder to evidence, consumers struggle to claim their rights and obtain adequate redress and/or the cessation of harmful conduct. Consumers cannot influence the way the market works for lack of meaningful alternatives. Reflecting on vulnerability in digital markets, it is necessary to transform the way we see consumer law and its enforcement, notably the role of public enforcement.*<sup>122</sup>

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<sup>120</sup> OECD 2018 paper 266 p.6

<sup>121</sup> See for eg, the UK regarding the reinforcement of consumer enforcement, or the EU for the adoption of a collective action mechanism.

<sup>122</sup> C. Riefa, Protecting vulnerable consumers in the digital single market 33 (2022) *European Business Law Review* 4 607-634.

Monitoring, surveillance and enforcement are cumbersome and expensive tasks leading to trade-offs and prioritisation to the detriment of consumer harm that may be deemed less urgent or less economically damaging on aggregate. State-funded enforcers may also face strong political incentives to prioritise enforcement benefitting their national consumers over consumers based abroad. As a result, even the best written substantive regulations may end up having minimal impact. Fast-moving digital markets extend and amplify the challenge of enforcement notably against unfair and unlawful practices. This is the case for a number of reasons:

### **5.1. Legitimation of practices**

Consumer harm in digital markets may stem from the legitimisation of practices that infringe rights, the mass use of unfair contract terms being a typical example. In the online consumer context, consumers enter into a large number of contracts on a regular basis for a wide range of activities - and often instantaneously.<sup>123</sup> The knowledge asymmetry between traders and consumers that informed offline unfair terms legislation is much greater in online transactions. The direct and indirect impact of agreeing to particular clauses is almost impossible for consumers to weigh up. In this vastly altered context, the expectation that consumers inform themselves of numerous contractual clauses within lengthy and complex documents is at odds with consumers' reality. Consumers wishing to use these services are required to accept the terms when creating an account or find themselves subject to clauses in the terms by simply using the service. The fast and frictionless nature of customer journeys online has seen engagement with legally binding terms become just one part of a seamless service. Time for consideration is designed out of user onboarding processes. To counter the information asymmetry, much focus has been given to making terms and conditions clearer and easier to engage with. However, it does not follow that this makes them any less unreasonable. This practice also interrogates the meaning of consent in online transactions. Unfair contractual clauses are prevalent in the terms of online services despite legislation designed to prevent them. These include terms that grant the online service provider a right to: unilaterally change the terms of service or the service itself; unilaterally terminate the contract, terms that exclude or limit liability, international jurisdiction clauses and choice of law clauses.<sup>124</sup>

### **5.2. Anonymity**

The anonymity of traders and producers brings particular challenges for enforcers. The identities of traders on online marketplaces can be easily obscured which makes identifying sellers of counterfeit, unsafe, illegal or age-inappropriate products difficult. The speed and volume of online sales makes online tracking and tracing of harmful listings extremely difficult. Regulators face the same difficulties as consumers in establishing third party sellers' identities and locations. Where they are based overseas, their powers are much more constrained.

### **5.3. Market structures and business models**

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<sup>123</sup> Hans-W. Micklitz, Przemysław Pałka, Ioannis Palagi, The Empire Strikes Back. Digital Control of Unfair Terms of Online Service 40 (2017) 3 Journal of Consumer Policy 367-388.

<sup>124</sup> Loos, Marco and Luzak, Joanna Aleksandra, Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers (January 8, 2015). Journal of Consumer Policy 2016/1, p. 63-90, Available at SSRN: <https://ssrn.com/abstract=2546859> or <http://dx.doi.org/10.2139/ssrn.2546859>

Intermediary platforms hosting third party producers and traders dominate consumer interactions. The third-party sellers are subject to self-regulatory codes and a degree of monitoring and enforcement by the platform, but this often takes place after a breach has been committed. The large, international platforms take on the role of private regulators. To date intermediary platforms have fought hard not to be held liable for problems in most jurisdictions although this will change with new legislation such as the Digital Services Act in EU or the Online Harms Bill in the UK.<sup>125</sup>

Some scholars have argued that we are all in fact made vulnerable by the structure of digital markets<sup>126</sup>, with the use of technologies that remove our ability to make decisions<sup>127</sup> or to understand what is happening around us, and the reliance on huge platform conglomerates to access essential services and consumer functions. Consumers will be increasingly vulnerable as unfair practices go unpunished notably if perpetrated from abroad with a risk that markets will no longer function optimally. Consumers may also be made vulnerable to things that have not yet materialised – for example the impact of mass data collection over a number of years on large populations leaves companies with vast swathes of insights about collective and individual behaviours.<sup>128</sup> This increases the consumer population requiring specific protection from digitally enabled harms and brings into focus the need to equip enforcers with the right tools to be effective. It is clear from the above that the limitations that private and public enforcers face in the protection of economic rights and the means at their disposal to combat poor practices transcend geographical boundaries.<sup>129</sup>

#### 5.4.Resource Asymmetry

Resource asymmetry is a particularly salient problem. The knowledge and financial resources available to large companies who may come under scrutiny by public enforcers far outweighs that of national regulators focusing their efforts on high profile, high impact targets. This is the case for both higher income countries (HIC) and lower income countries (LIC). Countries with mature regulatory regimes were taken unaware by the speed and scale of digital transformation and have still not caught up or invested enough in enforcement capability. When faced with enforcement action, companies can well afford to contest numerous claims across multiple jurisdictions over a long period of time. Even when decisions go against them, the appeal process can span years and the implementation of changes is much delayed. This may lead to decisions being disregarded by Big Tech companies and fines factored in as a cost of doing business.<sup>130</sup> The issue of fines that could be dissuasive is a key issue here as many enforcement efforts can be stripped of effectiveness if they come way too late (which will be the case in

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<sup>125</sup> In the EU, Digital Services Act, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en); or in the UK, see <https://bills.parliament.uk/bills/3137>.

<sup>126</sup> See notably Helberger et al., (2021) *EU Consumer Protection 2.0: Structural asymmetries in consumer markets* (report for BEUC) and C. Riefa, Protecting vulnerable consumers in the digital single market 33 (2022) 4 *European Business Law Review* 607-634.

<sup>127</sup> Riefa, Protecting vulnerable consumers in the digital single market 33 (2022) 4 *European Business Law Review* 607-634.

<sup>128</sup> Helberger et al., (2021) *EU Consumer Protection 2.0: Structural asymmetries in consumer market*.

<sup>129</sup> Riefa, Coronavirus as a catalyst to transform consumer policy and enforcement 43 (2020) *Journal of consumer policy* 451-461, <https://link.springer.com/article/10.1007/s10603-020-09462-0>.

<sup>130</sup> See for example, <https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm>

long fought enforcement actions) or come with financial sanctions that do not cover actual harm or feel too weak. This can undermine confidence of consumers in the public enforcement actions and results in less engagement from consumers such as reporting bad practices as they spot them.

## **Part 3: Designing the future of cross-border enforcement of consumer law**

As the process leading to the adoption of a formal international instrument with binding force, providing it may be desirable (as discussed in parts 1 and 2), is likely to be long, this report now reflects on the adoption of solutions that can come to mitigate for the lack of an effective supra national framework in the short to medium term. To assist consumers and protect them, the challenges highlighted above need to be factored in in the search for solutions and to optimise their design. While it is evident that pursuing the establishment and further roll out formalised cooperation mechanisms (para 1) would be beneficial, the Covid 19 pandemic has brought to the fore the power of coordinated actions (para 3). It revealed how very similar unfair practices were rolled out across the globe, at speed, prompting enforcers to react where they may not have otherwise done so. Public enforcement actions in this domain showed a fertile ground for creativity and coordination in enforcement often with little available means. In many respects, the pandemic revealed the lack of powers enforcers may have<sup>131</sup> but also the benefits of coordinated responses to a common problem.

This part of the report explores a number of solutions: the pursuit of formalised cooperation mechanisms (part 3.1), cross-border cooperation through coordination (part 3.2). The parts that follow will also investigate more closely the use of technology in enforcement (part 4) and the adoption of standards in framing the necessary enforcement powers and procedures for cross-border enforcement (part 5).

### **1. Pursuing formalised cooperation mechanisms**

We have explained in previous parts of this report that save soft law in the form of the UNCTAD UNGCP and the OECD Recommendations, there is not international legal basis for cross-border enforcement. There are however signs of progress in the development of those mechanisms. We highlight below 2 examples, one at regional level and one at national level and explore the role of the legislative toolkit published by the OECD in the pursuit of formalised cooperation mechanisms.

#### **1.1. Formalised cross-border cooperation at regional level: The European Union CPC**

Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws (CPC) came into force in January 2020.<sup>132</sup> The CPC Regulation aims to improve the legacy framework for cooperation between national enforcement authorities by:

- establishing stronger mechanisms for coordination across an extended field,
- increasing powers in cross-border situations,
- adopting a one-stop approach to widespread infringements,
- offering greater powers for “external bodies” (including consumer organisations) in market surveillance
- allowing for agreements on compensation to be made.

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<sup>131</sup> <https://link.springer.com/article/10.1007/s10603-020-09462-0> ; see also <https://unctad.org/news/covid-19-firmer-action-needed-better-protect-consumers>

<sup>132</sup> It replaces and updates Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation, CPC). For its full text, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R2394>

In parallel, Directive 2019/2161 on better enforcement is deemed necessary for the operation of the revised CPC Regulation, which has a particular cross-border character. It provides for the amendment of four directives to strengthen the public enforcement of consumer law, fundamentally through the harmonisation of effective and proportionate fines and penalties imposed by national consumer authorities. The key aim is to sanction and deter practices of traders that may generate mass harms, both domestically and cross-border.

### ***Scope of the CPC***

In the European context, ‘cross-border’ is limited to intra-community and thus the legislation does not reach out of this geographical zone (a total of 27 countries). However, recital 40 of the CPC states:

*‘The enforcement challenges that exist go beyond the frontiers of the Union, and the interests of Union consumers need to be protected from rogue traders based in third countries. Hence, international agreements with third countries regarding mutual assistance in the enforcement of Union laws that protect consumers’ interests should be negotiated. Those international agreements should include the subject matter laid down in this Regulation and should be negotiated at Union level in order to ensure the optimum protection of Union consumers and smooth cooperation with third countries’.*

There are 3 types of cross-border dimensions catered for by the CPC:

- Intra-union infringements which harm the collective interest of consumers residing in a Member State other than the Member State in which the act or omission took place, the trader responsible is established, the evidence or assets of the trader are to be found.<sup>133</sup>
- Widespread infringements, which harm the collective interest of consumers residing in at least 2 Member States other than the Member State in which the act or omission took place, the trader responsible is established, the evidence or assets of the trader are to be found.<sup>134</sup>
- Widespread infringements with a union dimension, which harms the collective interest of consumers in at least two-thirds of the Member States, accounting together for at least two-third of the population of the Union.<sup>135</sup>

### ***Mutual assistance mechanism***

The Regulation puts in place mechanisms for cooperation, including a **mutual assistance mechanism** for intra-union infringements (involving 2 Member States).

Under this mechanism (art 11) an ‘applicant’ authority can request from a ‘requested’ authority that it provides information necessary to establish whether an intra-union infringement has occurred or is occurring and to bring about the cessation of that infringement. The requested authority needs to undertake the necessary investigation or take necessary measures in order to gather the information. Request for information need to be fulfilled without delay and, in any event, within 30 days unless otherwise agreed. To do so they can ask for assistance from other

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<sup>133</sup> Article 3(2) CPC.

<sup>134</sup> Article 3(3) CPC.

<sup>135</sup> Article 3(4) CPC.

public authorities or designated bodies (see Art 7 defining them).<sup>136</sup> Art 11(3) also states that ‘on request from the applicant authority, the requested authority may allow officials of the applicant authority to accompany the officials of the requested authority in the course of their investigations’.

Similarly, under Article 12, the applicant authority may request that the requested authority takes appropriate enforcement measures needed to bring about the cessation or prohibition of the intra-union infringement. Requests for enforcement measures need to be fulfilled without delays and in any event within 6 months of receiving the request, unless specific reasons justify an extension (Art 12(1)). The requested authority is under duty to regularly inform the applicant authority of steps and measures taken or intended (art 12(2)) and also make sue of the electronic database set up for the operation of the CPC to notify the applicant authority, the competent authorities in other members states and the European Commission of the measures taken and their effect on the infringement.<sup>137</sup>

Article 13 defines the procedure for requests of mutual assistance, and art 14 tightly controls refusals to comply with such requests.

To be able to decline a request for information under art 11, the requested authority needs to show one or more of the following:

- *‘following a consultation with the applicant authority, it appears that the information requested is not needed by the applicant authority to establish whether an intra-Union infringement has occurred or is occurring, or to establish whether there is a reasonable suspicion that it may occur;*
- *the applicant authority does not agree that the information is subject to the rules on confidentiality and on professional and commercial secrecy laid down in Article 33;*
- *criminal investigations or judicial proceedings have already been initiated against the same trader in respect of the same intra-Union infringement before the judicial authorities in the Member State of the requested authority or of the applicant authority’.*<sup>138</sup>

The reasons for declining a request for enforcement measures under article 12 are also limited to the following (as per Art 14(2)):

- *criminal investigations or judicial proceedings have already been initiated, or there is a judgment, a court settlement or a judicial order in respect of the same intra-Union infringement and against the same trader before the judicial authorities in the Member State of the requested authority;*
- *the exercise of the necessary enforcement powers has already been initiated, or an administrative decision has already been adopted in respect of the same intra-Union infringement and against the same trader in the Member State of the requested authority in order to bring about the swift and effective cessation or prohibition of the intra-Union infringement;*

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<sup>136</sup> The CPC requires the designation of one or more competent single liaison office responsible for the application of the Regulation (Art 5(1)) and each enforcement authority is fulfilling the obligation set out in the Regulation either by acting on behalf of consumers in their own member states or on their own account (art 5(2)). Effective cooperation between authorities is mandated by Article 6 of the CPC and Art 7 covers the role of designated bodies.

<sup>137</sup> The operation of the database in question is defined in art 35 CPC.

<sup>138</sup> Art 14 (1) CPC.



- *following an appropriate investigation, the requested authority concludes that no intra-Union infringement has occurred*
- *the requested authority concludes that the applicant authority has not provided the information that is necessary in accordance with Article 13(1) (which defines the procedural aspects of any requests);*
- *the requested authority has accepted commitments proposed by the trader to cease the intra-Union infringement within a set time limit and that time limit has not yet passed.*  
If the trader fails to implement within the time limit, the request will have to be implemented.

All refusals for information or enforcement measures need to be notified to the applicant authority and the European Commission together with the reason for the refusal (art 14(3) CPC).

In the event of disagreement between requested authority and applicant authority, the matter can be referred to the European Commission which shall issue an opinion without delay. The Commission is also able to issue opinions in the absence of a referral. The Commission in any event has access to request and relevant documents in order to monitor the functioning of the mutual assistance mechanism (art 14(4) CPC). The Commission is also able to issue guidance and provide advice to the Member States to ensure the effective and efficient functioning of the mutual assistance mechanism (Art 14(6) CPC).

### ***Coordinated investigation and enforcement***

The CPC Regulation also makes provisions for **coordinated investigations and enforcement** where violations span more than two Member States (widespread infringements and widespread infringements with a Union dimension). In this context, at least 3 Member States will be represented. The member State with close link to the trader (act/ omission, establishment or asset) and at least 2 Member States where detriment is experienced by consumers. As a result, a certain modicum of coordination is required to avoid duplication of efforts. Art 15 CPC explains that competent authorities in this context shall act by consensus. They follow some general principles for cooperation laid out in article 16.

The principle are as follows:

- (1) *Where there is a reasonable suspicion that a widespread infringement or widespread infringement with a Union dimension is taking place, competent authorities concerned by that infringement and the Commission shall inform each other and the single liaison offices concerned by that infringement without delay, by issuing alerts pursuant to Article 26.*
- (2) *The competent authorities concerned by the widespread infringement or widespread infringement with a Union dimension shall coordinate the investigation and enforcement measures that they take to address those infringements. They shall exchange all necessary evidence and information and provide each other and the Commission with any necessary assistance without delay.*
- (3) *The competent authorities concerned by the widespread infringement or widespread infringement with a Union dimension shall ensure that all necessary evidence and information are gathered, and that all necessary enforcement measures are taken to bring about the cessation or prohibition of that infringement*

- (4) Without prejudice to paragraph 2, this Regulation shall not affect national investigation and enforcement activities carried out by competent authorities in respect of the same infringement by the same trader*
- (5) Where appropriate, the competent authorities may invite Commission officials and other accompanying persons, who have been authorised by the Commission, to participate in the coordinated investigations, enforcement actions and other measures covered by this Chapter.*

Rules govern the launch of coordinated actions and the designation of a coordinator (art 17). Authorities concerned designate a coordinator<sup>139</sup> for any actions and in the absence of agreement the Commission can take on this role (art 17(2) CPC). The launch of any action is notified to the single liaison offices concerned and the Commission (article 17 (1) CPC). The Commission can instigate action if it has a reasonable suspicion of a widespread infringement with a Union dimension and the authorities concerned have 1 month to investigate and report back (art 17(3) CPC). In those cases, and where action is warranted, the Commission coordinates and any competent authority can join if they are in fact concerned by the widespread infringement (art 17 (4) and (5) CPC). The reasons for declining to take part are laid out in Art 18. In those actions, it is possible to accept commitments from traders, which may be published (respecting the rules on confidentiality and professional secrecy laid out in art 33) and monitor their implementation (art 20). A number of enforcement measures are also available to the authorities to bring an end to infringements (article 21). Art 24 deals with language arrangements and lays out the rules to agree on a common language and/ or arrangements for translations (art 24). The trader is entitled to use the official language of its residence or establishment (art 25).

The CPC also contains several relevant powers, tools and methods for cross-border enforcement, such as provisions on sweeps (art 29) Union wide alerts (art 26), exchange of officials contributing to investigation and enforcement (art 30).

### ***International cooperation***

The provisions on international cooperation that goes beyond the EU's boundaries are laid out in Article 32. This article states:

*'(1) To the extent necessary to achieve the objective of this Regulation, the Union shall cooperate with third countries and with the competent international organisations in the areas covered by this Regulation in order to protect consumers' interests. The Union and the third countries concerned may conclude agreements setting out arrangements for cooperation, including the establishment of mutual assistance arrangements, the exchange of confidential information and exchange of staff programmes.*

*(2) Agreements concluded between the Union and third countries concerning cooperation and mutual assistance to protect and enhance consumers' interests shall respect the relevant data protection rules applicable to the transfer of personal data to third countries.*

*(3) When a competent authority receives information that is potentially of relevance for the competent authorities of other Member States from an authority of a third country, it shall communicate the information to those competent authorities insofar as it is permitted to do so under any applicable bilateral assistance agreements with that third country and insofar as*

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<sup>139</sup> On the role of the coordinator, see Art 23 CPC.

*that information is in accordance with Union law regarding the protection of individuals with regard to the processing of personal data.*

*(4) Information communicated under this Regulation may also be communicated to an authority of a third country by a competent authority under a bilateral assistance agreement with that third country, provided that the approval of the competent authority that originally communicated the information has been obtained, and provided that it is in accordance with Union law regarding the protection of individuals with regard to the processing of personal data.'*

## **1.2.National sources enabling cross-border intervention: The example of the Federal Trade Commission**

An OECD survey (2006) revealed that in many countries (84% of respondents), consumer authorities have relevant cross-border enforcement powers. Consumer authorities can enforce laws against their domestic businesses harming foreign consumers. However, there is a considerable difference in the conditions for such action which may depend in some countries for example on the existence of affected domestic consumers. 77% of respondents can enforce consumer protection laws to protect domestic consumers against foreign businesses. However, in some countries, the ability to take actions may be limited and may depend on the effect of the business conduct on consumers.<sup>140</sup>

In this section we reflect on the required legal basis for intervention looking at the case of the USA. The FTC has been active in cross-border enforcement by bringing actions against US subsidiaries of foreign entities who direct deceptive practices at consumers located in the United States. This is facilitated by the fact that the FTC SAFE WEB Act gives the FTC various tools to improve enforcement regarding consumer protection matters with an international dimension.<sup>141</sup> These tools include for instance:

### ***Investigatory powers to help foreign law enforcement agencies***

The SAFE WEB Act allows the FTC to provide assistance to a foreign law enforcement agency upon a written request. To do so, the requesting agency must be investigating or engaging in enforcement proceedings against alleged violations of laws prohibiting fraudulent or deceptive commercial practices.<sup>142</sup>

### ***Enforcement actions against foreign businesses to protect domestic/foreign victims***

Under the SAFE WEB Act, the FTC can take enforcement action involving global commerce under the following conditions. There should be unfair and deceptive acts or practices that: (i) cause or are likely to cause reasonably foreseeable injury within the United States, or (ii) involve material conduct occurring within the United States. The SAFE WEB Act further states that “all remedies available to the FTC with respect to unfair and deceptive acts or practices

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<sup>140</sup> Report on the implementation of the 2003 OECD guidelines on cross-border fraud, executive summary, <https://www.oecd.org/digital/ieconomy/37125994.pdf>

<sup>141</sup> For more on international collaboration at the FTC, see <https://www.ftc.gov/reports/annual-highlights-2020/international-cooperation>

<sup>142</sup> 15 U.S. Code § 46 Section (j).

shall be available for these acts and practices, including restitution to domestic or foreign victims”.<sup>143</sup>

### ***Sharing of confidential information to foreign law enforcement agencies***

Pursuant to the SAFE WEB Act, the FTC has the authority to share confidential information in its files related to consumer protection matters with foreign law enforcement agencies, subject to appropriate confidentiality assurances. More specifically, the foreign agency must provide a written certification that the materials provided will be maintained in confidence, and will be used only for official law enforcement purposes. The foreign agency must also identify the legal basis for its authority to maintain the material in confidence.<sup>144</sup> For example, the US FTC used its powers under the SAFE WEB Act to assist the UK CMA in issuing demands for information to US entities associated with Viagogo, a ticket reseller based in Switzerland accused of violating consumer laws through its advertising and pricing representations. The company produced information to the FTC about the investigations which were subsequently shared with the CMA. The latter then successfully secured a court order against Viagogo.<sup>145</sup>

All these tools provided in the SAFE WEB Act allow the FTC to play an instrumental role in many cases with international aspects, such as online pyramid schemes, telemarketing schemes, advertising as well as privacy and data security. Yet, this does not mean that no practical challenges are involved in litigating against foreign individuals or entities. For instance, there may be obstacles involving service of process, personal jurisdiction challenges, judgement enforcement and locating overseas assets (an issue likely shared by other enforcement authorities).

## **2. Role of the toolkits in creating coherence in cross-border enforcement**

To effectively conduct cross-border enforcement, there is a need for some convergent powers being available to national enforcers. Toolkits are instruments that are acting as resources (interactive<sup>146</sup> or not) to assist in the development of laws. They normally have an educational value, providing advice and guidance. They tend to have a practical focus. Toolkits are not model laws.

Enforcement authorities have discussed what the ideal toolkit for cross border enforcement may look like in various fora, notably UNCTAD and the OECD. The OECD’s implementation toolkit on legislative actions for consumer protection enforcement cooperation<sup>147</sup> offers a valuable practical resource for consumer protection agencies that do not have the domestic legal authority needed for enforcement cooperation. It was designed to help make the case for obtaining relevant legislative tools and provide guidance to ensure that related legislative

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<sup>143</sup> 15 U.S. Code § 45, Section a(4).

<sup>144</sup> 15 U.S. Code § 46 Section (f).

<sup>145</sup> <https://www.ftc.gov/legal-library/browse/cases-proceedings/petitions-quash/matter-september-13-2018-civil-investigative-demands-issued-viagogo-inc-viagogo-entertainment-inc-0>.

<sup>146</sup> See for eg the international cyber law in practice interactive toolkit: [https://cyberlaw.ccdcoe.org/wiki/Main\\_Page#:~:text=The%20Cyber%20Law%20Toolkit%20is,consists%20of%2025%20hypothetical%20scenarios](https://cyberlaw.ccdcoe.org/wiki/Main_Page#:~:text=The%20Cyber%20Law%20Toolkit%20is,consists%20of%2025%20hypothetical%20scenarios).

<sup>147</sup> OECD (2021), “Implementation toolkit on legislative actions for consumer protection enforcement cooperation”, OECD Digital Economy Papers, No. 310, OECD Publishing, Paris, <https://doi.org/10.1787/20716826>.

reforms are fit for purpose.<sup>148</sup> This toolkit builds upon work carried out in 2018 on consumer protection enforcement in a global digital marketplace.<sup>149</sup> This OECD toolkit sets out ten guiding principles grounded in three areas: investigative powers, enforcement outcomes and co-operation practices. The first two areas cover the need for consumer protection authorities to have adequate investigatory and enforcement powers at the domestic level. The third area focuses on other forms of co-operation, such as notification, information sharing and confidentiality. The Annex then spells out the underlying rationale behind each guiding principle and illustrates their relevance in practice by providing concrete examples.

At UNCTAD some activity was also developed dating back to 2018, in order to develop a similar toolkit via the work of sub-group 3. The sub-group hosted a side event on building international enforcement cooperation at the IGE in July 2019 presenting an international toolkit<sup>150</sup> and exploring a number of hypothetical scenarios to illustrate the gaps in cross-border enforcement. The toolkit focuses on three key areas: intelligence sharing and coordination, investigation and securing outcomes. On intelligence sharing, the toolkit emphasises some key themes including pipeline discussion and alerts, evidence exchange, obligation to keep shared information confidential, coordination of investigations and outcomes. Regarding investigations, the toolkit highlights the need for minimum investigatory powers and their application to overseas traders. Regarding securing outcomes, the toolkit illustrates the importance of the enforcement of laws that protect overseas consumers, the ability to apply remedies to overseas traders and what minimum enforcement outcomes ought to be expected. The toolkit also discussed the issue of conflicts of law and jurisdiction and what may need to be done to recognise rulings, or issues of standing.

The exercise of some of the powers discussed in the aforementioned toolkits would be facilitated by the adoption of technological means of enforcement (some maybe rather low tech such as a database of available enforcement action powers and flagging if assistance can be provided; other higher tech harnessing AI and machine learning for eg), an aspect to which we turn in part 4 of this report. The development of toolkits could also be facilitated by the adoption of an international standard catering for cross-border enforcement which while mimicking some of the content of the toolkit could represent the best practice standard in this area and be used as a working model for cross-border enforcement, as discussed in part 5.

### **3. Cross-border cooperation through coordination of national enforcement tools**

Enforcers do have some experience of cross-border cooperation via a range of mechanisms. Some mechanisms give a binding nature to cross-border enforcement. This for example includes the use of trade agreements or bilateral / multilateral agreements (such as those arrangements in place in the EU). But much of the cross-border cooperation in place can rest on non-binding agreements such as MoUs and/ or take place via coordinated actions notably through ICPEN. Most countries however employ a mix of those approaches combining some formal and informal cooperation strategies.<sup>151</sup> Note also that to be effective, consumer protection often needs to rely on cross-agency collaboration within and outside the border of a

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<sup>148</sup> OECD (2021), “Implementation toolkit on legislative actions for consumer protection enforcement co-operation”, OECD Digital Economy Papers, No. 310, OECD Publishing, Paris, <https://doi.org/10.1787/20716826>, p.6.

<sup>149</sup> [https://www.oecd-ilibrary.org/science-and-technology/consumer-protection-enforcement-in-a-global-digital-marketplace\\_f041ecad-en](https://www.oecd-ilibrary.org/science-and-technology/consumer-protection-enforcement-in-a-global-digital-marketplace_f041ecad-en)

<sup>150</sup> [https://unctad.org/meetings/en/SessionalDocuments/cicplp\\_4th\\_SE\\_CP\\_Enforce\\_Coop.pdf](https://unctad.org/meetings/en/SessionalDocuments/cicplp_4th_SE_CP_Enforce_Coop.pdf).

<sup>151</sup> OECD legislative toolkit (2021) 6.

given state, while cross-agency collaboration *within* jurisdictions is also often essential (notably with regards to the enforcement of practice that involve the use of data at scale) but this aspect is beyond the remit of this report.<sup>152</sup>

### 3.1. Information sharing through databases

Where action is needed and already possible is through the exchange of best practices in enforcement as well as the exchange of information. Having methods to communicate to others where problems exist is useful in flagging up problems and helping other authorities prioritise or strategize. Perhaps one step forward may be to seek the creation of databases tracking and cataloguing actions so that a repository of enforcement actions can be tapped. Public enforcement would also greatly benefit from feedback notably coming from consumer complaints and from issues detected and identified by market players, platforms in particular.

Databases of this kind already exist notably in the area of unsafe products<sup>153</sup> and emulating some of those initiatives may be beneficial for cross-border enforcement of general consumer law. Such initiatives already exist, for example in the EU, with article 35 of the CPC mandating the creation of an electronic database maintained by the European Commission that will serve communications between competent authorities, single liaison offices and the Commission. Information will be directly accessible to those entities and provided by those entities. The database can be used to store and publicise external alerts.

One initiative also looks at partnering consumer associations and public enforcers to harness consumer complaints data. The CICLE project<sup>154</sup> run by consumer associations in Spain and Italy, seeks to maximise data capture through an online dashboard recording consumer complaints and offers a live tracking tool to generate alerts to authorities as well as detect trends. This data will feed into the EU mapping carried out by the Consumer Protection Cooperation Network database to also assist in enhancing EU enforcement. The tool also can record the responsiveness of companies and ranks the companies with the most complaints. The dashboard will also offer access to ADR schemes.<sup>155</sup>

However, in developing searchable datasets lack of up-to-date information being fed through and a variety of classification used for reporting may make the task of creating usable tools at international level challenging. For example, concerning social media scams, Consumers international noted that ‘consumer protection authorities record and classify fraud incidents in

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<sup>152</sup> The OECD conducted research in the area of domestic inter-agency co-operation that showed that cooperation with other law enforcement authorities was a key component of effective consumer protection enforcement. 87% of respondents had arrangements in place for such cooperation (whether properly formalised in law or not) and significant efforts were being made in this area to increase and widen cooperation with other public bodies working on consumer policy (see OECD digital economy paper on Consumer protection enforcement in a global digital marketplace March 2018, no. 266 (2018), 20 (figure 9)). For example, in the UK, the Competition Markets Authority has MoUs with the Information Commissioner’s Office and OFCOM (the regulator for the Communications Services), (see CMA, The commercial use of consumer data: Report on the CMA’s call for information (2015), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/435817/The\\_commercial\\_use\\_of\\_consumer\\_data.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf).)

<sup>153</sup> See notably, the OECD Global Recall Portal, <https://globalrecalls.oecd.org/>. See also The UNCTAD Recommendation on preventing cross-border distribution of known unsafe consumer products, which recommends information exchange (Rec 4) although it does not explain in what form or through which mechanisms, [https://unctad.org/system/files/information-document/tdrbpconf9\\_d01\\_consumer-products\\_en.pdf](https://unctad.org/system/files/information-document/tdrbpconf9_d01_consumer-products_en.pdf)

<sup>154</sup> <https://www.euroconsumers.org/activities/cicle-consumer-law-enforcement-complaints-data>

<sup>155</sup> <https://www.euroconsumers.org/activities/cicle-consumer-law-enforcement-complaints-data>



different ways, making it difficult to compare data. On a positive note, in our interviews, some organisations explained that they are starting to code online fraud incidents with reference to where they originate from on social media platforms. However, this good practice is not consistently applied at a global level.<sup>156</sup>

This of course is without accounting for the IT platforms on which such databases may run, and which may not be compatible in the first place, requiring some migration to a common platform or additional work to feed data through.

### **3.2.Role of MoUs**

Regarding the international framework for enforcement co-operation, 93% of respondents to the 2003 OECD survey reported having improved their frameworks to co-operate with consumer authorities in other countries against fraudulent cross-border practices. All but two countries had bilateral or multilateral arrangement with authorities outside their countries to enable co-operation. Many countries indicated that they had increased collaboration through existing international networks, such as ICPEN and the EU CPC.<sup>157</sup> When it comes to cross-border collaboration, only half of the authorities have taken joint or co-ordinated enforcement actions with their foreign counterparts.<sup>158</sup> But MoUs are also utilised for cross-border collaborations. For example, the CMA (UK) has entered an MoU with the FTC in the USA.<sup>159</sup>

### **3.3.Parallel enforcement actions**

In the absence of cross-border cooperation channels or in the absence of a uniform way of addressing enforcement, coordinated action can be used by enforcers to use all tools available against the practices of a company that may be damaging to consumers. For example, the covert collection of consumers' personal data could be dealt with as an unfair commercial practice, by a consumer enforcement agency in country A<sup>160</sup>, by competition enforcement agency<sup>161</sup> in country B and by a data protection agency in country C.<sup>162</sup> If those are the only tools available this cross-agency and cross-border collaboration may yield results, as it forces a multi-national company to field multiple claims and will also no doubt attract press attention. The reputational risks may well be sufficient to see the business alter their behaviours moving forward to restore trust.

## **4. Coordinated actions through ICPEN**

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<sup>156</sup> <https://www.consumersinternational.org/media/293343/social-media-scams-final-245.pdf> para 4.2; see also, Christine Riefa, consumer protection on social media platform, A briefing note for Consumers International (2017) (unpublished. On file with the author).

<sup>157</sup> Report on the implementation of the 2003 OECD guidelines on cross-border fraud, executive summary, <https://www.oecd.org/digital/ieconomy/37125994.pdf>.

<sup>158</sup> OECD Consumer Protection Enforcement in a global digital marketplace, 2018

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<sup>160</sup> See for example, in Italy <https://www.theguardian.com/technology/2018/dec/07/italian-regulator-fines-facebook-89m-for-misleading-users>

<sup>161</sup> See for eg in Germany, [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07\\_02\\_2019\\_Facebook\\_FAQs.pdf;jsessionid=8AC7BDEADC4225A6CF187BCAEC7A3EE8.1\\_cid378?\\_blob=publicationFile&v=6](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf;jsessionid=8AC7BDEADC4225A6CF187BCAEC7A3EE8.1_cid378?_blob=publicationFile&v=6)

<sup>162</sup> See for eg, <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>

Consumer protection agencies are becoming increasingly adept at cooperating across borders without resort to court proceedings, for example by relying on colleagues in other jurisdictions to act. Cross border exchanges have been set up by the International Consumer Protection & Enforcement Network (ICPEN), composed of organizations in over 50 countries, aiming to:

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

While the initial membership was predominantly from OECD countries, it has spread further afield to a wide range of countries, including many of the countries of the Middle East/North Africa region, Latin America and the Caribbean islands and sub-Saharan Africa.<sup>163</sup> Regional bodies can join as observers as has UNCTAD.

ICPEN runs education campaigns such as the annual Fraud Prevention Month and it carries out the annual Internet Sweep<sup>164</sup> which searches for websites that may be defrauding consumers. The sweep is described by the UNCTAD Implementation report as: *'parallel and coordinated law enforcement actions'*. Such actions signal the existence of a global law enforcement network, and enable 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.

According to ICPEN, sweeps are useful in:

- Improving market conduct by demonstrating an enforcement presence online;
- Raising the profile of each participating agency by promoting their involvement in a significant event with agencies from over 30 economies;
- Facilitating further action by each agency from education, enforcement and international referrals in light of information revealed from the Sweep; and
- Broadening Internet users awareness by releasing information through the media.<sup>165</sup>

Note that similar sweeps are run in the EU via the CPC (article 29). Of late they have included a sweep on online consumer reviews in 2021.<sup>166</sup>

Other examples of successful ICPEN collaborations to enforce consumer law across borders include:<sup>167</sup>

- The Australian Competition and Consumer Commission (ACCC) requested official co-operation with the US Federal Trade Commission (FTC) regarding an enforcement action against Reebok International Ltd in 2013. The Federal Court of Australia

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<sup>163</sup> Including COMESA as observer.

<sup>164</sup> <https://icpen.org/international-internet-sweep-day>

<sup>165</sup> <https://icpen.org/international-internet-sweep-day>

<sup>166</sup> [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps\\_en#2021-sweep-on-online-consumer-reviews](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en#2021-sweep-on-online-consumer-reviews)

<sup>167</sup>

[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2020\)5/FINAL&docLanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2020)5/FINAL&docLanguage=en)



subsequently levied penalties on Reebok Australia of AUD 350 000 for false and misleading representations about the benefits of shoes.<sup>168</sup>

- A business directory scheme targeting Canadian and international businesses was investigated by the Competition Bureau Canada (CBC) in 2011. As part of the investigations, the CBC co-operated with the US FTC and the ACCC, all of which brought their own enforcement actions. ICPEN and the International Mass Marketing Fraud Working Group also supported the CBC in this matter.
- In a joint letter sent in 2019, the Belgian Directorate General for Economic Inspection (DGEI) and the Netherlands Authority for Consumers and Markets (ACM) asked the Turkish Ministry of Trade for assistance with an investigation into fraudulent debt collection agencies linked to two call centres in Turkey. The Ministry of Trade collaborated with other domestic agencies to obtain additional information, and helped the ACM by, for instance, providing trade registry records of the companies involved. With the information provided, the ACM was able to bring the inquiry to a conclusion.
- The Zambian Competition and Consumer Protection Commission (CCPC) requested investigative assistance from the Tanzanian Fair Competition Commission (FCC) in 2019, based on the Principles on Cooperation in Consumer Protection Enforcement of the African Dialogue. Fast Jet was the subject of the investigation, a Tanzanian airline that operated in Zambia which eventually shut down. The co-operation was required in this case with the aim of assisting a customer to receive a refund.

## **5. Coordinated actions by consumers and consumer associations to complement public enforcement**

In the absence of global mechanisms, co-ordination of local means can provide some effective relief to consumers. This can include coordinated complaints to enforcers (as led by BEUC in the EU<sup>169</sup>) or co-ordinated litigation using local tools available.

Many of the rules protecting consumers taking private actions were set up for individual action. Saumier and Micklitz noted that the high costs and delays in the use of courts for the resolution of consumer disputes has led some countries to see collective redress as a way forward. However, the authors note that there is a big gap between countries that have embraced collective redress and those who have not, sometimes based on cultural lines.<sup>170</sup> Collective actions however are starting to gain ground, but there remains some divergence in the type of actions available and what can be gained from them. The US style class action has many different features from the EU style collective action for example. Other countries offer collective action mechanisms that may also have distinguishing features.

There is to date no international mechanism for collective action (although some regional ones may be in place – remaining rare)<sup>171</sup>, but co-ordinated action at national level can reach a similar outcome.

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<sup>168</sup> <https://www.accc.gov.au/media-release/reebok-australia-to-pay-350000-for-false-and-misleading-representations>

<sup>169</sup> See for example, coordinated complaint against Google, <https://www.beuc.eu/publications/european-consumer-groups-take-action-against-google-pushing-users-towards-its/html>.

<sup>170</sup> Micklitz, Saumier (eds.), *Enforcement and effectiveness of Consumer law* (Springer 2016).

<sup>171</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828&from=ES>

One interesting example of co-ordinated and global collective action is that of the ‘Diesel gate’ affair. Dieselgate, by far the largest automotive scandal in the world, ultimately resulted in the first global consumer law private enforcement co-ordinated action. In 2014, the US Environmental Protection Agency (EPA) discovered a significant disparity in the emissions data of Volkswagen diesel cars. The amount of nitrous oxide emissions in real-world driving conditions was up to 40 times higher than those measured in the laboratory conditions. A year later, the corporation finally admitted that the software in the vehicles could artificially lower emissions in lab settings.<sup>172</sup> It soon became apparent that the problem was global in scope, affecting consumers all over the world.

Parallel proceedings were launched in Brazil, Australia, Canada, Chile, Germany, the Netherlands and the USA.<sup>173</sup> In addition, parallel proceedings were also launched under the impulsion of BEUC to coordinate action in the EU. The goal there was to ensure that any legal tools available to claim compensation were used and that the VW group was held liable for such infringement.<sup>174</sup> BEUC’s role was in the coordination of the actions taken at national level by its member consumer associations. Having a common strategy would enable concentrating scarce resources. However, while circumstances were similar, the outcomes have been inconsistent at EU level, and the level of compensation differed widely across jurisdictions – leaving nearly all of the 8 million car owners empty-handed, thus indicating the need for change at the European level.<sup>175</sup>

Notably, the European Commission adopted its long-discussed EU-wide collective redress directive in 2020, partly in response to the disparate options available for redress in the Dieselgate case. The directive requires every state to establish representative collective redress options for any sectors governed by provisions which protect the interests of consumers. The directive goes some way to making sure that consumers are able to access the same processes wherever they live.

The Representative Action Directive (RAD) of 25 November 2020<sup>176</sup> (that will enter into force in December 2022) makes provisions for cross-border collective actions. Indeed, Art 2(1) states that the Directive ‘applies to domestic and cross-border infringements, including where those infringements ceased before the representative action was brought or where those infringements ceased before the representative action was concluded.’ For the purpose of this Directive, ‘cross-border representative action’ means a representative action brought by a qualified entity in a Member State other than that in which the qualified entity was designated (art 3(7) RAD). In this sense the cross-border element is contained to the EU. The text does not cater for cross-border actions outside the EU. Qualified entities (which may include consumer associations and organisations that represent members from more than one member states) can

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<sup>172</sup> <https://www.euroconsumers.org/activities/dieselgate-long-road-to-consumer-compensation>

<sup>173</sup> The Globalization of Mass Civil Litigation Lessons from the Volkswagen "Clean Diesel" Case by Deborah R. Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel A. Gómez, Axel Halfmeier, Ianika Tzankova [https://www.rand.org/pubs/research\\_reports/RR917-1.html](https://www.rand.org/pubs/research_reports/RR917-1.html)

<sup>174</sup> [https://www.beuc.eu/publications/beuc-x-2020-081\\_five\\_years\\_of\\_dieselgate\\_a\\_bitter\\_anniversary\\_report.pdf](https://www.beuc.eu/publications/beuc-x-2020-081_five_years_of_dieselgate_a_bitter_anniversary_report.pdf)

<sup>175</sup> [https://www.beuc.eu/publications/beuc-x-2019-050\\_report\\_-\\_four\\_years\\_after\\_the\\_dieselgate\\_scandal.pdf](https://www.beuc.eu/publications/beuc-x-2019-050_report_-_four_years_after_the_dieselgate_scandal.pdf)

<sup>176</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1828>

be allowed to bring domestic and cross-border representative actions. To qualify for cross border actions, Article 4(3) sets out a number of criteria, including:

- Being a legal person with at least 12 months public activity
- Statutory purpose focussed on consumer protection
- Non-profit and solvent
- Independent.

Bringing cross-border representative actions is governed by Art 6 (RAD) which makes arrangements for qualified entities to be recognised at national level as having the required legal standing in front of national courts and administrative authorities. The Directive also makes provisions on the operation of representative actions notably, injunctive measures, redress measures, funding, allocation of costs, and information (including via the use of a database).

Globally, the conduct of the Dieselgate case has shown that financing of the cases remains a key issue.<sup>177</sup> In the EU, it is possible that some funding could come from the EU Commission, but this type of funding would not be available everywhere. In different parts of the world, the financing of such lawsuit requires more often than not, the intervention of third-party funders. This is most likely in response to cost-shifting and lawyer fee rules. Without solid financing there may also be obstacles to the certification of class representatives. Thus, third-party funding has arisen as a near-essential ingredient to facilitate aggregate and collective litigation in many jurisdictions.<sup>178</sup> Some bodies have now emerged and specialise in funding strategic litigation. This is for example the case of the Digital Freedom Fund<sup>179</sup> in Europe.

The study of the actions undertaken globally also revealed that the conduct of cases could lead to different results in different jurisdictions, which may be a difficulty for consumers who perceive the harm as being the same. Notably the sanctions imposed in Europe were significantly lower than those imposed in the USA for example.<sup>180</sup> Actions also progressed at vastly different speeds.<sup>181</sup>

## **6. The role of online platforms in cross-border enforcement**

With an uneven level of protection across the world, and the coinciding rise of platform commerce, pushing more of the responsibility for the enforcement of consumer protection onto platforms should not be overlooked.

Due to the liberal approach adopted by regulators, platforms have already carved out their own control over what behaviours they deem acceptable or not. Companies such as Meta (formerly

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<sup>177</sup> The Globalization of Mass Civil Litigation Lessons from the Volkswagen "Clean Diesel" Case by Deborah R. Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel A. Gómez, Axel Halfmeier, Ianika Tzankova [https://www.rand.org/pubs/research\\_reports/RRA917-1.html](https://www.rand.org/pubs/research_reports/RRA917-1.html)

<sup>178</sup> The Globalization of Mass Civil Litigation Lessons from the Volkswagen "Clean Diesel" Case by Deborah R. Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel A. Gómez, Axel Halfmeier, Ianika Tzankova [https://www.rand.org/pubs/research\\_reports/RRA917-1.html](https://www.rand.org/pubs/research_reports/RRA917-1.html)

<sup>179</sup> <https://digitalfreedomfund.org/>

<sup>180</sup> Beate Gsell, Thomas M.J Mollers (eds.), Enforcing Consumer and Capital Markets Law, The Diesel Emissions Scandal (Intersentia 2020) 467.

<sup>181</sup> Beate Gsell, Thomas M.J Mollers (eds.), Enforcing Consumer and Capital Markets Law, The Diesel Emissions Scandal (Intersentia 2020) 466.

known as Facebook) have grown at unprecedented rates, with an average of 2.91 billion users, daily active throughout the globe, in November 2021 alone.<sup>182</sup> In this context, platforms must moderate the flow of information and content available on their infrastructure, either to protect their users or to present their best face to potential advertisers.<sup>183</sup> To do so, they have developed their own private governance framework with self-regulatory measures, such as the terms of service and the community guidelines, to indicate the conditions of use and the type of content considered inappropriate. That is to say that platforms already find themselves having to set standards, arbitrate tastes, interpret laws, adjudicate disputes, and most importantly, enforce rules they choose to establish – without the need to rely on a public mechanism such as a court order.<sup>184</sup> Platforms have an incentive to establish a modicum of trust to ensure their perennity.

Given that the platform ecosystem is already equipped with enforcement functions, it is crucial to better understand their responsibility in enforcing consumer law across borders. While online platforms may consider themselves as passive intermediaries between consumers and traders, their position is in reality more complicated than that. In fact, platforms could perform at least three main functions in cross-border enforcement of consumer law by (i) driving compliance, (ii) monitoring compliance, and (iii) providing redress.

### ***Driving compliance***

A concrete example of how compliance could be driven by platforms can be directly found in the much-awaited Digital Services Act (DSA) of the European Union. According to Article 22 DSA, platforms intermediating online contracts between traders and consumers must obtain identifying information from traders. The role of the platform is therefore to provide a virtual space on their website where traders can post their contact and withdrawal information.<sup>185</sup> For instance, Amazon provides traders with platform functionalities (called platform affordances)<sup>186</sup> allowing them to provide disclosures before consumers enter into a commercial transaction. A more active approach would be for platforms to advise traders on the type of information that should be included in order to comply with consumer law.

### ***Monitoring compliance***

In addition to obtaining identifying information from traders, platforms are also required under the DSA to undertake “reasonable efforts” in verifying the reliability of the information given.

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<sup>182</sup>

<https://blog.hootsuite.com/facebook-statistics/#:~:text=36.8%25%20of%20the%20world's%20population,of%20everyone%20online%20uses%20Facebook>

<sup>183</sup>

[https://www.researchgate.net/publication/327186182\\_Custodians\\_of\\_the\\_internet\\_Platforms\\_content\\_moderation\\_and\\_the\\_hidden\\_decisions\\_that\\_shape\\_social\\_media](https://www.researchgate.net/publication/327186182_Custodians_of_the_internet_Platforms_content_moderation_and_the_hidden_decisions_that_shape_social_media)

<sup>184</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3469443](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469443)

<sup>185</sup> <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B>

<sup>186</sup> J Hemsley, J Jacobson, A Gruzd and P Mai, “Social media for social good or evil: an introduction” (2018) 4(3) Social Media + Society 1.

Concretely speaking, platforms could, for example, verify the real existence of traders under an upcoming know-your-customer regime, check the accuracy of prices as well as monitor national and European standards the interpretation of which does not leave room for discretion (e.g. undisclosed native advertising). For instance, the Competition and Markets Authority required Instagram to investigate hidden advertising on its infrastructure as a growing number of social media influencers were posting content without clearly indicating that it was a partnership with a brand.<sup>187</sup>

### ***Providing redress***

Platforms could also provide redress to consumers in cases of infringement. For example, the UK Consumer Credit Act requires the payment intermediary operating the credit card to intervene in certain circumstances where consumers did not receive the expected good. In these instances, consumers are entitled to pursue the credit card company together with the traders who failed to fulfil their contractual obligation.

As a result, establishing the responsibility of platforms in cross-border enforcement of consumer protection could be an important part of finding a solution. It may even become a necessity in the future as online transactions are no longer solely performed on traditional marketplaces, such as e-Bay or Amazon. In fact, an increasing number of social media platforms have introduced e-commerce features allowing consumers and traders to conclude contracts without ever having to leave the platform. Enforcers must therefore navigate through already-existing legal frameworks and determine whether they offer a way out for platforms or, on the contrary, should be constructed in a more limited fashion.

While some enforcement tasks could be performed by platforms, one should however not neglect that public authorities must also carry out oversight activities to monitor and control them. To do so, public administration must first be equipped with the relevant infrastructures and technological tools applicable to the oversight of consumer law and align those to national or supranational enforcement frameworks.

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<sup>187</sup> <https://www.gov.uk/government/news/instagram-to-tackle-hidden-advertising-after-cma-action>

## Part 4: Exploring the use of digital technology in enforcement

One important way to improve enforcement mechanisms, nationally but also cross-border could be through using technology to assist enforcement activities. According to the OECD, there are three key elements needed for cross-border enforcement especially (but not exclusively) in digital markets: technical ability, behavioural insights (including understanding dark patterns, vulnerability of all consumers) and international reach. Some aspects, notably technical ability, may constitute a challenge at this stage, as many enforcers around the world will need to review operations and may need to upskill staff or consider hiring outside talent in order to service the technological aspects of enforcement. Dealing with cross-border issues with regards to e-transaction is indeed already a major challenge for enforcers notably in developing countries.<sup>188</sup>

However, digital technology can assist with a variety of tasks<sup>189</sup> and is already widely used by some enforcement authorities and most companies. Much existing practice is focused on the application of technology for regulatory, compliance and enforcement tasks in the financial sector, but other sectoral and general enforcement agencies are developing solutions. The use of technology is not a purely cross-border issue and national interventions can also benefit from its use. However, in cross-border settings, technology can come to assist and bridge some gaps that exist in the regulatory framework and could thus become a useful solution.

We have already mentioned how the use of databases to share information between enforcers may provide useful solutions. Consumer complaints could also be harnessed more strategically to help prioritise and focus enforcement efforts as the CICLE project is currently looking at doing, by boosting the power of complaints data (see part 3, para 3.1).<sup>190</sup>

This part of the report seeks to explore technology as a way to go further than information exchange. We seek to observe and report how technology is used to identify, monitor and redress detriment and elaborate on how it could be used in the future.

### 1. A technological approach to consumer enforcement: the use of EnfTech

So far, the use of technology falls into two main categories: (SupTech) and (RegTech).<sup>191</sup> Technology has been classified according to the user or beneficiary of the technology.<sup>192</sup> On the one hand, supervisory authorities (SupTech) to facilitate and enhance supervisory processes.<sup>193</sup> On the other, companies have used technology for the management of regulatory

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<sup>188</sup> UNCTAD, 'Information Economy Report 2015 Unlocking the Potential of E-Commerce for Developing Countries' (n 4), Figure V2, 66.

<sup>189</sup> For more on the reasons for using technology in consumer enforcement, see L. Coll, C. Riefa, Exploring the role of technology in consumer law enforcement (forthcoming, Loyola Consumer Law Review 2022).

<sup>190</sup> <https://www.euroconsumers.org/activities/cicle-consumer-law-enforcement-complaints-data>

<sup>191</sup> From Spreadsheets to Suptech Technology Solutions for Market Conduct Supervision, Discussion Note, World Bank, June 2018 [127577-REVISED-Suptech-Technology-Solutions-for-Market-Conduct-Supervision.pdf](https://www.worldbank.org/publications/cifir/2018/127577-REVISED-Suptech-Technology-Solutions-for-Market-Conduct-Supervision.pdf) (worldbank.org)

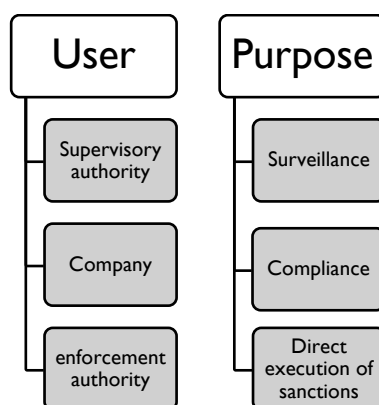
<sup>192</sup> L. Coll, C. Riefa, Exploring the role of technology in consumer law enforcement (forthcoming, Loyola Consumer Law Review 2022).

<sup>193</sup> For example, the Financial Intelligence Unit at the Bank of Italy explores huge data sets to measure anomalies in suspicious transaction reports. This is then used to classify the reports according to the type of money laundering scheme and track and sanction more easily.

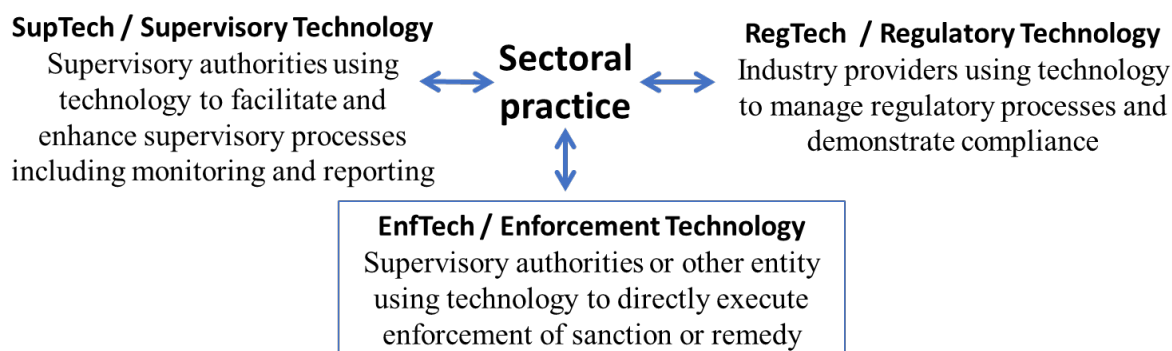


processes and to ensure compliance (RegTech).<sup>194</sup> As a result, technology used by an enforcement authority could be coined **EnfTech**.<sup>195</sup>

However, this expression is not limited to the user of the technology. It can also designate the purpose of the technology. The literature on SupTech and RegTech does not tend to make a distinction between the types of use/ purpose of the technology. But it is useful to make the distinction as technology can assist not only with monitoring or reporting but also with the active application of preventative measures, remedies or sanctions that support consumer protection. For example, the technology could be used Developing the ability to deliver direct execution of enforcement in national and cross-border settings will be indeed critical in enhancing the functioning of consumer protection.



In the financial sector for example, where RegTech and SupTech are well established, there is less use of technology at the level of direct enforcement where sanctions, takedowns or remedies might be implemented remotely, yet banks for example, make great use of overdraft fees by automatically deducting consumers' accounts, thus imposing a direct sanction. Technology can implement the direct execution of an enforcement action such as a warning, takedown or sanction. It can implement a remedy such as a refund or correction of service remotely and automatically. In this regard, the use of the technology can also be deemed to class as 'Enforcement Technology' (or EnfTech) because it focusses on delivering a remedy.



Classification according to user of the technology (Liz Coll)

<sup>194</sup> For example, systems that analyse regulations across multiple jurisdictions, extract rules, map them against organisations internal procedures and automatically alert relevant staff if new action needs to be put in place.

<sup>195</sup> This is the expression coined by Liz Coll while working on this report.

Generally, and for the purpose of this report, we use EnfTech to conceptualised as the overall set of tools enforcers have at their disposal and which could then encompass SupTech, RegTech and EnfTech and focusses on the purpose the technology serves.

Supervisory and enforcement authorities are only starting to make use of EnfTech for consumer protection purposes. There are however, multiple long-standing examples of private actors applying types of EnfTech as they police suppliers and traders on their platforms. In addition, there are established systemic tools used by international, multi stakeholder bodies to take down illegal material. All could be effectively harnessed for consumer protection purposes and find use in the role of supervisory and enforcement agencies charged with consumer protection in particular across borders, although applications will and can be deployed at any level.

## **2. Examples of EnfTech in action**

To understand the opportunity and the capabilities of existing (E) and prototype (P) technologies, the below sections highlight a non-exhaustive selection of applications. These can help deliver enforcement activities at a speed and breadth that better matches consumer online activities. There is a long yet non-exhaustive list of examples of use of technology. The below shows a few of the initiatives that may be most relevant to, or already catering for, consumer protection needs.

### **2.1.Prevention of consumer harm & detection**

A large pool of current applications is focussed on anticipating needs and preventing harm. It is focussed on designing products that will do no harm. It is about safe products and fairness by design. For example, this includes tools that will flag potential violations of the law or can model the effect that a particular practice can have on consumers before it is rolled out. For example, this includes:

**(E) Regulatory intelligence monitoring** aimed at multinational companies, tech-enabled platforms continuously monitoring every issuing body, producing close-to-real-time notifications of all regulatory announcements, enforcement actions, speeches and other regulatory updates helping in compliance efforts.<sup>196</sup> This could be envisaged as a standard for all industries to be aware of actions they need to take to be regulatorily compliant. It could work in administrative systems where fines can be issued by enforcers.

**(E) Anticipating misconduct:** The Monetary Authority of Singapore (MAS) uses existing reports of misconduct by financial adviser representatives working at insurers, banks, and financial advice firms to develop a series of predictive factors for those most likely to sell unsuitable life insurance or investment products to consumers. Using the model, MAS is able to identify representatives and transaction samples for scrutiny during onsite inspections.<sup>197</sup> Such technologies could be harnessed to detect and anticipate mis-selling to consumers.

**(E) Fraud identification:** PayPal has pioneered machine learning systems to identify fraud. Databases of legitimate and fraudulent credit card transaction information such as date, time,

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<sup>196</sup> [Revolut monitors regulatory landscape with CUBE platform \(fintechfutures.com\).](https://www.fintechfutures.com/2018/05/revolut-monitors-regulatory-landscape-with-cube-platform/)

<sup>197</sup> Case study featured in Appendix 1 of [The Use of Supervisory and Regulatory Technology by Authorities and Regulated Institutions: Market developments and financial stability implications \(fsb.org\)](https://www.fsb.org/2018/04/the-use-of-supervisory-and-regulatory-technology-by-authorities-and-regulated-institutions-market-developments-and-financial-stability-implications/)



merchant, merchant location and price were used to train the algorithm to predict frauds with accuracy before they occur.<sup>198</sup> This technology could be used to prevent harm to consumers.

**(P) Intelligibility of contracts:** prototypes are in development that use machine learning and semantic analysis to assess how difficult legal and regulatory communications are to understand. It then suggests ways to improve intelligibility and aid simplification whilst still remaining legally compliant. It helps companies provide more tailored information to its customers to meet their needs. Originally designed for the finance sector, these types of tools are transferable to any regulated sector with a reliance on legal communications to customers.  
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**(E) Retail banking customer experience:** The Bank of Ireland has used social media monitoring since 2013 to gather real-time insights about consumer experiences with financial service providers (FSPs) and emerging consumer issues.<sup>200</sup> This type of application can be used to monitor markets and complaints data which can help with prioritising actions of enforcers for example.

**(E) Child protection:** The Internet Watch Foundation ‘IntelliGrade’ tool was designed in response to the proliferation of illegal images of child sexual abuse online. The tool enables our analysts to accurately grade images and videos and create a unique #hash (a type of digital fingerprint) that is compatible with child sexual abuse laws and classifications in the UK, US, Canada, Australia, New Zealand and the Interpol Baseline standard. Once an image has a unique fingerprint it can be removed everywhere, even if images have been edited.<sup>201</sup>

**(P) Antitrust:** The Computational Antitrust project at Stanford University Codex Center is exploring how to advance the automation of antitrust procedures and the improvement of antitrust analysis. They propose this would advantage both competition authorities by increasing their ability to detect, analyse and remedy anticompetitive practices, and companies with the tools to ensure they are in compliance with the law. The Computational Law project at Stanford sees wider advantages in applying information technology to laws beyond antitrust and enforcement.

**(P) ‘Backseat’ enforcement:** Stanford’s Codex Center envisages some broader use cases for computational law, whereby automated legal reasoning is applied during activities or when activities are planned, as opposed to ex post. This is likened to a ‘driving instructor’ in the backseat, a non-punitive agent alerting a novice driver if they are about to break a traffic law and advising an alternative action. The punitive version of this would be an agent with the power to immediately alert the authorities of violations (eg as soon as the driver ignores the advice). The examples here involve individuals subject to criminal law but could be applied to companies. Indeed, this is the job many RegTech applications perform, altering prior to action where rules might be broken. We might easily then imagine the ‘computerised police enforcer’ able to notify authorities or consumers directly that a law has been broken and enabling the next stage of enforcement or redress. This might be automating an immediate refund to a

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<sup>198</sup> [PayPal's Use of Machine Learning to Enhance Fraud Detection \(and more\) - Technology and Operations Management \(hbs.edu\)](#)

<sup>199</sup> [Making legal terms accessible for everyone: Amplified Global’s Lawtech Sandbox Pilot Report - Tech Nation](#)

<sup>200</sup> [Central Bank of Ireland \(cgap.org\) Social Media Monitoring Consumer Protection Bulletin - May 2017 \(centralbank.ie\)](#)

<sup>201</sup> [IntelliGrade from the Internet Watch Foundation | IWF](#)

consumers, or initiating a change to service terms and practice, or perhaps entering the consumer into an opt-in class action, or retaining their details when an opt-out class action is at the distribution stage.

## 2.2. Market surveillance & Minimising harm

Another type of applications for technology would be a focus on facilitating enforcement and supervision. It is about market surveillance. Potential harm here can be identified, but by monitoring with large data sets or access to analytical tools, actual harm can be minimised and intervention time can be improved, thus reducing detriment. Those tools would work well for consumers for example to protect them from unsafe products or avoid detriment linked to unfair terms in contracts or unfair commercial practices. For example, this includes:

**(E) Online counterfeiting and piracy:** Alibaba Group has a monitoring tool to tackle online counterfeiting and piracy. It uses fake product identification modelling, image recognition, semantic recognition and product information databases to identify products and real-time interception systems in order to serve ‘take down’ notices. Further, by tracing the movement of funds and finance, it can identify counterfeiters and the factories producing the goods.<sup>202</sup>

**(P) Monitoring unfair contract terms:** As discussed in section 3, a high number of contracts containing unlawful and unfair clauses remain in use in online services with enforcers unable to appropriately assess and deal with this proliferation. Micklitz and his team have developed a prototype called ‘uTerms’ that reads and highlights potentially unfair terms to automate the time-consuming processes of reading, reviewing and judging the likelihood of unfairness of clauses. Based on training data from 20 online service terms, partially automating the initial stage frees up the time of lawyers and consumer organisations who can then focus on analysis and initiating proceedings where appropriate.<sup>203</sup> This tool could also with some minor adaptation no doubt be used by companies to monitor their compliance and thus also be a Reg Tech tool (resembling in this sense the ‘backseat enforcement’ tool described above). The Consumer Authority of Poland is currently developing a tool to identify unfair term.

**(E) Automated data reporting:** This is the automatic gathering of data from different platforms and integration of reporting or transactional data into a regulatory system. This could involve two types of technology: ‘push’ technologies where pre-defined data are delivered from the regulated entity to the regulator, and ‘pull’ technologies where the authority can draw data from the regulated entity as required. Both require standardised formats for data, and APIs to allow submission and communications between entities.<sup>204</sup> To some extent the CICLE project makes use of automated data reporting pushing alerts to enforcers.<sup>205</sup>

**(E) Criminal activity detection:** The Financial Intelligence Unit (UIF) of the Bank of Italy has developed a tool to spot anomalies in transactions that could indicate suspicious activity. They use a big data dashboard to monitor wire transfers to and from selected countries and

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<sup>202</sup> [The global digital enforcement of intellectual property \(wipo.int\)](https://www.wipo.int)

<sup>203</sup> Hans-W. Micklitz, Przemysław Pałka, Ioannis Palagi, The Empire Strikes Back. Digital Control of Unfair Terms of Online Service 40 (2017) 3 *Journal of Consumer Policy* 367-388.

<sup>204</sup> [5. The use of SupTech to enhance market supervision and integrity | OECD Business and Finance Outlook 2021: AI in Business and Finance | OECD iLibrary \(oecd-ilibrary.org\)](#). An application programming interface (API) can be defined as a data tap allowing various stakeholders access to platform structured data.

<sup>205</sup> <https://www.euroconsumers.org/activities/cicle-consumer-law-enforcement-complaints-data>

combine this with structured and unstructured data (e.g. press articles) to calculate indicators that help in measuring the degree of anomaly of each flow.<sup>206</sup>

**(E) Algorithmic enforcement of copyright breaches:** Online content platforms use automated search and takedown tools to remove material that breaches copyright. Copyright owners use robots to issue huge volumes of takedown requests to platform intermediaries, and the platforms use algorithms to filter, block, and disable access to allegedly infringing content automatically, with minimal or no human intervention<sup>207</sup>. This approach is embedded in the design of all major intermediary systems since the adoption of the Digital Millennium Copyright Act (DCMA) in 1998. However, the law enforcement and adjudication role played by private online intermediaries is subject to little transparency or accountability for how decisions are made, and redress is challenging.<sup>208</sup> This type of technology could help with detecting goods that have been identified as fake on online platforms for example. If enforcers had access to platform data they could also use this kind of technology as a means of market surveillance.

**(E) Parsing adverse drug event database:** in response to a poor record in post-market surveillance of new drugs, the US Food and Drug Agency has experimented with machine learning in its analyses of adverse drug events. The tool is designed to parse the unstructured, free text-based reports which feed into a centralised database, recording adverse events related to newly marketed drugs. Further tools were tested which use ‘natural language processing’ to search the text more deeply for potential causal relationships between existing conditions and use of particular new drugs<sup>209</sup>.

**(P) Consumer law:** UK CMA’s DaTA team are using a cutting-edge analytics platform to store, process and analyse big and complex data at speed. They are using this to develop machine learning tools that can identify potential breaches of consumer law occurring on digital platforms.<sup>210</sup>

**(P) Modelling product safety testing:** the US Food and Drug Administration (FDA) is trailing the adoption of algorithmic predictions for how a product might perform in terms of safety and efficacy once in the market. This simulated model is a ‘surrogate for direct evidence of safety and efficacy’.<sup>211</sup> This has received criticism for relying on AI-enabled predictions given the well documented challenges with accuracy, data quality and bias. However, as AI develops and these challenges can be mitigated, it could be applied to other consumer products. Perhaps there may also be potential for measuring and assessing the impact of a type of company behaviour on consumers, for example, modelling the impact of removing the option to directly contact a human representative of a company and replacing customer service with chatbots. In the sense that good customer service can avoid disputes and thus remove the need for consumer enforcement later on, those technological solutions could also be encouraged and pursued by

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<sup>206</sup> Case study featured in Appendix 1 of [The Use of Supervisory and Regulatory Technology by Authorities and Regulated Institutions: Market developments and financial stability implications \(fsb.org\)](#)

<sup>207</sup> [Accountability in Algorithmic Copyright enforcement](#) Maayan Perel & Niva Elkin-Koren 19 STAN.TECH. L.REV. 473 (2016)

<sup>208</sup> As above Perel/ Elkin-Koren

<sup>209</sup> Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies, Engstrom et al 2021

<sup>210</sup> See for more details on their activities, Stefan Hunt, *The technology-led transformation of competition and consumer agencies: the Competition and Markets Authority’s experience*, CMA Discussion Paper (14 June 2022).

<sup>211</sup> [Automating FDA Regulation by Mason Marks :: SSRN](#) 2022.

enforcers. This may become especially useful in cross-border contexts where enforcement prevention ought to be a prime objective. However, it is important to also recall that the lack of human contact may also be detrimental to a consumer's experience.

### **2.3. Curtailment and Reparation of harm**

The third type of tools can help in obtaining reparation for harm or cessation of practices. It includes:

**(E) Online dispute resolution (ODR)** which is a type of alternative dispute resolution that uses technology to facilitate negotiation between parties in a dispute and can deliver or support negotiation, mediation or arbitration. Applications under ODR vary greatly, from simply utilising an online platform to enter and manage disputes between parties through to a fully machine led system where algorithms determine a fair settlement for each party.

**(E) (P) Smart contracts:** Smart contracts are essentially tamper-proof contracts which auto-execute provisions based on pre-set conditions, for example a smart contract between projects and funders could enable a crowdfunding initiative by releasing funds only when the overall funding target has been reached. Enforcement uses might include auto-execute refunds in particular circumstances if obligations or service standards are not fulfilled, without a consumer or customer service function needing to act. But note that smart contract in the current state of the technology may create some enforcement problem in the sense that they may make the contestation of unfair terms or other issues.

## **3. Merits of embedding technology in consumer protection enforcement**

The above examples illustrate the way in which SupTech and EnfTech use cases can meet the broad challenges for consumer protection and competition enforcement in both online and offline settings. There are fewer active examples here of consumer protection applications but the technological capability of the applications is particularly well suited to challenges specific to digital consumer markets and interactions. There are merits to pursuing technological solutions (but inevitably some downsides explored further below).

### **3.1.Meeting challenges of high-volume, high-speed transactions**

The computing capacity of algorithmic and AI enabled tools lends itself well to analysing a high volume and high speed of transactions and spotting patterns of bad practice. This assists enforcement in numerous ways. When the traders involved are anonymous or hard to identify, creating a digital identification system for products enables them to be traced and removed. This is widely in use in markets where brands stand to lose out financially such as in counterfeiting and copyright infringement, and in tracking criminal activity such as Child Sexual Abuse Images (CSAI). Such identification allows take down and de-listing of particular items. Some tools are able to track and trace to the source of the problem – from the digital world to a physical location bringing an online breach of the law into the offline work. The use could extend to fake or unsafe products in consumer markets.

### **3.2.Challenges with analysing harms and priorities**

Analysis of harms helps improve enforcement agenda and priorities. Given the lack of strategic and evidenced based priority setting within public enforcement authorities, there is a major

opportunity to use structured and unstructured data sources to understand how markets are working for consumers and where problems are present or anticipated to arise in the future. AI-enabling technologies also have the potential to predict effects that may come from products or services yet to reach the market. This ultimately could bring about major benefits for consumers.

### **3.3.Challenges with unfair contractual clauses**

Specifically, for digital markets and the embedded problem of unfair contractual clauses within terms of service, there are many cases where a consumer may not knowingly experience a material harm, but where the law on unfair contract terms may have been broken (and repeatedly so in several different ways). Tools such as those envisaged by Micklitz which identify such breaches, or by the Codex Center which propose alerting the company to breaches before they reach consumers are potentially good to prevent harm. At a further stage, one could envisage an auto-executed ('smart' style) contract potentially cutting out the need for a third party to run the analysis of clauses and simply removing or remedying for unfair terms based on the legal framework the company is subject to.

### **3.4.Challenges with onerous consumer enforcement journeys**

Perhaps the biggest value comes from the ability of EnfTech tools to reverse the current enforcement journey that consumers are required to take. This involves a consumer experiencing a harm, being able to relate it to a specific legal breach, gathering evidence of the harm, bringing it to an alternative dispute resolution system or to a court via a private action, or reporting it to a public authority in the hope of preventative action being taken at scale.

## **4. Using EnfTech across borders**

The examples above demonstrate that cross-border use of technological enforcement is possible. It has been used by companies operating across multiple borders (for example, Alibaba for counterfeit goods, and YouTube for copyright breaching material). It has also been used across borders by multi-stakeholder organisations such as the Internet Watch Foundation whose digital image identification system is designed to work with different legal jurisdictions.

However, for large scale, regulator-led roll out of enforcement technology across borders, the following factors must be considered:

**First, Data standards:** the data in use by enforcement authorities could be from static data sets of live feeds of information on transactions and/or contracts. The quality and format of this data is critical for ensuring that activity can be monitored within and across borders. Financial regulatory authorities have begun to explore how to translate regulatory rules into machine-readable formats so that reporting and compliance can be more easily automated. This involves digitising reporting instructions and converting them into code so that a machine is capable of executing them.<sup>212</sup> Currently the absence of common standards is holding back developments in machine-readable formats. Several elements must be standardised to enable a productive flow of data across borders including: identifiers for legal entities, definitions and format. To address this challenge within the multi-state single market of the European Union, the

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<sup>212</sup> See for eg, Mohun and Roberts, Cracking the code, rulemaking for humans and machines, OECD 2020 [https://www.oecd-ilibrary.org/governance/cracking-the-code\\_3afe6ba5-en](https://www.oecd-ilibrary.org/governance/cracking-the-code_3afe6ba5-en)

European Commission is developing a strategy on supervisory data.<sup>213</sup> For consumer protection the situation may be different. In many markets such as e-commerce, there is not a long-term history of reporting requirements and so making rules machine readable and data portable would begin from a different starting point. As well as data, systems must also be compatible with each other and able to communicate effectively within and across jurisdictions.

**Data types:** as described above, digital e-commerce markets are not subject to the regulatory reporting requirements of sectors such as finance or health. Therefore, different types of data may be required to aid monitoring and enforcement. This data might include real time performance data of for example, transport providers' telematic data to show safety performance<sup>214</sup>; data on inventory and prices in online stores; data on supplier identity.

**Information sharing:** current processes for sharing information for enforcement processes are ineffective. An UNCTAD survey of 87 UN member states found that only 40% have cross border co-operation on enforcement.<sup>215</sup> This impacts on the cross-border co-operation that is required in a global digital market. Part of this is because of rules on confidentiality and information sharing, which holds back action.

**Culture and partnership:** individual regulatory authorities are taking the lead in developing technology based supervision and enforcement solutions. Co-ordination and collaboration between them will be essential in ensuring that best practice is not just limited to one jurisdiction. However, given the differences in funding of authorities across the world, the technical capabilities will also be very different making collaboration more challenging. For example, a 2018 survey of 30 countries by the OECD found that the annual funding of CPAs ranged from \$0.04million to \$285million<sup>216</sup>, with full time employee equivalents ranging from 20 in Austria to over 3,000 in Mexico. A 2019 OECD report<sup>217</sup> recommended fostering peer learning with regards to the successes and failures of SupTech uses. Looking beyond the regulatory agencies is also important. The examples in this report came from corporate innovations, civil society partnerships, sustainability solutions and supply chain solutions. There is much to learn from applications outside of regulated markets and they may have more to offer consumer protection than direct carry over of uses from financial services regulation.

**Investment** in technology and in staff with the right skills and experience to design and develop appropriate innovations will also be important. The tech systems added to the regulatory mix will require regular updates and staff able to keep up with state of the art.

## 1. Risks, challenges and limitations of EnfTech for consumer protection

Moving towards more use of technology in consumer enforcement also requires some acknowledgement of the potential risks and the limitations that come with the use of such

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<sup>213</sup> European Commission, 2020

<sup>214</sup> Ride hailing motobikes in low-regulated environments have using telematic software to assign each driver a safety score based on their real-time performance. This performance rating is visible to consumers who can then opt for a safer ride and thus drive up the demand for safer transport, however the data could also be used for enforcement purposes.

<sup>215</sup> UNCTAD International Cooperation in Consumer Protection, 2020

<sup>216</sup> OECD Consumer Protection Enforcement in a global digital marketplace, 2018

<sup>217</sup> OECD (2019), "Using digital technologies to improve the design and enforcement of public policies", OECD Digital Economy Papers, No. 274, OECD Publishing, Paris, <https://dx.doi.org/10.1787/99b9ba70-en>. [Open DOI](#)



solutions. Those will apply as much to national enforcement as they will to cross-border enforcement, although their manifestations may not be identical in those two settings.

**Exacerbating bias:** over reliance on data which reflects existing structures and biases is a well-recognised risk in AI systems. The same challenge arises in EnfTech, where for example, data on consumer complaints used to develop or train machine learning models is unlikely to represent the experiences of all consumers, particularly those who face particular disadvantages. The same risk may occur with some Enf Tech for example, where reliant on consumer complaints to develop or train machine learning models as they are unlikely to represent the experiences of all consumers, particularly those facing some disadvantage (who often do not report problems).

**Company resistance:** EnfTech like SupTech will require cross-border information flows to function properly. Companies based in different jurisdictions may resist this, with the support of their governments who may wish to protect their home-grown businesses from international enforcement scrutiny.

**Increasing complexity of delivery:** where decisions are made by algorithmic machine learning programmes about consumer options and interactions in real time, it becomes very difficult for consumers, companies and regulators to be able to understand where and how an infringement of consumer law has taken place. For example, identifying potentially discriminatory personal pricing strategies is time consuming for external researchers and yet will be happening continually. There may thus be limits to how much digital enforcement can help here. It may be more appropriate to see how consumers themselves can use some technological solutions to guard against those practices.

**Gaming the system:** there is evidence that when authorities adopt SupTech, companies are inclined to adapt their behaviour to avoid attention. There has been speculation that companies may increase the use of self-deleting encrypted data to make evidence for investigations difficult.<sup>218</sup> Research by Cao et al from 2020 found that: “*Growing AI readership...motivates firms to prepare filings that are friendlier to machine parsing and processing. Firms avoid words that are perceived as negative by computational algorithms, as compared to those deemed negative only by dictionaries meant for human readers.*”<sup>219</sup> There will therefore be a need for ensuring any automation is not devoid of any human intervention and oversight.

**Digitising a broken system:** If EnfTech for consumer protection is only focused on speeding up the current system it will be a missed opportunity. It is often a tempting option to apply technology to streamlining and efficiencies as opposed to more transformative means. More potential lies in taking the best of technology and applying it to solving problems of technology with a reinvigorated approach to legal and regulatory and enforcement concepts. The real value will lie in imagining how technology can be put to uses that tackle the systemic failure of enforcement of consumer rights. Indeed, enforcement of consumer rights, while successful in many areas, is not a perfect tool by any means. It would be necessary to guard against ‘tech-ing’ a system that is less than optimal. As a current example, Apple has opted to pay a fine to the Netherlands Competition Authority but not to immediately change its practices, despite being called upon to do so. This shows that however fast or effective information gathering

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<sup>218</sup> <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04563.html#panel3>

<sup>219</sup> Cao, S. et al. (2020), *How to Talk When a Machine is Listening: Corporate Disclosure in the Age of AI*, <https://dx.doi.org/10.2139/ssrn.3683802>.

and analysis becomes, structural resource and power imbalances make it possible for a multinational company to refuse to comply with the law and thus limits the efficiency of enforcement.<sup>220</sup> However, if we stretch our imaginations to some of the applications that execute contract conditions or legal requirements directly to consumers then we might also imagine a switch from a post-hoc system to one where protection is built in by design.

**Reliance on platform data:** It is useful to note that we could envisage the use of the same technology for public enforcement of consumer law, but this would require access to the platform data. This cannot be done without legislative mandates in most cases. As the technologies already deployed by platforms are likely to be one step ahead of newly developed techniques by enforcers, it may be beneficial to reflect on how to harness privately developed systems of detection for application in a public enforcement sphere. The Internet Policy Unit at TBI makes a proposal on this with regards to greater scrutiny by independent experts of the way platforms self-regulate, in a similar way to Financial Audits.<sup>221</sup>

*"Online harms regulation needs to create the right incentives to design safe platforms and manage healthy communities. There is currently significant information asymmetry between platforms and the governments and regulators who seek to regulate them. In order to understand platforms and therefore regulate in a meaningful way, regulators need to be able to effectively investigate, assess and measure platforms' mechanisms and procedures.*

*In other regulated sectors there are often tiers of independent experts, who are not regulators, but whose job is to affirm that a certain standard is met by the companies or bodies they are auditing. Social media companies and online platforms have been publishing detailed transparency reports for some years now, but they lack effective scrutiny and verification. The practice of auditing, specifically qualitative audit, could provide a model that delivers periodic, robust assessment of online harms and platform health".<sup>222</sup>*

**Privatisation of public enforcement risk:** Goanta and Spinakis warn against the dangers of privatising legal enforcement.<sup>223</sup> Given the fact that harnessing technology is only an emerging trend, there may be a tendency to be a technology 'user' rather than a technology 'maker' in the pursuit of consumer law compliance. In the realm of ADR, the use of private entities to run the system has been criticised and the same circumspection may be required here. One may thus wonder if in this context, there needs to be another level of supervision implemented via SupTech that is able to hold platforms accountable for their monitoring/takedown role, i.e. opening up data for inspection on their enforcement activity as opposed to opening up data on the enforcement targets.

Technology shows promise for the improvement of consumer enforcement in general and can be very useful when applied across borders as well. While there is some irony in the fact that tech needs to be rolled out to control tech, avoiding the use of technology does not seem wise as the digital markets have capitalised on what algorithms and other tech tools can do. However, it is not on its own a complete solution and the technologies selected by enforcers, especially in a cross-border setting, will also need to be compatible and talk to each other. Exchanging information to aid enforcement will require some agreement on the way

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<sup>220</sup> Damien Gerardin, *Is Apple a threat to the rule of law?* (7 February 2022) The Platform Law Blog, <https://theplatformlaw.blog/2022/02/07/is-apple-a-threat-to-the-rule-of-law/>

<sup>221</sup> <https://institute.global/policy/online-harms-bring-auditors>

<sup>222</sup> <https://institute.global/policy/online-harms-bring-auditors>

<sup>223</sup> Goanta, Spanakis, *Discussing the legitimacy of digital market surveillance* (2022) Stanford Computational Antitrust vol II, 54.



information gets collated, stored and what treatment of it is possible. We have mentioned how the absence of legal basis may hinder cross-border enforcement. Similar issues would come to hamper the roll out of technical solutions. In the absence of a possible way forward for an international instrument for the time being, the use of alternative methods to aim towards the necessary level of convergence may help. Countries can choose to have bilateral agreements. They could also decide to invest in the production of a set of international standards for cross-border enforcement to define a best practice blueprint (as set out in part 5).

## Part 5: The role of international standards in cross-border enforcement

To build coherence in international consumer law and provide solutions in a relatively short time scale (compared to a binding internationally binding instrument), this report recommends exploring the use of International voluntary standards. Part 3 of this report explored the role of toolkits. Standards are different from toolkits in that they can formalise best practices and be negotiated within an established and recognised framework (described below) where a range of stakeholders can contribute to their elaboration. In that sense, they can be conceptualised as a bridge between toolkits and soft law instruments. Standards can therefore come to support on-going efforts to develop an international toolkit for cross-border enforcement. They can also, once adopted and successful, form a platform for the adoption of soft law and more formal legislation if desirable.

The 2017 BEUC report ‘The challenge of protecting EU consumers in global online markets’<sup>224</sup> recommended the use of existing and new international voluntary standards to enhance substantive consumer protection. The following section of this report outlines the potential of international voluntary standards to assist national enforcement agencies in their mission to protect consumers who shop cross-border. In this regard, it seeks to survey the role standards can play in improving procedural consumer protection and enforcement mechanisms. Standards that inform substantive consumer law are also useful and do exist at this stage in a cross-border electronic commerce environment, although more may be necessary in future.

### **1. Standards can be well suited as international tools supporting consumer protection**

Standards are instruments well versed on the international stage. Standards are documents that spell out good practice for a product, service or process. International standards offer a unique, credible and robust method for developing good practice, which can be applied across borders and jurisdictions. This could be particularly valuable in e-commerce, where goods and services are regularly traded across borders and efforts to protect consumers are limited by the lack of a consistent regulatory framework.

The negotiation of international standards brings together experts from around the world in a formal collaborative process to define good practice, offering benefits to all stakeholders. Standards can help responsible businesses to improve quality, consistency, efficiency and minimise risks. They can help government agencies to deliver regulatory goals and enhance consumer protection. They can also assist enforcement agencies in tackling fraudulent and unfair trading practices by developing efficient and consistent processes for monitoring, surveillance and redress. As a result, international standards have the potential to improve experiences and outcomes for on- and off-line consumers, increase levels of consumer confidence and trust in global e-commerce, and boost international trade.

International standards are published by [ISO](#) and [IEC](#). At a national level, standards are published by national standards bodies (NSBs), such as the [British Standards Institution](#) (BSI) in the UK.<sup>225</sup> Around 95% of standards published by BSI each year are European or international, demonstrating their importance in response to the growth of global markets and

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<sup>224</sup>[https://www.beuc.eu/publications/beuc-x-2017-](https://www.beuc.eu/publications/beuc-x-2017-122_the_challenge_of_protecting_eu_consumers_in_global_online_markets.pdf)

[122\\_the\\_challenge\\_of\\_protecting\\_eu\\_consumers\\_in\\_global\\_online\\_markets.pdf](https://www.beuc.eu/publications/beuc-x-2017-122_the_challenge_of_protecting_eu_consumers_in_global_online_markets.pdf)

<sup>225</sup> Standards Development Organisations like ISO are made up of private bodies (the national standards bodies) who do not all have stakeholder involvement committee as BSI (in the UK) does.

consumer issues that transcend political and geographical boundaries. This global consistency in standards helps to reduce barriers to trade and deliver benefits for consumers.

Indeed, ISO standards can be developed with the involvement of governments worldwide, ensuring the needs of policy makers are taken into account.<sup>226</sup> ISO standards can help policy makers to open up world trade, notably through a strategic partnership between ISO, IEC, ITU and the WTO. The WTO's Agreement on Technical Barriers to Trade<sup>227</sup> recognizes the contribution that international standards can make towards improving the efficiency of production and international trade, and their key role in the harmonization of regulations. Standards can contribute to effective consumer policy by providing much of the technical detail and safety requirements needed. They are indeed embedded in legislation in some regions, acting as part of the regulatory framework. This is for example the case of product safety legislation in the UK and was proposed as a regulatory means for the control of AI technology in the EU, where there would be a presumption of conformity given to high-risk AI (in the draft AI Act) if they were to tick all the standards' boxes, so to speak.<sup>228</sup>

International standards have strong support from Consumers International, who represent consumer interests on key standards. Consumers International has liaison status with the Consumer Policy Committee of International Standards Organisation (ISO COPOLCO) and has the right to propose new work items that can lead to the development of new standards. UNCTAD already recognises international standards as a way of promoting sustainable consumption and consumer protection. The United Nations Guidelines for Consumer Protection (UNGCP) promote the use of national and international standards that provide good practice which can improve the quality of goods and services (Guideline 33) in areas as diverse as: e-commerce (GL 65), financial services (GL 68), sustainability (GL 53), customer satisfaction and complaints handling (GL 11f). UNCTAD has also explored how to use standards as a tool for consumer protection notably with a joint project in 2020 with COPOLCO.<sup>229</sup>

Standards are instruments based on achieving best practices and benefiting from the input of a range of stakeholders (government, academics, NGOs, industry, consumers). The way that standards are developed makes them different from other 'tools' in the consumer protection toolkit or other methods of developing guidance/codes. Standards, notably offer a number of advantages that make them well suited to being adopted on an international stage. They can and should respond to consumer protection needs - International standards are developed in response to a global market need, including the need to protect consumers. This can come from any stakeholder group. Standards tend to be quicker and easier to develop, amend and update than legislation/regulation. Fast track standards deliverables in particular, (such as technical specifications, PAS and IWAs) can get expert-agreed best practice 'out there' in response to

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<sup>226</sup> For more information about how standards support public policy see <http://www.iso.org/policy>.

<sup>227</sup> <https://tbtc.iso.org/sites/wto-tbt/home.html>

<sup>228</sup> See for eg, Mark McFadden, Kate Jones, Emily Taylor and Georgia Osborn, Harmonising Artificial Intelligence: The Role of Standards in the EU AI Regulation, <https://oxaig.ox.ac.uk/publications/harmonising-artificial-intelligence>; Carolina Caeiro, Kate Jones, Emily Taylor, Technical Standards and Human Rights: The Case of New IP [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3907165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907165); Martin Ebers, Standardizing AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3900378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900378); Michael Veale and Frederik Zuiderveen Borgesius, Demystifying the Draft EU Artificial Intelligence Act, <https://arxiv.org/abs/2107.03721v3>.

<sup>229</sup> <https://unctad.org/meeting/unctad-iso-copolco-consumers-international-joint-webinar-using-standards-tool-consumer>

urgent market needs and rapidly evolving harms. In addition, they fit UNCTAD practice well as the standards development process is based on consensus. This means that all stakeholders have, at least in theory, a seat at the table and are given an equal opportunity to put forward their views to ensure that standards address key consumer issues. For international standards, each participating country's view, developed by a range of relevant stakeholders, is taken into account. This, in principle, leads to robust standards documents where global experts have reached shared agreement on good practice, providing that the standards body is able to ensure a balanced participation and avoid any 'regulatory capture' by better resourced participants.<sup>230</sup>

The development of ISO deliverables uses a defined process, which is transparent to all parties. All standards go through several draft stages with expert groups and the public able to comment. This defined process enhances confidence and trust in outputs. Standards can offer an incentive in adopting a particular default standard to create confidence. In the context of the use of AI in market surveillance or enforcement for example, this may be a useful tool. There are, however, some concerns that were expressed with regards to standards for AI regarding the elaboration phase of standards and the need for substantive participation in the development of relevant standards. The need to guard against regulatory capture by a few more committed and resourceful representatives (as mentioned above) was raised in this context, alongside the need for equity of stakeholder representation and the need for reactive standards that can be adopted in a timely fashion and responsive to needs as technology develops (at a fast pace).<sup>231</sup>

Standards are voluntary, although some underpin legislation, for example in the areas of domestic appliances, toys and construction. However, standards can be verified within organisations either by self-declaration or independent verification, which requires regular audit. Standards are written in a way that all requirements are verifiable, should the user wish to seek independent third-party certification. They also benefit from systematic review by relevant stakeholders to assess if a standard is still accurate, relevant, and required and thus can be confirmed, withdrawn or amended as needed.

## **2. Use of standards feeding through enforcement practice**

ISO standards are developed with the involvement of governments worldwide<sup>232</sup>, ensuring the needs of policy makers and regulators are taken into account. Standards are already used in law making and in enforcement, notably regarding unsafe products or within the scope of unfair commercial practices legislation. For example, in the EU, claiming membership or compliance with a standard when it is not the case is a recognised unfair practice. Standards can also be used in market surveillance activities in other areas. For example, ISO/ TS Ethical Claims was a COPOLCO/CASCO initiative to prepare a document that could be used for verification/market surveillance.<sup>233</sup>

In the area of electronic commerce, a number of standards are already in use and already feed through enforcement practices and mechanisms. Standards can be used by a range of

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<sup>230</sup> Note indeed some potential issues in this area with large corporations and other stakeholders being able to deploy larger resources than individual consumers or consumer representatives may not be able to. This is a problem that needs to be guarded against to ensure fairness in the elaboration and content of standards.

<sup>231</sup> Mark McFadden, Kate Jones, Emily Taylor and Georgia Osborn, Harmonising Artificial Intelligence: The Role of Standards in the EU AI Regulation, <https://oxaigg.oii.ox.ac.uk/publications/harmonising-artificial-intelligence>.

<sup>232</sup> <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100359.pdf>

<sup>233</sup> <https://www.iso.org/news/ref2423.html>.

stakeholders. The table below illustrates the stakeholders using standards and provides examples of use already in operation.

User	Examples of use
<b>Product designers/manufacturers</b>	Standards can specify exact measurements, components, design etc <i>Examples: packaging, labelling, button batteries, e-scooters, fires in domestic appliances, toys, plugs, ATMs</i>
<b>Service providers (inc. retailers – on/ offline)</b>	Standards can provide guidance (requirements and recommendations) for design/delivery of customer service, provision of information, complaints handling, dispute resolution, accessibility. <i>Examples: contact centres, online reviews</i>
<b>Regulators</b>	Standards can provide clear and consistent guidance for firms and regulators across different sectors on how to deliver on their obligations/ licence conditions. <i>Example: Consumer Vulnerability/ Inclusive Service</i>
<b>Government</b>	Standards can underpin legislation in some sectors – such as toy safety and domestic appliance safety where they are cited by legislation as a way of helping organizations to fulfil their legal obligations. <i>Examples: domestic appliances, toys, building safety</i>
<b>Consumer testing</b>	Consumer organizations use standards to develop product testing – as a benchmark for quality, efficiency, durability, energy efficiency etc
<b>Enforcement</b>	Standards can be used as a benchmark to prove whether a business behaved fairly, reasonably and with due diligence by following expert-agreed good practice. <i>Examples: Children's playgrounds, age verification</i>

Standards that are aimed at businesses as a primary audience, contribute to enforcement in the sense that they embed good business practices in line with UNGCP on good business practices. By helping businesses raise their game and use state of the art practices to deliver services or develop goods addressed to consumer, they reduce the need for market intervention by enforcers. For example, E-commerce – ISO 10008: 2013 (under revision) frames good practices in customer satisfaction in B2C electronic commerce. It assists with ensuring a high level of care and thus reduces the need for dispute resolution outside of the remit of the business. While standards cannot address the difficult issue of rogue traders and need buy-in from businesses, they do have an important role to play, in as much that respect and implementation of standards can act as a strong marker of quality assisting with consumer choice and reinforcing trust in markets.

Standards can be developed under the sponsorship of governments. For example, in the UK, the Code of practice on consumer product safety related recalls and other corrective actions: Part I: Business Part II: Regulators – PAS 7100: 2018 (UK only) was sponsored by the Government Department for Business, Energy and Industrial Strategy (BEIS) following a recommendation of the working Group on product recalls and safety. Its development was facilitated by the BSI (standards body). In the realm of cross-border e-commerce enforcement, we would encourage discussions around the idea of several governments/ enforcement authorities jointly sponsoring an ISO standard on cross-border enforcement. This would provide a forum to agree best practice and in time this standard may form the basis for the development of compatible cross-border enforcement mechanisms.

Standards can also be used to address enforcement agencies' needs in creating a fairer substantive environment. Standards can be used as a benchmark to prove whether a business behaved fairly, reasonably and with due diligence by following expert-agreed good practice.

This is notably the case with regard to product conformity. Standards can be coupled with regulation. For example, in the UK, the government introduced a regulatory regime which relies on designated standards to support conformity with the relevant UKCA regulation.<sup>234</sup> UKCA marking is achieved by following the guidance contained in a standard leading to the assumption that products are in conformity with regulatory requirements of safety notably. It is also possible to envisage (as is the case in the USA) that claiming compliance with a standard when it is in fact not true could be an actionable unfair commercial practice.

### **3. Developing specific standards for cross-border enforcement**

In the context of cross-border enforcement, standards could be used by national enforcement agencies to facilitate effective cooperation and improve consistency of process at an international level. National agencies could still operate within their own legal frameworks and systems, but standards could help to set overarching principles and requirements for good practice.

It is important to recognise that standards can also be implemented by government agencies and departments and are often used to underpin legislation. Laws can require organisations to comply with specific standards as a way of meeting legal obligations (for example Buildings Regulations, Domestic Appliances and Toy safety in the UK). This has the potential to strengthen consumer protection and help to overcome challenges in modern enforcement.

In the area of cross-border enforcement, international standards could help to develop best practice methodology and process for:

- Data collection
- Marketplace monitoring
- Information/data sharing
- Reporting
- Cross border cooperation and collaboration between agencies
- Corrective actions

They could help national enforcers to collaborate more effectively to:

- Monitor online marketplaces/traders
- Identify and recall unsafe products
- Identify and take down fraudulent content
- Check authenticity of green claims, health claims or claims of standard conformity.
- Identify poor/ unfair business practice
- Help consumers achieve satisfactory redress

A standard could be developed around the categories identified by the UNCTAD sub-working group 3 and developed in the OECD implementation toolkit for legislative actions for consumer protection enforcement cooperation<sup>235</sup>, namely documenting best practices and seeking an international agreement on a standard or other document of similar standing under the following headings:

- Tools for cross-border enforcement (Investigatory Powers, Enforcement powers)

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<sup>234</sup> <https://www.bsigroup.com/en-GB/about-bsi/uk-national-standards-body/standards-and-regulation/>

<sup>235</sup> <https://www.oecd.org/digital/implementation-toolkit-on-legislative-actions-for-consumer-protection-enforcement-co-operation-eddc57-en.htm>

- Enforcement outcomes (Forms of redress available, Administrative v judicial enforcement set ups, Best practices in cross-border enforcement)
- Co-operation practices (Status quo in cooperation, Best practices in co-operation, Developing co-operation).

While there are currently no standards documenting cross-border enforcement processes, the report shows that there is scope to develop one. Such document if it was to see the light of day could help frame cross-border enforcement more effectively, helping enforcers to streamline their operations and get value for money. Such standard could also pave the way to open discussions in international fora for a more formal cooperation framework, should the need arise.



## Part 6: Conclusions and recommendations

While substantive consumer law has greatly expanded, much remains to be done to ensure that consumers that buy beyond across state frontiers are adequately protected. This report charts how the enforcement frameworks developed in the analogue era are no longer sufficient because one of the key deficiencies of current regulatory and enforcement frameworks is that they remain national in nature and organised along geographical borders. In the absence of any binding international framework, a process of regionalisation of substantive consumer law alongside some regionalisation of procedural enforcement structures, may help. The protection of consumers when they engage in the digital sphere remains a challenge, but some regionalisation processes have been successful at reinforcing the enforcement structures in place to facilitate and, in some cases, mandate cross-border collaborations (eg: Consumer Protection Cooperation Network in the EU and strengthening of rules in neighbouring disciplines such as product safety or competition law). However, each regional grouping will need to take actions so that consumers across the world can ultimately be protected regardless of which entity they contract or interact with. Regionalisation has many advantages in as much as it helps bridge the sometime wide gap that exists between national and international enforcement, but it is not sufficient overall and may create more entrenched positions.

Harmonisation as a process is not necessarily well adapted to an international set up such as that of UNCTAD. Therefore, in this report, we talked not of achieving harmonisation but instead of finding a way to ensure that diversity in legal systems and cultures can remain yet be harnessed to protect consumers. As a result, the focus was on a process of coherence in consumer law making and enforcement, the idea that what legal systems ought to strive for is convergence<sup>236</sup>, not uniformity.<sup>237</sup> This is particularly important in the context of cross-border enforcement as this process needs to be accommodated within enforcement frameworks already in place and cannot wait for an international instrument mandating uniformity to be adopted. That is not to say that such an instrument could not be pursued but pragmatic solutions which can be rolled out in a much shorter time frame are necessary.<sup>238</sup>

The below list the priorities is therefore identified for further work at UNCTAD and more specifically sub-group 3.

### **1. Continue efforts to build up the legal and institutional frameworks (substantive and procedural law) to facilitate cross-border enforcement**

In many ways, the protection of consumer purchasing from abroad is intimately linked to the protection of domestic consumers and the state of the enforcement apparatus in their home countries. This report focuses on how to make improvements in cross-border enforcement, but readily acknowledges that to do so, national and regional systems also need to develop and build the required maturity and expertise. As a result, it is paramount to focus efforts on

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<sup>236</sup> Note that convergence seems to be terminology used at the WTO notably in the context of negotiations on electronic commerce. See for eg: [https://www.wto.org/english/news\\_e/news22\\_e/jsec\\_04feb22\\_e.htm](https://www.wto.org/english/news_e/news22_e/jsec_04feb22_e.htm)

<sup>237</sup> Note however that this terminology also has limitation and, when it has been used, it is possible the use is not intended to be a legal construct.

<sup>238</sup> Note that the same concern for convergence and coherence ought to apply to bridging disciplines that are relevant to protecting consumers in the digital age. Notably, those seeking enforcement solutions in data protection or competition for example, ought to consider the role of consumer law and vice-versa. At national level more cross-fertilisation and sharing of enforcement functions (eg: data protection/consumer protection) may also need to be developed. This report however does not delve into this interaction.



legislative changes that last. This, for example, requires looking into legislation already in place and exploring a potential shift towards principles and expectations that traders will behave fairly ‘by design’<sup>239</sup> and will not wait for enforcers to come knocking to alter their behaviour. This in turn is linked to designing substantive and procedural rules that incentivise markets to behave fairly and can assist in harm prevention rather than being focussed on repairing harm after the event. Procedural laws which had not been prioritised in the past now need to be developed in tandem with substantive rights. A performant public enforcement system is also must. There is therefore a need to reflect on institutional setups and the ability to facilitate cross-border enforcement. While there is no winning formula when it comes to enforcement structure design and the powers necessary to effect cross border enforcement, States need to keep a critical eye on their current operations and be prepared for changes or, if no such structures yet exist, to carefully select enforcement structures and power sets that can deliver results, learning from best practices. Examples such as the CPC in the EU which for example, includes mutual assistance mechanisms or the powers that the FTC benefits from in the USA, and which enable the protection of foreign consumers, ought to be better understood and, where appropriate, emulated.

## **2. Recognising enforcement solutions have to be thought out beyond geographical borders**

It is a priority to shift law making away from geographical borders and ensure that lawmakers think more holistically about their interventions. Global solutions would be attractive but more localised ones can also be effective so long as they can adapt/ scale up to more international dimensions. While many stakeholders would be encouraging the building of international institutions and systems, we know that today some effective coordinated solutions already exist. Looking at how to make systems of consumer protection more coherent and how they can already work in tandem is a worthwhile exercise. The Sub-group 3 mapping exercise undertaking in 2021, in this respect, is an important milestone and UNCTAD should be encouraged to continue this important work in the future.

## **3. Explore the use of enforcement technology (EnfTech) in consumer enforcement**

What seems to be universal at this stage is the need for enforcement teams to skill up in order to embrace a new era of enforcement through the use of new and emerging technology. Embracing technology in enforcement, in the same way that market actors have embraced it to frame their relationship with consumers is an avenue this report carefully reflected upon.

There is at this stage a clear knowledge gap. More research is needed to understand what companies are capable of doing (e.g. dark patterns<sup>240</sup>, choice architecture<sup>241</sup>) and how to harness technology to counteract/ detect those behaviours in the market and ultimately enforce against them.

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<sup>239</sup> Siciliani, Riefa, Gamper, *Consumer Theories of Harm, An economic approach to consumer enforcement and policy making* (Hart 2019); also see Willis, Lauren E., Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud. 80 Law and Contemporary Problems 7-41 (2017), Loyola-LA Legal Studies Research Paper No. 2017-26, <https://ssrn.com/abstract=3018168> and Willis, Lauren E., Performance-Based Consumer Law. 82 University of Chicago Law Review 1309 (2015), Loyola-LA Legal Studies Paper No. 2014-39, Available at SSRN: <https://ssrn.com/abstract=2485667>.

<sup>240</sup> <https://www.deceptive.design/>

<sup>241</sup> See for example, the work of the CMA in this field: <https://www.gov.uk/government/publications/online-choice-architecture-how-digital-design-can-harm-competition-and-consumers>.

The report posits that technology can come to alleviate some big cross-border enforcement issues (such as evidence gathering and data analysis that matches techniques used in commerce) and greatly assist with cross-border collaboration as well as support developing countries and developed countries to rise to the challenges of the digital age. In any event, agile enforcement institutions that harness technological change are now required to protect consumers effectively. Technological solutions need to be developed to monitor and intervene in markets that cause consumer detriment. There is a need to discuss ways of adapting and developing technology that can roll out sanctions where relevant.

This report has mapped out the existing and prototype technology and laid out benefits and drawbacks of a move to a technological approach to consumer enforcement. It recommends that sub-group 3 urgently adopts the exploration of this approach in its work plan and seeks to support the common development of tech tools to improve cross border enforcement.

#### **4. Use databases to best effect for information sharing and help cross-border enforcement response**

By way of technological response, this report also explored the role of databases in the exchange of information and noted that many examples already existed. However, it also noted that the use of databases tends to suffer from a few issues, notably lack of up-to-date information being fed through and an issue regarding classification, notably of unfair practices, making the running of a database very difficult. If stakeholder all report in different ways, the data that can be analysed is unlikely to provide a good guide to enforcers. In this regard, the report flagged the need for the update of the UNCTAD cyber tracker. Our study showed that the Cyber tracker, while a very useful tool, is limited by the depth and accuracy of its data. Updating and developing the functionalities of the cyber tracker ought to be a priority, as this would provide better knowledge for enforcers of the substantive rights available in each country.

Building a solid data set will also contribute to the work of enforcers working cross-borders. In addition, it would be beneficial to explore the ability for enforcers to also exchange on procedural laws and thus we suggest that work is started towards an ‘enforcement capability’ map at UNCTAD (which could be informed by an international standard). This could act as a database that would inform consumer enforcement authorities of co-operation tools in place already and flag where the gaps are. It could save time as cross-border collaboration could be streamlined with a common starting point. To avoid duplication of efforts, any such initiatives should tap into already existing cross-border collaborative networks such as ICPEN and coordinate actions with the OECD also and other regional bodies.

#### **5. Look at the development of international standards as part of the solution**

Awaiting further development via more formalised channels, enforcers should be invited to collaborate and include other stakeholders to develop standards to benefit consumers engaged in cross-border electronic commerce. While there are currently no standards documenting cross-border enforcement processes, the report shows that there is scope to develop one. This report recommends exploring the prospect of an international standard for cross-border enforcement. Such standard could help bridge the gap between the elaboration of toolkits and the adoption of more formal soft law instruments for cross-border cooperation. While the UNCTAD UNCGRP already encourages cooperation, it does not spell out the details of how this can be achieved (other than making some recommendations, notably on information exchange).

An international standard could flesh out enforcement needs for cross border enforcement. We therefore encourage UNCTAD and in particular sub-group 3 to continue the work started out with COPOLCO<sup>242</sup> to explore the development of such standard, while keeping in mind the need for a process that guards against the problem of regulatory capture.

**6. Pursue the development of private means of cross-border redress for consumers as part of a mix of mechanisms**

ADR/ ODR systems for private enforcement can be useful for cross-border disputes. However, they should not become the bulwark of consumer protection cross-border. So are efforts to enable consumers to group their claims and coordinate actions across borders. Pursuing such private enforcement systems can assist enforcers with their cross-border enforcement efforts, by enabling consumers to get remedies where their prioritisation agendas might not have enabled action on their behalf or for their protection. However, this report guards against an overreliance on private enforcement and calls for the development of strong public enforcement mechanisms and adequate resources and tools available to them.

**7. The best should not be the enemy of the good**

This report has documented copiously the limitations of national consumer protection faced with increasingly international business. While countervailing international legal protections would appear to provide an antidote to cross-border malpractice, there is as yet little evidence for imminent resolution of the problem of ‘applicable law and jurisdiction’ despite its repeated consideration within the UN and OECD. There are, however, moves towards greater cooperation between national consumer protection agencies based on existing legal powers and simple approaches such as simultaneous actions and information exchanges – acts which are already within the reach of national agencies. Despite the scarcity of legally binding multilateral enforcement mechanisms, there is scope for action now by consumer protection agencies working in concert as colleagues, neighbours and global citizens. So while this report looks to the future and aims to develop best practices solutions, it also encourages sub-group 3 to look into some more modest interventions alongside.

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<sup>242</sup> <https://unctad.org/meeting/unctad-iso-copolco-consumers-international-joint-webinar-using-standards-tool-consumer>

## ANNEXES

### ANNEX 1 – UNCTAD Guidelines for consumer protection

#### VI. International cooperation

79. Member States should, especially in a regional or subregional context:

- (a) Develop, review, maintain or strengthen, as appropriate, mechanisms for the exchange of information on national policies and measures in the field of consumer protection;
- (b) Cooperate or encourage cooperation in the implementation of consumer protection policies to achieve greater results within existing resources. Examples of such cooperation could be collaboration in the setting up or joint use of testing facilities, common testing procedures, exchange of consumer information and education programmes, joint training programmes and joint elaboration of regulations;
- (c) Cooperate to improve the conditions under which essential goods are offered to consumers, giving due regard to both price and quality. Such cooperation could include joint procurement of essential goods, exchange of information on different procurement possibilities and agreements on regional product specification.

80. Member States should develop or strengthen information links regarding products which have been banned, withdrawn or severely restricted in order to enable other importing countries to protect themselves adequately against the harmful effects of such products.

81. Member States should work to ensure that the quality of products and the information relating to such products does not vary from country to country in a way that would have detrimental effects on consumers.

82. Member States should improve their ability to cooperate in combating fraudulent and deceptive cross-border commercial practices, as that serves an important public interest, recognizing that cooperation on particular investigations or cases under these guidelines remains within the discretion of the consumer protection enforcement agency that is asked to cooperate.

83. The consumer protection enforcement agencies of Member States should coordinate investigations and enforcement activities to avoid interference with the investigations and enforcement activities of consumer protection enforcement agencies taking place in other jurisdictions.

84. The consumer protection enforcement agencies of Member States should make every effort to resolve disagreements that may arise regarding cooperation.

85. Member States and their consumer protection enforcement agencies should make use of existing international networks and enter into appropriate bilateral and multilateral arrangements and other initiatives to implement these guidelines.

86. Member States should enable their consumer protection policy agencies, in consultation with consumer protection enforcement agencies, to take a leading role in developing the framework for combating fraudulent and deceptive commercial practices, as set out in these guidelines.

87. Member States are invited to designate a consumer protection enforcement agency or a consumer protection policy agency to act as a contact point to facilitate cooperation under these guidelines. Those designations are intended to complement and not replace other means of cooperation. Such designations should be notified to the Secretary General.

88. Member States should provide their consumer protection enforcement agencies with the authority to investigate, pursue, obtain and, where appropriate, share relevant information and evidence, particularly on matters relating to cross-border fraudulent and deceptive commercial practices affecting consumers. That authority should extend to cooperation with foreign consumer protection enforcement agencies and other appropriate foreign counterparts.

89. Member States should consider participating in multilateral and bilateral arrangements to improve international judicial and inter-agency cooperation in the recovery of foreign assets and the enforcement of decisions in cross-border cases.

90. Member States may wish to consider relevant international guidelines and standards on protecting consumers from fraudulent and deceptive cross-border commercial practices, in considering the legal authority to provide to their consumer protection enforcement agencies, and, where appropriate, adapt those guidelines and standards to their circumstances. In so doing, Member States may wish to study the Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders of the Organization for Economic Cooperation and Development.

91. To promote sustainable consumption, Member States, international bodies and business should work together to develop, transfer and disseminate environmentally sound technologies, including through appropriate financial support from developed countries, and to devise new and innovative mechanisms for financing their transfer among all countries, in particular to and among developing countries and countries with economies in transition.

92. Member States and international organizations, as appropriate, should promote and facilitate capacity-building in the area of sustainable consumption, particularly in developing countries and countries with economies in transition. In particular, Member States should also facilitate cooperation among consumer groups and other relevant organizations of civil society, with the aim of strengthening capacity in this area.

93. Member States and international bodies, as appropriate, should promote programmes relating to consumer education and information.

94. Member States should work to ensure that policies and measures for consumer protection are implemented with due regard to their not becoming barriers to international trade and that they are consistent with international trade obligations.

## **ANNEX 2 – Consumer Protection in E-commerce OECD Recommendation**

### **Part III – Global Cooperation Principles**

54. In order to provide effective consumer protection in the context of global e-commerce, governments should:

i) Facilitate communication, co-operation, and, where appropriate, the development and enforcement of joint initiatives at the international level among governments and stakeholders;

ii) Improve the ability of consumer protection enforcement authorities and other relevant authorities, as appropriate, to co-operate and co-ordinate their investigations and enforcement activities, through notification, information sharing, investigative assistance and joint actions. In particular, governments should:

- Call for businesses to make readily available information about themselves that is sufficient to allow, at a minimum, location of the business and its principals for the purpose of law enforcement, regulatory oversight and compliance enforcement, including in the cross-border context,
- Strive to improve the ability of consumer protection enforcement authorities to share information subject to appropriate safeguards for confidential business information or personal data, and
- Simplify assistance and co-operation, avoid duplication of efforts, and make every effort to resolve disagreements as to co-operation that may arise, recognising that co-operation on particular cases or investigations remains within the discretion of the consumer protection enforcement authority being asked to co-operate.

iii) Make use of existing international networks and enter into bilateral and/or multilateral agreements or other arrangements as appropriate, to accomplish such co-operation;

iv) Continue to build consensus, both at the national and international levels, on core consumer protections to further the goals of promoting consumer welfare and enhancing consumer trust, ensuring predictability for businesses, and protecting consumers;

v) Co-operate and work toward developing agreements or other arrangements for the mutual recognition and enforcement of judgments resulting from disputes between consumers and businesses, and judgments resulting from law enforcement actions taken to combat fraudulent, misleading or unfair commercial conduct;

vi) Consider the role of applicable law and jurisdiction in enhancing consumer trust in e-commerce.

## ANNEX 3 - Update to the UNCTAD cyberlaw tracker

— Already in the tracker — Missing in the tracker

UPDATE OF UNCTAD CYBERLAW TRACKER PER COUNTRY	
<b>Argentina</b>	<p>Ley 24.240 de Defensa al Consumidor - Consumer Protection Act</p> <p>Resolución 104/2005, Derecho a la Información del Consumidor en las Transacciones Comerciales Efectuadas a través de Internet en el marco del MERCOSUR</p> <p>Resolución N° 316/2018 de la Secretaría de Comercio Interior sobre obligatoriedad de contar con un Botón de Baja en la web del proveedor</p> <p>Resolución N° 270/2020 de la Secretaría de Comercio Interior que incorpora la Resolución N° 37/2019 del Grupo Mercado Común relativa a la protección del consumidor en el comercio electrónico</p> <p>Resolución N° 424/2020 de la Secretaría de Comercio Interior sobre la obligación del proveedor de incluir el “botón de arrepentimiento” en sus páginas o aplicaciones web</p> <p>Resolución N° 449/2020 de la Secretaría de Comercio Interior sobre el deber del proveedor de informar sus puntos de venta y medios de pago aceptados, incluyendo los electrónicos</p> <p>Resolución N° 137/2020 de la Secretaría de Comercio Interior sobre Sistema de Conciliación por Medios Electrónicos (SICOME)</p> <p>Resolución N° 616/2020 de la Secretaría de Comercio Interior sobre Procedimiento de Celebración de Audiencias por Medios Electrónicos</p> <p>Civil and Commercial Code Act 26.994 of 2015</p>
<b>Greece</b>	<p>Law 2251/1994 on the Protection of Consumers</p> <p>Law 3587/2007 amending Law 2251/1994</p> <p>Law 4314/2013 amending Law 2251/1994</p> <p>Law 3758/2009 on companies informing debtors on overdue claims</p> <p>Law 3043/2002 on the seller's liability for actual faults and lack of agreed qualities</p> <p>Law 3869/2010 on debt arrangements for over-indebted individuals</p> <p>Law 4001/2011 on the functioning of energy markets for electricity and natural gas</p> <p>Presidential Decree 109/2010 on audiovisual media services</p> <p>Presidential Decree 339/1996</p> <p>Presidential Decree 182/1999</p> <p>Presidential decree 100/2000</p> <p>Presidential Decree 131/2003</p>
<b>Italy</b>	Legislative Decree No. 206 of 6 September 2005 - Consumer Code
<b>Japan</b>	<p>Consumer Contracts Act 2000</p> <p>Product Liability Act 1994</p> <p>Basic Consumer Law 2004</p> <p>Consumer Safety Act 2009</p> <p>Law for the Promotion of Consumer Education 2012</p> <p>Food Indications Act 2013</p> <p>Law on Special Procedure for Recovery of Massive Damages from Consumers 2013</p> <p>Law on Consumer Contracts - Provisions on Actions of Consumer Associations</p> <p>Law on Certain Types of Business</p>
<b>New Zealand</b>	<p>Fair Trading Act 1986</p> <p>Consumer Guarantees Act 1993</p> <p>Credit Contracts and Consumer Finance Act 2003</p> <p>Contract and Commercial Law Act 2017</p> <p>Auctioneers Act 2013</p> <p>Arbitration Act 1996</p> <p>Motor Vehicle Sales Act 2003</p> <p>Weights and Measures Act 1987</p>

<b>Republic of Korea</b>	<p>Acct on the Consumer Protection in Electronic Commerce Transactions etc Act No. 10303</p> <p>Framework Act on Safety of Products</p> <p>Framework Act on Consumers</p>
<b>Romania</b>	<p>Law No. 363/2007 on unfair commercial practices of traders in relation to consumers and harmonizing the regulations with the European legislation on consumer protection</p> <p>Decision No. 914/2019 on the institutional framework and measures for the implementation of EU regulation 2018/302</p> <p>Government Ordinance No. 21/1992 regarding Consumer Protection</p> <p>Law No. 158/2008 republished, regarding misleading of comparative advertising</p> <p>Law No. 296/2004 regarding the Consumer Code</p> <p>Law No. 193/2000 on unfair terms in consumer contracts</p> <p>Law No. 148/2000 on advertising</p> <p>Law No. 245/2004 on general product safety</p> <p>Law No. 240/2004 on producers' liability for damages caused by defective products</p> <p>Law No. 504/2002 on the field of audio visual media</p> <p>Law No. 190/1999 on mortgage credits</p> <p>Law No. 457/2004 on publicity of tobacco products</p> <p>Government Ordinance No. 20/2010 laying down measures for the uniform application of European Union legislation harmonizing the conditions for selling of products</p> <p>Government Ordinance No. 85/2004 regarding the distance contract for financial services</p> <p>Government Ordinance No. 2/2018 regarding the selling of tourist packages</p> <p>Government Ordinance No. 106/1999 regarding the contracts concluded outside the commercial spaces</p> <p>Emergency Ordinance No. 50/2010 on consumer credit</p>
<b>Poland</b>	<p>Item 827 Act, 30 May 2014 on Consumer Rights</p> <p>Act of 23 April 1964 - Polish Civil Code</p> <p>Act of 16 September 2011 on timeshare</p> <p>Act of 12 May 2011 on consumer credit</p> <p>Act of 23 August 2007 on countering unfair market practices</p> <p>Act of 16 April 1993 on combating unfair competition</p> <p>Act of 16 February 2007 on competition and consumer protection</p>
<b>Portugal</b>	<p>Decree-Law 330/90, of 23 October</p> <p>Decree-Law 57/2008, of 26 March</p> <p><del>Regulation (EU) 524/2013, of 21 May 2013</del></p> <p>Decree-Law 24/2014, of 14 February</p> <p>Lei No. 24/96 de 31 de Julho</p> <p>Decree-Law 9/2021 of 29 January</p> <p>Decree-Law 446/85 of 25 October (Abusive Terms Act)</p> <p>Law 7-B/2016 of 32 March</p>
<b>Slovenia</b>	<p>Act Implementing the Regulation (EU) of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws</p> <p>Consumer Credit Act (Zakon o potrošmoških kreditih - ZPotK-1, OG RS No 59/100 et seq)</p> <p>Out-of-Court Settlement of Consumer Disputes Act</p> <p>Consumer Protection Act</p> <p>Consumer Protection against Unfair Commercial Practices Act No. 58/2007</p> <p>Collective Actions Act (Zakon o kolektivnih tožbah-ZKoIT, OG RS No.55/17)</p> <p>Civil Procedure Act (Zakon o pravnem postopku - ZPP, PG RS No. 73/07 et seq)</p> <p>Patient Rights Act (Zakon o pacientovih pravicah Z pac, OG RS No. 15/08)</p>
<b>South Africa</b>	<p>Consumer Protection Act</p> <p>Electronic Communications and Transactions Act, 2002</p>



	National Credit Act Long-Term Insurance Act Financial Advisory and Intermediary Services Act Rental Housing Act Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972 Agricultural Products Standards Act 119 of 1990
<b>Spain</b>	Royal Decree of 16 November 2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementaries Ley 26/1984, de 19 julio, General para la Defensa de los Consumidores y Usuarios (General Law of consumers and users protection) Ley 16/2011 on consumer credit Ley 22/2007 on financial services at distance Real Decreto-ley 6/2013 on financial products Ley 4/2012 on timeshare
<b>Turkey</b>	Law No. 6502 on Consumer Protection Law No. 7223 on Product Safety and Technical Regulations

#### ANNEX 5 - Table of institutions and provisions relevant to the cross-border protection of consumers

<b>INTERNATIONAL INSTITUTIONS AND INSTRUMENTS</b>	<b>Provisions</b>
<b>UN Guidelines on Consumer Protection (UNGCP)</b> give consumer rights legitimacy and practical support to develop national consumer protection legislation, frame minimum standards, share information, and guide regulation and inspection. Consumer rights are not technically rights in international law like, for example, the United Nations Human Rights.	2015 revision included rights to equivalent protections for e-commerce and the protection of consumer privacy and global free flow of information.  IV on international cooperation
<b>UNCTAD (UN Conference on Trade and Development)</b> is the home of the UNGCP. Under the guidelines, it is mandated to carry out various international cooperation activities. UNCTAD also houses a standing body, the Intergovernmental Group of Experts (IGE), to monitor the application and implementation of the UNGCP, provide a forum for consultations, produce research and studies, and provide technical assistance to LMICs and LDCs.	UNCTAD E-commerce and Digital Economy Programme is focused on building the capacities of developing countries to use the digital economy as an opportunity for inclusive development. Programmes include 'e-commerce readiness', law reform and technical assistance. A working group on e-commerce looks at common issues such as dark patterns and greener e-commerce.

<p><b>OECD</b> has a consumer protection committee that comprises national consumer protection agencies. It develops guidelines and instruments that members are expected to adopt. For example, in response to the financial crisis, acting under a mandate from the G20 in 2010, a G20/OECD Task Force on Financial Consumer Protection published in 2011 a set of High-Level Principles on Financial Consumer Protection which were later referenced in the 2015 revision of the UNGCP. In 2003, while e-commerce was in its infancy, they published guidelines for protecting consumers across borders.</p>	<p>OECD published e-commerce guidelines (2016) which offered an outline for regulators, and for an evaluation of protections. The OECD Privacy Framework was updated in 2013 with new guidelines. The OECD toolkit for protecting digital consumers (2018) covered fair business and advertising practices, payment transactions, privacy and security, product safety, redress and dispute resolution, regulatory frameworks, enforcement and cross-border cooperation.</p>
<p><b>G20</b> is a regular international meeting of leaders of HICs which have a disproportionate influence on global consumption and on global rule-making. Involved in consumer finance issues in the wake of the 2008 recession but did not host a consumer summit until 2017.</p>	<p>Resulted in a leader statement on digital consumer trust (2017, 2018). G20 digital ministers and leaders adopted commitments on digital rights in their final statements at the first G20 consumer summit in 2017, and further <a href="#">commitments</a> relating to security for vulnerable consumers were adopted at the G20 summit in 2017.</p>
<p><b>World Trade Organisation (WTO)</b> governs trade agreements which often regard consumer protection rules as a barrier. National and international consumer associations are observers to trade negotiations and have fought hard over the years to prevent the dilution of consumer protections in the name of free trade.</p>	<p>The WTO's programme on e-commerce has been in place since 1998 and principles of consumer rights will be included in future WTO e-commerce trade deals. The online consumer protection article requires members to adopt or maintain measures that proscribe misleading, fraudulent and deceptive commercial activities that cause harm, or potential harm, to consumers engaged in e-commerce.</p>
<p><b>International standardisation[2]</b> is tightly linked to consumer protection such as through the information security standard developed by the International Organization for Standardization and the International Electrotechnical Commission (ISO-IEC). ISO-IEC standards are recognised in multilateral and bilateral trade treaties of the WTO, and in countries with low regulatory maturity they are often used to fill gaps in governance. Technical standards can be mandated for use in national or supranational settings to enable implementation of legislation (e.g. the proposed AI Act in the EU uses a product safety approach that relies on the implementation of harmonised standards).</p>	<p>ISO-IEC Joint Technical Committee ICT develops technical standards that impact consumer markets such as cybersecurity and AI. For consumer standards, ISO has also published market standards, for example principles and requirements for the collection, moderation and publication of online consumer reviews, and is developing standards on clear online terms and conditions.</p>

<p><b>International Consumer Protection Enforcement Network (ICPEN)</b> is a membership organisation that consists of consumer-protection law enforcement authorities from across the world. Its current membership stands at 65 countries.</p>	<p>ICPEN hosts the econsumer.gov initiative, an online tool that enables consumers in 35 member countries to submit complaints online. This data provides intelligence that can support consumer protection and law enforcement authorities in their investigations of, and actions against, international scams.</p>
<p><b>International Financial Consumer Protection Organisation (FinCoNet)</b> was established in 2013 as an international organisation of supervisory authorities responsible for financial consumer protection. FinCoNet promotes sound market conduct and strong consumer protection through supervising the conduct of financial markets.</p>	<p>FinCoNet published reports on the supervision of online and mobile payment risks, and on digitalisation of high-cost, short-term credit.</p>

REGIONAL ORGANISATIONS	Provisions/ Rationale/ Aims relevant to cross-border
<p><b>Association of South East Asian Nations (ASEAN)</b> has a committee on <a href="#">consumer protection</a> and aims to implement, monitor and support consumer protection in member countries and improve harmonisation of regional arrangements.</p>	<p>Enables information sharing on digital policy in the region and crafted the ASEAN <a href="#">Framework</a> on Personal Data Protection (2016).</p>
<p><b>EU Consumer Protection Network</b> is a network of authorities responsible for enforcing consumer protection laws to protect consumers' interests in EU and EEA countries when dealing with traders in other European countries.</p>	<p>Joint action with European Commission taken on online platforms such as Airbnb and Booking.com resulted in agreements to improve and clarify the way they present accommodation offers to consumers, for example displaying the full price with all local and mandatory taxes. Also secured commitments on changes to in-app purchases and app marketing in 2013. Priorities for 2020–2021 included digital fraud.</p>
<p><b>Ibero-American Forum of Consumer Protection Agencies (FIAGC)</b> is a regional forum composed of consumer protection agencies in Latin America, Portugal and Spain to promote cooperation and improve public policies on consumer protection.</p>	<p>FIAGC previously had working groups on e-commerce and the digital economy, but both are now disbanded.</p>

<p><b>US–EU Trade and Technology Council</b></p> <p>Established in 2021 to lead values-based global digital transformation.</p>	<p>Working groups cover issues relevant to consumer protection, such as technical standards cooperation, secure supply chains, ICT security and competitiveness, data governance and technology platforms, and with relevance to human rights including the misuse of technology threatening security.</p>
<p><b>African Development Bank</b> hosts the Africa Digital Financial Inclusion Facility (ADFI)</p>	<p>Focused on achieving universal access to digital financial services as a driver of inclusive growth across Africa.</p>

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