Harnessing business and consumer interests; is statute the only way?

Robin Simpson, Consumers International
Fair Trading Commission of Barbados
4th Annual FTC lecture
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My answer to the question posed in the title: No.

Is it possible to harness business and consumer interests to reach a balance that works to the wider benefit of society? I hope so.

Are businesses and consumers inevitably in conflict? Up to a point yes as the transactions involve a balance of interests and we may not always succeed in ensuring that that balance is fair. But clearly businesses and consumers need each other.

Is statute the only way to establish the balance? Or are there alternatives? Recent evolution of consumer policy is in the direction of the latter view. That does not mean that there are not false alternatives, and some alternatives have proved as bad as the problems they were meant to address. There is a risk of perverse effects as I will attempt to show.

Statutes
There is no doubt about the need for statutory protection of consumers and indeed statutory protection of businesses against predatory practices by other businesses. At CI we are currently attempting to map out the geography of consumer protection legislation and institutions world wide. What is remarkable at first glance is the huge variety of institutional arrangements and the considerable similarity of generic consumer protection legislation. This is especially the case since the collapse of the Soviet Union. All the European countries of the former USSR are adopting EU style legislation as is Russia itself. Africa and Latin America and the Caribbean are also heavily influenced by European or North American law. This remarkable convergence of legal provisions was summed up recently by our Australian colleagues in an Australian Productivity Commission issues paper. Contrasting generic consumer protection (CP) legislation with industry specific legislation, they listed four main themes in generic legislation:

- Conduct – prohibiting unconscionable, misleading and deceptive conduct and unfair practices
- Contractual terms – including implied conditions and warranties
- Product safety and information provision – product safety and disclosure of information
- Redress – remedies and penalties, including civil and criminal actions and product liability

I would be inclined to unpack these issues slightly, safety and information for example could be separated out as can redress from product liability. Nevertheless that pretty well sums up the range of generic consumer legislation, to which one can add the distinct but linked category of competition law.

What is far more varied is the sector specific legislation and institutional arrangements. You will be glad to hear that I am not covering those areas today. What I am covering is the interface of business and consumers and the scope for non-statutory intervention.

Corporate social responsibility: I should also refer at the outset to yet another related area that I am not talking about here namely corporate social responsibility, currently receiving a lot of attention in the corporate and NGO world. CSR is about good corporate citizenship. It covers a range of issues such as human rights and environmental matters that go far beyond the focus of today's discussion, which is about the substance of transactions between consumers and business. I hasten to add that this is not to belittle CSR in any way, nor to imply that there is a conflict with consumer protection. On the contrary, Consumers International (CI) want to see consumer protection introduced into the range of issues to be taken into account within the CSR framework. To this end, CI strongly supports the efforts of the International Organization for Standardization (ISO) to create a standard on Social Responsibility – ISO 26000. An internationally agreed SR standard can significantly contribute to the existing instruments in this sphere and streamline the various initiatives and codes of conduct that organizations use today.

The general discourse on social responsibility focuses on social and environmental questions. In the drafting process of ISO 26000 CI and other consumer organizations were able to establish consumer issues as a separate core issue along with, *inter alia*, human and labour rights and environmental issues. In so doing CI was driven by the consumer expectation that organizations treat them fairly, that organizations assume responsibility for the safety of their products and services and that organizations enable consumers to consume in a sustainable manner. Unfair marketing or contractual practices or the provision of dangerous products and services are incompatible with socially responsible behaviour of organizations. Similarly, good corporate citizenship it is not a substitute for a framework of law or other regulatory mechanisms. But being a good citizen goes above and beyond legal obligation. And the same is true of the other mechanisms which I examine below.

Now I concentrate on the development of self-regulation and co-regulation mechanisms and their inter-relationship with statute. (I will explain the difference between the two terms in due course.)Self-regulation and Co-regulation are means of providing a framework of regulation without having to rely on the rigidities of legislation, or indeed waiting for legislation to come along. There is an important role for consumers and their representatives in the development of self-, or co-regulation and their execution, and I will elaborate on this.

The context:
UN Guidelines for Consumer Protection

The draft UN guidelines were discussed at great length from the 1960s onwards before finally being adopted 1985, and expanded in 1999, re-adopted in General Assembly decision 54/449. They provide a vital context and indeed legitimacy for the development of SR/CR practices.

The UN *General Principles* set out the *legitimate needs* of consumers as follows:

- a) the protection of consumers from hazards to their health and safety
- b) the promotion and protection of the economic interests of consumers
- c) access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs
- d) consumer education including education on the environmental social and economic impacts of consumer choice
- e) availability of effective consumer redress

- f) freedom to form consumer and other relevant groups or organisations and the opportunity of such organisations to present their views in decision-making processes affecting them
- g) the promotion of sustainable consumption patterns (added in 1999)

CI are in the early stages of discussions with UNCTAD of a process for updating and adapting the guidelines, and I would welcome any suggestions any of you may have in that respect.

The guidelines have been interpreted by CI and 'translated' into simple consumer rights as follows:

- the right to satisfaction of basic needs
- the right to safety
- the right to be informed
- the right to choose
- the right to be heard
- the right to redress
- the right to consumer education
- the right to a healthy environment

These were last reaffirmed by the World Consumer Congress in Lisbon in 2003.

Turning towards the detail of our discussion today, the *Objectives* of the UNGCP (Art 1) include in para c): *to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers.*

Under the respective legitimate needs listed above , under *b) protection of economic interests*, Art 16 unsuprisingly envisages governments acting to protect consumers through *laws and mandatory standards.* Interestingly consumer organisations are also to be *encouraged to monitor adverse practices such as adulteration of foods, false or misleading claims..and service frauds.* Moving closer to issues of self regulation, and still under para b), Art 26 specifies that *Governments should, within their own national context, encourage the formulation and implementation by business, in cooperation with consumer organisations, of codes of marketing and other business practices to ensure adequate consumer protection. Voluntary agreements may also be established jointly by business, consumer organisations and other interested parties. These codes should receive adequate publicity.*

Another vital aspect of self- and co-regulation is to be found in sub-para e) *availability of effective consumer redress* as set out above. Under Art 32: *Governments should establish or maintain legal and/or administrative measures to enable consumers, or as appropriate, relevant organisations, to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.* This is worth setting out at length because it is quite a demanding standard and it is open to question whether many countries satisfy it. Equally of interest is that the guidelines do not envisage statute as the only route.

For Art 33 sets out: *Governments should encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers.*

Art 34 goes on to say that: *Information on available redress and other dispute-resolving procedures should be made available to consumers.*

The simultaneous application of the above three articles are essential to guarantee effective consumer redress. It implies communication and close cooperation between institutions such as state administration at central and local level, courts, consumer organisations and other NGOs, ombudsmen, etc. and indeed businesses themselves, including those which are run by the state.

Is SR appropriate for all sectors? Should it be reserved for special markets?
Some consumer advocates see self-regulation as a poor alternative to law. Others, including some academic economists see it as a recipe for legalised cartels. These risks are real. In reply, some defenders and advocates of SR inside their respective sectors see it as necessary for their sectors because those sectors are in some way peculiar. Well known examples that come to mind are medicine and law. The EC and OECD have at times referred to such sectors using the rather peculiar term 'dysfunctional markets' to imply particular difficulty in the relationship between the professionals and the consumer. My view is that some services are indeed characterised by intrinsic difficulties to do with consumer choice. However, I believe that this should not be overstated to justify suspension of the normal principles of consumer protection. To call them dysfunctional is going too far.

The danger with applying the language of 'dysfunctionality' to services is that one can create the impression that lack of choice is inevitable and that thus the existing monopolistic tendencies have to be accepted, whatever the structure. But, as European Commissioner Mario Monti pointed out in his March 2003 Berlin speech to the *Bundesanwaltskammer* (German Legal Professional Association) about the 'liberal professions', liberalisation has happened in some sectors and in some countries without undue problems.

Commissioner Monti also pointed out that: *in countries with low degrees of regulation, there are relatively lower revenues per professional, but a proportionately higher number of practising professionals generating a relatively higher overall turnover.* He suggested that in consequence: *low regulation is not a hindrance but rather a spur to overall wealth creation.* He did not have the indelicacy to suggest that the purpose of regulation was to maintain professional privileges but his comment does suggest that the restrictions can have a perverse effect in suppressing demand for professional services.

In market economies, consumers expect competition to prevent abuse in the provision of most goods and services, with consumer protection legislation and institutions to provide safeguards against malpractice and undue market dominance. At the other end of the spectrum where there are natural monopolies, then Regulatory Authorities (such as the FTC here in Barbados, the Jamaican Public Utilities Commission, the new breed of energy regulators in the EU or the state/province level Public Utility Commissions in North America) are established to protect the consumer interest while also ensuring the viability of these essential industries.

Funeral services. There is, however, an intermediate level at which, although markets are not natural monopolies, they are 'difficult' in terms of imbalances between consumers and providers. In the case of funeral services, for example, the problems are obvious at first glance. In the UK, and I can well imagine in the Caribbean region, funerals can be the third largest category of purchases made by consumers in their lifetime, exceeded only by houses

and cars. The consumer, the bereaved relative, may be too distressed to pay the kind of attention which would normally be exercised in the case of a similarly sized purchase, and where the transaction has to be completed rapidly.

But there are two observations to be made here. First, that the problems should not be made out to be more intractable than they are. There is the possibility of pre-paid funerals of which there is a long tradition within the cooperative movement in northern Europe. Pre-purchase of burial plots is long established in southern Europe. Such mechanisms in which the cost is defrayed over a long period of time can be used to render unnecessary the need for what may amount, quite literally, to a 'distress purchase'.

Second, the fact that the bereaved may be distressed should not be an excuse for failure to provide accurate estimates in advance, with different costed options, which would enable friends and relatives to be able to take a more detached view of value for money and advise accordingly. In other words the consumer does not always have to be completely helpless, and while extra sensitivity is clearly called for, especially in the case of an untimely death such as that of a child, 'normal' market practices should not be considered to be completely suspended.

Yet in a survey several years ago, Consumers Association (CA) of the UK found funeral services to be very reticent in providing price information. They found that 10 out of 25 funeral services surveyed gave no information on prices until prompted at the end of their encounters with potential clients. The Office of Fair Trading also criticised lack of price information in 28% of cases surveyed a few years ago. Professor Harrington of Kenyon College Ohio argues that unnecessary qualifications such as embalming for funeral services, (unnecessary for cremation) have the effect of raising costs and preventing competition. The risk is that the aura surrounding death can make discussion of such matters as price seem vulgar and distasteful. So it is not surprising that CA found *dramatic variations* in costs between regions with *no justifiable reasons for these huge discrepancies.* Although this could be taken to indicate that no national cartel was operating, it also suggested that something was wrong, and this did not preclude the possibility of local cartels. In response to criticisms, the UK funeral sector established a funeral ombudsman some years ago covering two of the three trade associations in the sector. Unfortunately when one of them withdrew, the system collapsed.

Legal services. In the case of legal services the case for 'normality' is even stronger. The service is less of a natural monopoly, (it does not have the physical constraints of other services for example),and yet it has operated in effect as a legalised cartel in country after country. A satisfactory justification for this restriction of competition is lacking in many areas of law. Many legal transactions are of a routine administrative nature, neither intrinsically distressing nor incomprehensible. In fact many of our members have argued that consumers should have the right to choose to do some basic legal operations themselves (such as wills and probate) and are prevented from doing so. The fact that some of the occasions for recourse to law are distressing or complex does not have to determine the procedure for all of the rest. And yet consumers are denied the kind of normal information which would be accepted as routine in other sectors where the unpredictable can happen making costs and timing uncertain, such as plumbing, building or computer programming. The complexity is often exaggerated by recourse to confusing language which creates a mystique which leads consumers to be too nervous to exercise rights which they would regard as normal in other sectors.

There have been surveys done by our members in several countries which have demonstrated the desire to restrict entry to the legal profession, not to compete on prices, resistance to advertising simple information such as legal specialities or languages spoken, resistance even to advertising in the Yellow Pages. I quote the judgement of Advocate General Leger of the European Court of Justice:

there is no causal effect between the level of fees charged and the quality of services supplied. I fail to see how a system of mandatory prices would prevent members of the profession from offering inadequate services…

I would agree, and point, for example, to how the end of the solicitors' house conveyancing (buying and selling) monopoly for house purchase in England and Wales has had no discernible ill effects. (It is possible that reducing transaction costs may have had an effect on house prices, but that is hardly an argument for maintaining legal costs at a high level.)

The approach of the legal profession to its allegedly unique features has been to set up self-regulatory bodies, with the support of legislation. These have been found wanting, and in the UK the complaints system for solicitors has had to be completely remodelled more than once, having been named the Solicitors Complaints Bureau, the Office for the Supervision of Solicitors, the Consumer Complaints Service, (in addition to which there is the Legal Services Ombudsman). Embarrassingly, while these changes were being made, the number of complaints to the Law Society was running at one for every six solicitors in England and Wales every year.

What to do?

So if I am not too impressed by the argument that certain sectors have to resort to self regulation as a way of avoiding market disciplines, then why do I think it may have something to offer? Because the law cannot cater for every contingency, and enforcement authorities need to concentrate on those areas of outright illegality rather than areas of ambiguity.

Much of what our members advocate is a matter of plain old-fashioned consumer protection; eg price transparency, information to the public on service availability, restriction of entry only to the extent necessary to protect the public from real risks. All of these can legislated for by the usual legislation that I identified at the start. But too many countries rely simply on legal mechanisms and inspectorates and frankly fail to guarantee the welfare of consumers. The answer is often put forward as more inspectors, but my observations of many markets indicates that this often does not work, indeed it sometimes makes things worse.

But self-regulation systems have a mixed record. The concept of 'dysfunctional' special markets may be abused to exaggerate the extent to which sectors should not be subjected to 'normal' principles of consumer protection. Having said this, we accept there are difficult areas within particular sectors and would wish for codes of practice and other instruments of self-regulation be developed accordingly. However, we would argue that such codes be developed with consumer participation for it is the consumer interest which is the justification for special mechanisms. If the public interest is to be better served, then such systems need to be opened up to a wider constituency than the professions themselves.

So the purpose of self regulation should not be to deny conventional consumer protection but to enhance it.

What is self-regulation?
There is no universally accepted definition of self regulation that I have been able to find, it has developed for different reasons in different countries. It can be broadly defined as enforceable rules formulated by private professional agencies to govern professional and trading activities.

Self regulation is not new. Medieval guilds practised it, inspecting markets, weights and measures, and setting quality standards and rules. In advertising, self regulation goes back to the British poster industry in the 1880s. In car repair it is practically as old as the automobile industry, the New Zealand Motor Body Builders Association starting up in 1913 and its British equivalent in 1914. And still debate rages.

There seem to be three broad sets of circumstances for which SR is designed. One is where the task of protecting consumers has been delegated by government to the professions and reinforced by legislation and licensing arrangements. I call this 'delegated self regulation' as commonly used for lawyers and doctors. As indicated earlier such arrangements should not be considered immune to criticism.

The second kind of self- regulation is where a group of businesses choose to regulate themselves, making voluntary commitments to behave in a certain way. This could be described as 'voluntary self regulation'. Commitments go beyond any legal requirements and set standards in areas where there are none set by law. Monitoring with voluntary standards and sanctions for failure to comply are left to the SR body without legislative back up. The defunct UK funeral Ombudsman is an example.

It is rare for the legal structure of a SR body to be set in statute, the legal and medical professions come closest to that. The fact that SR bodies rarely describe their own legal form implies that it is not that important.

However, criteria can be set by government for schemes to describe themselves as SR, to guard the integrity of the description. Such criteria include: benefits which go beyond the law; the organisation which sets up a code having a significant influence in the sector, independent organisations, (such as consumer or advisory bodies) having influence on the preparation of the code; adequate complaints mechanisms and redress for breaches of the code; review and monitoring of the scheme; sanctions against failure to comply; adequate publicity. Generally speaking consumer organisations believe that SR carries more authority if the responsible organisation is independent of the trade association which promotes the interests of its members, and if there are at least some public interest members on the governing body.

The state has a legitimate interest in protecting the SR 'brand', especially where it vests its own authority in the existence of a scheme. If SR schemes develop which deserve state recognition or even subsidy, that raises the question of 'accreditation'. Who should award the 'logo', a ministry, a joint committee, an independent body?

OFT Codes approval scheme
Until 2001 in the UK, the Office of Fair Trading (OFT) recognised 42 self regulatory codes in total. In general the codes were not thought to be very effective and thus the role of the OFT itself came in for criticism. When I was working at the National Consumer Council (NCC) our policy team joined the ranks of the critics. In due course government and OFT came to accept the criticisms and at the end of 2001, all the existing codes other than those

specifically legislated, were discontinued, a remarkably dramatic step. Under the 2003 Enterprise Act, the OFT was granted powers to set up a new process of approval of stronger codes, and those which met the criteria were given an 'OFT approved' logo. The system was in effect, shut down and rebooted. High priority sectors were selected first for approval (with just one casualty, the scheme that had been run for many years by the Association of British Travel Agents).

The core criteria for approval were as set out above but with some elements strengthened. For example, monitoring systems had to carry Performance Indicators, there had to be annual reviews and annual reports to the public and to OFT, resources to run the scheme had to be demonstrably adequate, and there had to be a majority of non-industry members on the disciplinary committees. The schemes had to have a sponsor such as a dedicated body set up for the purpose (like the Advertising Standards Authority) not just a trade association with other things on its mind. The OFT has the power to withdraw its approval in the event of the schemes not complying with the criteria.

One fundamental principle is that codes should not simply restate the law. Practical examples of where codes go beyond the legal minimum are the Direct Sales Association codes in both the UK and New Zealand. Under EU law a sales agreement made off business premises (for example at the consumers home) has a 'cooling off period' of seven days. The UK DSA code specifies 14 days.

Another important criterion is the extent of the market which is covered by the members of the code. For example, the UK DSA members have about 53% of the direct sales market, while the New Zealand membership accounts for 90%. The high NZ figure may be accounted for by the fact that, part from the cooling off period, the code does little more than restate the law. And that illustrates the problem with the voluntary approach. The further the code goes beyond the law, the less inclined a trader may be to join, unless all his rivals do so as well. There are other factors which can militate against coverage. Car repairers get custom to a large extent from being on insurance companies' approved lists rather than direct consumer choice. This diminishes the incentive for consumers to choose freely and thus handicaps membership of SR codes. So it is no surprise that the UK Vehicle Builders & Repairers Association code only covers 30% of the market. It is not that the non-members are not up to scratch. The problem is why enter the SR club if the insurers are calling the shots, rather than consumers at whom the logo is directed?

So the self regulation concept contain dilemmas. If SR is too weak the concept is devalued. On the other hand there are dangers the other way. If it is too elaborate then SR could impose barriers to entry into a trade and thus act in an anti-competitive way. Delegated self-regulation tends to have the most comprehensive level of coverage (indeed membership may become almost a licence condition) and voluntary the least. Voluntary SR sometimes has an excessive number of small schemes. For example in Japan, there are 105 codes. Some cover very narrow product areas such as soybean paste, soy sauce, biscuits, eyeglasses, pianos, while others take in major product sectors such as home electronics and banking. This could well confuse the public.

Natural monopoly sectors such as public utilities are something of a special case. It is widely assumed that state regulation remains necessary. But 'necessary' does not mean 'sufficient'. State regulation can incorporate dialogue between industry and other bodies such as consumer or environmental groups. External bodies can be included in such matters as price setting and dispute resolution, and there is a rich tradition of CI members doing just that. In

the Netherlands consumer associations take part in the drafting of standard public utility consumer contracts. In the UK water and energy sectors, the Guaranteed Standard Schemes are negotiated between companies and consumer bodies using the good offices of the regulator with no legal measures being invoked. The strength of those schemes lies in the fact that all the service providers sign up to an undertaking to compensate the users for service failures. In a sense the companies undertake to sanction themselves for interruptions of supply to take a common example.

From self-regulation to co-regulation
Taking the spectrum from delegated to voluntary SR the risk is that the former is often too restrictive, the latter often too weak and diffuse. I would argue for a hybrid similar along the lines of the EC concept of *co-regulation*. The Commission defines it as follows:
Business and consumer stakeholders negotiate consumer rights and business obligations with each other under the auspices of public authorities with legislative effect.

The recent UK Communication White Paper defined the two concepts as follows:

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

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

So the state may choose to rely on self-regulatory schemes to deliver regulation which would otherwise be delivered by the state. In Australia, for example, the government has reserve powers to make voluntary codes compulsory, can require industry to have codes, or can impose or prescribe mandatory codes. The state makes clear in legislation that observance of self-regulatory standards is tantamount to complying with the law. In such cases, the obvious danger is that the machinery will be captured by professional interests, with a perverse effect for consumers. For when the state confers a monopoly power on a self regulatory organisation (SRO) this may well constrain supply and create shortages thus raising charges. For this reason, participation by consumer stakeholders is highly desirable in the development of schemes, and for adjudication in cases of disputes, it is preferable to have majority consumer representative participation as the OFT has now acknowledged. There may be short term problems in finding suitably qualified 'lay' participants, but I will indicate examples below where such consumer participation has come to pass.

Time for some categories:

Definitions of self/co regulation:
A spectrum of possibilities:

1. ***Unilateral codes of conduct***
Eg returns policy, fixed penalties for mistakes. Restricted to single business

2. ***Customer charters***

Covers all key aspects of dealings with consumers. Defined standards usually with fixed penalties. Restricted to single business.

3. ***Unilateral sectoral codes***
'Purest' form of SR but almost extinct. Voluntary, self imposed, collective, no involvement of non-professionals: health and legal professions in the past.

4. ***Negotiated/approved codes***
Negotiated between industry on one hand and government and/or consumer organisations on the other. Non-professionals often involved in administration of code. May be recognised as meeting government approved standards for codes, but may go beyond legal minima for sectors in question.
Approved codes generally:
a) must go beyond the law and improve practice
b) code signatories must represent a significant presence in the sector
c) non-professionals must have been consulted in preparation of code
d) must include complaints mechanisms
e) must provide low cost alternative to court procedures for redress of breaches of the code
g) must include sanctions
h) must be adequately publicised

5. ***Recognised codes***
Regulation delegated by government, so have statutory foundation. Most common in law, medicine and financial services. Professionals still make the rules.

6. ***Official codes and guidance.***
Issued by government with self regulatory input. Enforceable through the courts.

7. ***Legal codes***
Imposed by governmental statute Adjunct to legislation, eg food safety codes, meat handling regulations, dairy product hygiene rules etc. Often issued by decree as Executive regulations.

Summary*:* Broadly codes divide into: voluntary, delegated and hybrid.

Delegated: legal regulation delegated by state to self regulatory body, eg law and medicine. Membership compulsory and similar to license to practice. Standard setting will usually be delegated to such a body.

Voluntary: sanctions set by trade association, membership is voluntary, standards may be more than legal requirements.

Hybrid. Membership not compulsory by law but recognition of title of 'approved code' is by government and observance of standards may be equivalent to meeting legal requirements. Standard setting for products my also be delegated to a voluntary body eg food standards, or through participation in national standards body by industry body alongside consumer bodies.

Strengths and weaknesses of self regulatory systems and legislation
The above does the classification, here summarised are some of the attributes of the SR compared with statute.

Self regulation:
Pure self regulation may be too weak and may need to cede to statute in cases of:
Fraud, risk to life and health, exploitation of the vulnerable, unprofitable consumers (eg access to goods and services in remote areas)

Strengths:
a) voluntary can be flexible, codes are easier to change than laws
b) can promote good practice not just prevent bad practice
c) an industry may identify more closely with a code it has drawn up itself
d) can deal with cultural matters such as taste or decency
e) may place burden of proof on the trader thus favour consumer
f) redress may be cheap and rapid
g) cost may be borne by industry

Weaknesses:
a) only covers those who sign up to the scheme
b) if comprehensive can lead to anti-competitive behaviour
c) non-members my undercut standards
d) requirements may not be taken seriously
e) a variety of codes may confuse consumers
f) sanctions may be too weak (reluctance to discipline peers) or too strong (expulsion)
g) consumer scepticism
h) conflict of interest for trade association between representing members and upholding standards
i) may be barrier to necessary legislation
j) may have inadequate monitoring

Legislation:
Strengths:
a) authority of government
b) coercive effect compliance obligatory
c) comprehensive; coverage throughout a sector
d) adaptable in terms of content; no veto from industry in theory
e) credibility with consumers

Weaknesses:
a) difficult to obtain legislative time; may be overtaken by events in the market
b) negative rather than positive
c) general legislation vague; precise legislation complex
d) criminal law unwieldy and inflexible
e) unintended consequences
f) built in obsolescence

Sectoral example:
CI are currently taking part in an OECD working group on 'industry led regulation', the latest term for self regulation. Among the examples which have been brought forward is the following which I précis, from various sources.

Advertising
One of the most widely self-regulated sectors internationally is the advertising industry. It lends itself to such regulation having relatively few powerful outlets affecting large numbers of consumers, and being notoriously difficult to legislate for in terms of such concepts as taste and decency for example or age limits when it comes to the 'pitching' of advertisements. Even then, there are of course limits to how successfully one can regulate say, small ads , which may have very localised distribution but which may nonetheless have the capacity to inflict considerable harm on consumers. That is why there will still need to be a role for statutory enforcement agencies.

The UK Advertising Standards Authority is a good example of an industry heading off the threat of legislation by setting up its own machinery which has become endowed with quasi-judicial powers recognised by government. The ASA was set up in 1962, that is, well in advance of the 1968 Trade Descriptions Act which was brought in to tighten up on misleading advertising. The Council of the ASA has 15 members of whom ten come from outside the industry.

The ASA strictly speaking does not have legal powers but it does have power to refer cases to the Office of Fair Trading (OFT) or to the regulator for communications (OFCOM). In practice these powers are seldom used, only three references out of 13,448 complaints in the non-broadcast media last year. For the threat of ASA action is a severe deterrent, the obligatory withdrawal of a broadcast advert is often headline news, as has only recently been shown regarding health claims for example.

The ASA code is well summed up and embedded in public consciousness by its injunction that all advertisements must be, in the words of its well-known slogan *"legal, decent, honest and truthful"*. (The public response to that motto indicates incidentally the falseness of the idea that the general public are incapable of dealing with more than one message at a time).

The owners of the code administered and applied by the ASA are the Committee of Advertising Practice (CAP) which keeps the code up to date, (or rather codes, for they vary by medium. The huge advantage when it comes to enforcement is that not only does the CAP include advertisers, it also includes publishers and those responsible for clearance of broadcast advertising. (Broadly speaking the members include the makers and publisher/broadcasters not the makers of the products or services.) This means that rapid action can be taken without court action. Advertisers who are not members of the CAP are not technically bound by the code and so legal action by OFT or local trading standards is necessary in such cases for all advertisers are covered by the law. But action is speeded up by the ASA which covers by far the greatest part of the industry as it is recognised as an 'established means' of investigation, and for broadcast advertisement, OFCOM effectively contracts ASA to act on its behalf. ASA also participates in the European Advertising Standards Alliance and contributes to the Consolidated International Chamber of Commerce Code of Advertising & Marketing Communication Practice.

The advantage of the system for enforcement agencies is clear, it allows them to turn their attention to issues which ASA is not competent to judge such as mass scams, door to door

abuses and web-site content a notable absence from the ASA remit. At its best the system is a win-win-win situation, advertisers are judged by experts, government agencies are not left in the slip stream of events playing catch-up and they are free to concentrate their resources elsewhere, the courts are not overloaded and consumers have somewhere to go.

As concern about the power of advertising to promote consumption increases, there are inevitably calls for still stronger policing of the industry, and I should make clear that CI have been party to such calls with our work on the marketing of food to children, the promotion of pharmaceutical products and our repeated calls for an outright ban on tobacco advertising which are now reaching fruition with implementation of such a ban in the EU for example. In a personal capacity, I have also been involved in campaigns against food and drink advertising directed at young children.

Faced with such pressures, and with some 50 attempts in five years to introduce legislation in the US Congress to limit, restrict or alter marketing and advertising, the American food producers have proposed a code of practice for food advertising to children. The Children's Food and Beverage Advertising Initiative, CFBAI is aimed at children under 12 and designed to promote advertising via TV, radio, print and internet, of healthier or 'better for you' foods and beverages and even eliminate some types of adverts to youngsters (such as product placement on children's TV and advertising in primary schools). The CFBAI is housed in the Better Business Bureau which is an independent organisation which promotes self regulatory reforms, taking in a range of stakeholders, and serving some 400,000 small and medium enterprises in the US and hundreds of national and US-based multinational corporations. In this case the BBB is contracted by the industry sponsors to run the scheme.

The BBB acts as the review body for future plans which must include healthier foods or contain lifestyle messages. The scheme monitors compliance with such plans, which must include a commitment to marketing healthy foods for at least half the time. So far there are 13 participants in the scheme including some major household names, accounting for two thirds of the children's food and beverage TV advertising in 2004. They include Coca Cola and Pepsi, Mars, McDonalds, Campbell's, Cadbury, Kellogg's, Kraft, Unilever, heavy hitters indeed.

Apparently some legal scholars consider that an attempt to impose such regulation would violate the US constitutional provisions regarding freedom of expression. This seems to me unlikely given that the scheme remains voluntary. It remains to be seen what would happen regarding a statutory scheme. The scheme is clearly a response to the rising levels of concern world wide to issue of childhood obesity. It is still young, the 'pledges' having been made in July 2007. The programme is not subject to government approval although it has the blessing of the Federal Trade Commission. It is entirely funded by industry participants and is subject to review by the BBB which will also make the crucial judgement as to what is or is not judged to be 'healthy', a judgement that is likely to be the touchstone issue for many observers. More big name companies are expected to sign up, and some have already decided to stop targeting under 12s in any advertising and to go for 100% 'healthier' foods. What these commitments mean in practice remains to be seen, this initiative will be regarded with intense interest from all sides. The example is ground-breaking in that it pushes the limits of self-regulation beyond the simple buyer-seller transaction and moves towards wider social policy.

Alternative Dispute Resolution
A vital part of SR and CR is clearly dispute resolution. Alternative Dispute Resolution (ADR) has been defined by the UK Legal Aid Advisory Committee as:

> "Any means of providing a resolution of a dispute between two or more parties which does not involve an open court trial - that being "dispute resolution" in the traditional sense. Its components may include a continuum of stages such as negotiation, arbitration and mediation."

Faced with the difficulties of legal procedures throughout the world, and the repeated reports of length, cost (and hence risk) and complexity of cases, CI has been keen to develop non-judicial alternatives, most recently for example, with our members in Kazakhstan. As members of the Committee on Consumer Policy of the Organisation for Economic Policy & Development, we participated in the OECD work that resulted in a recommendation on Consumer Dispute Resolution & Redress just last July. We have been keen to adapt the concept of ADR to changing times and were active in the negotiations surrounding the drawing up of the guidelines on ADR in e-commerce which were adopted by the Global Business Dialogue on Electronic commerce in 2003. We were strengthened in this negotiation by the resolution calling for ADR in e-commerce passed in 2000 of the Transatlantic Consumer Dialogue which brings together consumer bodies from the EU and US and for which we provide the secretariat

To some extent, consumer organisations have been ahead of governments in respect to ADR. It took until the late '90s for the EU to pay sufficient attention to these developments. The EU specifically encourages the development of fair and effective alternative dispute resolution systems for solving consumer complaints. In March 1998 seven principles were set out in the European Commission Recommendation on alternative dispute resolutions schemes for solving consumer complaints. They were:

- Principle of independence;
- Principle of transparency;
- Adversarial principle;
- Principle of effectiveness;
- Principle of legality;
- Principle of liberty;
- Principle of presentation.

It is very interesting to note that in a second recommendation in 2001, these principles were modified, reducing from seven to four. These were:

- Impartiality
- Transparency
- Effectiveness
- Fairness of procedure

The change is interesting in focussing more on practicalities but above all in dropping reference to the adversarial principle, which, I argue elsewhere is contrary to what a lot of

consumers want. Their goal is not usually to grind the opposition into the dust, it is to resolve their consumer issue. The adversarial principle could well operate against this goal and lead to excessive legal complexities.

Following the adoption of the 1998 Recommendation, the Commission drew up a list of schemes which member states considered met the criteria. This experience could be of interest in the context of the development of a Caribbean single market, for the idea was that consumers in one member state would be able to bring cases against service providers from other member states in cases of cross-border trade. The schemes notified varied hugely in their scope from medicine and law schemes in Germany, the credit industry in Ireland, to chimney sweeps in Austria. (In fact Austria had two schemes for chimney sweeps, one hesitates to speculate on the reasons for this.) The main differences between schemes were that some member states had generic schemes providing a general ADR service regardless of sector - Denmark, Netherlands, Sweden, France, while others had very detailed sectoral schemes, notably Germany and the UK. In fact this distinction blurred somewhat as some of the generic schemes developed sectoral specialised departments. Some schemes operated at local level such as Greece, while others operated nationally. The problem with national schemes is that they can be remote from the actual context, while with local schemes, expertise can be spread very thin and in France for example, some systems which in theory were operating throughout the country were in practice almost defunct at local level. The advantage of a small country with an educated population like Barbados is that simple national schemes should be viable, neither too remote from the specific context, nor lacking in expertise relating to a sector.

According to Klaus Viitanen within the European Union member states we can find the following ADR models:[1]

- The Scandinavian model known as consumer ombudsman based on public complaint boards, which have been established and financed by the State.
- The Dutch model based on public complaint boards run jointly by trade and consumer organisations.
- Small claim courts developed in the United Kingdom and Ireland which are based on simplified court procedures.
- The Iberian model based on consumer arbitration procedures.
- The Central European model based on private boards established and financed mainly by trade organisations only (e.g. Germany, Austria, Belgium).

Before moving to the discussion of Ombudsmen, it is important to bear in mind the clear differences between arbitration and mediation. Arbitration is quasi-judicial in that it contains an element of delegated authority. The procedures are bound in legislation and the results are binding on the parties. It is frequently complex and expensive and therefore suffers from many of the drawbacks of traditional legal methods. It is not surprising then, that the use of trade sponsored arbitration schemes, ostensibly there for the benefit of consumers has fallen by the wayside in the UK. Even when in theoretical use, some had only a handful of adjudications to their credit, some even none at all.

Mediation, in contrast, does not involve imposing a solution. The mediation/conciliation approach helps the parties to reach a decision themselves. This tends to be suitable for cases where the parties will have a continuing relationship, eg family or neighbour disputes.

[1] K.Viitanen, ADR in the settlement of consumer disputes in the Baltic States, conference paper, Bratislava Conference, 4 February 2000.

Neighbourhood justice centres in the USA have concentrated on mediation of disputes in such circumstances. Participation is voluntary and referrals come from a wide range of sources, though the majority are from the courts, prosecutors and the police. Mediators include lawyers, law students and undergraduates, and ordinary citizens.

At first glance this seems remote from consumer disputes, certainly 'high street' transactions over goods. But some consumer –provider disputes do revolve around continuing relationships, for example, provision of public utility services or long term credit agreements. In such cases mediation could have a lot to offer.

Of interest in this respect are the 'commissions' which now exist throughout France following the Loi Niertz on consumer indebtedness. On 31st December 1989, the French Government approved a new law on consumer debt which establishes a tribunal procedure for amicable settlement of debts at the request of the debtors.

The law provided for a 5-strong panel to be established in every *departement* of France. Membership of each panel was laid down in the law and must include a representative of the credit industry and one of consumer or family organisations. Each panel's job is to 'regulate the situation of over-indebtedness characterised by the manifest impossibility for the debtor of good faith to face the totality of his or her debts.' The debtor and his creditors can call any witness they choose, and the panel has the power to obtain information from a variety of bodies including credit institutions, social security offices and public authorities. Social service authorities can prepare a social report on the welfare of the family. The object of the exercise is to draw up a plan of repayments which can include reduction or suppression of interest payments and consolidation of loans. The panel can treat creditors differently according to the lenders' knowledge of the debtors circumstances at the outset of the loan. Any rescheduling plan is conditional on the debtor not carrying out actions which would further aggravate his or her indebtedness.

The civil court remains as a last resort if the parties fail to reach agreement, if the creditor starts enforcement proceedings, or if the debtor fails to abide by the procedures. In the event of the case proceeding to court, the panel's dossier is passed on to the court as evidence.

It has been interesting to see the reactions of my French colleagues to the introduction of these commissions. Originally suspicious because they felt they would substitute for due, ie legal, process, many colleagues now believe they have at least the merit of existing, i.e. they provide a forum for an agreement to be reached, as an alternative to the more threatening court procedure. A crucial point for both parties is that they are not binding and resort can be had to the courts. The use of the commission has far outstripped expectations at the time the law was passed.

Ombudsmen

A further modern development of non-judicial systems has been the celebrated ombudsmen developed in the Nordic countries. In their further incarnations, the ombudsmen straddle the boundary between mediation and arbitration depending on the degree to whether their recommendations are binding or not. The contrast with classical arbitration lies in the powerful image of the ombudsman himself as a fair adjudicator who is a permanent presence but is above the fray. In contrast, arbitration in the abstract seems a somewhat mysterious process less identified with the individual adjudicator.

In the UK the ombudsmen began as an antidote to maladministration by public authorities. Specialised ombudsmen developed for national administrations, local government, and the National Health Service. A recent development which started in the UK , and has subsequently spread across much of the EU, is the development of sectoral ombudsmen for the private sector, particularly in financial services. In Italy, an ombudsman panel is available for low value disputes with banks, in Germany too certain banking associations have conciliation services for consumers. Australia and New Zealand both have banking ombudsmen. The Australian Electronic Funds Transfer Code

of Conduct was developed by a working group of government industry and consumer representatives and is now subscribed to by most financial institutions operating electronic funds transfer services.

Some ombudsmen were established by statute and membership is obligatory; in the UK these included the Building Society Ombudsman and the Occupational Pensions Ombudsman. Others were established on a voluntary basis in that membership was not compulsory, but they nevertheless achieved fairly comprehensive coverage - the Insurance and Banking Ombudsmen for example. In the event these have now been swept under the wing of the Financial Services Ombudsman and the Financial services authority.

Because of their variable status ombudsmen do not conform to a particularly precise definition. Indeed there is a danger of loose use of the term "Ombudsman". The first joint United Kingdom Ombudsman Conference as long ago as 1991 foresaw this danger and set up a working group to consider what criteria a scheme should meet before being called 'ombudsman'. It has defined four key criteria. Ombudsmen should be independent of those they have the power to investigate, and schemes should be effective, fair, and publicly accountable. The working party proposed that the term 'ombudsman' should only be used if these general criteria are met. But the fact is that despite terminological difficulties the term 'ombudsmen' has caught the public's imagination and their profile is growing all the time regardless of precise definitions.

Where the EU member states do not generally have ombudsmen is in public utilities and that is where the experience of our Latin American colleagues should be watched with interest. For in Peru and in Argentina (and possibly elsewhere) the office of the *Defensor del Pueblo* has been developed with the duty to consider cases relating to public utilities. The concept derives from recent Latin American history in that it grew out of a concern for the development and maintenance of human rights. I think it is an extremely interesting development and one from which the rest of the world may have a great deal to learn. The concept of citizens having a right to these most basic of services as part of the range of citizens rights could well be path-breaking. There is talk of the Ombudsman concept developing in public utilities, and in the UK there is an energy ombudsman somewhat criticised for its lack of independence from industry, and the 2003 Communications Act requires every public communications provider in the UK to provide consumers with access to a dispute procedures scheme which has been approved by the telecommunications regulator OFCOM. In Australia, the telecoms Ombudsman was established under 1999 legislation. In the small ex-Yugoslav state of Macedonia, the Ombudsman deals with consumer rights in publicly owned utilities. But the concept has been slow to develop in European utilities.

Ombudsmen are of course a kind of arbitration but in a less juridical sense then traditional arbitration schemes. When I worked for the NCC, we made various recommendations for improving the profile and procedures for trade arbitration schemes but in due course it became clear that they were unlikely ever to be effective . The primary motive of the consumer is not so much to ‘win’ as to resolve the issue and for the consumer to get the goods or services he or she thought he was getting. Misconduct, if there be any is for the authorities to decide. So mediation is often closer to what the consumer actually is seeking. Arbitration schemes may simply not be what the consumer is actually looking for, being closer to traditional judicial practice. The

astonishing success of the Ombudsman model has testified to this preference for non-judicial solutions.

Principles of Mediation

I have been critical of legal arbitration but it must be recognised that mediation too has its critics. A well-known American critic of alternative dispute resolution, Professor Fiss, put it like this: 'Adjudication uses public resources, and employs not strangers chosen by the parties, but officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle'.

Fiss also argues that alternative dispute resolution procedures may exacerbate imbalances of power. Poorer parties may not have the resources to collect the information necessary to predict the likely outcome of their cases or may be likely to accept less in an early settlement than could be obtained if they were able to pursue the process for longer. He concludes that settlement is not necessarily preferable to litigation, nor should it be institutionalised wholesale. This he condemns as 'a capitulation to the conditions of mass society'.

To a lay person such as myself, these criticisms seem pompous. Huge number of cases undergoing litigation are settled out of court anyway, the vast majority in fact. Furthermore most cases do not require restatement of law, indeed to the outsider, litigation can seem more like a game of poker than a legal process. Furthermore, it is difficult to see that discouraging the development of alternative dispute resolution procedures will result in any benefit to consumers who have never shown much enthusiasm for traditional litigation. Their response to a reduction in alternative methods of dispute resolution would probably not be to flock to the courts, but simply to capitulate.

Nevertheless, it should be recognised that there are circumstances in which alternative dispute resolution procedures would not be appropriate:

*where an issue of principle is involved which necessitates a binding and public precedent, such as a civil rights or consitutitional issue;

*where one party does not have legal competence, for example a minor or someone with mental handicap;

*where there is a substantial and serious power imbalance between the parties;

*where a case turns solely on legal issues which need to be decided upon;

*where immediate enforcement by court order is essential, as where an injunction is sought;

*where an action is being instituted or defended for tactical reasons and it becomes clear that recourse to alternative dispute resolution does not reflect a genuine wish to resolve the matter.

At a more practical level, in response to theoretical criticism, it is simply unrealistic to suppose that the state will provide facilities of the traditional kind for the resolution of all kinds of disputes in a way which
would make them accessible to large numbers of citizens. There is no prospect of resources being available on that scale.

I believe ADR should always be voluntary, keeping open always the option of court action as with the French Loi Niertz. Decisions by established ADR bodies such as Ombudsmen should be recorded, and standards needs to be monitored. In this sense ADR is not necessarily in competition with the courts. It provides as its name suggests, an alternative, without which many consumers will simply forego their access to justice.

Conclusion

There have been a lot of lists in this paper and I conclude with one more. I have argued self regulation, co-regulation, industry-led regulation are consistent with the UN guidelines for consumer protection and that they do not replace the need for good statutory protection but they can strengthen it. But simply adopting the mantra of self regulation is no guarantee of success, there have been plenty of examples of SR which have been too restrictive, too loose, too obscure. I have argued that ADR is a vital application of SR and that mediation conforms more to consumer wishes and interests than does legal arbitration. The rapid spread of the ombudsman model attests to a public desire to have a public figure to safeguard their interest and this model can adopt elements of arbitration and mediation, hopefully getting the best of both worlds. I believe there is somewhat underused capacity for consumers to play a role in the development of SR and its monitoring and in particular in ADR where knowledge of local circumstances could be so important. So on that optimistic note I leave you with a check list of desirable features of self regulation. It has been a privilege to take part in this discussion with you.

Check list for SR/CR

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

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Bridgetown, Barbados February 8th 2008.