

## Part 5: Institutional structures relating to the administration and enforcement of consumer laws

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### 5.1 Introduction

The following Part describes international institutional structures for the administration of consumer laws in:

- the US and Canada;
- the UK, a country in the EU;
- New Zealand;
- Singapore a comparable ASEAN nation.

This Part identifies compares and analyses approaches to consumer protection in those jurisdictions, and examines their approaches to access to justice, digital purchasing and other developments in e-commerce.

All jurisdictions studied are facing the challenge of protecting consumers when they purchase goods or services from an overseas seller via the Internet. The resolution of cross-jurisdictional disputes can be particularly complex, time-consuming and expensive. Many governments do not devote a great deal of attention or resources to the issue, but rather are exploring ways of encouraging informal (often industry initiated) ways of resolving consumer disputes. In some cases, it is in a business's self-interest to resolve consumer complaints so as to maintain and build a trustworthy reputation.

This Part identifies a number of themes about the ways governments establish institutional structures for consumer protection. In some jurisdictions the ministry responsible for consumer affairs is a relatively distinct and separate entity, whilst in other jurisdictions responsibility for consumer affairs sits within the ministry responsible for trade and industry development. In the latter case it may raise questions about how potential conflicts in advancing consumer and business interests are to be resolved. In New Zealand, for instance, responsibility for consumer protection is subsumed under the larger policy objective of promoting business. Consumer policy is delegated to a division within the Ministry of Business Innovation and Employment.<sup>695</sup> In some jurisdictions the agency responsible for consumer affairs holds considerable investigatory, and sometimes judicial, powers. These agencies will often be proactive in dealing with alleged illegal and exploitative market behaviour. Agencies in other jurisdictions, however, may play little more than a monitoring and reporting role, with greater reliance being placed on industries to self-regulate.

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695 Note that the name of the Department has changed several times in the last few years [www.mbie.govt.nz/](http://www.mbie.govt.nz/).

In some jurisdictions a considerable degree of reorganisation and reforming of institutional structures is taking place. In the UK for instance there has been substantial reorganisation and reorientation of the institutional structures for consumer affairs. This is explored further in the discussions below.

## 5.2 Functions of consumer law enforcement and policy agencies

Institutions for protecting and advancing consumer interests typically involve the administration of consumer laws and regulations, the enforcement of those laws and regulations and the resolution of consumer disputes with sellers. In some countries, including EU countries such as France, consumer protection agencies are required to take a more interventionist role than is the case in other jurisdictions. In France, for instance, the agency responsible for consumer affairs has both rulemaking and administrative powers, and takes a proactive approach to market intervention.

In other countries, such as the EU country Germany, and to an increasing extent the UK, agencies take a less market interventionist role. These agencies perform a more advisory role and undertake consumer awareness and education programs. Under this approach, it is seen that the market itself is the better mechanism for protecting consumer interests than government intervention in the market. Similarly, the US and Canada, and increasingly the UK and New Zealand, tend to adopt a caveat emptor approach in which the burden is placed on consumers to protect their own interests.

Amongst the studied jurisdictions the powers and functions of agencies responsible for consumer affairs include:

- (1) advising the government on appropriate policies and measures for consumer protection;
- (2) representing the consumer interest on inter-governmental committees;
- (3) enforcing consumer protection and (in some instances) competition laws;
- (4) advising consumers and businesses of their rights and obligations under the relevant consumer protection laws;
- (5) conducting or commissioning market surveys and research into consumer protection issues;
- (6) conducting or commissioning product testing for safety and quality and disseminating information to consumers;
- (7) managing and monitoring the performance of consumer tribunals or other bodies for the mediation of consumer claims;
- (8) consulting with relevant stakeholders to understand consumer issues and developing policy to address problem areas;
- (9) organising public education and information programmes independently or in collaboration with consumer organisations and business entities;
- (10) registering and issuing licences for designated types of business activities;
- (11) issuing administrative rules to regulate the conduct of business entities and ensuring protection of consumer interests; and
- (12) publishing an annual report of its activities.

The agencies in most jurisdictions have some rule making powers, and in some instances, such as the US FTC can exercise a measure of judicial power.

In some jurisdictions responsibility for protecting and advancing consumer interests extend beyond the usual well-established agency for consumer protection; for example, the US FTC. Other agencies may have responsibility for aspects of consumer protection, such as responsibility for the regulation of particular market segments, including the regulation of utility services that provide water, energy and telecommunications. These agencies are typically required assist in resolving consumer complaints. This is a matter of key concern in Europe where new policies and approaches are being developed to deal with the large growth in utility related complaints.

Particular areas demanding policy attention include telecommunications and responses to the 2008 financial crisis. The telecommunications market has substantially transformed over the past few decades as a result (in some jurisdictions) of: the privatisation of the government monopoly telecommunications provider, leading to the emergence of competing providers; and rapid and highly dynamic technological change. These developments are placing considerable pressures on governments to develop appropriate policy responses. In the UK telecommunications and broadband regulation is under a single regulator. However, these relatively clear demarcation lines of regulation are being challenged by smart phone technology that enables consumers to use their phones for banking and other financial transactions. This raises difficult questions as to whether mobile technology ought to be regulated by the communication regulator or the financial institutions regulators. In Singapore Mobile money is regulated by the Central bank, whereas in Canada and the US it is largely self-regulated by industry. This concern is more pronounced in the five less developed of the ten ASEAN Member States where mobile telephony is one of the few sectors of communication that functions well.

The 2008 financial crisis, triggered by the US sub-prime mortgage crisis, has prompted significant financial services marketplace reforms. Financial services regulators have been granted increased powers to deal with market abuses and are required to place greater emphasis on consumer protection. In some cases regulatory functions are divided amongst different regulators. For instance, in the UK and the US prudential regulation is separated from marketplace conduct regulation.

Root and branch reviews of the regulatory institution structures for the consumer marketplace have been undertaken in a number of countries, most recently in New Zealand, along with the UK and European countries. The general trend of the reviews is to shift from heavy reliance on government regulatory control and oversight to shared regulatory models with business and consumer co-responsibility. Governments in some countries are placing greater obligations on corporations to comply with international guidelines such as the OECD Guidelines for Multi-National Enterprises, and ISO standards such as ISO26000 on social responsibility. The recent Re-publication of the UN Guidelines for Consumer Protection (UNGCP)<sup>696</sup> goes to some lengths to reinforce the obligations upon stakeholders to meet certain standards and marketplace standards of conduct.

### 5.3 Country institutional structures for consumer law

This section compares international institutional structures for the administration and enforcement of consumer laws in each of the five reference countries. It may be noted that obtaining a reasonable depth of information about these structures for this study has proven difficult in some instances. This section outlines:

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696 Agreed by the UN General Assembly on December 15 2015 although not yet published in a final form.

- the main institutions for the administration and enforcement of consumer laws, including semi-government and non-government agencies;
- the jurisdictional reach and key roles of the main institutions;
- regulatory agency responsibilities and linkages with other governmental and non-governmental agencies;
- the institutional settings for consumer agencies, including whether they sit within a larger governmental agency such as a Ministry for business and industry; and
- any recent changes to the jurisdictional reach or structure of the consumer protection agencies.

## 5.4 Comparison of main institutions for consumer protection

### 5.4.1 United States

US consumer protection policy is in essence based on the notion that consumers should be empowered to protect their own self interests. This leads to an emphasis being placed on requiring sellers to provide full disclosure about their products to enable consumers to make informed choices, and allowing access to justice, including by enabling class actions and collective action. Despite that, some federal and state agencies actively engage in enforcement actions in the public interest.

The best-known, biggest and most active consumer agency is the Federal Trade Commission (FTC) which administers a wide variety of consumer protection and competition laws. In keeping with the US philosophy of equipping consumers to take care of their own interests, the FTC's overall goal is to take measures to promote a deception free marketplace and enable vigorous competition.

The FTC's key source of authority derives from Section 5(a) of the *FTC Act*, which prohibits 'unfair or deceptive acts or practices in or affecting commerce'.<sup>697</sup> A recent publication notes that:

... deception occurs when there is a material representation, omission, or practice that is likely to mislead a consumer who is acting reasonably under the circumstances. Unfair practices are those which cause, or are likely to cause, reasonably unavoidable and substantial injury to consumers without any offsetting countervailing benefits to consumers or competition.<sup>698</sup>

In addition to its Section 5(a) jurisdiction, the FTC has enforcement and administrative powers under 46 other statutes, 37 of which relate to the FTC's consumer protection responsibilities. Among these laws are credit-related acts, such as the Truth in Lending Act, Fair Credit Billing Act, Fair Credit Reporting Act, and the Equal Credit Opportunity Act, as well as continuing enforcement of industry specific acts, such as the Petroleum Marketing Practices Act, and the *Comprehensive Smokeless Tobacco Health Education Act of 1986*, and additional laws relating to consumer privacy such as the Do-Not-Call Registry Act of 2003, and the *Controlling the Assault of Non Solicited Pornography and Marketing Act 2003 (CAN-SPAM)*.

The FTC uses its investigative authority to uncover deception, unfair activities, or violation of any statute under which it has authority. The Bureau of Consumer Protection may issue civil investigative demands ('CIDs') to explore possible violations. Like a subpoena, a CID can compel the

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697 See [www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf](http://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf).

698 See [www.ftc.gov/about-ftc/bureaus-office](http://www.ftc.gov/about-ftc/bureaus-office).

production of existing documents or oral testimony, while also requiring a recipient file written reports or responses to questions. Investigations can be triggered by Presidential or Congressional requests, court referrals, consumer complaints, or internal research.<sup>699</sup>

Upon completion of an investigation, the FTC may issue a complaint to a person, partnership, or corporation if it believes the person has violated the law, and enforcement is in the public interest. Hearings are held before an Administrative Law Judge (ALJ). If the actions at issue are deemed a violation, the ALJ may recommend entry of a cease and desist order. These orders are the FTC's primary tools for stopping anti-consumer practices. If a party violates the order, the FTC is authorised to use the courts to seek civil penalties and restitution for harmed consumers.

A party may appeal an order to the full FTC, then to a federal appellate court, and eventually the US Supreme Court. If neither party appeals the order, it becomes final within 60 days of being issued. Once final, a respondent's violation of the order can result in a civil penalty of up to US\$10,000 per violation. Third parties with actual knowledge of a breach who violate the Commission's orders may also be subject to fines.<sup>700</sup>

The FTC also has authority to make trade regulation rules that specifically define unfair or deceptive trade practices. For example, according to the FTC Telemarketing Sales Rule, it is deceptive if a telemarketer fails to truthfully disclose the cost of products or services, or the nature of certain return policies. Knowingly violating FTC trade regulation rules may result in a civil penalty of up to US\$10,000 per violation.

The FTC occasionally acts on behalf classes of consumers who suffer loss or damage. The Commission can require wrongdoers to surrender the proceeds of their wrongdoing. The FTC seeks these remedies when it can objectively determine a clear violation of a law and reasonably calculate the damages payment. However, if the FTC determines that private actions or criminal proceedings will result in complete relief for the consumer, it may choose not to use the restitution or disgorgement remedies. Finally, if the FTC believes a party is violating, or will violate, a law it may seek a preliminary or permanent injunction from the federal district court to prevent the violation.

As with its jurisdiction in competition law, the FTC does not have the power to bring criminal charges. The Department of Justice can prosecute federal consumer protection cases involving criminality before a federal court. It must establish the case beyond reasonable doubt.

The FTC consumer remit is implemented via seven divisions of the Bureau of Consumer Protection. Collectively they protect consumers against unfair, deceptive, or fraudulent practices. These divisions include: Advertising Practices, Financial Practices, Marketing Practices, Privacy and Identity Protection, Planning and Information, Consumer and Business Education, and Enforcement.

The Division of Advertising Practices works to prevent false advertising claims, particularly if the claims affect health and safety or cause economic injury. In addition to advertising claims regarding dietary supplements, weight loss products, alcohol, and tobacco, the Division also monitors the marketing of food, violent movies, and music and electronic games to children.

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699 See [www.ftc.gov/about-ftc/bureaus-offices](http://www.ftc.gov/about-ftc/bureaus-offices).

700 See [www.ftc.gov/about-ftc/bureaus-office](http://www.ftc.gov/about-ftc/bureaus-office).

The FTC's Division of Financial Practices was the only agency specifically charged with protecting consumers from fraud or deceptive practices in financial services until 2010. Credit card offers, mortgage practices, and debt collection practices were all covered by the Division. These functions are now carried out jointly with the Consumer Financial Protection Bureau created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009.<sup>701</sup>

The Division of Marketing Practices addresses the marketing of products and services over the Internet, the telephone, or through the mail. The Division has issued a number of trade regulation rules to address marketing practice concerns. For instance, the Telemarketing Sales Rule governs when and how marketers may use the telephone for sales pitches. Other rules, such as CAN-SPAM Rules, the Franchise and Business Opportunity Rule, the 900 Number Rule, and the Funeral Rule outline proper methods for how, when, and to whom products or services may be marketed.

The Division of Privacy and Identity Protection is the newest division and protects consumers' personal information from being used improperly, and works to ensure that companies with access to that information, such as credit card companies, keep it secure. The FTC also maintains a website wholly dedicated to preventing identity theft.

The Division of Planning and Information manages the Consumer Response Centre and the Consumer Sentinel database<sup>702</sup>. The Centre receives and addresses consumer complaints via phone or mail, while the Consumer Sentinel is a central database which contains over 3.5 million fraud and identity theft complaints. The Sentinel website analyses complaint data to better understand and prevent fraud and identity theft.

The Division of Consumer and Business Education seeks to equip consumers with the skills to protect themselves by disseminating information to consumers through a myriad of media, including print, broadcast, and electronic outlets. Recent education efforts include the creation of industry-specific websites to educate consumers about how competition in the healthcare, real estate, oil and gas, and technology marketplaces can result in better products at lower prices.

When a survey showed that Hispanics were more than twice as likely than non-Hispanic whites to be victims of consumer fraud, the Division extended its outreach by releasing its educational materials in both Spanish and English. The Division also educates young consumers to be smarter shoppers through publications such as 'The Real Deal,' a booklet that teaches through the use of games, puzzles, and cartoons.

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701 The preamble to the Act ([www.sec.gov/about/laws/wallstreetreform-cpa.pdf](http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf)) states that the purpose of the act is 'To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes'.

702 See [www.ftc.gov/enforcement/consumer-sentinel-network](http://www.ftc.gov/enforcement/consumer-sentinel-network) Consumer Sentinel is the unique investigative cyber tool that provides members of the Consumer Sentinel Network with access to millions of consumer complaints.

A list of the most frequent consumer complaints gives a quick sense of the agency priorities in recent times. In 2012, the top 15 categories of consumer complaints were:<sup>703</sup>

Rank	Category	No. of Complaints	Percentages
1	Identity Theft	369,132	18%
2	Third Party and Creditor Debt Collection	199,721	10%
3	Banks and Lenders	132,340	6%
4	Shop-at-Home and Catalog Sales	115,184	6%
5	Prizes, Sweepstakes and Lotteries	98,479	5%
6	Imposter Scams	82,896	4%
7	Internet Services	81,438	4%
8	Auto Related Complaints	78,062	4%
9	Telephone and Mobile Services	76,783	4%
10	Credit Cards	51,550	3%
11	Foreign Money Offers and Counterfeit Check Scams	46,112	2%
12	Advance Payments for Credit Services	42,974	2%
13	Television and Electronic Media	41,664	2%
14	Health Care	35,703	2%
15	Mortgage Foreclosure Relief and Debt Management	33,791	2%

These categories of complaints have been quite stable over the past few years.

#### 5.4.1.1 Other US consumer law institutions

Other federal agencies also play an important consumer protection role. The US Consumer Product Safety Commission (CPSC) has a mandate for reducing injury or death caused by consumer products. The CPSC develops product standards for manufacturers while also conducting recalls of any products that could, or do, cause harm.

The CPSC<sup>704</sup> does not however have jurisdiction over all consumer products. For example, food, drug, cosmetic and medical device safety is the focus of the US Food and Drug Administration (FDA). A recent initiative of the FDA has been to more deeply regulate the tobacco industry. The FDA has authority under the 2009 Tobacco Control Act to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors. The 2009 law restricts the use of 'Light,' 'Mild,' 'Low,' or similar descriptors in the labelling or advertising of tobacco products. The law also grants the FDA powers to impose civil penalties and even forbid tobacco sales by retailers who fail to comply with age limits and age identification rules regarding tobacco sales to minors.

703 A complete list of complaints can be found at: [www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf](http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf).

704 CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$1 trillion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. CPSC's work to ensure the safety of consumer products — such as toys, cribs, power tools, cigarette lighters, and household chemicals — contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 40 years.



The National Highway Traffic Safety Administration (NHTSA)<sup>705</sup> covers automobile, truck, and motorcycle safety.<sup>706</sup> Its consumer protection powers arose from a public scandal in the mid-1960s. In the 1950s and 1960s automobiles were designed for style, not safety. Even with accident prevention and driving improvement efforts, automobiles remained the leading cause of death for the population below age 44 in the 1960s, with about 50,000 vehicular deaths in 1965.

The Federal Communications Commission (FCC)<sup>707</sup> has broad jurisdiction over broadcast communications and communication common carriers. The FCC has a Consumer and Governmental Affairs Bureau that ensures that consumer interests are considered in FCC decisions. The Bureau also monitors and resolves consumer complaints about communications services. Similarly, virtually every federal executive branch and independent agency has some similar office or bureau designed to advance consumer interest in its particular field.

#### **5.4.1.2 The Bureau of Consumer Financial Protection<sup>708</sup>**

Following the excesses of credit and mortgage provision throughout the US, which was a major contributor to the global financial crisis, the Dodd Frank Wall Street Reform and Consumer Protection Act was passed by Congress. This law can be regarded as the most significant change in federal consumer protection in a generation and is a distinct break from the generally hands off approach to markets adopted by US regulators.

The main operative provision in the Act is the Consumer Financial Protection Act of 2010 which established an independent entity within the Federal Reserve System, the Bureau of Consumer Financial Protection (the Bureau). The new Bureau has a substantial budget, ramping up to \$500 million per annum. The Bureau is consolidating various consumer protection functions now being performed by the FTC and other federal agencies such as the Federal Reserve, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development.

Key elements of the Bureau's mandate include:

- Conducting financial education programs; collecting, investigating, and responding to consumer complaints; collecting, researching monitoring, and publishing information about the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets; supervising covered persons for compliance with Federal consumer financial law; and issuing rules, orders, and guidance implementing Federal consumer financial law.
- Having broad supervisory powers over 'non-depository covered persons' and over large banks, credit unions, and savings associations. A non-depository covered person is a person to who provides 'brokerage or servicing of loans secured by real estate for use by consumers', who 'offers or provides to any consumer any private education loan,' 'offers or provides to a consumer a payday loan,' and that the bureau has cause to believe 'has engaged in conduct that poses risks to consumers.' The Bureau is authorised to collaborate with the Federal Trade Commission or any other Federal or State agency that may assist it in carrying out its supervisory tasks.

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705 See [www.nhtsa.gov/About](http://www.nhtsa.gov/About).

706 NHTSA was established by the Highway Safety Act of 1970 and is dedicated to achieving the highest standards of excellence in motor vehicle and highway safety. It works daily to help prevent crashes and their attendant costs, both human and financial.

707 The Federal Communications Commission regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories. An independent US government agency overseen by Congress, the commission is the United States' primary authority for communications laws, regulation and technological innovation.

708 See [www.consumerfinance.gov/the-bureau/](http://www.consumerfinance.gov/the-bureau/).



- With regard to large banks, saving associations, and credit unions, the exclusive authority to examine any insured institution with total assets of more than \$10 billion and any affiliate thereof. Institutions with less than \$10 billion in assets are subject to oversight by the Bureau, but only so far as necessary to support the implementation of Federal consumer financial laws and to determine risks to consumers and consumer financial markets.
- The regulation of ‘the offering and provision of consumer financial products or services under the Federal consumer financial laws.’ The statute explicitly defines the ‘consumer financial products’ that are regulated by the Bureau. Financial products include extending credit and servicing loans, extending or brokering leases of personal or real property, providing real estate settlement services or performing appraisals of real estate or personal property, engaging in deposit taking activities, selling, providing, or issuing stored value or payment instruments, providing check cashing, check collection, or check guaranty services, providing financial advisory services to consumers on individual financial matters, and other similar financial instruments and activities.
- The power to include other financial products or services under its scope as it sees fit. Similarly, the Act goes to great length to identify those previously enacted consumer laws, that will be enforced by the Bureau. These enumerated consumer laws include the Alternative Mortgage Transaction Parity Act of 1982, the Consumer Leasing Act of 1976, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Truth in Lending Act, the Truth in Savings Act, among others.
- If the Bureau finds an organization to be in violation of a federal consumer financial protection law, it has enforcement authority to pursue actions against that entity. Additionally, the Bureau is required to coordinate its enforcement activities with the FTC. The agencies may take joint or individual actions against an entity in violation of any of the consumer financial protection laws. The Bureau’s main enforcement power is the power to bring a civil lawsuit against the entity for any violation of any provision of federal law under its jurisdiction. Such a suit may be brought independently of or in conjunction with charges brought by the FTC.
- The power to take any action allowable under the statute to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer. The Bureau may prescribe and apply any rules or require any public disclosures it deems necessary to carry out this obligation. Additionally, the Bureau may require that a covered person make available to consumers any information concerning a financial product or service that the consumer obtained from the covered person, excepting any confidential information and information that cannot be retrieved in the ordinary course of business.
- Finally, the Secretary of the Treasury, in consultation with the Director of the Bureau is required to appoint a Private Education Loan Ombudsman to provide assistance to borrowers of private education loans. The Ombudsman is charged with collaborating with the Department of Education to oversee the distribution of loans and provide assistance to borrowers of private or Federal education loans. Additionally, the Ombudsman is required to respond to borrower complaints and to make recommendations to the Director, Secretary of the Treasury, Secretary of Education, Committee on Banking, Housing, and Urban affairs and the Committee on Health, Education, Labour and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labour of the House of Representatives.

The Bureau's enforcement powers include using mechanisms for enforcing the federal consumer financial laws. It has general investigatory powers, and can appoint an investigator to conduct an inquiry into whether any person has violated the law. A Bureau investigator holds subpoena powers over witnesses and documents in connection with any investigation or hearing over a suspected offender.

After investigation, the Bureau may determine that further adjudication is required, at which point it can subpoena evidence in formal hearings. The hearing serves as a trial to determine whether the covered person is guilty of a violation. The Board's decisions are appealable to the Court of Appeals for the circuit where the principal office of the covered person is located. If the offending party is found guilty, the penalty is a monetary civil penalty and possibly a referral for criminal proceedings as well.

Since its creation in 2010, the Bureau has pursued several major settlements against companies engaging in deceptive and unfair credit and lending practices. In 2012, Discover Bank agreed to pay a \$14 million penalty in addition to \$200 million in restitution to 3.5 million customers for engaging for using deceptive sales practices to mislead consumers into paying for credit card add-on products.

The Bureau has also prohibited a Florida company from engaging in debt-relief sales or advertising for illegal debt-relief practices. Most recently, the Bureau obtained a \$6.5 million refund from a US bank that serviced members who participated in the Military Instalment Loans and Education Services auto loan program.

#### **5.4.1.3 Structure of the Bureau<sup>709</sup>**

The Bureau is led by a Director who is appointed for a five-year term by the President with the advice and consent of the Senate. The Director is charged with establishing the departments within the Bureau, which will assist with carrying out the Bureau's mandate.

There are three Specific Functional Units: Research, Community Affairs, and Complaint Collection and Tracking. In addition, there are four separate offices within the Bureau: The Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Service Member Affairs, and the Office of Financial Protection for Older Americans.

The Office of Fair Lending and Equal Opportunity is responsible for overseeing and enforcing any Federal laws intended to ensure the fair, equitable, and non-discriminatory to access to credit for both individuals and communities. Additionally, the Office of Fair Lending and Equal Opportunity is charged with coordinating fair lending efforts between the Bureau and other Federal and State agencies, and working with private industry and consumer advocates on the promotion of fair lending compliance and education.

The Office of Financial Education develops and implements initiatives intended to educate and empower consumers to make better informed financial decisions. Additionally, it is charged with developing programs to improve the financial literacy of consumers through financial counselling, providing information to aid in understanding credit histories and credit scores, and advising consumers with regards to educational expenses, debt reduction, and improving long-term savings strategies.

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709 See [www.consumerfinance.gov/the-bureau/](http://www.consumerfinance.gov/the-bureau/).

The Office of Service Member Affairs is responsible for developing and implementing initiatives for military service members and their families to help them make informed decisions about financial products. The Office of Financial Protection for Older Americans which provides individuals over the age of 62 with protection from unfair and abusive practices and activities to assist in the financial literacy of senior citizens.

A Consumer Advisory Board and a Consumer Financial Civil Penalty Fund is established within the Bureau. The Board provides information about emerging practices in the consumer financial products or services industry. The Board is composed of six members appointed after recommendation by the Federal Reserve Bank Presidents, and meets at a minimum of twice a year. The Civil Penalty Fund provides relief for victims of activities for which charges have been brought against a financial service provider. With the critical jurisdiction of financial transactions, Internet and cross-border commerce, it is clear that the bureau's will eventually become the largest consumer protection agency in the United States.

#### **5.4.1.4 State institutional structures for consumer protection**

State governments act as both consumer law enforcement agencies and consumer advocates, much like the federal government. Responsibility for consumer protection within state governments tends to be highly decentralized, without the presence of any single overarching consumer protection department or agency.

The State Attorney Generals are charged with enforcing state consumer protection laws In most of the 50 states. An Attorney General may, in most states, file lawsuits on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, obtain restitution on behalf of consumers, bring criminal cases when authorised by law, and make rules to govern trade practices.

The National Association of Attorneys General (NAAG) facilitates cooperation among Attorney Generals to enhance their consumer protection effectiveness and support multi-state consumer protection activity and litigation. In larger cities and counties, there may also be a consumer protection division or bureau handling criminal and civil investigations and cases under state or local law.

One of the most successful recent consumer protection initiatives was the joint state-federal National Mortgage Settlement. In 2012, 49 state attorneys general and the federal government announced a historic settlement agreement with the five largest mortgage servicing entities in the United States. The settlement has provided over \$50 billion in relief to mortgage borrowers and state and federal agencies in connection with allegation over improper mortgage foreclosure practices by the respondents. In the settlement, borrowers received loan modifications, refinancing relief, and payments to those borrowers who lost their homes. In addition, the mortgage servicing firms agreed to nationwide standards for the servicing of both past and future mortgages and the appointment of an independent third-party monitor to oversee and report on compliance with the terms of the settlement.

#### **5.4.1.5 State Investigative Powers**

State agencies generally have the authority to issue Civil Investigative Demands, or CIDs. Under a CID, and agency may request documents or oral testimony from specific individuals or companies. Attorney Generals may issue CIDs if they believe a violation has or will occur, and need not establish probable cause. Criminal investigations are conducted through the grand jury process and must be proved beyond a reasonable doubt in the appropriate state court.

## 5.4.2 Canada

In Canada, responsibility for consumer protection legislation is divided between federal and provincial governments. The federal government is responsible for certain specific sectors as well as for national marketplace standards, whereas provincial governments are responsible for contractual and local matters. Each of the provinces and territories has consumer protection laws and regulations.

The Canadian Constitution does not specifically assign consumer affairs to either federal or provincial jurisdiction. In practice, the federal government is responsible for certain specific sectors as well as for national marketplace standards, whereas provincial governments are responsible for contractual matters and local matters.

### 5.4.2.1 Federal mechanisms

The Office of Consumer Affairs (OCA) promotes the interests and protection of Canadian consumers. Well-informed and confident consumers help stimulate competition and innovation in the Canadian marketplace.

The OCA aims to ensure consumers have a voice in developing government policies and are effective marketplace participants. It provides research and analysis on marketplace issues in support of both policy development and intergovernmental harmonization of consumer protection rules and measures. It also identifies important consumer issues and develops and disseminates consumer information and awareness tools. Finally, the OCA provides financial support to not-for-profit consumer and voluntary organizations, in the form of a Contributions Program, to encourage them to reach financial self-sufficiency and assist them in providing meaningful, evidence-based input to public policy in the consumer interest.

Under the *Department of Industry Act*, the Minister of Industry is mandated to promote and protect consumer interests throughout Canada. The Minister's powers also extend to measures to strengthen the national economy, promote sustainable development, ensure an efficient internal market governed by effective marketplace rules, and foster science and innovation.

The OCA contributes to this broad mandate by helping to build trust in the marketplace, so consumers can protect themselves and confidently and knowledgeably drive demand for innovative products and services at competitive prices.

The OCA bases its strategic directions and agenda on the following three themes:

- **vulnerable consumers** in the marketplace;
- OCA assesses the **nature of consumer vulnerability** in Canada and helps ensure that policy developments do not impact disproportionately on the most vulnerable or disadvantaged Canadian consumers;
- consumers in the **electronic marketplace**;
- OCA helps to **increase consumer confidence** in the electronic marketplace as new technologies emerge. OCA works on issues such as e-commerce and electronic payment mechanisms, and lays the groundwork for possible future policy initiatives in areas such as commercial e-services and mobile commerce;
- **consumers in the sustainable marketplace.**

The OCA works in collaboration with key stakeholders to improve consumer understanding of their role in sustainable production and consumption. The OCA undertakes research and policy development on how best to educate and equip consumers to deal with sustainable consumption issues in the marketplace.

#### **5.4.2.2 Other Canadian federal Laws for consumer protection**

Key federal consumer protection laws include the following:

- *Competition Act*, RSC 1985, c C-34 (ensures fair and competitive markets provide consumers with competitive prices and product choices).
- *Weights and Measures Act*, RSC 1985, c W-6 (establishes standards for weights and measures).
- *Food and Drug Act*, RSC 1985, c F-27 (includes requirements for food, drugs, cosmetics and therapeutic devices).
- *Telecommunications Act*, SC 1993, c 38 (ensures accessibility of telecommunication to consumers, and sets a framework for regulation of the telecommunications industry by the Canadian Radio-television and Telecommunications Commission).
- *Canadian Consumer Product Safety Act*, SC 2010, c 21 (protects consumers from potentially dangerous products).
- The *Bank Act*, SC 1991, c46 (includes consumer protection measures applying to the banking industry).
- Finally, the *Department of Industry Act*, SC 1995, c 1, gives the Minister of Industry jurisdiction over consumer affairs and standards relating to consumer goods, and the task of promoting consumer interests in Canada.

Each of Canada's thirteen provinces and territories has consumer protection laws and regulations, often found in consumer protection acts, businesses practices act or fair trading acts.

Consumer protection institutions approximate the role and structure of those in Australian States and Territories prior to the implementation of the Australian Consumer Law in 2010

- Alberta: *Fair Trading Act*, RSA 2000, c F-2.
- British Columbia: *Business Practices and Consumer Protection Act*, SBC 2004, c2.
- Manitoba: *Consumer Protection Act*, CCSM, c C200.
- New Brunswick: *Financial and Consumer Services Act*, SNB 2013, c 30.
- Newfoundland: *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.
- North West Territories: *Consumer Protection Act*, RSNWT 1988, c C-17.
- Nova Scotia: *Consumer Protection Act*, RSNS 1989, c92.
- Nunavut: *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17.
- Ontario: *Consumer Protection Act*, SO 2002, c30.
- Prince Edward Island: *Consumer Protection Act*, RSPEI 1988, c C-19.
- Quebec: *Consumer Protection Act*, CQLR c P-40.1.
- Saskatchewan: *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.
- Yukon: *Consumer Protection Act*, RSY 2002, c40.

Several provinces also have industry specific laws and regulations. These cover specific industries such as travel agents, funeral services, debt collection, insurance, real estate and real property.

### 5.4.3 New Zealand

Institutional structures for the administration and enforcement of New Zealand consumer laws have remained largely unchanged for the past decade. However, commencing in 2010, successive governments have undertaken a root and branch review of all areas of consumer law and policy and gradually implemented major reforms to the law, policy and enforcement systems.<sup>710</sup>

#### 5.4.3.1 Commerce commission

The main agency responsible for enforcement of competition and consumer laws is the Commerce Commission (CC). The Commission is accountable to the Minister of Commerce and Consumer Affairs for its performance. Established as an independent agency, the CC operates as an impartial promoter and enforcer of the law.

A Statement of Intent is produced at least every three years setting out a work programme for the following four financial years. CC also produces a Statement of Performance Expectations annually outlining priorities, forecast financial statements, and output measures for the next financial year.

### 5.4.4 Singapore

#### 5.4.4.1 Consumer Protection Legal and Institutional Arrangements

In Singapore, the Ministry for Trade and Industry is the responsible department for consumer law and institutions. It states as its vision:

... for Singapore to be a leading global city with a dynamic economy, world-class enterprises and innovative and productive SMEs. Singapore will offer a conducive environment for entrepreneurs and enterprises to tap its diverse opportunities, and provide good jobs which are attractive to talent at all levels.

Consumer law administration and enforcement in Singapore is largely contracted out to implementation through schemes of self-regulation and co-regulation and in particular through the operations of the Consumers Association of Singapore (CASE)<sup>711</sup> which is contacted by the government to take a wide range of mediation negotiation and even enforcement action on the half of consumers. CASE is a non-profit, non-governmental organisation that is committed towards protecting consumer's interest through information and education, and promoting an environment of fair and ethical trade practices.

There are a number of laws in Singapore dealing with consumer protection, including the *Multi-Level Marketing and Pyramid Selling (Prohibition) Act*, *Sale of Goods Act* and the *Unfair Contract Terms Act*. These laws are generally applicable to transactions over the Internet. However, the Government recognises that some laws may not adequately address electronic transactions, and is thus actively looking into how existing consumer protection laws can be clarified and applied specifically to cyberspace consumer transactions.

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710 At the heart of reform of New Zealand consumer laws are changes to the Fair Trading Act which commenced operation at the end of 2013.

711 A concise outline of the history and functions of CASE can be found on the organisational member page of the Consumers International web site at:  
[www.consumersinternational.org/our-members/member-directory/CASE%20-%20Consumers%20Association%20of%20Singapore](http://www.consumersinternational.org/our-members/member-directory/CASE%20-%20Consumers%20Association%20of%20Singapore).



## 5.4.5 United Kingdom

Institutional structures for the administration and enforcement of consumer laws in the United Kingdom have undergone radical change over the past five years. Policy responsibility for consumer issues rests with the Employment Relations, and Postal Issues, Consumer, Competition, Corporate Governance and Intellectual Property Division of the Department for Business, Innovation and Skills (DBIS), which was formed after the abolition and re-formation of the Department of Trade and Industry (DTI).

The UK has transitioned away from a model in which a number of national quasi-autonomous enforcement, educational and advocacy bodies worked alongside the Trading Standards Offices and the Citizens Advice Network. Major nationally operating enforcement agencies such as the Office of Fair Trading (OFT) and the Competition Commission (CC) were abolished as were consumer complaints, policy and advocacy bodies such as Consumer Voice and Energywatch.

### 5.4.5.1 Abolition of national bodies

The work of the national bodies is now undertaken by a network of about 200 local authority Trading Standards Offices (TSO). The UK government has effectively contracted out its regulatory functions to the TSO and the charitable Citizens Advice (CA) offices. Much of the UK's previously existing consumer protection laws have been repealed and replaced. The Government was motivated by a desire to shift the burden of enforcement from government, and to place greater reliance on 'light touch' industry-based schemes.

The Government implemented new regulations in October 2015 to give effect to its obligations under the European directives on Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR). The regulations require traders who fail to resolve a dispute through their own customer service processes to advise the consumer complainant of their right to have their dispute resolved by an alternative dispute resolution body. Traders are not compelled to use the ADR body, however, it is hoped that the new regulations will encourage traders to do so.

## 5.5 Legislation and jurisdictional comparisons

### 5.5.1 United States

Most US states have statutes prohibiting unfair and deceptive conduct, modelled to varying degrees on the Federal Trade Commission Act. Under these 'Little FTC Acts,' each state Attorney-General has statutory authority to seek injunctions to remedy unfair or deceptive trade practices. A company may face contempt charges if it continues a practice after an injunction has been issued. Attorney Generals may also obtain voluntary assurances of compliance from violating companies. A breach of the voluntary assurance is akin to an injunction violation. States also may use civil and criminal penalties to penalise unfair or deceptive trade practices.

An Attorney-General may seek restitution for consumers who are victims of fraud or deception. Some states expressly grant Attorney-Generals the statutory power to obtain restitution. Other states do so implicitly because of state court decisions authorizing such actions. This remedy is especially effective if consumers have been harmed but monetary damages are not large enough to warrant litigation by private individuals. Restitution is paid directly to affected consumer if they can be readily identified. Otherwise the funds are distributed in lump sums to consumer groups and related non-profit organisations under the cy pres doctrine.



Most state consumer protection statutes allow the Attorney General, or other state regulatory or enforcement agency, to create rules that advise businesses of prohibited and acceptable business practices. Approximately 20 states have chosen to create such rules.

#### **5.5.1.1 State Regulatory Authorities**

Each state has a different system for addressing the special needs of regulated industries such as energy, transportation, health, and financial institutions. They each has a variety of mechanisms for addressing consumer concerns, resulting in little uniformity between the states or within the same state among the different regulatory structures for each industry.

States also regulate trades and professions through licensing boards and enforcement divisions. These state departments attempt to protect consumers by licensing only qualified individuals to work in specific professions, from health care providers, real estate agents, lawyers, and accountants. Consumers may search state license databases to find potential service providers or lodge a complaint against a licensed professional. Professional licenses can be suspended temporarily or permanently, or be revoked after a hearing; with the losing party having a right to appeal within the state court system.

#### **5.5.1.2 Private Rights of Actions for Consumers**

Private citizens can use the state and federal court systems to protect themselves from marketplace fraud and deceit. At the state level, consumers may use both common law and statutory causes of action such as the Little *FTC Acts*. Although the federal courts and each state court system operate independently, there are numerous commonalities to the private rights of action protecting consumers.

Common law legal action is one of the oldest means for obtaining consumer protection. Current common law actions provide consumers protection through torts for deceit, fraud, misrepresentation, and breach of warranty.

A consumer may file a lawsuit for deceit or fraud if a seller intentionally conceals a material fact or makes a false representation of a material fact, knowing the representation is false and seeks to induce the consumer to act on the representation. The plaintiff must also reasonably rely on the misrepresentation and suffer damage as a result of reliance. Deceit can arise if a seller makes a direct false statement, or when a misrepresentation arises from silence, concealment, half-truths, or ambiguity about a good or service. While misrepresentation of product facts may bring legal action, mere puffery or opinions are generally not subject to lawsuits for deceit.

If successful in court, a consumer may receive damages for out of pocket losses, rescission of the transaction at issue, damages to ensure the consumer receives the benefit of the bargain, or possibly punitive damages. Most common law consumer protection actions are brought in state court, although actions between citizens of different states can be brought in federal court under certain situations.

#### **5.5.1.3 Statutory Causes of Action**

Although common law actions have long protected consumers from fraud, it is often burdensome to successfully plead and prove such a case, particularly because a consumer must prove that the seller intended harm. If a common law claim is not possible, consumers may rely on federal or state unfair trade practice statutes to remedy misrepresentations or material omissions.

There is no private right of action under the *Federal Trade Act*, although there may be private rights under the more specific statutes enforced by the FTC and the new Consumer Financial Protection Bureau. Each state also has some form of consumer protection law, and many are modelled after the Federal Trade Commission Act and prohibit unfair and deceptive trade practices. These state laws normally allow consumers to sue for damages and injunctive relief. Consumers have a better chance of success in combating misrepresentations under these statutes because they do not typically require proof that the seller intended harm and often relax other requirements of common law fraud. In addition to protection from unfair and deception trade practices, many states also specifically prohibit certain deceptive pricing, bait and switch tactics, and pyramid sales scheme practices. In addition to preventing the broader harms of ‘unfair and deceptive’ trade practices, state ‘lemon’ laws streamline the remedy process for consumers who purchase a defective new or used car.

### 5.5.2 Canada

In common with the United States, Canadian consumer protection laws do not provide for Federal action on behalf of individual consumers. Consequently, the level of Federal intervention is relatively low. Canada, like the US, places heavy reliance on litigation as a basis for consumer redress. Despite that, there are a number of sector-specific areas where Canadian consumers have access to dispute resolution services. For example, the Commissioner for Complaints for Telecommunications Services provides a dispute resolution service for telephone and internet-related complaints. The Ombudsman for Banking and Investment Services provide services for consumers with banking and investment complaints.

### 5.5.3 New Zealand

The *Fair Trading Amendment Act 2013* modernises New Zealand consumer law, and responds to the rapid uptake of electronic and cross-border trade, and provides greater alignment of New Zealand and Australian Consumer laws than previously existed. The stated objectives of the updated legislation are to help ensure businesses can compete more effectively and that consumers are better protected.

Changes to legal and institutional arrangements for consumer law in New Zealand commenced with the publication of discussion papers in 2009 and 2010. In making the changes the government stated it reviewed the purpose and ongoing relevance of the then existing statutes, and sought to fill any gaps in the law. It also reviewed the overall effectiveness of enforcing those laws. The bulk of legislative change occurred at the end of 2013 when the consumer law reform bill received Royal assent.

#### 5.5.3.1 Objectives of the reform

The stated objectives for the reform were to revise and update consumer law so that it:

- is principles-based;
- enables consumers to transact in confidence;
- protects suppliers and consumers from inappropriate market conduct;
- is easily accessible to those who are affected by consumer law;
- better aligns New Zealand law with the Australian Consumer Law, where appropriate, in accordance with the government’s agenda for a single economic market with Australia.

The New Zealand Commerce Commission has been empowered to act in a timelier and more effective manner in dealing with breaches. Changes under the Act include providing additional rights for consumers and obligations for businesses as well as investigation and enforcement tools for the Commerce Commission. The list below provides a summary of the changes.

### **5.5.3.2 Rights and obligations**

- Auctions — new rules apply to certain types of auctions (excluding online auctions like Trade Me) Buying and selling online — traders who sell online must make it clear they are traders, meaning purchases have rights under the Consumer Guarantees Act Contracting out of the Fair Trading Act — businesses cannot contract out of their obligations to consumers.
- Door-to-door and telemarketing sales — consumers have extra protection when approached by uninvited sales people at their home or workplace, or by telephone.
- Extended warranties — traders must now disclose consumer’s rights under the Consumer Guarantees Act and a comparison of those rights with the benefits of the extended warranty being offered.
- Substantiation — it is an offence for traders to make a claim they can’t back up.
- Unsolicited goods and services — it is illegal for a business to demand payment for goods or services that haven’t been requested by the recipient Investigation and enforcement.
- Increased fines — penalties for misleading and deceptive conduct, false representations, unfair practices and issues around product safety have increased from \$60,000 to \$200,000 for individuals and from \$200,000 to \$600,000 for businesses.
- Management banning orders — in certain circumstances the Commerce Commission can ban an individual from being a director or involved in the management of a company.
- Product Safety Monitoring and Enforcement Powers — new powers when conducting inspections Laws prohibiting unfair contract terms.
- Compulsory interview powers — The Commerce Commission now has the ability to require oral evidence from people during some Fair Trading Act investigations. Previously the Commission could only request interviews and individuals could refuse to be interviewed or to answer certain questions. The interviewee must answer questions put by the Commerce Commission, but any responses cannot be used against the interviewee in criminal proceedings, other than in some limited, specified circumstances. The compulsory interview power can be used for investigations that started before the provision came into effect.
- Enforceable undertakings — are a form of out-of-court negotiated settlement. Where the Commerce Commission believes there has been a breach of the Act the Commission may accept enforceable undertakings. They may include agreements by a person or business to stop doing something, make compensation payments, publish corrective advertising or pay costs to the Commission. If the party does not keep to their agreement the Commission may apply to the Court to enforce the agreement.

Recent changes to the Act include significantly increased penalties, the introduction of infringement offences and the ability for courts to impose banning orders. The new penalties came into effect in 2015. Important changes include: Fines for misleading and deceptive conduct have been increased by at least 300%.

- Individuals now face fines of up to \$200,000 per offence. Companies face fines of up to \$600,000 per offence.
- Participants in pyramid schemes now face fines of up to \$60,000. In addition, a Court can also strip offenders of the equivalent revenue or 'commercial gain' earned from the offending. Breaches of Part 2 of the Act (relating to Consumer Information) or Part 4A (relating to consumer transactions and auctions) can result in a fine for an individual of \$10,000 and \$30,000 for a body corporate.
- The Commerce Commission can issue infringement notices with fines of up to \$2,000 for offences for: failing to comply with a suspension of supply notice issued under section 33D; involving the contravention of section 28 (consumer information standards); failing to comply with section 28B(1) or (2) (disclosure of trader status on Internet); involving the contravention of any of the following provisions of Part 4A:
  - (i) s 36C (layby disclosure requirements);
  - (ii) s 36D (further layby disclosure requirements);
  - (iii) s 36L (uninvited direct sale disclosure requirements); and
  - (iv) s 36T (extended warranty disclosure requirements).

### **5.5.3.3 Other remedies**

Other remedies under the Act remain unchanged. These include:

- Corrective advertising orders. A court may require a trader to publish corrective advertising; to disclose information to the public generally, or to an affected section of the public; and to publish corrective statements.
- Compensation or refund orders may be granted by a court. A court may also order a trader to refund or compensate a person who suffers loss from the trader's unlawful conduct.
- Altering or voiding a contract is an available remedy. A court may order that a contract be altered or voided as a result of unlawful conduct.

A Court can impose a management banning order which prohibits an individual from being involved in the management of a company. A management banning order can be taken against an individual who:

- has, on at least two separate occasions within a 10 year period, committed a criminal offence under the Act, or
- is, or was at the time of committing the offence, a director of, or concerned in the management of, an incorporated or unincorporated body that has, on at least two separate occasions within a 10-year period, committed a criminal offence under the Act, or
- has been prohibited by an overseas jurisdiction, in connection with the contravention of any law relating to unfair trading, from carrying on certain activities.

A person who breaches a management banning order commits an offence punishable by a fine of up to \$60,000.

### **5.5.3.4 Enforcement mechanisms in New Zealand**

Key measures for consumer protection enforcement in New Zealand:

- **Product Safety Standards** — Mandatory safety standards for certain products are enforced by the Commerce Commission under the Act. The purpose of these regulations is to prevent or reduce the risk of injury.
- **Service Safety Standards** — These are regulations made under section 35 of the *Fair Trading Act 1986*. Their purpose is to prevent or reduce the risk of injury to any person. Currently there are no Service Safety Standards under the Act.
- **Suspension of Supply Notices** — These notices prohibit the person or persons identified in them from supplying the particular goods for a short period. It may be issued by a Product Safety Officer of the Ministry of Business, Innovation and Employment and are enforced by the Commerce Commission.
- **Unsafe Goods Notice** — The relevant Minister may declare any goods unsafe where it appears they may cause injury. It is then the Commerce Commission's role to enforce compliance with the Notice.
- **Unfair contract terms** — Unfair contract terms are prohibited in all standard form consumer contracts entered into after 17 March 2015, and also in those contracts (except insurance contracts) that are renewed or varied after that date. The provision allows the Commission to seek a declaration from a court that a term in a standard form consumer contract is unfair. While only the Commerce Commission can apply for this, any person may ask the Commission to apply to the court in relation to a contract to which they are a party.

In relation to the foregoing provisions on unfair contract terms, the court may declare a term unfair if it is satisfied that the term would cause:

- a significant imbalance in the parties' rights and obligations, and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and
- would cause some detriment (whether financial or otherwise) to the other party if applied, enforced or relied on.

Certain terms cannot be declared unfair. These are terms that: define the main subject matter of the contract or set the upfront price payable under the contract.

## 5.5.4 Singapore

### 5.5.4.1 Consumer Protection (*Fair Trading*) Act

As with other jurisdictions reviewed in this comparative study, Singapore has a range of statutes providing consumer protection. The core law for consumer protection is the *Consumer Protection (Fair Trading) Act*. This Act provides the legislative framework to allow consumers aggrieved by unfair practices to have recourse to civil remedies before the courts. It also provides for a cooling-off period for direct sales and time share contracts, and allows specified bodies to enter voluntary compliance agreements with, or apply for injunction orders against errant traders.

### 5.5.4.2 Personal Data Protection

Singapore has both a strong common law tradition as well as appropriately structured statutory provisions to regulate use of personal data. Under the general law, confidential information may be protected under a duty of confidence. Personal information is also protected under sector-specific laws such as the *Banking Act*, *Statistics Act*, the *Official Secrets Act* and the *Statutory Bodies and*

*Government Companies (Protection of Secrecy) Act*. There is however no overarching legislation for the protection of personal data in Singapore. In February 2002, the National Internet Advisory Committee (NIAC) released a draft ‘Model Data Protection Code for the Private Sector’ which is modelled on internationally recognised standards.

In relation to e-commerce, cross border trade and consumer protection, Singapore has a highly developed policy and regulatory scheme. At the centred of the scheme is a statutory body, Info-communications Development Authority of Singapore (IDA). In the relatively laissez faire style of Singapore the IDA is something of an exception. To achieve the national goal of leadership in the region an e-commerce hub a range of policies and regulations have been promulgated and these constitute a large part of IDA’s efforts to create a conducive infocomm environment that is both pro-consumer and pro-business. To ensure sustainable growth and competition in a multi-operator, multi-network environment, IDA formulates and develops short- and medium-term infocomm-related policies, as well as standards, codes of practices and advisory guidelines — all of which are enforceable by IDA — pertaining to issues such as licensing, interconnection, resource and competition management.

IDA also monitors local and global infocomm market trends, developments and regulatory measures, while remaining technology-neutral, to ensure that the current infocomm policies and regulatory frameworks are effective and relevant.

Throughout its Policy and Regulations work, IDA claims to be committed to the principles of:

- Promoting effective and sustainable competition;
- Promoting facilities-based competition to the greatest extent possible;
- Relying on market forces;
- Adopting proportionate regulation;
- Remaining technology-neutral; and
- Providing a transparent and reasoned decision-making process.

These principles are aimed at creating an infocomm environment that allows free and fair competition, so that consumers’ interests are protected and they benefit from greater choices and the proliferation of innovative infocomm products and services.

In recognition of the dynamic nature of the infocomm industry, IDA also progressively fine-tunes and reviews its policies and regulations. We value the opinions, concerns and expertise of stakeholders and will continue to engage and consult the industry and consumers when formulating new policies or reviewing existing ones.

The IDA and the National Trust Council (NTC) conducted a public consultation on the code. Based on comments from the industry and members of the public, the Model Code has now been in operation for a number of years and has been taken up by the private sector.

The Model Code is a generic code that is available for adoption by the entire private sector. It applies to any private sector organisation that collects and installs personal data in electronic form, online or offline, using the Internet or any other electronic media. In the e-commerce area, the NTC has aligned its trust mark programme with the principles of the Model Code.

## 5.5.5 United Kingdom

### 5.5.5.1 Key UK legislation

The *Consumer Rights Act 2015* was introduced to update and transform institutional arrangements and legal provisions in the UK.

The *Consumer Rights Act* aims to rectify the complexities of UK consumer law by consolidating eight pieces of separate legislation in this area into a single piece of legislation. The Act is split into three parts. Part 1 deals with consumer contracts for goods, digital content and services; Part 2 covers unfair terms; and Part 3 contains miscellaneous and general provisions.

For the most part, the law set out in the Act is similar to existing UK laws, although there have been some changes, particularly regarding services and unfair terms. The Act introduces significant changes to private actions in competition law; including by expanding the jurisdiction of the Competition Appeals Tribunal, the introduction of opt-out collective actions and the establishment of voluntary redress schemes.

The majority of the Act's provisions came into force on 1 October 2015 and, in theory, should make compliance with consumer protection laws much easier in the long run. However, as the Act makes changes to contractual relationships and affects how products should be offered to consumers, some preparation will be required at the outset.

### 5.5.5.2 Application of the law in the United Kingdom

The *Consumer Rights Act* applies to contracts and notices between a 'trader' and a 'consumer'. A 'consumer' is defined as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. This definition is wider than definitions previously found in UK and EU law as it includes individuals who enter into contracts for a mixture of business and personal reasons.

A 'trader' is defined as 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'. This definition includes government departments and public sector authorities.

Territorially, the Act extends to England, Wales, Scotland and Northern Ireland. However, some parts of the Act include separate rules for Scotland: for example, it makes reference to the Scots law remedy of 'specific implement', which is used to compel performance.

Certain parts of the Act do not apply to financial services firms as they implement parts of the EU's Consumer Rights Directive which do not apply to these firms. The Act does not make it clear which terms do not apply to financial services firms. However, some provisions relating to the contractual status of information and the delivery and risk in goods that originated in the EU Directive clearly do not apply to financial services firms.

### 5.5.5.3 Supply of services

The provisions regarding the supply of services consolidate various pieces of existing legislation and regulations. The new provisions apply to financial services firms. So to do the various industry-specific regulations that are imposed on businesses, mainly by the Financial Conduct Authority (FCA); which apply as a result of industry-specific EU legislation. It is intended that if stricter duties or requirements are already in place, these will take precedence over applicable provisions outlined in the Act.



## 5.6 Comparative issues in policy and practice

### 5.6.1 United States

A long running consumer protection issue in the United States is the extent to which the law and the courts permit restrictions on consumers' rights to take collective action. The debate concerns class actions and fee shifting by lawyers.<sup>712</sup> Although filing a lawsuit is an option for combating fraud, when the economic harm is small, expensive litigation is not always a viable option. Class action lawsuits allow victimised consumers who are likely to receive relatively low amounts of damages to file a lawsuit collectively.

There is a growing trend for standard form consumer contracts to include an arbitration clause in which the consumer waives their right to bring a class action. Bringing a class action lawsuit for common law fraud is difficult because US courts require a high degree of commonality among all the plaintiffs' claims. If, however, there is such commonality, class actions can be a useful tool for consumers to assert their rights.

Attorney fee shifting renders legal action a possibility for consumers who have suffered low amounts of damages. In the American legal system, each party customarily pays its own legal expenses. However, in many federal and state consumer protection causes of action, and in most class actions, a prevailing party may be entitled to reasonable attorney fees and litigation costs to be paid by the defendant, in addition to any applicable damages. In most circumstances, unsuccessful plaintiffs are not responsible for the attorney fees and costs of the prevailing defendant. Such provisions have the effect of both increasing the incentives to bring such claims and minimising the cost of a successful lawsuit.

#### 5.6.1.1 *Consumer associations and related groups*

Consumer associations and other non-profit entities play an important role in consumer protection. They play a critical role in investigating, publicising, lobbying, litigating, and researching consumer issues. US consumer groups or associations lack the statutory right to bring super-complaints or collective action suits as is the case in several European countries. They do, however, have the power to bring complaints to government agencies, and bring actions in their own name. Unlike in the EU and most European countries, an agency complaint in the US is normally informal and does not require formal agency action (or judicial review) if the government agency chooses not to pursue the matter.

Nevertheless, many of the developments described above are the result of one or more private actors bringing to the governments, or the publics, attention conduct that harms consumers either physically or economically. Much like governmental action in this area, there are numerous different private groups focused on different aspects of the consumer protection field as outlined above. A small sample of such private sector entities follows.

#### 5.6.1.2 *Consumer Federation of America, Consumers Union*

The Consumer Federation of America has four main functions. Specifically, the Federation:

- (1) advocates for consumers to state and federal legislative and regulatory bodies;
- (2) researches consumer behaviour and concerns through polling and surveys;

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712 See [www.law.duke.edu/grouplit/papers/classactionalexander.pdf](http://www.law.duke.edu/grouplit/papers/classactionalexander.pdf).

- (3) attempts to provide education about consumer concerns by disseminating press releases, reports, and other material to the media, government representatives, and consumers; and
- (4) Supports a variety of local consumer-related organisations.

The Consumers Union was founded in 1936 and is a non-profit, nonpartisan organisation that educates consumers about a wide variety of products. The Union's mission is to work for a fair, just and safe marketplace for all consumers. It the Consumers Union publishes the magazine, *Consumer Reports*, as well as two newsletters, *Consumer Reports on Health* and *Consumer Reports Money Adviser*. *Consumer Reports* provides product reviews of cars, computers, appliances, extended warranties, and even sporting equipment so that consumers may have reliable third-party information before making a purchase. The Consumers Union also supports initiatives for health care access, food safety and consumer choice in media.

### 5.6.1.3 Summary of US administration and enforcement

Focusing on the formal rights and remedies of consumers provides only a partial picture of the state of consumer protection in the United States. Because of the emphasis on the formal nature of legal consumer rights, much depends on access to the legal system.

There is no constitutional or statutory right to legal representation in consumer protection matters, or civil litigation in general. Consumers without practical access to the courts may still benefit if one of the many government agencies discussed above take action on their behalf. Consumer associations also help fill the gap, as do legal aid bureaus and other forms of legal clinics. The availability of private rights of action which provide for different types of damages, attorney's fees, and costs to prevailing plaintiffs further help, but are still an incomplete solution.

Only certain causes of actions are covered, and only those cases with the best chances of prevailing and the best chance of recovering substantial damages will be brought, because of the needs of the private bar to obtain its fees at the end of the litigation. The US has moved from policy setting which could be described as caveat emptor, but still relies heavily on consumer self-protection

## 5.6.2 Canada

Provincial consumer protection legislation addresses digital purchasing and digital products in a variety of ways. Some provinces have incorporated e-commerce laws and regulations into existing legislation on distance sales, other provinces have created separate sections within legislation to deal specifically with e-commerce.

In 2001 the Consumer Measures Committee (CMC) working group on e-commerce created the Internet Sales Contract Harmonization Template (ISCHT) in an effort to encourage consistent legislation across the country. All or part of the template has been incorporated in the legislation of most provinces. The template includes guidelines for information disclosure requirements, contract formation, cancelation and recovery.

Under the *Canada Consumer Product Safety Act* Health Canada federal inspectors have the authority to conduct investigations into product safety. Where products do not comply with the Act, Health Canada may issue a recall and order the manufacturer, advertiser, importer or seller of the product to take corrective measures. If a business fails to comply with an order Health Canada may issue an Administrative Monetary Penalty and seek to have criminal charges laid against the business.

### **5.6.2.1 Enforcement mechanisms**

Enforcement of more general consumer complaints is often undertaken by provincial consumer protection branches. For example, provincial inspectors in British Columbia have the authority to investigate complaints as well as to issue compliance orders, freeze bank accounts and initiate civil actions where the circumstances warrant. The Director may also initiate civil actions, issue monetary administrative penalties, and has prosecutorial powers.

Some specific laws affecting consumer interests, such as building codes, are administered and enforced by municipalities through power delegated to them by the provinces. In most cases enforcement of bylaws relating to consumer interests takes place through municipal business licensing.

### **5.6.2.2 Chargebacks**

Section 11 of the ISCHT outlines procedures relating to credit card chargebacks. The section requires a credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges where a consumer has cancelled a contract under and the supplier has not refunded all of the consideration within 15 days. This section has been adopted in part or full by six provinces.

### **5.6.2.3 Innovative measures**

- Canada's Anti-Spam Legislation (CASL) came into force in 2014. This legislation requires business to have consent, include prescribed information, and have an unsubscribe mechanism when sending commercial electronic messages.
- Under the 2010 Canada Consumer Product Safety Act the federal government created expanded powers of inspection, information monitoring and enforcement of consumer product safety standards.
- The Canadian Radio-television and Telecommunications Commission recently developed a Wireless Code. The Wireless Code is a mandatory code of conduct for providers of retail mobile wireless voice and data services.
- The Canadian Radio-television and Telecommunications Commission has also developed a Television Service Provider Code (announced today) requiring television providers to provide consumers with accessible information on billing and services. The code will come into force in September of 2017 and be enforced through licensing.

## **5.6.3 New Zealand**

### **5.6.3.1 Changes to rights and obligations**

- Auctions — new rules apply to certain types of auctions (excluding online auctions like Trade Me) Buying and selling online — traders who sell online must make it clear they are traders, meaning purchases have rights under the Consumer Guarantees Act Contracting out of the Fair Trading Act — businesses cannot contract out of their obligations to consumers
- Door-to-door and telemarketing sales — consumers have extra protection when approached by uninvited sales people at their home or workplace, or by telephone
- Extended warranties — traders must now disclose consumer's rights under the Consumer Guarantees Act and a comparison of those rights with the benefits of the extended warranty being offered

- Substantiation — it is an offence for traders to make a claim they can't back up
- Unsolicited goods and services — it is illegal for a business to demand payment for goods or services that haven't been requested by the recipient Investigation and enforcement
- Increased fines — penalties for misleading and deceptive conduct, false representations, unfair practices and issues around product safety have increased from \$60,000 to \$200,000 for individuals and from \$200,000 to \$600,000 for businesses
- Management banning orders — in certain circumstances the Commerce Commission can ban an individual from being a director or involved in the management of a company
- Product Safety Monitoring and Enforcement Powers — new powers when conducting inspections Laws prohibiting unfair contract terms
- Compulsory interview powers — The Commerce Commission now has the ability to require oral evidence from people during some Fair Trading Act investigations. Previously the Commission could only request interviews and individuals could refuse to be interviewed or to answer certain questions. The interviewee must answer questions put by the Commerce Commission, but any responses cannot be used against the interviewee in criminal proceedings, other than in some limited, specified circumstances. The compulsory interview power can be used for investigations that started before the provision came into effect
- Enforceable undertakings — are a form of out-of-court negotiated settlement. Where the Commerce Commission believes there has been a breach of the Act the Commission may accept enforceable undertakings. They may include agreements by a person or business to stop doing something, make compensation payments, publish corrective advertising or pay costs to the Commission. If the party does not keep to their agreement the Commission may apply to the Court to enforce the agreement.

Changes to the *Fair Trading Act* in 2013 include significantly increased penalties, the introduction of infringement offences and the ability for courts to impose banning orders. The new penalties came into effect in 2015.

Important changes include:

- Fines for misleading and deceptive conduct have been increased by at least 300%. Individuals now face fines of up to \$200,000 per offence. Companies face fines of up to \$600,000 per offence
- Participants in pyramid schemes now face fines of up to \$60,000. In addition, a Court can also strip offenders of the equivalent revenue or 'commercial gain' earned from the offending. Breaches of Part 2 of the Act (consumer information) or Part 4A (consumer transactions and auctions) can result in a fine for an individual of \$10,000 and \$30,000 for a body corporate
- The Commerce Commission can issue infringement notices with fines of up to \$2000 for offences for: failing to comply with a suspension of supply notice issued under section 33D; being involved in the contravention of section 28 (consumer information standards); failing to comply with section 28B(1) or (2) (disclosure of trader status on Internet); being involved in the contravention of:
  - s 36C (layby disclosure requirements);
  - s 36D (further layby disclosure requirements);
  - s 36L (uninvited direct sale disclosure requirements); and
  - s 36T (extended warranty disclosure requirements).

### 5.6.3.2 *Other remedies*

There are other remedies available under the Fair Trading Amendment Act 2013 that are the same as before the Act's amendment include corrective advertising orders. A court may require a trader to publish corrective advertising to disclose information to the public generally, or to an affected section of the public, and to publish corrective statements.

A Court can now also impose a management banning order that prohibits an individual from being involved in the management of a company. A management banning order can be taken against an individual who:

- has, on at least two separate occasions within a 10 year period, committed a criminal offence under the Act, or
- is, or was at the time of committing the offence, a director of, or concerned in the management of, an incorporated or unincorporated body that has, on at least two separate occasions within a 10-year period, committed a criminal offence under the Act, or
- has been prohibited by an overseas jurisdiction, in connection with the contravention of any law relating to unfair trading, from carrying on certain activities.

A person who breaches a management banning order made against him or her commits an offence that is punishable by fine of up to \$60,000.

## 5.6.4 Singapore

### 5.6.4.1 *Trust Marks to build confidence in the online market*

As noted in the commentary on Singapore under the heading of Institutional Structures, the government has been active in establishing an environment conducive to growth of e-commerce. A further step in that direction was taken through the government sponsored development of e-commerce trust marks which form a significant part of consumer policy in Singapore. Part of a project known as 'e-Power', the Trust Marks are intended to encourage the private sector to position Singapore as an e-commerce hub. Together with relevant government agencies, Info-communications Development Authority of Singapore (IDA) identified a four-pronged approach to build trust and confidence in e-commerce:

- Establishing a secure environment;
- Establishing confidence in e-business;
- Building user confidence;
- Raising user awareness.

To ensure the proposed approach addresses the concerns of the industry, IDA issued a consultation document on 26 September 2000 to obtain feedback from the industry and the public. Much of the feedback indicated that trust marks would instil greater user confidence in e-commerce transactions. It was also recognised that a coordinated and multi-faceted approach must be taken to achieve widespread usage of trust marks.

The National Trust Council (NTC) was formed with the vision to build public confidence in e-transactions. The NTC, formed on 28 February 2001, is an industry-led committee with government support to ensure that relevant concerns from industry are addressed.

The Council implemented the first nationwide Trustmark Programme, TrustSG, whereby appropriate organisations, such as trade associations, chambers of commerce and businesses will be accredited as Authorised Code Owners (ACO). Upon accreditation, the ACO will be granted a license to use the TrustSg seal, and they can thereafter award the TrustSg seal to merchants who adhere to their stringent codes of practice. The TrustSg seal awarded by the ACOs identifies online merchants as e-commerce enterprises which adhere to good e-business practices. Together with the TrustSg seal, the accredited merchants will also receive the consumer or industry-specific trust mark from the ACOs.

#### **5.6.4.2 Content Regulation**

Singapore has a three-pronged approach to Internet content regulation. Firstly, a light-touch class license scheme applies, which provides minimum standards to safeguard values and promote healthy growth. Secondly, it encourages industry to self-regulate. Thirdly, an active public education programme has been introduced to promote parental supervision over children's access to the Internet. The class license scheme, administered by the Media Development Authority of Singapore, which oversees an automatic licensing scheme that requires Internet Service Providers and content providers to comply with an Internet Code of Practice.

#### **5.6.4.3 Lemon Law**

Consumer protection in Singapore is distinctive because of its overt approach to consumer warranties. Under the law, a consumer is entitled to reject goods and obtain a refund if they are not of satisfactory quality of a purchased good at the time of delivery. The legislation, which took effect in September 2012, provides more options for both consumers and retailers by providing the additional remedies of repair, replacement, and reduction in price for the purchase of goods. The law also applies to hire purchase agreements. Goods include second-hand goods, discounted goods and perishable goods. It does not apply to contracts of hire (such as rental goods), the supply of services or the sale of real property (i.e. land, buildings and fixtures).

#### **The key elements of the Lemon Law**

##### **Rules for repair or replacement of goods**

The retailer may offer to repair or replace a defective good, and must do so within a reasonable period and with minimal inconvenience to the consumer. In some cases, repair and replacement are not possible or reasonable. The consumer may instead keep the defective good and ask for a reduction in price (estimated to be the difference between the value of the product in its contracted condition and the value of the product in the faulty condition). Alternatively, a consumer may request to return the product for a refund. The refund amount may be reduced to take into account the use that the consumer has had of the goods. If the item has never worked, a full refund should be made.

##### **Rules on burden of proof**

The legislation provides clearer rules on the burden of proof. If a defect is found within six months of delivery, it is assumed that the defect existed at the time of delivery, unless the retailer can prove otherwise or if such a presumption is incompatible with the nature of the goods (e.g. perishable goods would not be expected to last longer than their normal shelf life). If the defect is found after six months of delivery, it is for the consumer to prove that the defect existed at the time of delivery.

Consumers can use the remedies of repair and replacement that the law provides. However, a consumer must give the retailer a reasonable time to comply with the requested remedy (e.g. replacement or repair) before seeking an alternative remedy (such as refund or reduction of price).

The legislation does not replace the existing protection available, such as guarantees/warranties, retailers' own return policies, and existing remedies under other legislation (such as the Sale of Goods Act) or the common law.

Consumers are not entitled to a remedy if they damaged the item, misused it and caused the fault, or tried to repair it themselves or had someone else try to repair it, which damaged the item. The remedies are also not available if the consumer knew about the fault before they bought the goods, or if they simply changed their mind and no longer want the item.

## 5.6.5 United Kingdom

### 5.6.5.1 *Changes to remedies and unfair terms regulation*

Under the *Consumer Rights Act 2015*,<sup>713</sup> consumers have statutory remedies of 'repeat performance' and price reduction if a service does not conform to the contract. The remedy available is dependent on the level of non-compliance, for example:

- if a trader breaches its duty to provide services with 'reasonable skill and care', or does not comply with information that they have provided to the consumer about the service, the consumer is entitled to repeat performance or a price reduction for the services;
- if the service is not performed within a reasonable time, or the trader does not comply with the information that it has provided to the consumer which does not relate to the service, then the consumer is entitled to a price reduction for the services.

Although the consumer has a statutory right to these particular remedies in the above circumstances, this does not exclude them from seeking other remedies such as damages or specific performance provided that they do not recover twice for the same loss. The inclusion of specific statutory remedies where none previously existed improves the consumer's position and provides clarity about their rights.

### 5.6.5.2 *Changes to the contractual status of voluntary statements*

Spoken or written voluntary statements, made by the trader, about the trader or the trader's service can now be deemed to be binding contractual terms. This can be the case where the statement is taken into account by the consumer when:

- deciding to enter into the contract;
- making any decision about the service after entering into the contract.

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713 A concise summary of the legislation can be found at [www.legislation.gov.uk/ukpga/2015/15/notes/division/2](http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2). The *Consumer Rights Act 2015* sets out a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. In addition, the Act introduces easier routes for consumers and small and medium sized enterprises ('SMEs') to challenge anti-competitive behaviour through the Competition Appeal Tribunal ('CAT'). The Act clarifies the maximum penalties that the regulator of premium rate services can impose on non-compliant and rogue operators. It also consolidates enforcers' powers as listed in Schedule 5 to investigate potential breaches of consumer law and clarifies that certain enforcers (Trading Standards) can operate across local authority boundaries. It will also give the civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law. Additionally, it changes the way in which judges are able to sit as chairs in the CAT; and imposes a duty on letting agents to publish their fees and other information. Further, the Act expands the list of higher education providers which are required to join the higher education complaints handling scheme, and includes certain requirements relating to resale of tickets for recreational, sporting and cultural events.



Previously, if a consumer was presented with misleading information, this information would not be deemed part of the contract. This meant that the only remedy available to the consumer would be to raise an action of misrepresentation. As any misleading statements made by the trader can now become contractual terms, a consumer will now be entitled to raise a breach of contract claim. This is significant because claims for breach of contract are generally easier to prove, and because damages will be awarded based on what the consumer's position would have been had the contract been performed.

#### **5.6.5.3 Unfair terms**

The test for 'unfair terms' in the *Consumer Rights Act 2015* is the same as under the 1977 *Unfair Contract Terms Act*. It provides that a term is 'unfair' if 'contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

The most significant change in the Act relates to 'relevant terms'; which are terms specifying the main subject matter of the contract or setting the price. These terms are not subject to the 'fairness' test provided that they are both:

- transparent: in plain and intelligible language and, if in writing, legible;
- prominent: brought to the consumer's attention in such a way that the average customer — who is well informed, observant and circumspect — would be aware of the term.

#### **5.6.5.4 Individually negotiated terms**

The Act provides that a term can be deemed to be unfair even if it has been individually negotiated with the consumer. This goes further than both the pre-existing law and the EU's Consumer Rights Directive. However, it is unlikely to have a major impact given that very few consumer contracts are actually individually negotiated, as consumers rarely have the bargaining power to negotiate their contract terms individually with traders.

#### **5.6.5.5 Additions to the 'grey list'**

The 'grey list' is an indicative and non-exhaustive list of terms in consumer contracts that may be regarded as being unfair. The list gives an indication of the types of terms which are likely to be considered unfair without any justification being provided. However, a term can be fair even if it is included on the grey list, and can be unfair even if it is not.

The *Consumer Rights Act* adds an additional three terms to the grey list. These are terms which have the object or effect of:

- allowing the trader to decide the characteristics of the subject matter after the consumer is bound;
- allowing disproportionate charges or requiring the consumer to pay for services which have not been supplied when the consumer ends the contract;
- allowing the trader discretion over the price after the consumer is bound.

#### **5.6.5.6 Inclusion of ‘notices’**

An innovative extension to the law in relation to fairness concerns the contents of notices given to consumers by traders. Consumer notices were not previously expressly covered in legislation but they are specifically covered in the Act, which brings them within the fairness regime. The Act treats consumer notices in much the same way as contract terms. Businesses will therefore have to be conscious of the content which is included in notices and ensure that this complies with the fairness test.

A consumer notice is broadly defined as a notice that relates to rights or obligations between the trader and the consumer or restricts the trader’s liability. The definition includes announcements and other communications even where these are made orally.

#### **5.6.5.7 New duty to consider fairness**

A court is now under an obligation to consider contractual terms for fairness, even if neither party to the proceedings raises fairness as an issue. This is already the position of the Court of Justice of the European Union (CJEU). This change will lead to contract terms coming under increasing scrutiny by the courts and terms may be held to be unfair even when the consumer has not complained of unfairness.

#### **5.6.5.8 Digital content**

The *Consumer Rights Act* is the first piece of legislation to regulate the supply of digital content as such. Generally, the supply of digital content is treated in much the same way as the supply of goods in that it must be of satisfactory quality, fit for purpose, and conform to the description provided by the trader.

The supply of digital content will be regulated when:

- it is supplied for a price; or
- it is supplied free with goods and services which the consumer has paid for, and would not be generally available to consumers otherwise.
- The provisions do not apply merely because the trader supplies a service by which digital content reaches the consumer.

## **5.7 Revised United Nations Guidelines for Consumer Protection**

In November 2015, the UN General Assembly passed a resolution adopting a revised set of United Nations Guidelines on Consumer Protection (UNGCP).<sup>714</sup> The resolution which recognises the rapid growth of e-commerce, privacy and digital consumption as essential measures for consumer policy comes 30 years after their initial implementation and 16 years after the addition of a chapter on sustainable consumption.

It is the first comprehensive revision of the UNGCP since 1985 and specifically recognises access to basic goods and services, and the protection of vulnerable and disadvantaged consumers as legitimate needs for consumers.

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714 2015 version not yet published this reference to previous version  
[www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf).

The revision follows a three-year process in which UN Member Countries and civil society organisations have been working on the strengthening and updating of the UNCPG.

The revision of the UN Guidelines was led by the UN Conference on Trade and Development (UNCTAD). In announcing the passage of the revised guidelines, Dr Mukhisa Kituyi, Director General of UNCTAD said:

Today's adoption by the United Nations General Assembly of the revised Guidelines for Consumer Protection is a milestone in the protection and promotion of consumer rights worldwide. I congratulate Governments and the civil society organisations that have joined these efforts. More globalised consumers require strengthened international cooperation, and UNCTAD, with this renewed mandate, stands ready to support developing countries and their consumers in seeking a more sustainable and inclusive world.

## 5.8 2030 UN Agenda for Sustainable Development

Following the successful conclusion of the negotiations on the post — 2015 development agenda, the General Assembly of the United Nations agreed on a plan of action to achieve global sustainable development, which has relevance to moving towards sustainable consumption of consumer goods.

The UN recently announced the Sustainable Development Goals and targets which sets out 17 sustainable development goals and 169 targets. They are designed to stimulate action over the next fifteen years in areas of critical importance for humanity and the planet.<sup>715</sup>

The Plan of Implementation of the World Summit on Sustainable Development can be found at [www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf).

## 5.9 Digital purchasing and digital products

The increased purchasing of goods and services online is presenting new enforcement and administrative challenges. A significant problem arises regarding cross-border enforcement. In this context, the paper reviews the newly introduced EU Regulation on Online Dispute Resolution. This section:

- (a) reviews the range of measures being undertaken by the European Commission and other nominated jurisdictions regarding e-commerce and digital purchasing;
- (b) reviews mechanisms for consumer disclosure and redress;
- (c) considers specifically implementation of the 2015 EU Regulation on Online Dispute Resolution;
- (d) surveys educational work undertaken by ECC-Net.

Perhaps the greatest distinction between the institutional structures relating to the administration and enforcement of consumer laws between United States and Canada on one hand and European member states on the other is the approach to alternative dispute resolution.

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715 See <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

### 5.9.1 Obstacles to the Digital Single Market (2015)

In September 2015, the European Commission published the results of extensive consumer surveys to identify the main cross-border obstacles to the completion of the Digital single market and map means of overcoming them.<sup>716</sup> The report entitled ‘Identifying the main cross border obstacles of the Digital Single Market and where they matter most’.<sup>717</sup>

The rationale for the studies was that in view of the rapid grow of E-commerce in the EU and the Commission’s plans to complete a connected Digital Single Market (DSM) for Europe, it was imperative to identify the existing barriers to the proper functioning of the DSM and to cross-border e-commerce in particular.

Both surveys covered three broad market categories: tangible goods and offline services ordered online (e.g. clothing, travel services), online services (e.g. social networks, communications services) and digital content (e.g. e-books, films and TV series). The Core survey was conducted online in all EU28 Members States, including Norway and Iceland, using consumer panels in all 30 countries. The Clickstream survey was conducted in Belgium and Poland with online respondents who reported their intention to make an online purchase during a 2-3-week period. Respondents allowed their online activity to be tracked by a special add-on designed to record online browsing activity (websites, time spent etc.). The raw clickstream data collected was supplemented by consumer insights obtained via weekly diary surveys which collected additional data on respondents’ actual online purchases.

Combining insights from clickstream data with online survey data provided a richer preliminary overview of the drivers and impediments to domestic and cross-border e-commerce. A dedicated chapter ‘Consumers in the Digital Single Market’ of the surveys’ results is featured at the 2015 Consumer Conditions Scoreboard.

### 5.9.2 Key findings of the surveys

- The proportion of online consumers who purchased tangible goods and offline services domestically ranged from 61-75% across 12 types of markets (54-73% accessed 8 different types of digital content), with cross border purchases within the EU accounting for 14-22% (12-17% for access to digital content) of online consumers. A significant proportion of respondents who accessed digital content (22-35%) did not know the origin of their online seller/provider
- At EU28 level, 95% of all online survey respondents purchased tangible goods and offline services at least once in the last 12 months. The most commonly purchased goods were clothing, shoes and accessories (76%).
- Online shoppers make cross-border purchases without always realising it — 40% of those making their latest online purchase from another EU country assumed the purchase to be from a domestic seller.
- Cross border online activity is more popular in some smaller EU countries with language and cultural links to larger markets. Young age and higher international exposure (knowledge of foreign languages and travelling abroad) are positively correlated with making online cross-border purchases.

716 Recent study on obstacles to the Digital Single Market (2015): [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm) Civic Consulting study on cross-border ADR (2011): [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/imco/dv/adr\\_study\\_/adr\\_study\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf).

717 See [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstACLes\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstACLes_dsm/index_en.htm).

### 5.9.3 Types of purchases and online spending<sup>718</sup>

- The total market value of the B2C segment of the DSM Market is estimated at ~ €231 billion. Tangible goods and offline services are estimated to represent 92% of this total value, with digital content and paid online services accounting for only 6% and 2% respectively. The intra-EU cross-border component represents around 14% of the total value (and cross-border purchases from outside the EU around 6%).
- The average online consumer who purchased tangible goods and offline services in the last year reported spending €760. Much lower figures for online services (€94/year) and digital content (€107/year) were reported amongst those who made such purchases (different base sizes). The difference between domestic and cross-border spending was less pronounced for digital content products than with tangible goods/offline services.
- EU13 consumers spend relatively more (than EU15) on online purchases from other EU countries.
- Online consumers spent on average €100 on their latest online purchase which tended to be a tangible good/offline service (93%). The most commonly purchased product was clothing, shoes and accessories (21%), followed by electronics and computer hardware (13%).

### 5.9.4 Consumer attitudes and behaviour regarding online purchases

- The average time online shoppers spent in total on their most recent online purchase was 3.1 hours.
- Visiting online market places, e.g. Amazon, eBay (42%), visiting seller or service provider websites (41%) and searching via a general search engine (38%) were the three most preferred means of researching an online purchase.
- The choice for a specific seller is mostly determined by price (45%) and previous experience (44%). 84% of online shoppers used a website for their latest online purchase, with 13% purchasing via an app and 3% via an Appstore.
- Respondents from EU13 countries (47% vs 12% for EU15) are much more likely to pay cash on delivery. The most commonly used devices for making online purchases were a laptop (80%), followed by a desktop PC (73%) and a smartphone (59%).
- Concerning knowledge of consumer rights when buying online, only 9% of EU28 online consumers identified correctly the latest stage when they have the right to withdraw from a purchase of a digital content and get their money back.

### 5.9.5 Perceived and actual barriers with online (cross-border) purchases

- Data protection and payment security (30% of online consumers were concerned that personal data may be misused and 25% that payment card details may be stolen) and consumer rights (fear of receiving wrong or damaged products — 26%, difficulty in replacing or repairing a faulty product — 22% and difficulty in returning a product they did not like and get reimbursement — 22%) are key concerns in domestic e-commerce.

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718 Recent study on obstacles to the Digital Single Market (2015): [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm). Civic Consulting study on cross-border ADR (2011): [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/imco/dv/adr\\_study\\_/adr\\_study\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf).

- Concerns about cross-border e-commerce are linked primarily to delivery (delivery costs — 27%, high return shipping costs — 24% and long delivery times — 23%), followed by redress (the difficulty of solving problems if something goes wrong — 23%) and consumer rights (getting a faulty product replaced or repaired — 20%, returning a product consumers did not like and getting reimbursed — 20%)
- 31% of all EU28 online shoppers experienced at least one problem when making or trying to make an online purchase in the past year; problems were more prevalent in the EU13. Cross-border purchases, both within the EU and from outside the EU, accounted for a disproportionately high amount of problems.
- Consumers continue to face problems with cross-border online transactions linked to their country of residence (e.g. refusal to sell, redirection to the foreign seller's website in the country of the consumer, being charged more by foreign seller, not being able to access the service etc.).
- When crossing an EU border, consumers are frequently prevented from accessing streaming content which they accessed for free or via a payment in their home country. Out of those respondents who streamed films and TV series or live events (e.g. sports matches) in the last 12 months and tried to access these streaming services of their own country while being abroad, 43% and 51% respectively reported not being able to access the content when abroad.
- 16% of respondents did not take any action to resolve their most recently experienced problem. Approximately two thirds of respondents who took action were satisfied with the way their complaint was handled. The highest satisfaction was with out-of-court dispute resolution entities (68%), whilst the lowest with court (54%).

## 5.10 Other interesting developments

The terms of reference for this project called for identification and a description of 'other interesting developments'. This section contains a number of recent consumer protection innovations and proposals.<sup>719</sup>

The first provides a review of the first 10 years of operation of the EEC-Net.

- Included in this section is a summary of the recent ECC-Net Europe wide study on Chargeback and maps the growing use of chargeback as a means for resolution of consumer.
- The section also includes a brief history of the development of chargeback and limitations in this remedy in circumstances where traders refused to make a refund where it is warranted.
- Also discussed is a proposal for the development of a Pan-European Trust Mark.
- The paper includes a review the project on Best Practices of Consumer Redress being undertaken by Dr Ying Yu from the University of Oxford for UNCTAD.
- Recent information on the launch of the European Union Online Disputes Resolution platform is provided.
- An outline of the innovative European e-Justice Portal.

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719 This recent study on legal and commercial guarantees may also be of relevance:[http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/guarantees/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/guarantees/index_en.htm).

- Consumer Conditions Scoreboard which tracks the situation and behaviour of consumers across member states of the EU and over time. Such a tool enables policymakers to plan interventions where necessary or discontinue interventions which are no longer necessary.
- To understand the progress and achievements of consumer and market integration policies, the EU commissions from time to time impact studies. This report presents the results of a study commissioned by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) and carried out by Civic Consulting between July and September 2014. The study concerns achievements in the area of the single market and consumer protection.

## 5.11 The European Consumer Centres Network (ECC-Net)

ECC-Net was established in 2005 to respond to the multiple challenges to consumer welfare caused by burgeoning cross border commerce. It was created by the European Commission together with national governments to provide an accessible network of European Consumer Centres (ECCs) for consumers across the Commission Member Countries. According to an ECC-Net report published on the 10th anniversary of the network, between 2005 and 2014, 650,000 consumers have used the services of the network. In recent years the activities of ECC-Net have extended beyond the boundaries of the EU and now include Norway and Iceland.<sup>720</sup>

A key aim for the Network (which has no formal consumer law enforcement role) is to undertake comparative research, engage in information and education projects and help consumers understand and use their consumer rights.

### 5.11.1 Operational information

The ECC-Net is a network of 30 offices in the EU Member States, Norway and Iceland, providing free-of-charge help and advice to consumers on their cross-border purchases, whether online or on the spot within these 30 countries.

The ECC-Net report states that it is in direct contact with some 100,000 consumers every year and handles about 40,000 consumer complaints. Well over 3 million more access information on member websites, and many others through their apps, from ECC staff on stands at events, or from media reports highlighting warnings or cases published by the Centres.

The ECC-Net is staffed by legal experts who provide personalised advice and assistance. They help consumers make complaints against traders who sell faulty goods and services, or otherwise fail to live up to the standards required by EU legislation, e.g. on travellers' rights.

The ECC-Net advises on handling disputes between a consumer and a trader located in two different countries with the aim of achieving amicable outcomes. More than two third of the cases are solved in this way.

ECC-Net staff do not have legal powers to settle disputes or offer court representation, but can advise on how to go down these routes if it proves necessary. The ECC-Net Centres strive to deliver services to a common high standard, based on uniform guidance on customer service, good practice, data protection, quality, branding, case-handling and more.

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720 CPEC evaluation of the ECC-Net (2011): [http://ec.europa.eu/consumers/ecc/docs/final\\_report\\_cpec\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/final_report_cpec_en.pdf). CPEC evaluation of the CPC Regulation (2012): [http://ec.europa.eu/consumers/enforcement/docs/cpc\\_regulation\\_inception\\_report\\_revised290212\\_en.pdf](http://ec.europa.eu/consumers/enforcement/docs/cpc_regulation_inception_report_revised290212_en.pdf).



The ECC-Net Centres work closely with each other and with enforcement bodies to resolve complaints, and to uphold the uniform consumer rights that EU residents enjoy wherever they are in the EU.

The ECC-Net Centres pool their expertise to research consumer rights topics and consumers' day-to-day experiences with EU legislation in action, and in this way to identify gaps and emerging issues.

### 5.11.2 Role and activities

European consumer policy and measures to implement it are an amalgam of Member State measures plus EU Directives which are transposed into local law and enforced and implemented by member state institutions. This makes ECC-Net an unusual body as an EU body operating in Member States alongside existing government and non-government agencies. In recent years, consumer policy has received high priority on the Commission's agenda and this is true of the current Juncker Commission's priority list. A key role adopted by ECC-Net is to assist in achieving a strong and coherent consumer policy to reap the full benefits of the Digital Single Market — for both consumers and businesses.

With rapid growth in online shopping, the ECC-Nets' role in resolving cross-border disputes has grown and is expected to continue at an accelerating rate. Their role in advising consumers, and ensuring that their rights are upheld are seen as important to building trust in the digital economy.

### 5.11.3 Future challenges

According to the 10th Anniversary Report of ECC-Net:

The numerous achievements of the last 10 years and the proposals for improvements already in the pipeline and described in this report are not the end of the story. There are still obstacles to consumers making the most of the opportunities of the EU's Single Market, and above all of the Digital Single Market. Consumers could save EUR 11.7 billion per year if they could choose from the fullest possible range of goods and services from across the EU's 28 countries when they shop online.<sup>721</sup>

Nearly three-quarters of all European Internet users feel they are being asked for too much personal data online, and of all attempts to place a cross-border order, in just over half the seller does not serve the country of the consumer.

In addition, copyright rules are preventing Europeans from watching content from their own country when they travel, or from watching content from other countries from their own homes. Yet, images, films, music and games are the most popular online activities and digital spending on entertainment and media has double digit growth rates.

The Commission's Digital Single Market Strategy is about overcoming the obstacles. Future legislation will improve data protection and give individuals control over their personal data, and further harmonise online rights while tackling unfair practices and discrimination. Other obstacles will be addressed by improving technical standards and telecoms infrastructure, and citizens' digital skills.

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721 See [www.google.co.id/search?q=ecc-net+10th+anniversary&oq=ecc-net+10th+anniversary&aqs=chrome.69i57.11395j0j9&sourceid=chrome&ie=UTF-8](http://www.google.co.id/search?q=ecc-net+10th+anniversary&oq=ecc-net+10th+anniversary&aqs=chrome.69i57.11395j0j9&sourceid=chrome&ie=UTF-8).

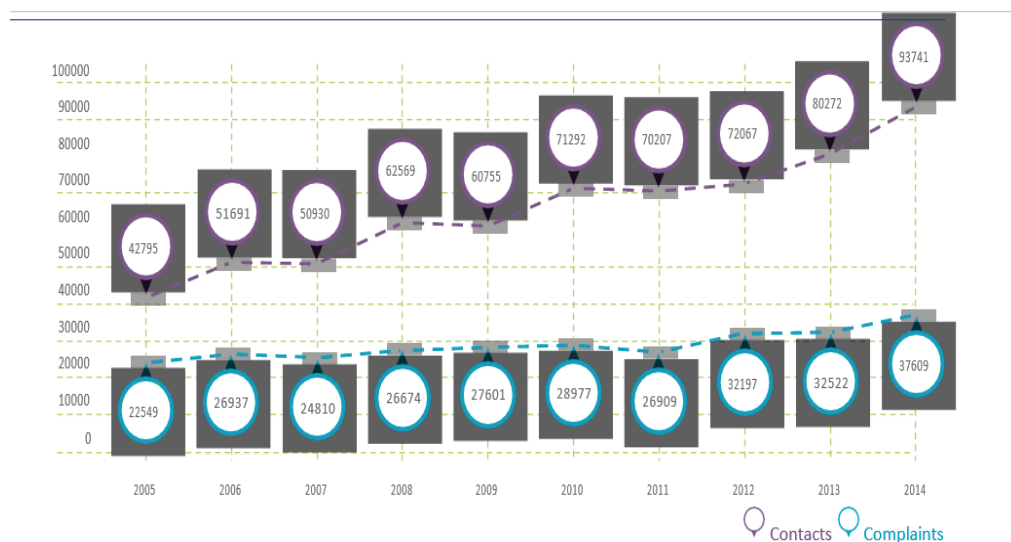
Over the 10 years from 2005-2014, the ECCs had over 650,000 direct contacts with consumers, and the number has grown steadily. In 2014 alone, the figure was well over 90,000, twice as many as in 2005. These are consumers who have made direct contact with an ECC. More often than not, all they need is an explanation about their rights.

If a consumer has a specific complaint about a trader, the Centres' legal experts provide specific advice. Where complaints remain unresolved, the ECC may get more directly involved, either by contacting the trader or asking the ECC in the country where the trader is established to do so. ECCs have helped out in this way nearly 300,000 times in the last 10 years. In 2014, they dealt with more than 37,000 complaints.

#### 5.11.4 Contacts and complaints

In addition to direct contacts, ECCs often reach out to consumers at events with publications and information, and increasingly consumers find what they need on the ECCs' detailed websites. In 2014, they received more than three million visits altogether. This number is expected to grow considerably as a consequence of active online marketing efforts being undertaken by the ECCs.

The move to online is also increasingly reflected in the way complaints are lodged, that is, via online forms (20% of all complaints in 2014).



#### 5.11.5 Research activity

Recent consumer research commissioned by ECC-Net undertaken through cross-border mystery shopping entitled 'State of the e-Union' uncovered a series of obstacles to cross-border shopping, starting with it being surprisingly difficult to find a website willing to sell to someone in another country. Many websites were not providing basic information about how to contact them, on where they were based, but for the websites agreeing to deliver cross border, there were as few issues as for a purely domestic transaction.

So while the ECCs concluded that consumers can shop on line with confidence, they stressed the need to check some basics before embarking on a purchase.

The ECC-Net has supported the development of online consumer fairness with tips for consumers on how to know which traders to trust and how to avoid scams. In the European Consumer Centres E-commerce report 2014, for example, consumers can test their knowledge of their rights using a checklist, and there is also a checklist where traders can make sure they are on the right side of the law.

#### **5.11.5.1 Case studies of ECC-Net activities**

Car rental to find a fair deal

- ECCs have dealt with more than 8,000 cases involving car rental over the last 10 years. Moreover, the number of complaints has more than doubled between 2010 and 2014, while the total number of complaints received by ECCs only increased by half.
- This has led ECCs to engage vigorously with the car rental industry, requiring it to become much more transparent about total rental costs and various exceptions to the damage coverage solutions proposed, and to be so right from the booking stage.
- ECCs have issued leaflets and detailed advice warning consumers about most common unfair commercial practices, such as overcharging for damage or fuel, or high administrative costs for dealing with road traffic fines on behalf of consumers.
- The evidence of malpractices accumulated by ECCs led the European Commission to propose to national enforcement authorities that they act jointly at EU level to require the car rental industry to comply with EU consumer legislation

ECCs provide guidance

- ECCs proactively issue guidance on passenger rights, regularly issuing information when airlines go out of business or passenger travel companies are on strike; they frequently take stands at travel fairs and have issued a number of special reports to support consumers and/or policy makers:
- 2010: Classification of Hotel Establishments within the EU provided practical guidance on understanding Europe's complex hotel classification systems. It described each ECC country's system in detail.
- ECC-Net Air Passenger Rights Report 2011 — in the aftermath of the 'Volcanic Ash Crisis': the problems passengers experienced in asserting their air passenger rights when many flights were re-routed, delayed or cancelled. These included a lack of information on their rights, a lack of assistance and not getting their money back when they arranged their own alternative transport.
- 2012: Alternative Dispute Resolution in the Air Passenger Rights Sector, highlighting how diverse the ADR landscape is for air travellers and underlining that it had not reached its full potential.
- 2013: Ski Resorts in Europe 2012/2013: the price range and infrastructure of ski, cross-country and indoor resorts all over Europe.

#### **ADR research**

- There has been a steady increase over the last decade in the number of EU-wide rapid and inexpensive cross-border dispute resolution options designed for cases which often involve small amounts of money. Consumers hesitate to engage in court litigation in such cases. Surveys have shown that one third of the EU's consumers have not gone to court after a

problem they encountered because the sums involved were too small or the procedure for going to court would be too expensive or too complicated. The same number felt similarly about alternative dispute resolution, or simply did not know this possibility exists.

- Pointing consumers in the direction of the right alternative dispute resolution mechanism which offers a fast and cheap solution is therefore an important part of the work of ECCs, once their best efforts to broker an amicable solution have not been successful.

### 5.11.6 Chargeback as a consumer protection tool

Recent developments in the protection of consumers in E-commerce include the right of payment card holders to ‘chargeback’ for payment for unsatisfactory goods or services. This US development is being taken up in the EU.

This section contains a summary of the recent ECC-Net Europe wide study on Chargeback and maps the growing use of chargeback as a means for resolution of consumer disputes in circumstances where traders refused to make a refund where it is warranted.

The section also includes a brief history of the development of chargeback and limitations in this remedy. This paper summarises a 2014 ECC-Net research report entitled “Chargeback in the EU/EEA:

#### **A solution to get your money back when a trader does not respect your consumer rights’**

The report considers that consumers in Europe have benefited greatly from recent improvements to national and European Union consumer legislation the reliability of e-commerce (and distance selling in general) has greatly improved in Europe in the last ten years. According to the last Consumer Scoreboard published by the European Commission<sup>1</sup>, the proportion of consumers engaging in e-commerce has grown significantly in recent years (from 20 % in 2004 to 45 % in 2012).

Despite the improvements in consumer protection, there remain a number of challenges to protect consumer rights when a trader refuses to provide a refund when warranted or has gone bankrupt, or when a card transaction was not authorised.

The 2012 ECC-Net European Small Claims Procedure Report highlighted a lack of awareness of the procedure among judges. It pointed out that translation costs can undermine the principle of obtaining redress. Serving the judgement, and above all, getting it enforced, are other obstacles to this procedure working as well as it might. This work was taken into account by the Commission in its 2014 proposal on a revised Procedure.

In many EU Member States, consumers having used a payment card may be entitled to be reimbursed by a chargeback procedure through the card issuing bank. The ECC-Net report was commissioned to inform European consumers about this procedure and how it is implemented in the various EU countries, Norway and Iceland.

#### **5.11.6.1 Definition of chargeback**

According to the ECC-Net originally chargeback was a system developed by payment card issuers to protect consumers in case of fraudulent authorisation of their card (e.g. following a theft or card cloning). However, chargeback may also apply to reverse authorised payments made by a consumer by card in duly justified cases of breaches of consumer rights or in case of the report bankruptcy of the recipient.

In a report from the year 2000 from the EU- Commission, chargeback is defined as the following:

Chargeback is the technical term used by international card schemes to name the refunding process for a transaction carried out by card following the violation of a rule. This process takes place between 2 members of the card scheme, the issuer of the card and the acquirer (the merchant's bank). The final customers of these 2 schemes members, the cardholder for the issuer and the merchant for the acquirer, do not have any direct relationship in the chargeback process.

#### **5.11.6.2 Objective and methodology of the report**

The objective of the report is to clarify the legal bases for chargeback procedures that can be used by consumers in the EU, Norway and Iceland (namely Directive 2007/64/EC on payment services in the internal market (PSD) and Directive 2008/48/EC on credit agreements for consumers (CCD), how they are implemented on the ground, the existence of out-of-court dispute resolution procedures and the additional possibilities that card issuers may give to their clients. The report has been completed by the European Consumer Centres Network. The ECC-Net main objective is to inform and assist European citizens in all their practical cross-border consumer issues. There is established a European Consumer Centre in the 28 EU countries.

#### **5.11.6.3 Legal rights to chargeback**

EC rules for payment services and credit<sup>722</sup> form the main legal bases to request a charge back in the following cases:

- the transaction is not authorised by the consumer/cardholder;
- the trader does not respect the consumers' rights;
- in the case of bankruptcy.

According to the ECCs participating in the project, these Directives have been transposed into the domestic legislation in all the EU member States, Norway and Iceland.

#### **5.11.6.4 Non-authorised use of cards**

In the EU, Norway and Iceland, when the consumer's card has been charged without authorisation from the consumer, e.g. if the card has been stolen, the payment service provider (e.g. a credit institution) shall refund the amount to the cardholder (Article 60 of the PSD).

However, Article 61 states that the cardholder/consumer shall bear the losses relating to any unauthorised payment transactions, up to a maximum of EUR 150, resulting from the use of a lost or stolen payment instrument, or if the cardholder has failed to keep the personalised security features safe, from the misappropriation of a payment instrument. In this respect, Article 56 of the PSD requires the cardholder to take all reasonable steps to keep personalised security features safe, incl. the PIN number.

#### **5.11.6.5 Cases relating to use of the PIN code**

If the PIN number has been used, the consumer may therefore be obliged to cover the losses him/herself in case of proven gross negligence or fraudulent behaviour (in the latter case, there could also be a criminal prosecution).

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722 EU Payment Agreements Directive 2007/64/EC on payment services in the internal market (PSD) and Directive 2008/48/EC on credit agreements for consumers (CCD).

The consumer has to notify the loss, theft or inappropriate use of the card to the card issuer as soon as he/she becomes aware. The payment service provider shall ensure that appropriate means are available at all times to enable the consumer to make a notification.<sup>723</sup>

#### **5.11.6.6 Pre-authorised payment transactions**

When it comes to pre-authorised payment transactions, sometimes the consumers complain about unexpected supplementary charges in the final payment, e.g. in relation to car rental. However, the consumers might have signed an agreement where the supplementary charges are included, for example that they have accepted to be charged for any damages to the car. According to PSD, Article 62, the cardholder may still be entitled to a refund of a payment transaction initiated by or through a payee and which has already been executed. The conditions are that the authorisation did not specify the exact amount, and this amount exceeded the amount the cardholder could reasonably have expected, taking into account his previous spending pattern, the conditions in his framework contract and relevant circumstances of the case.

#### **5.11.6.7 Goods or services not delivered or not in conformity with the contract**

If the consumer has purchased goods on the internet and does not receive the goods, he or she should first complain to the trader. If the trader does not deliver the goods or does not reimburse the payment made, the consumer can turn to the payment service provider.

In terms of chargeback, EU-law only covers credit card chargeback. Purchases where debit cards are used are not covered by EU-law but can be covered by national law such as in Denmark and Portugal. Debit card holders may nevertheless under certain circumstances enjoy protection of the card companies operating rules.<sup>724</sup>

The CCD leaves ample space for consideration to member states. The legal situation therefore varies among participating countries. Some countries allow consumers to exercise the same rights against the creditor (credit card issuer) as well as against the seller of goods or service provider. Certain conditions may have to be met in order for the consumer to be allowed to make a claim against credit card issuer. Such conditions may for instance include that the consumer makes an unsuccessful claim with the seller or service provider first.

#### **5.11.6.8 Bankruptcy**

When the trader goes bankrupt the trader will often not have the economic recourses to reimburse the consumer, and chargeback could be the only way for the consumer to obtain a refund.

### **5.11.7 Other chargeback possibilities**

Many of the respondents have stated that banks do provide chargeback based on the card companies operating rules, however, many of them also state that the bank doesn't inform consumers about this possibility and that consumers must insist to get the bank handling their requests.

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723 The consumer could be liable for all losses where there has been a failure to fulfil one or more of his obligations under Article 56 with intent or gross negligence, cf. Article 61 number 2.

724 Under Article 15 of *Directive 2008/48/EC* on credit agreements for consumers (CCD) where the goods or services covered by a linked credit agreement are not supplied, or are supplied only partially, or are not in conformity with the contract for the supply thereof, the consumer has the right to pursue remedies against the creditor. Member States shall determine to what extent and under what conditions those remedies shall be exercisable.

#### **5.11.7.1 Out-of-court dispute resolution procedures**

According to CCD (Article 24) and PSD (Article 83), the Member States shall ensure that out-of-court dispute resolution procedures/ Out-of-court redress procedures for the settlement of disputes are in place. If the consumer does not obtain a chargeback/refund, he should therefore be able to make use of out- of-court procedures.

There are out-of-court dispute resolution entities which can handle chargeback in all of the countries which participated to the survey. Not all of the countries have a specific ADR body for these cases. Romania has authorised mediators who have the competence to deal with payment service problems. In most countries, however, there is a specialised ADR, a general ADR covering all types of consumer disputes or different ADRs depending on the dispute category.

However, there might be certain conditions which must be fulfilled before the consumer can make use of the out-of-court dispute resolution procedures. In Romania mediation can only take place if both parties agree and conclude a contract. According to the Italian Law on Banking, it is mandatory for banks and financial intermediaries to participate in systems for the out-of-court resolution of disputes with customers. In Spain it is not mandatory to be a member of the ADR system. If the bank is not a member of the ADR system, the ADR is not able to handle the case. This is also the current situation in Norway, but very few companies do not participate in the ADR system, and participation will soon become mandatory.

The Financial Services Ombudsman of Ireland has handled 26 chargeback complaints from 2011 to 2013. Although these cases are confidential, they informed the ECC that the consumer complaint was upheld on 3 occasions, partially upheld on 1 occasion and not upheld in 22 instances.

#### **5.11.7.2 Cross-border disputes**

According to CCD (Article 24) Member States shall encourage the out-of-court entities to cooperate in order to also resolve cross- border disputes concerning credit agreements made between two parties residing in two different countries. According to PSD (Article 83), Member States shall also make sure that those concerned bodies cooperate actively in resolving cross-border disputes.

### **5.12 Proposal for a Pan-European Trust Mark**

This study presents the results of research conducted by Civic Consulting between March and June 2012. Its purpose is to examine the possibilities and opportunities of creating a pan-European Trustmark for e-commerce.

#### **5.12.1 Consumer trust in e-commerce**

Trust has been identified as an important factor in consumers' purchasing decisions and lack of trust has been repeatedly highlighted as one of the key impediments to e-commerce.

In a 2011 consumer market study consumers were concerned, among other things, about returning products, wrong or damaged products being delivered, problems with replacement or repair of a faulty product, products not being delivered at all, personal data being misused and payment card details being stolen. When considering shopping online in another EU country, only 12% of consumers stated that they did not have any concerns.



There are different possibilities for trust-building related to online shopping. Differences between smaller traders and those that have built their own widely known brands have to be noted. Big brands capitalise on their recognition and reputation and have less or no need to support their trustworthiness with additional cues such as Trustmarks.

### 5.12.2 Trustmarks for e-commerce

Trustmarks for e-commerce are intended to be displayed on a website as electronic labels, and the purpose is to signal adherence to a set of rules (a code of conduct) to increase consumers' confidence in the online trader.

One of the defining characteristics of a Trustmark is the involvement of a third party which provides an assurance to consumers regarding the online trader. Third-party certification is at the heart of a credible Trustmark. It entails a set of requirements and the assessment of an online trader's compliance with these requirements.

There is significant diversity among existing Trustmarks in the EU. Some points of distinction are: a formal accreditation of a Trustmark, the nature of organisations which administer Trustmarks, their sources of funding, involvement of stakeholders, geographical and substantive scope of coverage, monitoring traders' compliance and sanctioning non-compliance.

Research findings concerning the actual effects of Trustmarks are scarce and not consistent. Several studies have found that effects of Trustmarks are mostly identifiable with people who generally consider online shopping as risky. A previous study has indicated awareness among consumers and businesses as one of critical success factors, thus a particular challenge is the low consumer awareness of Trustmarks.

There has been some progress in recent years with the consolidation and expansion of some of the existing Trustmarks, as can be inferred from the increasing numbers of certified traders using Trustmarks included in this study.

### 5.12.3 Advantages and disadvantages of an EU Trustmark for e-commerce

Potential advantages and disadvantages of an EU Trustmark are conditional upon its design.

The main possible advantages identified through research for this report are: support for SMEs; enhanced cross-border coordination of Trustmarks and exchange of best practices; overcoming language barriers; increased legal certainty; increased credibility of accredited Trustmarks; broad recognition among consumers in different MS; increased trust in online shopping; enhanced cross-border trade.

Possible disadvantages could be in the administrative burden for businesses; potential confusion among consumers; interference with existing Trustmarks; difficulties with ensuring consistency across the EU; the cost of administering the Trustmark; gaps in coverage in case of an accreditation scheme for existing Trustmarks; and discrediting compliant traders and other Trustmarks in case of lacking enforcement.

#### 5.12.4 26.4 Legal framework for e-commerce Trustmarks<sup>725</sup>

There is no particular piece of EU legislation addressing only Trustmarks, but some legislation touches upon several relevant aspects: The primary legislation regulating the use of Trustmarks is that concerning commercial communication directed at consumers, including in particular the 2005 Unfair Commercial Practices Directive (UCPD). In addition, a number of other consumer protection directives are relevant in the context of drafting the requirements for the use of a Trustmark.

Generally, there is a comprehensive set of rules in EU legislation protecting consumers in e-commerce and any code of conduct underlying a possible EU Trustmark for consumer protection in e-commerce must be understood in the context of already existing EU legislation.

A Trustmark is likely to be perceived as a guarantee by a consumer. This entails that Trustmark must guarantee something that is not already prescribed by law. This principle is introduced into EU law in the UCPD Annex I, item 10, which states that it is a misleading commercial practice to present rights given to consumers in law as a distinctive feature of the trader's offer. However, it should be considered that for example certification, monitoring, enforcement, etc. by a third party intrinsically entails benefits for the consumer and is beyond what is merely prescribed by law.

The Trustmark may establish expectations, such as guarantees with consumers that the issuer may be liable for, to the extent consumers are disappointed with regard to their reasonable expectations. The Trustmark operator is not likely to be liable for all breaches by a trader — unless the Trustmark includes a guarantee that specifically covers this. Whether the Trustmark operator may be liable will depend on the interpretation of national law, including whether the Trustmark operator has failed to carry out controls of the trader in accordance with the reasonable expectations that consumers may form from the Trustmark and its marketing.

#### 5.12.5 An EU Trustmark for e-commerce<sup>726</sup>

There exists a broad spectrum of policy options on how to tackle and foster a pan European Trustmark for e-commerce. Five main strands of policy scenarios are: no intervention; encouraging self-regulation; co-regulation; establishing EU accreditation of Trustmark providers; establishing a pan-EU Trustmark for ecommerce.

If EU policy makers decide to introduce a Trustmark at EU level, this would basically be akin to establishing a privately operated Trustmark in the sense that the desired scope can be freely chosen. It is advisable for an EU Trustmark to provide for procedures for both initial and recurrent assessment as well as sanctions in case a violation of the code of conduct is identified.

A consumer may reasonably infer that a Trustmark is something earned (i.e. voluntary) rather than something required, as well as that the bearer of a Trustmark performs above the requirements of legislation. The existence of certification requirements and procedures could be taken to exceed compliance with legislation and offer consumers an extra aspect of protection.

If policy makers decided to introduce a mandatory EU Trustmark for e-commerce, it would be necessary to introduce EU legislation imposing the requirement on traders and to examine potential conflicts with existing EU legal framework. From a political and economic perspective, a mandatory EU Trustmark might come with a number of additional challenges.

725 See [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/e\\_commerce/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/e_commerce/index_en.htm). Civic Consulting study on a Pan-European trust market for e-commerce (2012): <http://bookshop.europa.eu/en/a-pan-european-trustmark-for-e-commerce-pbBA3212266/>.

726 See [www.ecommerce-europe.eu/about](http://www.ecommerce-europe.eu/about).

In general terms, the choice of legal instrument follows the scale of the extent to which Member States are to carry out the intentions of the Trustmark scheme. If an EU institution should award the Trustmark, a regulation would be appropriate. If the approach was for Member States to set up national institutions and ensure accreditation at national level, a directive would be appropriate.

When laying out the principles for certification of the EU Trustmark, it would be important to note that compliance with some requirements is much easier to control than with others. In contrast to compliance with information requirements that are generally easy to assess, the adherence to requirements concerning commercial practices and the processing of personal data seems rather difficult.

Challenges inherent in the setting-up of an EU accreditation scheme or an EU Trustmark would include legal implications, proper enforcement and sustainable funding, among others. Awareness among consumers is considered a key factor for success. Analysis for this study has revealed that it typically takes a minimum of five years from the inception of a Trustmark until considerable dissemination.

Differences in substantive law that continue to exist must be considered. They can be overcome by adopting a code of conduct that satisfies requirements in all Member States (highest common denominator). Another approach to deal with differences in national consumer protection law is to fully harmonise the areas in question.

### **5.13 Best practices for all consumer redress**

Review the project on Best Practices of Consumer Redress being undertaken by Dr Ying Yu from the University of Oxford for UNCTAD.

During 2015, The United Nations Conference on Trade and Development (UNCTAD) commissioned Dr Ying Yu, a Research Fellow at Wolfson College, University of Oxford to undertake a study on the best measures currently available for obtaining consumer redress.

In February 2016, Dr Yu, noted that research work was well underway and that the project has made considerable progress. Dr Yu observed however that no preliminary material resulting from the study is yet available and that this will be released at a seminar to be held in September 2016 in the UK.

This section of the report provides an overview of the underlying purpose for the study and describes objectives and project plan.

The functions of Consumer Protection Law include regulating business misconduct and providing redress for consumers when something goes wrong. However, providing redress for consumers is somewhat overlooked by both international and national consumer policy and law. The context to this research project is that consumers are not protected by the existence of a law, but resolution of problems in the simplest way.

A case study comes from the Consumers International member survey carried out in 2012/13. CI members were asked: 'Have any of the following enforcement actions been used in your country by the authorities in response to consumer protection violations?' Among the measures listed, out of 62 countries responding, fines were imposed in 92% of cases, but compensation orders were granted in only 53%. The European Commission has estimated aggregate losses to consumers and to the economy: 'In 2010 one in five European consumers experienced problems when buying

goods and services in the single market’<sup>2</sup> and ‘The cost of unresolved consumer disputes is estimated at 0.4% of the EU’s GDP. This includes the money lost by European consumers due to problems when shopping from other EU countries, which is estimated between €500 million and €1 billion.’

In the USA, it seems that Class Action is a very powerful tool to obtain redress for consumers by very punitive compensation. In contrast, US-style Class Action has been described as a ‘toxic cocktail’ by the EC which has placed emphasis rather on Consumer ADR (Alternative Dispute Resolution). Two new pieces of legislation, on Consumer ADR and Consumer ODR (Online Dispute resolution) have recently been adopted by EU on 21 May. Meanwhile, China is undertaking a reform of Consumer Protection Law with consumer redress as one of the most significant topics. Chinese legislators and consumer specialists anchor their hopes on introducing Class Action into Chinese consumer law to move away from the dilemmas caused by the present deficient consumer redress mechanisms. But whether Class Action will function well in every legal system is not known. The EU has already indicated its view that Class Action does not provide an effective way to redress consumer grievances in most cases, and that ADR does provide a more promising approach.

In the area of financial services, the Financial Ombudsman Service in UK turns out to have been a very successful Consumer ADR mechanism, judging from the volume of adjudications. In E-commerce area, payment medium seems very effective to ensure the consumer redress. ‘Chargeback’ for payment card holders originated from the USA as a legal right for consumers and was applied in the EU as a contractual right for consumers, and now functions as a very effective tool for consumer redress both in USA and EU. In China, Escrow is widely accepted by E-commerce consumers to guarantee their transactions, but is only a *lex mercatoria* not backed by legislation. It functions much better than statutory routes for consumer redress in China, but has been well developed in jurisdictions with a common law system for more than 500 years.

One area of increasing importance is cross-border redress as the volume of cross-border transactions rises following the development of e-commerce, migration and tourism. Difficulties in resolving potential cross-border problems have been found to inhibit cross-border transactions for some years now. Networks such as the ECC-Net have been set up to coordinate responses by consumer protection agencies in different countries and to advise consumers affected. Such networks have limited judicial powers but merit investigation nonetheless.

### 5.13.1 Objectives

The objective of this research is to compare and analyse some of the best practices of effective consumer redress in different jurisdictions, and draw a clear picture of the circumstances under which the individual practices function well. This will help developing countries to reach an objective approach to the orientation of their consumer redress policy. Moreover, the research will come up with suggestions regarding the possibility and the practical approach to building up an ADR (ODR) Platform of Cross-Border Consumer Redress globally.

#### 5.13.1.1 Project plan

- Phase 1: Investigate and select a few relevant and effective consumer redress tools as best practice models. Examples to be drawn from US, EC and China
- Phase 2: Survey and analyse how and why the models function well.
- Phase 3: Compare the results and try to synthesise an approach for a cross-border consumer redress platform.
- Phase 4: Draft a report containing the conclusions and recommendations.

### 5.13.2 The European e-Justice Portal<sup>727</sup>

The European e-Justice Portal benefits citizens, businesses, lawyers and judges with cross-border legal questions and boosts mutual understanding of different legal systems by contributing to the creation of a single European area of justice.

An Italian consumer travelling in Germany needs a lawyer. A French entrepreneur wants to search the Hungarian land register. An Estonian judge has a question about the Spanish court system. Answers to all these questions — in 23 official EU languages — can be found on the European e-Justice Portal.

With more than 12,000 pages of content, the portal provides a wealth of information and links on laws and practices in all EU countries. The resources range from information on legal aid, judicial training, European small claims and videoconferencing to links to legal databases, online insolvency and land registers. It also includes user-friendly forms for various judicial proceedings, such as the European order for payment.

The portal is implemented by the Commission in very close cooperation with the EU countries.

#### 5.13.2.1 The portal

Though not specifically designed as a means of access to justice for consumers, nonetheless, consumers will be able to get answers on how the 28 EU countries' legal systems function. More than 10 million citizens face judicial procedures involving different EU countries every year. The Portal helps them find relevant information when dealing with events such as divorce, death, litigation, succession or even moving house. They can find a legal practitioner in another country and learn how to avoid costly court cases through mediation, where to bring a lawsuit, which country's law applies to their case and whether they are eligible for legal aid.

Consumers, traders, government official's lawyers, notaries and judges can get access to legal databases, contact colleagues through judicial networks and find information on European judicial training. They can also find practical information on arranging multi-country videoconferences.

Businesses can search in interconnected insolvency registers, find links to land registers, find information on cross-border proceedings and the laws that apply.

#### 5.13.2.2 Next steps

The first release of the Portal in 2010 was just the first step in developing a multilingual online access point that makes life easier for citizens, businesses and practitioners in Europe. New information, tools and functions are being continuously added. For instance, the Portal will soon contain the following tools:

- ECLI Search Engine which will allow legal practitioners to easily find case law as the adoption of the ECLI standard gradually gains ground;
- businesses will also benefit from lower costs thanks to streamlined online legal procedures once business registers and land registers are accessible via the Portal;
- soon citizens will have the possibility to apply for cross-border European orders for payment and Small claims electronically and receive communication from the courts online.

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727 See [http://ec.europa.eu/justice/criminal/european-e-justice/portal/index\\_en.htm](http://ec.europa.eu/justice/criminal/european-e-justice/portal/index_en.htm).

### 5.13.3 Consumer Conditions Scoreboard

#### **Consumer Conditions Scoreboard: Consumer at home in the Single Market — 2015 edition**<sup>728</sup>

The Consumer Conditions Scoreboard tracks the situation and behaviour of consumers across Member States and over time. The 2015 edition brings together the latest consumer data based on an improved methodology with a fully revised conceptual framework for measuring consumer conditions. This edition has also a special focus on consumer conditions in the Digital Single Market.

#### **5.13.3.1 Highlights**

The Digital Single Market is emerging, but still faces constraints. The frequency of e-commerce transactions has been increasing. Half of Europeans bought goods or services over the internet in 2014. Yet, consumers continue to feel considerably more confident buying online from their own country (61%) than from other EU countries (38%).

While domestic online purchases are conducted considerably more frequently, accounting for 70% of most recent online purchases, the Scoreboard results suggests that the incidence of cross-border online purchases within the EU is considerably under-reported, since consumers are not always aware that they are buying from another EU country.

Cross-border purchases cause a disproportionately high amount of problems. In particular, concerns about delivery and product conformity seem to be confirmed by actual consumer experience. Moreover, consumers continue to face discrimination linked to the country of residence in cross-border transactions. These issues also account for the majority of complaints about cross-border e-commerce received by European Consumer Centres.

Further awareness raising on consumer rights is needed. Consumers' and retailers' awareness of some key consumer rights guaranteed by EU legislation remains limited. In the EU as a whole, only 9% of consumers were able to answer all three knowledge questions correctly, with the lowest levels of knowledge among young people.

Investing in enforcement does pay off. There is a high correlation between retailers' perceptions of enforcement efforts on the one hand and their assessment of compliance and of the prevalence of unfair commercial practices on the other hand, which suggests that monitoring efforts do translate into better outcomes for consumers.

Further development of Alternative Dispute Resolution (ADR) promises more effective consumer redress. Still a quarter of all consumers encountering problems do not complain in case of a problem. The majority of consumers who did not take any action in case of a problem were discouraged by the perceived difficulties (e.g. low likelihood of success, lack of information, length of procedure). Satisfaction with complaint handling is highest amongst those consumers who complained to Alternative Dispute Resolution (ADR) bodies, even though the use and knowledge of these bodies are still relatively low.

### 5.13.4 Contribution of the Internal Market and consumer protection to growth

The Contribution of the Internal Market and Consumer Protection to Growth Report<sup>729</sup> presents the results of a study commissioned by the European Parliament's Committee on Internal Market

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<sup>728</sup> See [http://ec.europa.eu/consumers/consumer\\_evidence/consumer\\_scoreboards/11\\_edition/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/index_en.htm).



and Consumer Protection (IMCO) and carried out by Civic Consulting between July and September 2014. The study concerns achievements in the area of the single market and consumer protection and related contributions to economic growth in the European Union, with a specific focus on the flagship initiatives of the Europe 2020 strategy.

The benefits of a single market for growth can be broadly subsumed into four separate categories: economies of scale; stronger competition; lower transaction costs; and better allocation of resources. In addition to benefits for growth, single market integration also induces other benefits, such as increased consumer choice and better quality, and innovative goods and services. Nonetheless, the single market may induce additional costs, including administrative costs, adjustment or transition costs, a widening in regional and distributional disparities, and an increase in environmental degradation.

Many studies have tried to quantify the overall impact of single market integration on economic growth. One of the most-often quoted ex-ante studies is the Cecchini report, commissioned in 1988 by the European Commission<sup>730</sup>. It estimated an impact of 4.25-6.5% increase in EU GDP for the EU-12. More recent studies assessing the effects of the elimination of intra-EU goods and services barriers have subsequently made even higher estimates, indicating that EU GDP could increase by 14% as early as 2020, depending on the assumptions made.

However, ex-post analyses have since measured the observed impact of the single market on growth and have generally estimated the real gains to be smaller. Several factors may explain the differences noted between ex-ante and ex-post estimates identified, including the absence of a clear control group or counterfactual; difficulty in predicting the dramatic transformative effects of market liberalisation; difficulty in accounting for dynamic effects of integration related to gradual changes in productivity and efficiency; and other potential biases leading to an overestimation of the predicted gains of single market integration.

Improving consumer protection and empowerment can also have positive effects on growth, through several channels including: consumers' increased confidence and trust; consumers' better decision-making and assertion of rights; lower consumer financial detriment from problems; and as a signal of high standards for third countries trading with the EU. However, while there is a significant body of literature confirming these benefits, little empirical evidence has been identified to support them. Nonetheless, a major EU-wide survey in 2010 concluded that total ex-post-consumer detriment — based on financial losses reported from problems experienced — was equivalent to 0.4% of EU GDP.

A larger number of achievements have been made relevant to the single market and consumer protection within the scope of 'A Digital Agenda for Europe', relating to electronic communications, e-commerce/online services and data protection. Major legislation proposed includes the Connected Continent Regulation and Data Protection Reform Package. Evidence suggests that completing the digital single market has significant potential to contribute to growth, with one estimate indicating a possible 2-4% increase in EU GDP by 2020.

Relevant aspects of 'Innovation Union' relate to breaking down barriers to innovation, improving cross-border access to finance for SMEs and encouraging cross-border mobility of researchers, which may each have beneficial effects on growth. Key achievements include the establishment of a unitary patent system, expected to reduce costs of applying for a patent valid EU-wide by 80%.

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729 Available at: [https://polcms.secure.europarl.europa.eu/cmsdata/upload/d6de1e78-a18e-4c7a-a643-b5c61a15113e/att\\_20141027ATT91951-5076263125688467492.pdf](https://polcms.secure.europarl.europa.eu/cmsdata/upload/d6de1e78-a18e-4c7a-a643-b5c61a15113e/att_20141027ATT91951-5076263125688467492.pdf).

730 See [www.europarl.europa.eu/RegData/etudes/STUD/2014/510981/EPRS\\_STU\(2014\)510981\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510981/EPRS_STU(2014)510981_REV1_EN.pdf).



Learning and employment mobility of young people constitute the key areas of relevance for the single market under 'Youth on the Move', for which available evidence indicates a potential positive impact on the EU economy. A major achievement is the regulation establishing Erasmus+, which combines the EU's education, training, youth and sport schemes into one integrated programme.

Significant achievements have been made within the scope of 'Resource-efficient Europe' relevant for the single market and consumer protection and empowerment in the energy and transport sectors. Major legislation adopted in the energy sector includes the Third Energy Package, while for several transport modes fresh single-market initiatives have been proposed, accompanied by a well-developed framework for passenger rights.<sup>731</sup>

Relevant achievements as part of 'An industrial policy for the globalisation era' relate mainly to industrial products, as well as specific areas such as combating late payments, business services, and entrepreneurship. Major legislation proposed includes the Product Safety and Market Surveillance Package. Addressing the remaining barriers to intra-EU trade in goods could be highly beneficial; one estimate shows that full integration of goods markets could result in a 2.2-8.8% increase in EU GDP in the long run.

Labour mobility is the main aspect relevant to the single market in 'An agenda for new skills and jobs'. Major legislation adopted includes the revised Professional Qualifications Directive. Research suggests labour mobility stimulates growth: one study finds the immigration of four million people from eight of the countries acceding to the EU in 2004 could lead to a long-run increase of 0.6% in EU GDP.

Finally, actions under 'European Platform against Poverty and Social Exclusion'<sup>732</sup> relevant to the single market relate primarily to social enterprise, which may also induce growth. A key achievement was the launch of the Social Business Initiative.

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731 Significant growth potential is evident: according to estimates, liberalisation of gas and electricity markets could raise EU GDP by 0.6-0.8% over 2011-2020, while supply- and demand-side effects of air transport liberalisation could, respectively, raise EU GDP by 1.8% and 1.3% over 2005-2025.

732 The European platform against poverty and social exclusion is one of seven flagship initiatives of the Europe 2020 strategy for smart, sustainable and inclusive growth. It is designed to help EU countries reach the headline target of lifting 20 million people out of exclusion. The platform was launched in 2010 and will remain active until 2020.