

An Analysis of the Effects of Globalisation on Consumer Protection.

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Globalisation has accelerated cross-border communication and trade, facilitating an interconnected world. However, the impact of globalisation on consumer protection must be seen in the negative. It has posed significant challenges to the current framework of international consumer legislation, causing governments, intergovernmental organisations, and legal scholars to struggle with providing adequate solutions to the twentieth-century challenges.

This essay will first outline an understanding of globalisation. It will then discuss the challenges posed to the current framework, focusing particularly on digitisation and enforcement. Finally, it will analyse the struggle to provide solutions, before concluding that ultimately, with such significant challenges and no adequate solution, globalisation can be said to have had a negative impact on consumer protection.

Globalisation and Consumer Protection

Globalisation refers to a process of social, political, and economic interconnectedness. In relation to consumer protection, globalisation is recognised as trade liberalisation and the expansion of global markets. Globalisation has accelerated significantly throughout the twentieth-century due to advances in communication technology.¹

Consumers are able to buy goods and services from almost anywhere in the world due to the rise of the internet, facilitating cross-border trade.² Thus, digitisation is considered as an element of globalisation.³ However, the current framework of international consumer legislation has not developed at the same accelerated pace and is characterised as “lagging behind”.⁴ It is argued by Twigg-Flesner and Micklitz that it is not only legal development that has failed to keep up, but also legal scholarship. Whilst it is acknowledged that some efforts have been made to tackle globalisation’s challenges to international consumer protection legislation, it is posited that there is a lack of adequate solutions.

I identify two broad challenges to consumer protection by globalisation, namely digitisation and enforcement.

¹ UN Department of Economic and Social Affairs Statistics Division, “Manual on Statistics of International Trade in Services” (2002), Series 86 <https://unstats.un.org/unsd/publication/Seriesm/Seriesm_86e.pdf>

² Christian Twigg-Flesner and Hans Micklitz, “Think Global – Towards International Consumer Law” (2010), *Journal of Consumer Policy*, 33:201-2072, 201

³ M. Goyens, “Effective Consumer Protection Frameworks in a Global and Digital World” (2019), *Journal of Consumer Policy*, 43:195-207, 195.

⁴ *Ibid*, 202.

The Challenges of Digitisation

Digitisation is one of the most rapid developments of globalisation, characterised as the “fourth industrial revolution”.⁵ Further, market digitisation has facilitated global corporate entities, for example, Amazon’s market reaches 300 jurisdictions on all continents.⁶ The evolution of digital economies prioritises consumers in international trade; as Goyens notes, the ‘hyped’ promotion surrounding global e-commerce encourages consumer participation on the ‘wrong belief’ that they enjoy a solid framework of protection.⁷ However, whilst consumers become central to international trade, pervasive gaps persist that fail to adequately address these new challenges.

First, smart contracts allow consumers to participate in a dynamic environment at the click of a button. Their self-enforcing nature presents issues when consumers habitually sign blindly, ignoring the terms and conditions and unaware of any potentially unfair terms. In addition, in highlighting the multi-layered complexity of digitisation, Goyens notes that consumers lack awareness that contract signing has a cross-border element.⁸ This becomes a concern when a dispute arises and the consumer attempts to enforce the rights they believed to exist.

Second, consumers lack information at the pre-purchase stage of digital transactions, exacerbating inequality of bargaining power. For example, consumers are unaware of who they are contracting with, particularly in an ‘eBay-like’ environment, there is no opportunity to inspect products, and consumers are unaware of the applicable legal regime to their transaction. This is a significant problem; a lack of information may result in a lack of consumer trust in the market, thus affecting cross-border online trade. Consumer law must provide the right regulatory environment but should not “stymie the developments of new technologies and their application in practice”.⁹ Whilst Goyens outlines a number of possible solutions to tackle this issue, they place the burden of information on the consumer.¹⁰ This is an inadequate response, failing to take account of the reasoning that underpins rules requiring the trader to disclose information. As such, the struggle to identify an adequate solution remains.

Third, digitisation places consumers at an increased risk of scams, cybersecurity attacks and data protection breaches. Consumers are enticed into transactions through illegitimate methods. Further, consumers also face such risks indirectly from businesses that profit from selling personal data and through attacks on the storage of such data. In the UK alone 46% of business reported cybersecurity

⁵ M. Durovic, “International Consumer Law: What Is It All About?” (2019), *Journal of Consumer Policy*, 43:125-143, 139.

⁶ N[5], 127.

⁷ N[3], 196.

⁸ *Ibid.*

⁹ *Ibid.*, 129.

¹⁰ *Ibid.*, 204.

breaches or attacks throughout 2019.¹¹ Whilst efforts have been made to form cybersecurity agencies, promoting international co-ordination and co-operation¹², the internet has grown to such an extent that it proves difficult to provide adequate protection through such methods.

The Challenges of Enforcement:

Enforcement is the ‘Achilles heel’¹³ of consumer law, as globalisation poses more and more challenges to its actualisation. First, challenges exist geographically with transactions occurring between traders and consumers located in different jurisdictions with differing legal rules. This in itself is not a new concept; the rules of private international law provide a solution as to which national laws should apply in relation to commercial dealings. However, consumer law usually has a “mandatory law” nature, in which it is not possible to disregard or contract out of the specific rules for consumer protection.¹⁴ This presents significant enforcement issues, making it difficult from the outset to make use of any protection afforded to the consumer.

Second, market globalisation interferes with the effectiveness of consumer policy frameworks leading to “enforcement paralysis”.¹⁵ Goyens explains that the majority of the consumer products offered on domestic markets have not been produced there, and instead result from a “complex and intertwined supply chain”.¹⁶ As such, vulnerabilities are created as domestic law is not necessarily applicable and consumer protection authorities do not have the jurisdiction to enforce. Further, the notion that the manufacturer of the end product is liable to the consumer is not accepted in all jurisdictions, thus making it difficult to identify which framework is applicable.¹⁷ Goyens observes that when enforcement authorities are confronted with such grey areas in relation to supervision powers, they hesitate to act and thus create “enforcement paralysis”.¹⁸ This is largely to the detriment of the consumer in an attempt to avoid litigation with powerful international companies.

Finally, enforcement through national courts is time-consuming and expensive. This acts as a barrier to protection and discourages enforcement of consumer rights. However, even if the consumer proceeded with litigation, they are likely to be at a disadvantage. The consumer must bring a claim in the appropriate court and seek legal representation. As the transaction may not be governed by their

¹¹ UK Department for Digital, Culture, Media & Sport, ‘Cyber Security Breaches Survey 2020’ (Gov.UK, 2020) <<https://www.gov.uk/government/publications/cyber-security-breaches-survey-2020#fn:1>> Accessed 20 November 2020

¹² N[3], 205; N[5], 137

¹³ N[3], 197.

¹⁴ N[2], 203.

¹⁵ N[3], 200.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, 201.

¹⁸ *Ibid.*

national laws, the consumer may find themselves litigating in unfamiliar countries.¹⁹ Whilst there are organisations to offer redress to consumers, they often lack the legal capacity to act in foreign jurisdictions and thus are insufficient.

Solutions Offered in Legal Scholarship

This essay will address two popular solutions to the outlined challenges; first, the creation of an international standard of consumer protection²⁰ and second, international co-operation to secure adequate enforcement.²¹ Ultimately concluding that neither are adequate, and thus globalisation has had a negative impact.

The Creation of an International Standard

An international standard of consumer protection refers to a unified and harmoniously applied international consumer law, with a centralised dispute resolution system.²² Such a standard would enhance consumer transactions to redress the obstacles posed by divergent legal regimes. *Prima facie*, this is not unrealistic; a comparison with international commercial law highlights the level of uniformity that can be achieved. However, it is argued that such regulations are possible because trade agreements are at the forefront of international relations.²³ Consumer protection does not dominate the research agenda in the same way²⁴ and thus is unlikely to inspire the creation of a harmonised regime.

The EU is oft-praised as the most advanced regional system of consumer protection globally. Over a twenty-five-year period, the EU has adopted a series of measures which seek to harmonise national consumer laws. This has been used to minimise the difficulties that mandatory rules present and make cross-border transactions more attractive.²⁵ However, whilst governments, international organisations and scholars *could* embark on creating an EU-like regime for the international sphere, this appears very unlikely. Consumer law is consistently regarded as a matter for individual jurisdictions²⁶; possibly due to differences in values and cultures. As such, unifying consumer protection concepts proves to be a difficult task. This is demonstrated through the negotiations for the Trade in Services Agreement, in which the EU and US disagreed over data privacy versus corporations' desire

¹⁹ *Ibid*, 202.

²⁰ N[5].

²¹ *ibid*

²² *Ibid*.

²³ Hans W. Micklitz and Mateja Durovic, *Internationalization of Consumer Law, A Game Changer* (SpringerBriefs in Political Science 2017), 88.

²⁴ *Ibid*.

²⁵ N[2], 203.

²⁶ *Ibid*, 203.

for new ‘rights’ to move data across the globe.²⁷ The EU has a strong system of rights on privacy and data protection, whereas the US policy favours global corporations.²⁸ Further, such a task would not merely be an exercise of establishing a ‘best’ or ‘common’ set of practices, in which a legal regime could be built on. It would require intensive research and a constant back and forth between jurisdictions on how to adapt to the unique challenges that globalisation has created. This would take considerable time. Thus, as it stands, the solution of an international standard of protection appears impossible.

International Co-Operation to Secure Adequate Enforcement

International co-operation is unattainable for two reasons. First, international organisations can be used as a ‘Trojan Horse’ for large global corporations to push their agenda and create development-preventing implications for consumer protection.²⁹ This is demonstrated by corporate representatives masquerading as ‘development experts’ at a United Nations Conference on Trade and Development (UNCTAD) forum on e-commerce.³⁰ Not only would this have significant consequences for the development of an adequate consumer protection regime, but it would also reduce the development of emerging economies as they struggle to compete in such a market. Further, 9 out of 10 of the top transnational corporations in the world are based in the US³¹, as such, any international cooperation through such organisations would present a significant Western favour.

Second, whilst international organisations dedicated to consumer protection exist, they are limited in their capabilities.³² International co-operation can only go so far; currently only 52% of countries have consumer law, 6% have drafts and 10% have no legislation.³³ Further, Africa has particularly low level of consumer protection.³⁴ Thus, co-operation to secure adequate enforcement is realistically only possible across those jurisdictions that have existing legal regimes. UNCTAD has created a Manual on Consumer Protection³⁵ in order to support emerging economies with their choice of consumer policies, however, in waiting for such a regime to develop, the challenges of globalisation grow and remain unresolved. Further, the International Consumer Protection and Enforcement Network (ICPEN) has been developed to secure a collaborative forum for developing and maintaining regular contact between consumer protection agencies.³⁶ This appears to offer an adequate solution. However,

²⁷ Deborah James, ‘Twelve Reasons to Oppose Rules on Digital Commerce in the WTO’ (HuffPost, 2017) <https://www.huffpost.com/entry/twelve-reasons-to-oppose-rules-on-digital-commerce_b_5915db61e4b0bd90f8e6a48a?guccounter=1> Accessed 20 November 2020.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Alex Gray ‘These are the world’s 10 biggest corporate giants’ (World Economic Forum, 2017) <<https://www.weforum.org/agenda/2017/01/worlds-biggest-corporate-giants/>> Accessed 20 November 2020.

³² N[5].

³³ N[5], 134. The remaining 32% has no available data.

³⁴ *Ibid.*

³⁵ United Nations Conference on Trade and Development, ‘Manual on Consumer Protection’ (UNCTAD, 2017) <https://unctad.org/system/files/official-document/ditccplp2017d1_en.pdf> Accessed 20 November 2020.

³⁶ N[5], 136.

ICPEN's main format is limited to annual meetings and workshops, it lacks transparency, clarity, and is only available in seven languages³⁷. As such, whilst ICPEN is a good start in addressing the challenges of globalisation, it is insufficient as a global initiative.

This essay has highlighted the significant challenges that globalisation has posed to consumer protection, categorised broadly as digitisation and enforcement. Further, this essay has analysed the two popular solutions put forward by legal scholars, concluding that each is inadequate in addressing the challenges presented by globalisation. As such, with such significant challenges and no adequate solution, globalisation can be said to have had a primarily negative impact on consumer protection.

³⁷ *Ibid*, 137.