

Ad Hoc Expert Meeting on Consumer Protection:
The interface between competition and consumer policies

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**Session 4: Emerging Issues in Consumer Protection:
Financial Services**

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A major 'emerging issue in consumer protection' from recent years has been the need to ensure that the abuses within the financial sector which have brought the world economy to its present state should not be allowed to recur. Given the scale of the recent crisis this is a vital issue for the UN. I take this opportunity, therefore, to 'stress test' the UN Guidelines for consumer protection (UNGCP) against the proposals recently made by Consumers International (CI) for Financial Services. For the last two years we have been engaged in detailed work following the progress of the G20 2010 commitment to strengthening consumer protection in financial services. The drafting of 'high level principles' was mandated by the G20 to the OECD and after the publication of those principles in October 2011, we are now participating in the arduous process of developing guidelines for implementing them at national level to the greatest advantage of consumers, both in and beyond the G20 countries. Our starting position in this brief analysis is that the UNGCP could be a useful reinforcement of this process, and so we make some suggestions, tentative at this stage, for possible amendments to the text of the Guidelines with regard to financial services. (For this reason the following paper is best read with the existing UNGCP text to hand).

Our requirements for FS reform, formally submitted to the OECD Task Force charged with the development of the principles, are listed below, and next to each one we draw the appropriate comparison with the UNGCP. In summary, CI proposed the following :

- 1. CI recommendation to G20: *Universal access to basic financial services:***
Governments should seek to encourage innovation in safe, effective, low-cost methods for banking inclusion whilst supporting the development of consumer protection. Stronger consumer protection needs to be developed for remittance services.

The UNGCP make scant direct reference to financial services (FS). We think section H would be appropriate for such reference to be made specifically in the context of access, as with other basic sectors mentioned there. FS are far from being a rich country issue as is demonstrated by the recent development of services in developing countries, including 'branchless banking', remittance services, and the terrible consequences of the current financial crisis which resulted from bad practices in rich countries with negative consequences for developing countries. We suggest the following new paragraph for Section H, which highlights specific sectors:

Proposed new UNGCP text for Section H: *"Financial services. Governments should formulate, maintain or strengthen national policies to improve the supply, and quality*

of financial services moving towards the goal of universal inclusion in service provision, including the development of international remittance services. Due regard should be had for appropriate levels of service for particular contexts, the need for education programmes and the importance of consumer participation in service regulation. Many of the elements of the guidelines set out above apply to this sector with particular force, notably issues of marketing, fair contracts, disclosure and information provision, redress and regulation. Due attention must be paid to depositor protection against systemic collapse”.

- 2. CI recommendation to G20: Better information design and disclosure:** *Financial service providers should be required to take more responsibility for ensuring consumers receive clear, sufficient, reliable, comparable and timely information about financial service products. Key information documents should be obligatory for purposes of comparison, and failure to meet the listed criteria should cause a contract to be voidable.*

Clearly the much quoted ‘legitimate needs’ of consumers listed in Art 3 of the UNGCP cover information under sub-para c). Reference to ‘*informative marketing*’ in Art 15, ‘*false or misleading claims*’ in art 16, information to enable consumers to make informed decisions and accuracy of information in Art 22, ‘*free flow of accurate information*’ in Art 23, are all highly relevant. The Guidelines generally meet our requirements then in this respect, but we suggest an amendment in the next section regarding voidable contracts.

- 3. CI recommendation to G20: Clearer contracts, charges and practices:** *regulators should introduce a requirement of comprehensibility, and remove from the market products that do not meet minimum standards. Financial advice to consumers should be separated from sales-based remuneration. Imposition of unfair contract terms (such as waiving statutory protections) unreasonable charges, and inappropriate sales should cause an agreement to be voidable.*

As with information design and disclosure, the UNGCP are generally adequate. Indeed Art 1 objective 1c) (‘*ethical conduct*’) and 1d) (‘*abusive business practices*’) are highly appropriate. Art 2 (‘*strong CP policy*’) is supportive but the legitimate needs are a little vague in this respect, although not in contradiction. We strongly support the existing art 21 (‘*contractual abuses*’) but suggest an insertion to make it more explicit to the effect that consumers should be protected from: “**the use of unnecessarily long or complex wording in contracts, variations or additions to the terms of use of a product or service to which the consumer does not freely agree**”. We also advocate an addition to Clause 21: “**Service contracts which do not meet legal requirements of fairness and intelligibility should not be enforceable by the service provider.**”

Art 7 (obligations on enterprises ‘*to obey relevant laws and regulations*’) appears at first sight to be highly appropriate. However, Art 7 is a statement of the obvious as it stands. Indeed its language subtly undermines the force of consumer protection law as it implies that conformity to the law is in the realm of grace and favour granted by companies, or indeed by the state when it is the service provider. We suggest that a new wording for Art 7 and other wording be drafted which points out that in addition to conformity to the relevant laws, *which is not negotiable*, enterprises may wish to accept obligations of a kind to promote their social responsibility. They could be guided in this direction by reference to such recent documents as ISO 26000. To that end CI proposes a further addition to Art. 7: “**Enterprises should be encouraged to go beyond simple legal conformity and make positive contributions to**

social responsibility over and above the minimum and in accordance with international guidelines emanating from international standards setting bodies". This is particularly relevant in the context of the development of international standards for FS such as the G20/OECD principles referred to above.

Remuneration structures are not much dealt with in the UNGCP but it is clear that they have been a major source of consumer detriment in the FS sector. We suggest that reference be made to this issue in Art 22 by the simple insertion of: ***"including remuneration structures"*** next to the existing reference to: 'sales practices'. As a means of updating the UNGCP in the light of technological developments, we also suggest an insertion at the end of section IIIB after para. 27: ***"The above protections should be applied equally to products and services obtained through electronic modes, as well as traditional retail transactions"***.

- 4. CI recommendation to G20: Mandatory financial consumer protection bodies:**
Every government should establish national regulators with full authority to investigate, halt and remedy violations of consumer protection law, including, where necessary, the right to define specific practices or products as unfair, deceptive or otherwise illegal. Regulatory bodies should be independent of industry and should ensure that consumer experience and expertise is drawn upon.

The UNGCP are very unspecific regarding institutional arrangements for CP. Arts 1a) and 2 advocate CP as a principle, but the nearest to advocating that there should be agencies charged with its promotion is the reference in Art 6 to 'infrastructure to develop, implement and monitor CP policies'. We argue that this could be used to include regulatory agencies for FS with a specific remit for consumer protection. Art 16 calls on governments to: 'intensify their efforts to prevent practices which are damaging to the economic interests of consumers through ensuring that manufacturers, distributors and others involved in the provision of goods and services adhere to established laws and mandatory standards'. This is welcome and balances the recommendation in art 26 that governments should promote codes of marketing and voluntary agreements. While we have always accepted that there may be a place for self-regulation, depending on the circumstances, it is clear that the spectacular failures in the FS sector calls for more vigorous action to be taken. We therefore suggest that the language of section IIIA on physical safety has much to offer the FS sector despite its very different application hitherto. This is particularly true of Art 14 which refers to product recall. 'Toxic' products require equally strong powers and we would advocate wording to that effect to extend to services in general and FS in particular. There are various options as to where in the existing UNGCP this amendment could be made. Section IIIA, in particular para. 14, could extend 'sideways' to services. Alternatively, Art. 18 which equates goods and services could make explicit reference to product recall.

The UNGCP text as it stands, refers to the 'freedom to form consumer groups' and their participation in decision-making processes as a 'legitimate need' in Art 3. This is a very important recognition for CI members, and we would wish to put more flesh on this very important bone. This involves proper disclosure of codes and standards and to that effect we propose an addition to Art 8: ***"All laws, regulations and non-statutory instruments such as codes and standards which are related to the protection and advancement of the interests of consumers or the public at large should be freely, accessibly and publicly available"***. This may seem to be a statement of the obvious, but obvious or not, it is not always honoured. We make reference to consumer participation in dispute resolution in the relevant section of the UNGCP, but there is no equivalent section regarding consumer participation in regulation. To correct this oversight we propose an amendment to Art. 68

adding: **“and consumer participation in regulation and redress”** to the existing *‘programmes relating to consumer education and information.’* Although this section deals with international cooperation, it calls upon national governments and international agencies to act in this respect. Similarly we suggest a new subclause c) by way of addition to Art 31: **“Involving consumer representatives in the regulation of essential services”**. This goes wider than financial services of course but we take the view that FS are indeed an essential service, hence its proposed inclusion in Section H.

A further reference to an important function of consumer organisations is needed where reference is made to testing, and activity which is applied increasingly by our member organisations to financial services. We therefore suggest an addition to Art. 30: **“Such testing should be carried out by either or both government inspectorates and independent consumer organisations, in an independent manner”**.

- 5. CI recommendation to G20: Effective redress and dispute resolution:** *consumers should have access to adequate individual and collective redress systems, that are expeditious, fair, inexpensive and accessible. To alleviate the immense strains experienced by existing systems, lessons from disputes should also be synthesised into consumer protection further upstream.*

We find the wording of the UNGCP on this issue to be acceptable as far as it goes. What it lacks is recognition of the role that consumer organisations can and do make to the process of dispute resolution. We therefore suggest the addition of the following to Art. 34: **“The expertise of consumer organisations should be brought to bear in resolving consumer complaints through involvement in dispute resolution forums either statutory or non-statutory”**. We recognise that such expertise is not always available and this should not be a brake on the development of dispute resolution mechanisms.

- 6. CI recommendation to G20: Competition in financial services:** *There is a need to reverse the market concentration, which, accelerated by the financial crisis, has contributed to the creation of institutions that are 'too big to fail'. Independent competition enquiries need to be carried out and public interest tests applied to government stakes in the banking sector and their disposal. There is a need to remove barriers that discourage consumers from switching accounts (for example, comparability of charges should be mandatory and portable account numbers should be introduced).*

Our starting point is that competition policy needs to go beyond issues of retail choice and extend to systemic issues, for example, in the case of FS, those raised by recent packages of state aid to the sector as a result of the financial crisis.

There are relatively few explicit references to competition policy in the guidelines but what reference there is, is extremely weighty for it consists of a direct referral to the ‘UNCTAD set’ as well as explicit reference to competition in Art 19 which reads: *“Governments should encourage fair and effective competition in order to provide consumers with the greatest range of choice among products and services at the lowest cost”*.

Other sections make indirect reference to competition policy. For example Art 1d) sets out as an objective: *“to assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers”*. Art 1g) *To encourage the development of market conditions which provide consumers with greater choice at lower prices”* also suggests a competition slant.

It could also be argued that the *'legitimate needs'* make indirect reference to competition when they refer under Art 3b) to *"The promotion and protection of the economic interests of consumers"*. This is, however, so general as to be of limited applicability in particular cases. A rather more specific link, between information and competition, is drawn by Art 3c): *"Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs"*. This has proved to be very important to us in actual negotiations such as those around the recent development of high level principles for consumer protection in financial services, and the OECD guidelines for multinational enterprises. In both cases we encountered significant resistance on the part of industry to mandatory comparability of products. Indeed comparability has had to be imposed by government on several occasions, such as the American 'truth in lending' regulations or the French imposition of price comparability in banking services in 2010. We therefore suggest a simple addition to Art. 22 : ***"and allows for comparability between like products"***.

As already noted, we propose a new Section H sub-section on financial services, incorporating the access and systemic issues referred to above. Following on from the new paragraph under 1 above we suggest:

Proposed new UNGCP text for Section H: *"Allowing competition law to be overridden in the interests of financial stability should be, at most, a short term emergency measure, as it risks the creation of ever larger institutions and may increase the probability of taxpayers and consumers needing to provide support in the future, leading to significant distortions of competition. Governments facing financial sector concentration should instigate independent competition inquiries and apply 'public interest tests' to the disposal of their stakes in the banking sector. This should include specific objectives to make competition stronger. For example, to encourage new entrants, governments and regulators should take steps, such as those pertaining to comparability of products and portability of account numbers to ease switching of accounts for consumers"*.

- 7. CI recommendation to G20: *Measures to promote stability and safety of consumers' deposits and investments: including separation of investment and retail banking divisions, bank 'living wills' with guarantees for protecting consumer deposits, and reform of insolvency procedures so that the rank of creditors is changed to put depositors at the top. Consumers should be assessed for credit-worthiness before loans are extended to them. Ratings agencies should be answerable to prudential supervisors.***

The UNGCP have little to say about systemic stability other than the general exhortations in Arts 1 to 3. We have already suggested wording referring to systemic stability in our proposals for a new section H: ***"Due attention must be paid to depositor protection against systemic collapse."***

Regarding assessment for credit-worthiness, the lack of which was a major contributor to the financial crisis, existing Art 21 makes reference to *'unconscionable conditions of credit by sellers'*. This was doubtless drafted with a view to ruling out usurious credit, which of course we support. We feel that consumers also need to accept the need for assessment of their own ability to repay loans, thus reinforcing the notion of responsible consumption. We therefore propose an addition to Art. 21 to the effect that: ***"Credit granters should be required to apply due diligence when extending loans to consumers, in particular assessing ability to repay."*** More systematic use of credit referencing in turn raises issues of privacy, and we therefore suggest a new art to follow Art 8: ***"Governments and businesses should ensure effective consumer control of personal data, through***

collection of personal data (including internet usage information and IP addresses) only when strictly necessary and in an open and transparent way, and wherever practicable and lawful, through free, informed and positive consent (opt-in). Consumers must have the right to obtain access to data held about them and to verify and rectify such information”.

CI is also suggesting a entire new section on **“Consumers in the digital age”** to update the guidelines in the light of recent technological developments and to address issues of intellectual property which are largely outwith the remit of the Guidelines as they stand. As this issue not specifically about FS it is not dealt with further here except to note that it too will make reference to privacy issues.

8. CI recommendation to G20: A new international organisation to support work on financial consumer protection: a permanent international organisation to enable national financial consumer protection bodies to share good practice, issue public alerts, and develop minimum standards and guidelines.

CI is active in the discussions about the development of FINCONET, the international network of consumer protection agencies working in financial services, which broadly aims to achieve the above objectives, and whose strengthening we very much welcome. As far as the UNGCP is concerned, Section IV deals with this up to a point, especially where it refers to ‘products’ a term which encompasses services as well as goods, and therefore FS. We would suggest the use of the same term (or the term **‘goods and services’** in Art 63 c). Such an amendment would in effect recognise that certain services (not just FS) are essential. We also think this section would be strengthened by a clearer reference to the development of international standards, as dealt with in Section IIIC.

Conclusion.

We are prompt to recognise that the UN Guidelines are widely used by our members, world-wide, not just as a grand declaration but as a guide to discussion of the nuts and bolts of national legislation and practice across the whole of consumer protection or regarding specific sectors. They have done a very important job, and so we take very seriously any discussion of their amendment, and look forward to cooperating with UNCTAD in that respect. Any set of guidelines has to move with the times and cannot be preserved in aspic. For this reason, in the light of the current financial crisis, but also on the underlying need for universal access, there is a strong case for inclusion of financial services in the guidelines as a specific sector. But many of the cross-cutting principles which constitute the bulk of the Guidelines are also applicable to Financial Services, and so my presentation today has dealt with the full text and not just with the insertion of a brief section on this particular sector. We have other amendments in mind concerning other principles and sectors, which we will raise as we participate in this important process. This is just our opening contribution.

Robin Simpson, UNCTAD, Geneva, July 13th 2012.