Consumer protection in international regulatory cooperation activities in Canada

RESEARCH REPORT

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Option consommateurs

MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montreal ACEF. In 1999, it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

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Option consommateurs helps consumers who experience difficulties, receives budget consultation and provides information sessions on budgeting, debt, consumer law and the protection of privacy.

Each year, we conduct research on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute legal collective action against traders.

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In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs at www.option-consommateurs.org

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Summary

Consumer protection in IRC activities in Canada

International regulatory cooperation (IRC) is an increasingly widespread practice by which States seek to reduce non-tariff barriers to trade. In Canada, IRC activities have grown significantly in recent years with the signing of new agreements and treaties with its trading partners. Regulatory cooperation also plays a role in the *Canadian Free Trade Agreement*, the new interprovincial trade agreement, which arose in part as a result of concerns over existing regulatory differences between Canadian provinces and territories.

Consumer protection is a vital consideration within IRC. Governments need to consider this not as a trade barrier, but as a means of ensuring consumer confidence in the market. IRC can play a role in the upward harmonization of consumer protection among States.

For these reasons, Canada must ensure a transparent process that permits all stakeholders to participate effectively. To this end, it has assured itself of a solid legal base. Furthermore, analysis of the legislative provisions of treaties suggests that there are opportunities for bolstering consumer protection. However, the results of recent consultations have revealed that the ability of consumer associations to participate in the IRC process is limited. Due to a lack of resources, they have neither the expertise nor the opportunity to effectively identify regulatory priorities or make recommendations.

Our study of foreign jurisdictions shows that the issue of regulatory harmonization of consumer protection and the involvement of consumer associations is not unique to Canada. Over the years, the European Union, Switzerland and Australia have concluded that harmonizing the levels of protection offered to consumers between jurisdictions should be considered a priority. Moreover, the analysis shows that the European States have been quick to recognize the relevance of a strong and united voice representing consumers made possible through multi-year funding.

Option consommateurs recommends that the Government of Canada provide additional funding to Canadian consumer associations to allow them to participate the IRC process. This would ensure a more balanced participation of stakeholders in IRC and recognize the role that consumer associations could play within it.

Option consommateurs recommends that the Consumer Measures Committee considers new regulatory cooperation initiatives to improve the upward harmonization of provincial consumer protection legislation. These activities should be accompanied by the compilation of a complete inventory of the regulatory differences that exist between provinces and territories, the creation of a working group tasked with

identifying priorities and the establishment of a committee to ensure that harmonization agreements are implemented.

Abbreviations

ACL	Australian Consumer Law
AIT	Agreement on Internal Trade
ANEC	European Association for the Co-ordination of Consumer Representation in Standardisation
BEUC	European Consumer Organisation
CAANZ	Consumer Affairs Australia & New Zealand
CAF	Legislative and Governance Forum on Consumer Affairs
CCC	Consumers Council of Canada
CETA	Comprehensive Economic and Trade Agreement
CFA	Consumers' Federation of Australia
CFTA	Canadian Free Trade Agreement
CJUE	Court of Justice of the European Union
CMC	Committee on Consumer-Related Measures and Standards
COAG	Council of Australian Governments
EFTA	European Free Trade Association
FCAB	Swiss Federal Consumer Affairs Bureau
FCC	Swiss Federal Consumer Commission
GATT	General Agreement on Tariffs and Trade
IRC	International Regulatory Cooperation
LMI	Federal Law on the internal market of Switzerland
LTBT	Federal Law on technical barriers to trade in Switzerland
MCCA	Ministerial Council on Consumer Affairs
MRA	Mutual Recognition Act
OECD	Organisation for Economic Co-operation and Development
RCC	Canada-United States Regulatory Cooperation Council
RCF	Regulatory Cooperation Forum
RCT	Regulatory Reconciliation and Cooperation Table
TBS	Treasury Board of Canada Secretariat
TTRMA	Trans-Tasman Mutual Recognition Act
WTO	World Trade Organization

1 Introduction

The arrival on the Canadian market of companies such as Uber and Lyft is just one example of rapid technological change that is disrupting regulatory spaces. Combined with the ever-increasing interconnectedness of economies, the pace of these changes is straining the capacity of governments to adapt their existing regulatory frameworks. In response, governments are increasingly turning toward international regulatory cooperation (IRC), a set of cross-jurisdictional activities aimed at optimizing regulatory resources. IRC activities also play a crucial role in eliminating non-tariff barriers to trade. They help to reconcile differences between regulatory regimes and increase trade flows. It is for these reasons that IRC occupies such an important place in the so-called "new generation" of free trade agreements.

IRC raises many issues, however, with regard to the regulatory sovereignty of States and transparency of their activities, particularly since differences in regulations - including those relating to consumer protection – may stem from divergent preferences of the populations. Several actors in civil society also fear that IRC activities may instigate a "downward harmonization" of protection levels guaranteed by laws and regulations. This concern is not new and was raised by consumer associations in Canada in trade negotiations between Canada and the United States as early as the 1980s.[1]

To avoid this pitfall and improve the overall efficiency of IRC activities, best practices require governments to involve stakeholders. These parties must be regularly solicited by the various levels of government so that they can identify regulatory differences or examine the impact of regulatory adjustments. For Canadian consumer associations, this poses a significant challenge. To participate in IRC, they must be able to react quickly in a world in which laws and regulations are becoming increasingly complex. This requires expertise and resources that are not always available to them. Without these means, the consumers will have insufficient voice in IRC-related matters.

Consumer protection is nevertheless at the heart of the issues addressed by IRC, as the United Nations, among others, points out.[2] Whether in terms of the business practices, product safety or conflict resolution mechanisms, the impact of IRC activities goes to the very core of consumer concerns. This means that Canada's consumer associations have a key role to play.

In this study, we propose to examine this role from four different perspectives. First, we will define what IRC is, and discuss its surrounding issues and its evolution in both the global and the Canadian contexts. We will then review the provisions and the results of consultations on three IRC initiatives by the federal, provincial and territorial

[1] Fédération nationale des associations de consommateurs du Québec, *Libre-échange Canada-États-Unis : Outils pour une décision*, 1987.
[2] United Nations, *Guidelines for Consumer Protection, Chapter VI,* 2016.

governments of Canada and their trading partners. Afterwards, we proceed to sketch out a general portrait of IRC activities as well as the role of consumer associations in three foreign jurisdictions. We will conclude by presenting some possible solutions concerning the participation of consumer associations in IRC and consumer protection.

2 Regulatory cooperation

2.1 Definition, context and objectives

In its broadest sense, regulatory cooperation refers to any process by which States work together to address divergences in their respective regulations.[3] For the rest of this text we will use the term "international regulatory cooperation", which incidentally is the one used by the Organization for Economic Co-operation and Development (OECD)[4].

This definition makes IRC an exercise that takes many forms depending on the objectives it seeks to achieve, the frameworks for collaboration or the fields of regulation in question. For example, the OECD lists 11 distinct cooperation mechanisms, ranging from dialogue and informal exchange of information to the creation of common or supranational institutions such as the European Union.[5] This diversity of means is reflected in free trade agreements, such as the *Canadian Free Trade Agreement* (CFTA) which provides in Annex 404.14: "that to reconcile their regulations, governments can use i) harmonization, ii) mutual recognition, iii) equivalency iv) such other method as the Parties may agree."

Other authors instead distinguish between regulatory coherence, consultation, cooperation and competition.[6] Deblock and Wells, on the other hand, differentiate four approaches to IRC:

> [TRANSLATION] The first, the one followed by the WTO, consists in defining common standards consistent with the general principles that trade must be guided by, while acknowledging that "nothing can prevent a country from taking the necessary measures" to protect health and life, the environment, security, etc. The second approach, the one followed by the OECD, is, [once it has been recognized that "sound regulatory frameworks" are necessary for democracy, the rule of law, prosperity, well-being and the public interest], consists in separating the levels of collective action and defining for each of them the guiding principles that the country will have to apply. The third approach, adopted for the TPP, consists in focusing on "good regulatory practices" and dialogue aimed at coherence and cooperation in regulatory matters while reaffirming the "sovereign right of each Party to determine its regulatory priorities." The fourth, adopted for CETA, subordinates regulatory cooperation to the legitimate right of Parties to regulate in the public interest and to achieve public policy goals, such as "public health, social services, public education, safety, environment, public morals, social and consumer protection, privacy and data protection and the promotion and protection of cultural diversity".[7]

Regardless of the form or approach adopted, we should point out that IRC activities have been carried out between States for over a century, as illustrated by the creation

[3] J. Chaisse and T-V Lin, *International Economic Law and Governance: Essays in Honor of Mitsuo Matsushita,* 2016, p. 392.
[4] Throughout the text, we also use the term "CRI" to refer to regulatory cooperation activities between Canadian provinces and territories, including those under the Canadian Free Trade Agreement.
[5] OECD, *International Regulatory Co-operation - Addressing Global Challenges*, 2013, p. 22.
[6] B. Hoekman and P. C. Mavroidis, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, 2015.
[7] C. Deblock and G.-P. Wells, *Coopération réglementaire et accords de commerce*, 2017, p. 340-341.

of the Universal Postal Union in 1874. Today, regulatory fields affected by IRC activities extend far beyond the economic sphere and touch equally on social and administrative regulations. Examples of this are the monitoring of hazardous materials and products, the protection of endangered species or the approval of drugs or health care procedures. However, there has been an acceleration in IRC activities since the 1990s. Indeed, the reduction of trade barriers and the liberalization of global trade initiated by the *General Agreement on Tariffs and Trade* (GATT) have focused attention on "regulations as the remaining barriers to trade."[8]

Three important transformations are worthy of note. First, as of the early 1990s, we see initiatives appearing in order to improve regulatory consistency, such as the creation of the Office of Information and Regulatory Affairs in the United States. The European Union[9] and Canada[10] were also seeking "better regulation" in the early 2000s. New concerns later arose around the issue of regulation as a barrier to trade and competitiveness. In many cases, however, these efforts were unsuccessful. Finally, renewed attention has been paid to IRC since the 2008 economic crisis.[11] IRC is now a "trade priority" that takes the form of a [TRANSLATION] "new model of negotiation, which no longer focuses on reciprocity, but on the mutual recognition of regulatory practices, all in a spirit of transparency, predictability and convergence."[12]

Canada plays a role in this transformation and has been engaged in IRC activities for several years. The Treasury Board of Canada Secretariat (TBS) reports that "Canada has a long history of contributing to multilateral forums (e.g. the Codex Alimentarius Commission, the Organization for Economic Co-operation and Development (OECD), and the International Telecommunications Union)."[13] Today, Canada is multiplying its cooperation initiatives and positioning itself as a pioneer with the signing of treaties such as the *Comprehensive Economic and Trade Agreement* (CETA), an entire chapter of which deals with IRC.

The growth of IRC activities is motivated by several factors related to the ever-increasing globalization of economies. Certain players, including those in the finance and insurance sectors, are seeking to respond to the globalization of the economy in situations where companies and consumers do business in several countries. Other cooperation activities are aimed more at coordinating the provision of public goods or at controlling negative external factors that transcend borders, such as the issues raised by climate change and pollution. Other governments see IRC as a way to pool expertise and better manage the limited resources at their disposal.

[8] D. Drezner, *All Politics is Global*, 2007, p. 43.
[9] The European Council, *Better Law-Making*, 2003.
[10] Privy Council Office, *Smart Regulation. A Regulatory Strategy for Canada*, 2004.
[11] OECD, *International Regulatory Cooperation - Addressing Global Challenges*, 2013, p. 15.
[12] Deblock and Wells, 2017, *op. cit.*, p. 345.
[13] TBS, *Guidelines on International Regulatory Requirements and Cooperation*, 2007.

However, the traditional objective of IRC put forward by the States is the reduction of costs associated with red tape such as the duplication of procedures or regulatory inconsistencies. This, by the way, is the goal adopted by the Government of Canada, which sees IRC as a way to:[14]

- reduce unnecessary regulatory differences;
- eliminate duplicative requirements and processes;
- harmonize or align regulations;
- share information and experiences; and
- adopt international standards.

As Pascal Lamy, former European Commissioner for Trade and Director General of the World Trade Organization (WTO) from 2005 to 2013, points out: [TRANSLATION] "The possibilities arising from the lowering of tariffs can quickly disappear if the regulatory landscape is too uneven."[15] The Canadian Chamber of Commerce presents this "uneven landscape" as the main obstacle to trade: "The main barriers in the way of exporters and importers today are not tariffs or quotas; they are regulatory barriers to trade."[16] According to this grouping, the issues raised by regulation are all the more important, since "[a]ccording to the WTO, the number of regulatory measures affecting trade increased more than ten-fold from 1995 to 2010, with a spike after the global financial crisis in 2008."

The estimated cost of the lack of regulatory harmonization is difficult to measure, however, and varies greatly by sector.[17] According to the OECD, regulatory heterogeneity can generate costs in the service sector equivalent to tariffs of between 20 and 75%.

First, there are the information costs, i.e. the costs related with the identification and control of companies the regulatory requirements of external markets. Second, companies must incur specification costs to adapt their products to the constraints of external markets, in order, for example, to meet product labelling requirements. Finally, companies must demonstrate to the regulatory authorities that their product complies with requirements and must therefore bear the costs of evaluating product conformity. All these costs will vary, depending on the transparency of the regulatory regimes and the degree of divergence.

[14] Online: https://www.canada.ca/en/treasury-board-secretariat/services/regulatory-cooperation/learn-about-regulatory-cooperation.html (Accessed February 15, 2019).

[15] P. Lamy*, Avant-propos. L'OMC et les normes internationales*, 2012, p 8.

[16] Canadian Chamber of Commerce, *Canada's Next Top Trade Barrier: Taking International Regulatory Cooperation Seriously*, 2016, p. 5.

[17] OECD, *International Regulatory Co-operation and Trade: Understanding the Costs of Trade Regulatory Divergence and the Remedies*, 2017, p. 9.

As noted below, the effects of IRC are as yet little known and difficult to quantify, but many consider the potential economic benefits of such cooperation to be substantial. For example, according to an OECD study, countries with similar regulations trade more with each other.[18] Several studies have also been conducted that demonstrate that regulatory convergence would translate into an increase in GDP.[19]

While globalization and market liberalization increase the benefits of IRC, this does not reduce the cost of the domestic adjustment that needs to happen in the event of regulatory reform.[20] However, although the short-term costs are undeniable, "regulatory cooperation can help regulatory departments and agencies enhance the effectiveness of the programs for which they are accountable."[21] In addition, coordination makes it possible to share costs (e.g. by avoiding duplicating scientific research, thereby freeing up resources for allocation to other parts of the regulatory process) and achieve economies of scale that help regulators carry on their "expanding missions as their resources become ever more constrained."[22] IRC also has a role to play when it comes to developing new regulations, since, from a practical point of view, it is much easier to cooperate in the development of new regulations than to attempt to reduce the heterogeneity of existing ones.

In short, it is plain that economic gains can be achieved when IRC is applied to regulations that are inconsistent, redundant or arbitrary, as shown in CETA ("unnecessary differences in regulation"[23]), the Memorandum of Understanding of the Canada-United States Regulatory Cooperation Council (RCC) ("unnecessary regulatory differences"[24]) or by the Government of Canada ("multiple regulatory regimes can lead to duplication and waste"[25]).

However, the presence of heterogeneity in regulations may reflect differences in the objectives pursued by the jurisdictions that have implemented them. This explains—and we will return to this later—why so many in civil society are worried about a race to the bottom, to the benefit of trade and to the detriment of consumers, that IRC might bring about. All stakeholders, including businesses and civil society groups have an important role to play in IRC activities. First, to help governments identify regulatory differences, but also to highlight people's preferences. We will briefly discuss the role of stakeholders in the following section.

[18] H. Nordas, *Services Trade Restrictiveness Index (STRI): The Trade Effect of Regulatory Differences*, 2016, p. 21.

[19] Hoekman and Mavroidis, 2015, *op. cit.*, p. 2.

[20] Drezner, 2007, *op. cit.*, p. 32.

[21] TBS, 2007, *op. cit.*, point 2.2.

[22] K. W. Abbott, *International Organizations and International Regulatory Cooperation: Exploring the Links*, 2014, p. 22.

[23] Comprehensive Economic and Trade Agreement, art. 21.3 c) ii).

[24] RCC MoU. Online: https://www.canada.ca/en/treasury-board-secretariat/services/regulatory-cooperation/memorandum-understanding-between-canada-united-states-advance-regulatory-cooperation-council.html (Accessed January 20, 2019).

[25] TBS, 2007, *op. cit.*, point 2.2.

2.2 The role of stakeholders in IRC

As suggested above, regulatory differences may be the result of divergent policies and objectives. Moreover, citizens and consumers may well have different preferences, even in similar economies such as the European Union and Canada. To illustrate this point, Lamy gives the example of [TRANSLATION] "the growing complexity of the European system for authorizing GMOs or the famous EU/Canada/Norway conflict over EU measures banning the import and sale of products derived from seals. This trade measure was based on standards for the welfare of an animal that the Inuit hunt, because it is part of their lifestyle and their cultural tradition, which offended the vision of Europeans."[26]

According to Lamy, when it comes to lowering tariff barriers, values are not an issue, whereas when it comes to regulation [TRANSLATION] "this issue has become central." The issue of values is addressed in Article 21.5 of CETA. It states that "a Party is not prevented from adopting different regulatory measures or pursuing different initiatives for reasons including [...] values or priorities that are particular to that Party." While the CFTA does not directly address the question of values in the chapter on regulatory cooperation, the Preamble indicates that governments recognize "the diversity of social, cultural and economic characteristics of the Provinces."[27]

For IRC to be socially and commercially advantageous for all stakeholders, there must be transparency and the presence of a balance of power. The Government of Canada, meanwhile, also recognizes that "regulatory consistency is about good regulatory practices, transparency, and stakeholder accountability in a domestic regulatory process."[28] The frequent technical nature of the discussions only reinforces this perception[29]. However, [TRANSLATION] "regulatory processes are far from being transparent and free from the influence of particular economic interests."[30] [TRANSLATION] "While regulatory cooperation in the context of trade and investment agreements seems *de jure* to grant the same rights to companies as to civil society, the outcome of regulatory cooperation on standards also depends on a *de facto* balance of political power and pressure tactics used by lobbies and NGOs."[31]
As Samuel Delpeuch states:

> [TRANSLATION]From a legal point of view, regulatory cooperation is largely *terra incognita*. Sometimes referred to as a "secret parliament" by its opponents, regulatory cooperation clearly poses the question of sovereignty and democratic control of the decisions taken by the State and

[26] P. Lamy, *Le Nouveau Monde du Commerce*, 2015, p. 497.

[27] *Canadian Free Trade Agreement*, Preamble.

[28] Chamber of Commerce of the United States of America, *Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP)*, pp. 1–2.

[29] G. Hale, *Regulatory Cooperation in North America: Diplomacy Navigating Asymmetries*, 2019, p. 125.

[30] Deblock and Wells, 2017, *op. cit.*, p. 4.

[31] S. Delpeuch, *La coopération réglementaire dans les accords de nouvelle génération*, 2017, p. 156.

> federal parliaments. Regulatory cooperation has no legislative power as such and the assertion of respect for the right of States to regulate is inherent in the discourse related to the inclusion of regulatory cooperation in trade and investment agreements.[32]

The transparency of the processes is therefore of paramount importance. It ensures the responsibility of public actors and the confidence of citizens in the regulatory process. According to the OECD, "Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible and less Influenced by special interests, and therefore more open to competition, trade and investment."[33] To ensure this transparency, governments can undertake several actions, including standardizing procedures for regulatory changes, consulting with stakeholders, communicating and publishing regulatory texts, and instituting effective appeals procedures. The publication of data, models, hypotheses or arguments, as well as the use of impact assessments and cost-benefit analyses, will require regulators to justify their proposals adequately. Governments will therefore have more reason to take stakeholders' positions into account. As Susan Dudley states, "In sum, transparency in the regulatory process can enhance the effectiveness of regulatory governance and offer a counterweight to tendencies of politicians and bureaucrats to suffer from tunnel vision, be captured by influential interests, to serve narrow rather than public goals, and to issue regulations that are unnecessarily bureaucratic or have disproportional effects."[34]

Specialists illustrate the role of private economic actors and civil society organizations in IRC differently. Abbott and Snidal, for example, are interested in the degree of influence the various players have on international IRC organizations[35]. Deblock and Wells, on the other hand, highlight the influence of three groups of actors on the formation of rules at the international level: States, non-governmental organizations and businesses. According to the authors, [TRANSLATION] "the game is[...] to arbitrate between the public interest and economic efficiency[36]."

According to these authors, two questions emerge: [TRANSLATION] "First, what form should the institutional debate between the three parties involved–businesses, governments and NGOs–take? And secondly, what place should be given to the common good in a debate that concerns both the collective interest and the special interest?" In their view, [TRANSLATION] "the debate cannot be confined to the technical dimension alone, any more than it would be up to the experts alone to define common standards or judge the quality of regulations." This brings us to the issue of transparency and institutionalizing the participation of a wide range of actors. In Deblock and Wells'

[32] *Ibid*., p. 155.
[33] OECD, *Better Regulation in Europe*, 2010, p. 51.
[34] S. E. Dudley and K. Wegrich*, The Role of Transparency in Regulatory Governance: Comparing US and EU Regulatory Systems*, 2016, p. 1143.
[35] A.K. Abbott and D. Snidal*, International Regulation International Without Government: Improving Performance through IO Orchestration*, 2010, p. 315.
[36] Deblock and Wells, 2017, *op. cit.*, p. 17.

view, the best solution is to find consensual rules that satisfy the various actors involved.

2.3 IRC and consumer protection

As the TBS points out, "a central pillar of regulatory cooperation is the maintenance or enhancement of standards of public health and safety and environmental protection."[37] Since the scope of the IRC is so vast, a multitude of regulations, laws and standards designed to protect the consumer are affected.

In a broader perspective, IRC can address many of the traditional demands put forward by consumer organizations. These are summarized in the *United Nations Guidelines for Consumer Protection* (the Guidelines). The Guidelines "apply both to home-produced goods and services and to imports" and prescribe a series of measures for Member States to develop, maintain and strengthen consumer protection policies:

- The adoption of national consumer protection policies that promote, *inter alia*, the adoption of good business practices and the creation of fair, affordable and prompt dispute resolution and redress mechanisms;
- The adoption of measures to ensure the physical safety of consumers;
- The promotion and protection of consumers' economic interests, including protection against abusive commercial practices such as misleading or deceptive advertising and fraudulent practices;
- The development and application of standards governing the safety and quality of consumer goods and services;
- The adoption of measures to create distribution channels for consumer goods and essential services;
- The promotion of dispute resolution and redress;
- The development of education and information programs;
- The promotion of sustainable consumption methods;
- The development of transparent policies to enhance consumer confidence in e-commerce;
- The development of measures to protect consumers in the financial sector;
- The adoption of measures in the sectors of food, water, pharmaceuticals, energy, public services and tourism.

It is particularly interesting that the United Nations should place IRC activities at the heart of the Guidelines. The Guidelines contain a series of suggested IRC activities for Member States:

[37] TBS, *Cabinet Directive on Regulation*.

- Establish mechanisms for the exchange of information on their consumer protection policies and measures;
- Cooperate or encourage cooperation in the implementation of consumer protection policies to achieve greater results within existing resources.;
- Cooperate to improve the conditions under which essential goods are offered to consumers, giving due regard to both price and quality;
- Develop or strengthen information links regarding products which have been banned, withdrawn or severely restricted in order to enable other importing countries to protect themselves adequately against the harmful effects of such products;
- Ensure that the quality of products and the information relating to such products does not vary from country to country in a way that would have detrimental effects on consumers;
- In the public interest, strengthen the capacity to cooperate in the fight against fraudulent and deceptive cross-border commercial practices.

It is also proposed that Member States designate a consumer protection enforcement agency that could serve as a point of contact. These agencies "should coordinate investigations and enforcement activities," and "make use of existing international networks and enter into appropriate bilateral or multilateral agreements." Finally, Member States and relevant international organizations should promote consumer education and training programs.

While the IRC can play a role internationally in strengthening consumer protection laws and standards, it is equally relevant in the Canadian context. As noted by former Office of Consumer Affairs Director Micheal Jenkin, in Canada "costs are spread over many jurisdictions and there is duplication of institutional overheads, uncoordinated policy and enforcement, and varying (arguably, lower) levels of protection across the country"[38]. In 2015, the Consumers Council of Canada (CCC)[39] identified several regulatory areas affecting consumers in which the Canadian provinces would have an opportunity to harmonize their regulations. The range is wide: agricultural products, alcohol products, consumer services, e-commerce, energy, financial products, housing, labour standards, payment systems, pharmaceuticals, standards and measures and waste management.

This disparity in provincial and territorial laws and regulations is not unrelated to the fragmentation o f the Canadian consumer movement. Unlike other jurisdictions, including the European Union and the United States, there is no central national association that advocates for the rights of Canadian consumers. Rather, the consumer movement in Canada is organized around a few groups (the main ones being the CCC,

[38] M. JENKIN, *The steady decline of consumer protection in Canada*, 2018. Online : https://policyoptions.irpp.org/magazines/june-2018/the-steady-decline-of-consumer-protection-in-canada/ (Accessed November 15th, 2019).

[39] CCC, *Options for a Sustained Institutional Role for Consumer Organizations in Internal Trade Harmonization Initiative*, 2015.

the Public Interest Advocacy Centre, Union des consommateurs and Option consommateurs) that have each developed their respective areas of expertise over time. For example, the Public Interest Advocacy Centre, is mainly active in the telecommunications sector and intervenes regularly before the Canadian Radio-television and Telecommunications Commission.

The context of fragmentation of the consumer movement in Canada is therefore a challenge for the application of the Guidelines mentioned above. This situation is accentuated in Canada by a decline in recent years in the financial resources available to consumer associations and the lack of public funding to support the movement's mission. Indeed, "in terms of membership and budgets consumer organizations across Canada and in Quebec are miniscule compared with the resources and lobbying capacity of their counterparts in the US or the UK, even accounting for the differences in population"[40].

IRC is therefore a privileged instrument to ensure consumer protection in a context of increasing market interconnection, both internationally and within Canada. For consumers to have their interests heard in IRC activities, however, consumer organizations will have to overcome the challenges posed by the lack of national coordination and the insufficiency of financial resources.

2.4 IRC in Canada

Canada has a "legal foundation" that frames IRC activities at the federal level and, more broadly, provides federal departments and agencies with guidelines to follow in performing regulatory activities. Under the direction of the TBS, the Cabinet Directive on Regulation[41] (The Directive) establishes requirements that must be met by the means specified in the Policy on Regulatory Development[42] (the Policy). They serve as guidelines to "all regulations that are or will be registered as such."

The Directive and the Policy apply to IRC activities and provide for the involvement of stakeholders, since "robust early consultation with stakeholders provides an opportunity to inform analysis." The Directive thus requires that the regulatory process followed by departments and agencies be "modern, open and transparent" and that it "meaningfully engages the public and stakeholders, including Indigenous peoples, early on."

To achieve this, the Directive requires the use of modern tools and platforms that promote stakeholders consultation and mobilization. Stakeholders are defined as

[40] JENKIN, *op. cit.*, 2018.

[41] Online: https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulation.html (Accessed February 15, 2019).

[42] Online: https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/policy-regulatory-development.html (Accessed February 15, 2019).

"individuals or parties who have an interest or concern in federal regulations." Note that consumer associations are not explicitly named as stakeholders.

The Directive strongly encourages IRC activities. It is expected that departments and agencies will "assess opportunities for cooperation with other jurisdictions" including by harmonizing regulations "in order to reduce the regulatory burden on Canadian business, while maintaining or improving the health, safety, security, social and economic well-being of Canadians, and protecting the environment." The Policy specifies that IRC also aims at promoting economic growth and job creation as well as expanding choice for consumers.

The Directive also requires departments and agencies to conduct impact assessments, including on the effects that changes in regulations can have on consumers, such as the cost of living as well as the price, quality and variety of available goods. In addition, "Departments and agencies must undertake a regular review of their existing regulatory stock, which should include technical guidance and other associated policies, in order to ensure that the regulations continue to be appropriate and effective, and achieve their intended policy objectives."

As mentioned previously, federal departments and agencies have been involved in IRC activities for several years. These cover a "range of regulatory activities" which may result in the development of policies or the adoption of standards.

For example, Canada and its main trading partner, the United States, have been working together for several years under the auspices of RCC. The initiative, launched in 2011, was intended as "a 'laboratory' of sorts, with agencies employing various methods and approaches for strengthening […] cooperation efforts, while identifying elements that would form the basis for a more long-term, systemic approach to regulatory cooperation between [the two] countries."[43]

Bilateral discussions between Canadian and U.S. departments and agencies have resulted in the creation of a common portal for electronic submissions for pharmaceuticals and biologics, mutual recognition of decisions on animal disease zoning and the harmonization of product review methods for crop protection. Canada and the United States recently signed a new Memorandum of Understanding (MoU), to which we will return in the next section.

We can also highlight the work carried out by the Committee on Consumer-Related Measures and Standards (Consumer Measures Committee - CMC), established by the Agreement on Internal Trade (AIT). In the late 1990s, experts observed that [TRANSLATION] "An overview of Canadian consumer protection legislation revealed inconsistent and

[43] Online: https://www.canada.ca/en/treasury-board-secretariat/corporate/transparency/acts-regulations/canada-us-regulatory-cooperation-council/joint-forward-plan-august-2014.html (Accessed February 15, 2019).

unequal levels of consumer protection among the different jurisdictions."[44] Efforts to harmonize consumer protection were therefore deployed by the Canadian federal government, provinces and territories. Five formal agreements were signed covering collection agencies, cost of credit disclosure in Canada, Internet sales contracts, law enforcement cooperation and solicitation laws.[45] It is important to note that these harmonization agreements are not binding. While it would be desirable if the principles set forth in the agreements were implemented, no mechanism has been developed by the provinces and territories for this purpose.

Since the conclusion of these agreements, CMC's activities have slowed down. Currently, the CMC function is to serve as a forum for consumer protection agencies in the various provinces and territories. It also participates in the development of outreach activities with Canadian consumers through various tools such as a complaints roadmap and a six-step guide to getting out of debt. As we will see in the next section, the CMC is renewed in the CFTA.

[44] R. Tassé and K. Lemieux, *Les Droits à la Protection du Consommateur au Canada dans le Contexte du Commerce Électronique*, 1998, pp. 54–55.
[45] Online: https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/eng/h_fe00157.html (Accessed January 12, 2019).

3 Three IRC initiatives in Canada

As stated previously, Canada and the Canadian provinces and territories are involved in numerous IRC initiatives. In this section we focus on three of these, for two main reasons. First, they are recent initiatives, which means that the related consultation processes are modern and the regulatory issues addressed are contemporary. Second, the consultations that the Treasury Board of Canada Secretariat launched in Canada on these three initiatives in 2018 provide an opportunity to analyze the results in terms of regulatory issues and stakeholder involvement.

The first initiative to be considered is the CETA, an agreement reached between Canada and the European Union and its Member States on October 30, 2016 that came into force provisionally on September 21, 2017.[46] Many view this as a «new generation free-trade agreement" that could serve as a "model" for the regulation of international trade and investment. It is considered by the European Commission and the Government of Canada as "progressive" and "covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers."[47] For some, it is "the first step forward towards a global system."[48]

According to the Preamble to CETA, the European Union and Canada seek to establish an "expanded and secure market for their goods and services." This market must be established "through the reduction or elimination of barriers to trade and investment." Thus, to achieve the objectives as set forth in the Preamble, in addition to the traditional question of reducing tariff barriers to trade, CETA creates new obligations with regard to more contentious issues such as the environment,[49] investment,[50] labour mobility,[51] and the right to work.[52] Specifically, IRC is included in many provisions of the agreement, but some chapters (especially Chapters 12, 21 and 27) deal specifically with this form of cooperation and establish its terms. We focus here on the IRC activities in chapter 21, which Deblock and Wells describe as the most innovative part of CETA.[53]

These areas, which are traditionally regulated by the State, are subject to multilateral debate, especially as regards social, economic, cultural and sovereignty issues, both

[46] As listed in the Preamble to the Agreement, the Member States of the European Union include the following contracting parties: the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland , the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

[47] Online: http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/canadian_statement-enonce_canadien.aspx?lang=eng#a26 (Accessed January 20, 2019).

[48] C. Malmström, CETA - *An Effective Progressive Deal for Europe, 2015*.

[49] CETA, *op. cit.*, Chapters 22 and 24.

[50] *Ibid*., Chapter 8.

[51] *Ibid*., Chapter 11.

[52] *Ibid*., Chapter 23.

[53] Deblock and Wells, 2017, *op. cit.*, p. 333.

between and within contries. It was to ensure that States retain control in these areas that the *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada & the European Union and its Member States* (*the Joint Interpretative Instrument*) was adopted.[54] Point 1b in particular states that CETA will "boost trade and economic activity, while also promoting and protecting our shared values and perspectives on the role of government in society." As we will see, Canada and the European Union have sought to establish a legal framework in their trade relations that balances rights and obligations. This balance involves obligations that go beyond those set by the multilateral framework but is based on a "voluntary" cooperation in the more contentious areas.

The second IRC initiative that we will analyze is the RCC, a forum for cooperation between Canada and the United States. The first draft of the RCC was announced on February 4, 2011 "to better align the two countries' regulatory approaches, where possible."[55] The *Memorandum of Understanding between the Treasury Board of Canada Secretariat and the United States Office of Information and Regulatory Affairs* (the Participants) *regarding the Canada-United States Regulatory Cooperation Council* (RCC MoU) is signed in June 2018, thereby providing a legal basis for the council and institutionalizing the relationship between the Participants.

The RCC MoU takes up and develops the principles already established in the *Terms of Reference of June 3, 2011*.[56] Although relationships between regulatory agencies in both countries already exist, the goal is to make the process more efficient and increase the "pace and scope of regulatory co-operation between the two countries."[57] It should be noted that the RCC MoU is not legally binding.

It is currently uncertain how the *Canada-United States-Mexico Agreement*, which Canada has just ratified, will affect the activities of the RCC. However, there is reason to believe that regulatory cooperation between these countries will increase since the new North American free trade agreement contains an entire chapter on "good regulatory practices" that includes several provisions on IRC[58]. It should also be noted that these provisions are subject to the dispute settlement mechanism of the agreement[59].

Finally, we will analyze the CFTA, the free trade agreement concluded between Canadian provinces and territories and the Government of Canada, which came into force on July 1, 2017. Although the AIT,[60] the CFTA's predecessor, helped advance the

[54] Online: http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/fr/pdf (Accessed January 25, 2019).
[55] Online: https://www.canada.ca/en/health-canada/corporate/about-health-canada/legislation-guidelines/acts-regulations/canada-united-states-regulatory-cooperation-council.html (Accessed January 25, 2019).
[56] Online: https://www.trade.gov/rcc/us-canada_rcc_terms_of_reference.pdf (Accessed January 25, 2019).
[57] OECD, 2013, *op. cit.*, p. 17.
[58] *Canada-United States-Mexico Agreement*, chapter 28.
[59] *Canada-United States-Mexico Agreement*, art. 28.20.
[60] As well as these 14 amendment protocols and bilateral agreements that emerged after its entry into force (e.g. the New West Partnership Trade Agreement).

process of integrating Canadian markets, the CFTA was born out of the recognition of the persistence of trade barriers restricting trade within Canada[61] and the conviction that "more can be done."[62]

AIT prohibited the adoption or maintenance of measures that had the effect of creating obstacles to internal trade, unless such measures pursue a legitimate aim and provide regulatory reconciliation in accordance with Article 405 (and its Annex).

However, as summarized by Industry Canada:

> […] after 20 years, the very architecture of the agreement is out of date, resulting in a patchwork that does not cover all economic activity or even embody a presumption of open trade. Some of the AIT's provisions are not binding, and many AIT rules have exceptions for provinces to pursue legitimate objectives such that the application of rules is uneven across the country. Accordingly, progress has been slow in tackling areas such as aligning regulations and standards across the country, or making the dispute resolution provisions more accessible, transparent and binding on governments.
>
> [...] Unnecessary differences in standards and regulations can have major cost implications for doing business and may impede investment. While many of these costs are difficult to measure, there are many examples that demonstrate the higher costs and inefficiencies from the lack of a common approach to internal trade across Canada. [63]

Indeed, between 2000 and 2017, the value of interprovincial exports of Canadian goods and services increased from $213.3 billion to $406.4 billion, which represents an average annual growth of 3.9%.[64] However, according to Statistics Canada, the impacts of non-tariff barriers[65] on interprovincial trade represent an "implied *ad valorem* tariff equivalent of 6.9%."[66] The Standards Council of Canada gives several examples of these non-tariff barriers, including the *Renewable Fuels Regulation*,[67] according to which producers, importers and sellers of oil must include at least 5% renewable fuel in gas-oil and 2% in diesel. However, there was minimum harmonization and some provinces took advantage of their rights to demand higher shares of renewable fuels, even as much as 8.5% of renewable fuels in gas-oil.

[61] J. Whalley, *Interprovincial Trade Barriers Towards Goods and Services in Canada,* 2007, p. 11; Standing Senate Committee on Banking, Trade and Commerce, *Tear down these walls: dismantling Canada's internal trade barriers, 2016.* L. Albrecht and T. Tombe, *Internal Trade, Productivity and Interconnected Industries: A Quantitative Analysis,* 2015, p. 261; Industry Canada, *One Canada, One National Economy – Modernizing Internal Trade in Canada,* 2014.
[62] Online: http://www.canadaspremiers.ca/premiers-will-lead-comprehensive-renewal-of-agreement-on-internal-trade/. (Accessed January 20, 2019)
[63] Industry Canada, 2014, *op. cit.,* p. 2.
[64] *https://www.cfta-alec.ca/annual-meeting-of-the-committee-on-internal-trade-all-parties-continue-to-work-collaboratively/* (Accessed January 21, 2019).
[65] R. K. Bemrose, W. M. Brown and J. Tweedle, *Going the Distance: Estimating the Effect of Provincial Borders on Trade When Geography Matters,* 2017, p. 33
[66] Standards Council of Canada, *Conformity Assessment in Canada: Understanding the Value and Implications for Internal Trade,* 2018.
[67] Renewable Fuels Regulations (SOR/2010-189).

Thus, it seemed that the AIT needed to be modernized. We will see that, in order to tackle the "unnecessary disparity in standards and regulations," the CFTA went further than its predecessor, notably by means of its fourth chapter, which provides for regulatory notification, reconciliation and cooperation among Canadian provinces and territories.

Also, the AIT established rules in 11 specific sectors: public procurement, labour, investment, consumer measures and standards, agricultural and food products, alcoholic beverages, natural resources, energy, communications, transport, and environmental protection. Unlike the the AIT, the CFTA uses a negative list approach, that is to say, it establishes rules for all sectors of the economy, except for the nearly 100 pages of exemptions and exceptions specified in the Agreement. This was a step forward for many[68] who considered that the use of a positive list forced politicians to negotiate in the economic areas that were not included, "making it difficult and time-consuming to liberalize trade."[69]

3.1 Principles and objectives, regulatory sovereignty and protection levels

3.1.1 The CETA

The regulatory cooperation objectives of CETA are set forth in Chapter 21, Paragraph 21.2.4, and in Article 21.3. Paragraph 21.2.4 states:

> Without limiting the ability of each Party to carry out its regulatory, legislative and policy activities, the Parties are committed to further develop regulatory cooperation in light of their mutual interest in order to:
>
> a. prevent and eliminate unnecessary barriers to trade and investment;
> b. enhance the climate for competitiveness and innovation, including by pursuing regulatory compatibility, recognition of equivalence, and convergence; and
> c. promote transparent, efficient and effective regulatory processes that support public policy objectives and fulfil the mandates of regulatory bodies, including through the promotion of information exchange and enhanced use of best practices.

It can be seen that the objectives attributed to regulatory cooperation are primarily economic in nature. The main objective is to prevent and eliminate unnecessary barriers to trade and improve market conditions. It should be noted that the cooperation referred to is not limited to aspects that facilitate trade, unlike, for example, the measures referred to in the chapters on sanitary and phytosanitary measures[70] and

[68] The negative list approach was particularly recommended by Industry Canada (Industry Canada, 2014, *op. cit*., p. 6.), OECD (C. LUU, *Strengthening competition in network sectors and the internal market in Canada, 2016, p. 41)* and the Standing Senate Committee on Banking, Trade and Commerce, (Standing Senate Committee on Banking, Trade and Commerce, 2016, *op.cit.,* p. 4)
[69] Canada's Public Policy Forum, *Canada's Evolving Internal Market - An agenda for a more cohesive economic union,* p. 17.
[70] According to Art. 5.3, Ch. 5 "applies to SPS measures that may, directly or indirectly, affect trade between the Parties."

technical barriers to trade.[71] However, it is likely that the Parties will give priority attention to measures that are harmful to trade via this mechanism.

Article 21.3, however, gives priority to a series of non-commercial objectives. It states:

> The objectives of regulatory cooperation are to:
>
> a. contribute to the protection of human life, health or safety, animal or plant life or health and the environment […]
> b. build trust, deepen mutual understanding of regulatory governance and obtain from each other the benefit of expertise and perspectives [...]
> c. facilitate bilateral trade and investment […]
> d. contribute to the improvement of competitiveness and efficiency of industry […]

Thus, the first objective assigned to regulatory cooperation in the context of CETA is non-commercial in character and intersects with certain aspects of consumer protection. However, trade objectives are over-represented compared with non-commercial objectives and thus may take precedence over the latter when there is conflict between the two as noted by the Commission nationale consultative des droits de l'homme, a French national institution responsible for the promotion and protection of human rights:

> However, although the protection of people and the environment are mentioned at the top of the list of these objectives, it appears that the aspects dealing with trade, investment and the business climate take greatest precedence. Indeed, the different subjects are not treated equally — some have more importance than others. This observation casts doubt, over time, over the real balance between these two aspects — human rights and trade — in the terms for implementing regulatory cooperation. Therefore, there is a risk that the aspects linked to human rights rarely, or even never, prevail over economic aspects.[72]

Beginning in the Preamble to CETA, the EU and Canada call attention to their sovereignty in the matter of regulating economic activity. Although governments must be prepared to make some concessions in order to establish a free, secure enlarged market and promote trade, most regulations concern politically sensitive areas that directly affect the ability of governments to regulate on their territory. In the words of the CFTA, governments signing agreements wish to establish "a mutually agreed balance of the Parties' rights and obligations."[73]

Note that, in the Preamble of CETA, when the State's ability to regulate is emphasized, it is always in connection with the "public interest" or "legitimate objectives." The notion of "public interest" remains to be defined.

[71] According to Art. 4.1, Ch. 4 "applies to the preparation, to the preparation, adoption, and application of technical regulations, standards, and conformity assessment procedures that may affect trade in goods between the Parties."
[72] Commission nationale consultative des droits de l'homme, *Opinion on international trade and investment agreements: "Let us not sacrifice human rights for commercial interests" - The example of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada*, 2016, p. 19.
[73] CFTA, *op. cit.,* Preamble.

The voluntary nature of IRC is also recalled in the dedicated chapter on IRC, particularly in paragraph 21.2.4 cited above, which states that IRC activities must not limit the ability of "each Party to carry out its regulatory, legislative and policy activities". This cooperation is not completely voluntary since, according to the same paragraph, the Parties "are committed to further develop regulatory cooperation" and must, under article 21.4, strive to achieve the objectives pursued by undertaking IRC activities, in addition to being able to justify their decision not to participate in certain IRC activities when appropriate.

It will be recalled that an interpretative instrument was adopted as a result of resistance by the French and Walloon Parliaments to CETA[74] . The provisions of the instrument and the Preamble have only declarative value, yet, according to the *Vienna Convention on the Law of Treaties* (1969), they permit all of the provisions of the Treaty to be interpreted. Indeed, according to Article 31 of the *Vienna Convention on the Law of Treaties*: "The context for the purpose of the interpretation of a shall comprise, in addition to the text, including its preamble and annexes: [...] Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."
The interpretative instrument states:

> The European Union and its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, privacy and data protection and the promotion and protection of cultural diversity. CETA will also not lower our respective standards and regulations related to food safety, product safety, consumer protection, health, environment or labour protection. Imported goods, service suppliers and investors must continue to respect domestic requirements, including rules and regulations. The European Union and its Member States and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements.

In addition to general reminders found in the Preamble and the interpretative instrument, CETA contains multiple provisions for preventing the High Contracting Parties from sacrificing their level of protection in order to boost trade and attract investment, thereby leading to a downward leveling of the regulations. Examples include Articles 23.2 and 23.4, which prohibit Canada and the European Union from lowering their level of labour protection,[75] or Articles 24.2 and 24.4, which ensure that the level of environmental protection is maintained.[76] Unfortunately, there is no similar article with horizontal scope that relates explicitly to maintaining the level of consumer protection and rights. While the scope of these clauses is difficult to assess, their inclusion in the text of CETA illustrates the legislators' desire to strike a balance between the commercial and non-commercial interests pursued by the Agreement.

[74] F. Matsumoto, *L'épopée de la Wallonie et la signature de l'AECG / CETA, 2017.*
[75] The common interpretative instrument reinforces these clauses in points 1 d), 2, 7 b) and 8 a).
[76] The common interpretative instrument reinforces these clauses in points 1 d), 2 and 9 a).

CETA also has the distinction of including within in its chapter on IRC the objective of ensuring "high levels of protection for human, animal and plant life or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS and this Agreement."[77]

3.1.2 The RCC

The RCC objectives are in turn presented in the Annex to the RCC MoU. According to the first point in the Annex, the RCC aims to:

> i. facilitate coordination between agencies and departments in both countries, enable engagement between stakeholders and regulators, and promote opportunities for cooperation; and
> ii. foster alignment of existing federal regulatory activities where feasible and appropriate or, absent such alignment, explore the possibility of adopting other measures in order to reduce, eliminate or prevent unnecessary regulatory differences between both countries while maintaining high levels of protection for health, safety, and the environment.

Interestingly, the Preamble to the RCC MoU includes the objective of enabling "engagement between stakeholders and regulators." It also indicates that the Participants must accord priority to "economic growth, innovation, competitiveness, and job creation as an objective of the RCC, while maintaining high levels of health protection, safety and the environment." Thus, the objective is presented as primarily economic; however, economic objectives should not prevent the maintenance of high levels of protection. Participants are also seeking "to reduce or eliminate unnecessary regulatory differences between their two countries through the greater alignment of regulatory measures and systems".

The RCC MoU also states in its Preamble that "their countries may adopt different approaches to address similar issues."[78] For instance, Article 1 states that "their respective regulations continue to apply" and that regulatory harmonization is carried out "in accordance with their respective national law." The RCC MoU therefore reaffirms the priority of the national laws and regulations, and it highlights the voluntary nature of IRC, since the Participants acknowledge in point 1.iv that "cooperation initiatives [are] pursued on a voluntary basis."

There are also similar provisions in the Annex to the RCC MoU. For example, point 2.i: "each country maintains its sovereign regulatory decision-making, which is consistent with national law." Furthermore, the Annex specifies that the RCC MoU in no way precludes the respective agencies of the two countries from cooperating.

[77] CETA, *op. cit.*, art. 21.2.2.
[78] RCC MoU, Preamble.

The RCC MoU is not legally binding, it can also be easily modified and the Participants may decide to withdraw from it at any time. In fact, according to the procedures set forth in paragraphs 11 and 12:

> 11. The Participants may amend this MoU upon their mutual written consent.
> 12. A Participant may cease its participation under this MoU by giving a written notice to the other Participant.

As for maintaining the levels of protection, the RCC MoU specifies in its Preamble that IRC activities must be conducted "while maintaining high levels of protection of health, safety, and the environment." This point is reiterated, with the addition of consumer protection, in points 1.iii and 2.iii of the Annex, both of which state that it is expected that "regulatory outcomes for consumer protection, health, safety, security, and the environment are not compromised."

3.1.3 The CFTA

The chapter on IRC in the CFTA is divided into three parts. The first is about transparency and regulatory notification, the second is about reconciling existing regulatory measures, and the third is about regulatory cooperation with a view to developing future regulations.

Reconciliation applies to existing regulatory measures that act as "a barrier to trade, investment or labor mobility within Canada." Part C of the chapter, on the other hand, applies to "future regulatory measures." This part promotes cooperation between the provinces, territories and the Government of Canada, in order to:

> (a) avoid regulatory divergences that may impair trade, investment, or labour mobility within Canada;
> (b) facilitate innovation, competition, or growth in emerging industries, technologies, or sectors; or
> (c) ensure that, if feasible, common processes exist among Parties for implementing future regulatory measures in order to help streamline approval processes and minimize the administrative burden for enterprises working in multiple Provinces.[79]

Thus, the objectives of this cooperation are only commercial and economic. It should be noted, however, that the cooperation provided for in Part C goes beyond the issue of regulatory differences that impede trade, investment and mobility of labour, and relates to any regulations that can "stimulate innovation, competition or growth in emerging industries, technologies or sectors" or reduce administrative burdens.[80]

The Preamble and Articles 100 and 102 of the CFTA also highlight the need for a form of regulatory cooperation between the different parties to the Agreement. Note also that

[79] CFTA, *op. cit.*, art. 408.1.
[80] CFTA, *op. cit.,* art. 408.1 b) and c).

Section 102.1 a), contrary to Article 101.3 a) of the AIT, which focused on future obstacles, posits the removal of existing obstacles as a guiding principle for the parties to the Agreement. This provision is added to paragraph c), which concerns the need to reconcile regulatory measures.

There are several articles in the CFTA that reaffirm the ability of governments to regulate within their territories, including Article 102.2 and Article 1200. The latter best illustrates this jurisdictional safeguard, as it reasserts the powers and responsibilities conferred by the Constitution Act, 1867. Article 102.2 uses very strong language. In fact, it proclaims that the right to regulate within its territory is a "basic and fundamental attribute of government." The Parties also recognize "the need to preserve flexibility in order to achieve policy objectives, such as public health, safety, social policy, environmental or consumer protection, or the promotion and protection of cultural diversity." It should also be highlighted that, according to Annex 404.1 b), "any amendment to a regulatory measure that is legislation will require the approval of Parliament of Canada or of a legislature, as applicable."

It should be noted, however, that the CFTA states: "If a Party has reconciled a regulatory measure pursuant to a reconciliation agreement, that Party shall not amend that regulatory measure in a manner that circumvents the reconciliation agreement[81]." It adds that the parties "shall make every attempt, through cooperation, consultations and other dispute avoidance and resolution processes available to them to arrive at a mutually satisfactory resolution of any matter that affects the operation of this Agreement[82]."

Just like CETA, the CFTA contains provisions to prevent protection levels from being leveled downward. However, CETA and the CFTA both missed the opportunity to include a provision specifically intended to ensure that consumer protection levels are maintained, despite the existence of similar clauses for the environment in Articles 604 and 606 even encourage increasing protection levels:

> Article 604: Right to regulate and levels of protection
> 1. Each Party has the right to establish its own environmental priorities and levels of environmental protection in its territory consistent with this Agreement and to adopt or maintain its environmental measures accordingly.
>
> 2. Each Party shall ensure that its measures provide for high levels of environmental protection and shall continue to strive to endeavour to improve those levels of protection.
>
> Article 606: Upholding levels of protection
> A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental measures as an encouragement for trade or investment in its territory.

[81] CFTA, *op. cit.*, art. 403.3.
[82] *Ibid*., art. 1000.2.

Note however that Article 202 allows a Party to "determine the level of protection it considers appropriate to achieve a legitimate objective"[83] and to derogate from a number of CFTA rules[84] if:

> (a) the purpose of the measure is to achieve a legitimate objective;
> (b) the measure is necessary to achieve that legitimate objective;
> (c) the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail; and
> (d) the measure is not applied in a manner that would constitute a disguised restriction on trade. [85]

Paragraph 4 of Article 202 of the CFTA clarifies point b) of paragraph 3:

> For the purposes of paragraph 3(b), a measure shall be considered necessary to achieve a legitimate objective provided that:
>
> (a) the measure makes a contribution to the achievement of the legitimate objective; and
> (b) there are no reasonably available alternatives that would make an equivalent contribution to the achievement of the legitimate objective in a less trade-restrictive manner.

Moreover, the CFTA makes a direct link between sovereignty, regulation and consumer protection. According to Article 102.2 b):

> In applying the principles set out in paragraph 1, the Parties recognize: [...]
> b) the need to preserve flexibility in order to achieve public policy objectives, such as public health, safety, social policy, environmental or consumer protection, or the promotion and protection of cultural diversity;

Note also that according to Chapter 13, a legitimate objective is:

> Any of the following objectives pursued within the territory of a Party:
> (a) public security and safety; [...] (c) protection of human, animal, or plant life or health; (d) protection of the environment; (e) consumer protection [...]

And a legitimate objective for labour mobility is defined as:

> One or more of the following objectives pursued within the territory of a Party:
> (a) public security and safety; […] (c) protection of human, animal, or plant life or health;
> (e) consumer protection; […] (f) protection of the health, safety, and well-being of workers […]

Finally, Article 400 highlights the benefits of regulatory cooperation for the consumer and encourages Parties to continue efforts in this direction. Implicitly, Article 400 creates a clause for the maintenance of consumer protection levels. It reads as follows:

[83] CFTA, *op. cit.*, art. 202.1.
[84] However, according to the first paragraph, not those provided for in Article 302 (Technical Barriers to Trade), Article 303 (Sanitary and Phytosanitary Measures), Article 320 (Prohibited Incentives), section 402 (regulatory notice) and Article 403 (Reconciliation of regulatory measures) or chapter Six (environmental Protection) and chapter Seven (Mobility of the workforce).
[85] CFTA, *op. cit.*, art. 202.3

> Parties recognize the importance of continuing to work toward the enhancement of existing regulatory measures such as consumer and worker protection, health and safety, environmental protection, and the effectiveness of related measures.

This Article could be invoked if regulatory cooperation and reconciliation result in lower consumer protection levels in Canada. Note, however, that the AIT contained better precautions for preventing the leveling down of consumer protection levels. For example, under Article 807 of the AIT:

> 1. For the purposes of Article 405 (Reconciliation), the Parties shall, to the greatest extent possible, reconcile their respective consumer-related measures and standards listed in Annex 807.1 to a high and effective level of consumer protection. No Party shall be required by such reconciliation to lower the level of consumer protection that it maintains as at the date of entry into force of this Agreement.

3.1.4 Discussion

When we look at the regulatory cooperation objectives of the three initiatives, it is clear that economic objectives prevail. And where non-trade objectives are present, (e.g., "protection of human life, health or safety" in the CETA, areas that overlap with consumer protection) these are overwhelmed by economic objectives. Trade, mobility, competitiveness, growth, innovation are the watchwords when talking about regulatory cooperation. However, as what in the European Community, the harmonization of consumer protection regulations could be linked to stimulating competition or be seen as a way of avoiding the trade barriers that can result from a lack of consumer confidence in imported products.

Maintaining regulatory sovereignty and levels of protection are two of the main criticisms made of IRC. From a consumer protection perspective, it is indeed important that regulations reflect citizen's preferences and do not reduce or prevent an increase of protection levels.

The three initiatives studied attach great importance to the sovereign right of governments to regulate on their territory, to which they subordinate all regulatory cooperation activities. It should be noted that this right is justified differently depending on the nature of the initiatives.

Unlike CETA, which is based on public international law, the CFTA is based on the *Constitution Act, 1867,* in order to justify the division of powers and sovereign rights of the provinces and territories. Sections 1200 and 102.2 also have the distinctive feature of stressing the right of governments to regulate independently of the pursuit of the "public interest" or "legitimate objectives," which is not to be found, for example, in CETA. These provisions also emphasize the cooperative character of Canadian federalism.

In effect, such wording may lead to a proportionality test in the manner set out in paragraph 202.4 of the CFTA. The voluntary nature of IRC is, however, recalled in Chapter 21 independently of the notion of "public interest". Also noteworthy is the emergence, once the conciliation procedure for a CFTA regulatory measure has been completed, of more binding aspects such as the prohibition on modifying a measure "in a manner that circumvents the reconciliation agreement"[86] or the possible inclusion of a dispute settlement mechanism[87].

As for the RCC MoU, the number of provisions reaffirming the ability of States to regulate on their territory clearly shows the importance afforded to sovereignty and far exceeds the provisions of the CFTA and CETA. The nature of cooperation is also more voluntary, since the CFTA and CETA impose a number of obligations that can lead, in particular, to a dispute settlement procedure.[88] By nature, MoUs are not enforceable. Therefore the RCC MoU is not legally binding on its signatories or their respective governments. With respect to the link between regulatory capacity and consumer protection, the CFTA remains the most explicit initiative, with Article 102.2 b).

The participants in IRC include within treaties and agreements a number of provisions to ensure that reconciliation or regulatory cooperation does not result in reduced protection. These clauses seem sufficient to avoid such race to the bottom. Unfortunately, none of them encourage the strengthening of consumer protection. In this respect, the provisions of the CFTA seem reassuring, thanks, among other things, to Article 400 and the renewal of the CMC.

3.2 Regulatory cooperation activities and processes

3.2.1 The CETA

Article 21.4 of CETA presents a partial list of regulatory cooperation activities that Parties can and are encouraged to undertake within the framework of the agreement. The main objectives are to increase transparency, exchange information and observations on regulations and their adoption processes, and to conduct joint analyses.

Note as well Article 21.4 r) which, among approaches to reduce the adverse effects of regulatory differences on trade, proposes "minimizing the use of trade and investment distorting regulatory instruments." Since many regulatory instruments set in place to protect the consumer can have a "distorting effect" on trade and investment, this article may be problematic in incentivizing the Parties to avoid recourse to these instruments, at least unilaterally. Point 21.4 k) also proposes "examining the appropriateness and the possibility of using the same or similar assumptions and methodologies." However, the

[86] CFTA, *op. cit.*, art. 403.3.

[87] *Ibid*., Annex 404.15.

[88] Including issues of transparency, notification, on sanitary and phytosanitary measures and technical barriers to trade.

term “assumptions” is not defined and may refer to different regulatory approaches (e.g. employing the precautionary principle or considering the method of production).

At the same time, some of the activities laid out in Article 21.7 are particularly interesting with regard to consumer protection. For example, in paragraph 3:

> The Parties endeavour to cooperate and to share information on a voluntary basis in the area of non-food product safety. This cooperation or exchange of information may in particular relate to:
>
> (a) scientific, technical, and regulatory matters, to help improve non-food product safety;
> (b) emerging issues of significant health and safety relevance that fall within the scope of a Party’s authority;
> (c) standardisation related activities;
> (d) market surveillance and enforcement activities;
> (e) risk assessment methods and product testing; and
> (f) coordinated product recalls or other similar actions.

Paragraph 4 also allows the Parties to establish “reciprocal exchange of information on the safety of consumer products and on preventive, restrictive and corrective measures taken.” In particular, the European Union may decide to grant access “to selected information from the European Union RAPEX alert system,” which was established by Directive 2001/95/EC of the European Parliament and of the Council of 3 December, 2001 on general product safety. The European Union will in turn have access to Canada’s consumer product incident reporting system, known as RADAR, “with respect to consumer products as defined in the *Canada Consumer Product Safety Act*, S.C. 2010, c. 21 and cosmetics as defined in the *Food and Drugs Act*, R.S.C. 1985, c. F-27.”

Note that this mutual exchange of information is to be carried out under the auspices of the Committee on Trade in Goods, which will therefore have a significant role to play in regulatory consumer protection cooperation issues. The Government of Canada notes on this point:

> The chapter commits the Parties to discuss further cooperation regarding consumer products. This allows Canada and the EU to share more information about product safety issues, thereby facilitating the protection of public health and safety.[89]

The IRC activities presented in Chapter 21 of CETA are voluntary. Indeed, according to Article 21.2.6:

> The Parties may undertake regulatory cooperation activities on a voluntary basis. For greater certainty, a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation.

[89] Online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng (Accessed January 12, 2019).

However, according to the same paragraph, "if a Party refuses to initiate regulatory cooperation or withdraws from cooperation, it should be prepared to explain the reasons for its decision to the other Party." Thus, even though the IRC mechanisms are voluntary (the common interpretative instrument also calls attention to this), the Party that refuses to cooperate must be able to justify its decision. One wonders if this justification must meet the "criteria" specified in Article 21.5 which states that "A Party is not prevented from adopting different regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party."[90]

Under CETA, IRC activities are organized around specialized committees under the auspices of the Joint Committee, which is "composed of representatives of the European Union and representatives of Canada."[91] These specialized committees must "report to the CETA Joint Committee on results and conclusions from each of their meetings."[92] Moreover, the CETA Joint Committee has established its own rules of procedure (under Article 26.1.4.d)) and made sure that the rules it has established "apply mutatis mutandis to the specialized committees and other bodies established under the Agreement."[93] Paragraph 6 of Article 26.2 states: "The creation or existence of a specialized committee does not prevent a Party from bringing any matter directly to the CETA Joint Committee." The results of the regulatory cooperation activities therefore partly depend upon it.

Article 26.1.5 h) allows the CETA Joint Committee to "establish specialized committees and bilateral dialogues in order to assist it in the performance of its tasks." It could therefore, in theory, create a special committee on consumer protection that would take a similar form to the CMC incorporated in the CFTA.

One specialized committee, the Regulatory Cooperation Forum (RCF), was established under Article 26.2.1 h) in order to promote and facilitate regulatory cooperation between the Parties in accordance with Chapter 21. As mentioned above, however, this was not the only specialized committee established by CETA to address these issues, since, as discussed below, other committees facilitated and promoted this cooperation in more specific areas.[94] RCF procedures are not defined in CETA. Indeed, according to Article 21.6.4 a), the RCF shall "adopt its terms of reference, procedures and work-plan at its first meeting after the entry into force" of CETA, which would take place within

[90] CETA, *op. cit.*, art. 21.5.
[91] CETA, *op. cit.,* art. 26.2.1.
[92] CETA, *op. cit.*, art. 26.2.6.
[93] Online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2018-10-rules-procedure-regles.aspx?lang=eng (Accessed January 12, 2019)
[94] Note that Article 26.2.1 also establishes committees on regulatory cooperation in specific areas including "the Committee on Trade in Goods, which addresses matters concerning trade in goods, tariffs, technical barriers to trade, the Protocol on the mutual acceptance of the results of conformity assessment and intellectual property rights related to goods. At the request of a Party, or upon a reference from the relevant specialized committee, or when preparing a discussion in the CETA Joint Committee, the Committee on Trade in Goods may also address matters arising in the area of rules of origin, origin procedures, customs and trade facilitation and border measures, sanitary and phytosanitary measures."

one year following said entry into force.[95] We shall return later to the work plan recently adopted by the RCF.

The Government of Canada summarizes the mandate of the RCF as follows:

> The RCF will meet annually and help to identify potential areas for cooperation, and facilitate discussions between regulatory authorities in Canada and the EU. In addition, the RCF will encourage cooperation between regulators and the sharing of information with a view to minimizing the differences in regulatory approaches.[96]

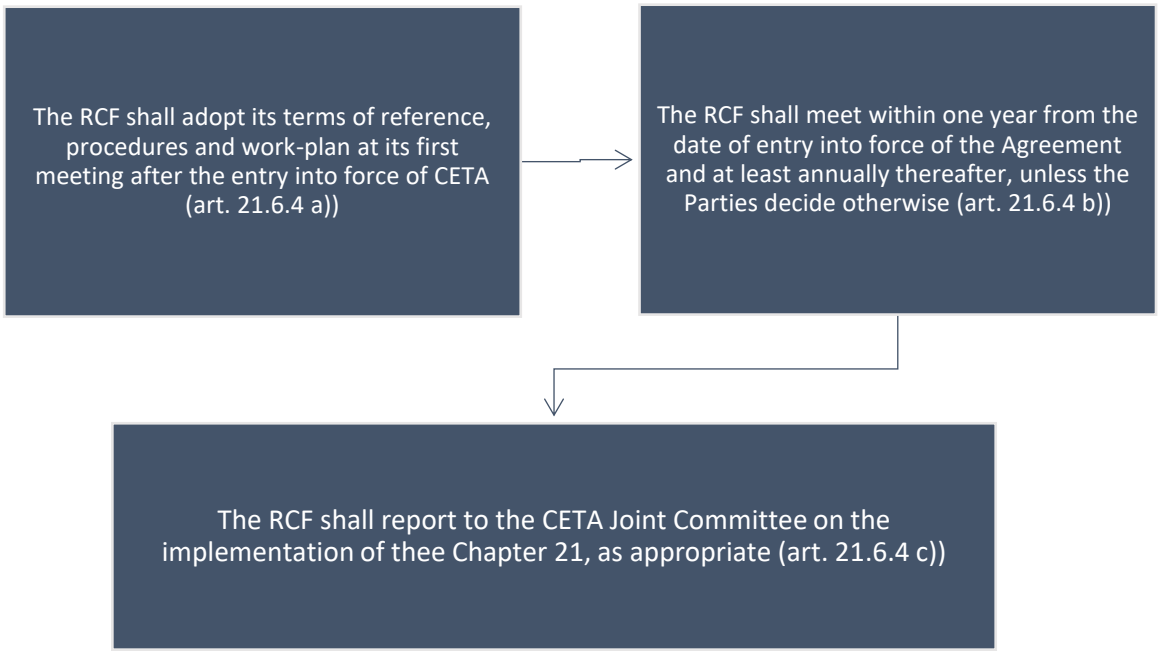
The RCF's functions are presented in section 21.6.2:

a) provide a forum to discuss regulatory policy issues of mutual interest that the Parties have identified through, among others, consultations conducted in accordance with Article 21.8;
b) assist individual regulators to identify potential partners for cooperation activities and provide them with appropriate tools for that purpose, such as model confidentiality agreements;
c) review regulatory initiatives, whether in progress or anticipated, that a Party considers may provide potential for cooperation. The reviews, which will be carried out in consultation with regulatory departments and agencies, should support the implementation of this Chapter; and
d) encourage the development of bilateral cooperation activities in accordance with Article 21.4 and, on the basis of information obtained from regulatory departments and agencies, review the progress, achievements and best practices of regulatory cooperation initiatives in specific sectors.

The RCF must also meet once a year and report to the Joint Committee, as indicated in the chart below:

[95] CETA, *op. cit.*, art. 26.2.4 b).
[96] Online https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2018-10-rules-procedure-regles.aspx?lang=eng (Access on December 15, 2018).

Figure 1 - IRC process of the RCF



Apart from these functions, the RCF is described in only general terms. Some fear that is not sufficiently responsible for its actions and is too open to the influence of lobbies, particularly that of "business lobbyists—the one group with sufficient resources to attend such meetings."[97] Of course, it is difficult to assess the consequences of the RCF, since even though the agreement seems to provide the necessary guarantees for preventing trade from gaining supremacy over social and environmental issues, [TRANSLATION] "it is in the practical functioning [...] of RCF [and all bodies responsible for regulatory cooperation] that the risks exist."[98]

It should also be mentioned that the RCF possesses no decision-making power. The Government of Canada emphasizes that the RCF would pose no challenge to its own ability to regulate:

> While the mandate of the RCF will be to seek regulatory convergence where feasible, it is a voluntary mechanism. The Government will use that mechanism, recognizing that the goal is not regulatory harmonization, but rather, effective regulation that facilitates trade. The Government will retain complete control over its own regulatory process.[99]

[97] PowerShift and Canadian Center for Policy Alternatives, *Making Sense of CETA, An Analysis of the Final Text of the Canada-European Union Comprehensive Economic Trade Agreement,* 2016, p. 45.
[98] Commission d'évaluation de l'impact du CETA*, L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé*, 2017, p. 6.
[99] Online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/canadian_statement-enonce_canadien.aspx?lang=eng (Access December 15, 2018).

3.2.2 The RCC

According to point 3 of the MoU, the mandate of the RCC, whose activities "focus on closer alignment of existing regulatory systems at the federal state"[100], is to :

(i) serve as a forum to discuss, coordinate, and provide broad guidance on regulatory cooperation initiatives between Canada and the U.S.;
(ii) conduct senior-level discussions to proactively identify and discuss challenges, opportunities, and lessons learned regarding Canada-U.S. regulatory cooperation;
(iii) identify opportunities to bring significant economic benefits to both countries through increased regulatory alignment within key existing and emerging sectors of the North American economy;
(iv) help resolve existing unnecessary divergences and develop mechanisms to facilitate and secure future alignment based on transparency and early engagement between countries and with stakeholders; and
(v) design new regulatory activities with the goal of achieving regulatory alignment, to the extent feasible and appropriate.

The RCC is therefore first and foremost a discussion forum between the two countries, where IRC takes various forms depending on the possibilities, the opportunities and regulatory activities identified by the Participants.

Leadership of the cooperation process is provided by the governing Council which is chaired by the Secretary of the Treasury Board and the Administrator of the Office of Information and Regulatory Affairs. The Council, which is required to meet « at least once a year », is responsible for setting strategic direction, including priorities and objectives of the IRC initiatives, and for assessing progress[101]. The RCC Secretariat acts as the "central single window" coordinating the RCC's IRC processes and activities. Its responsibilities include receiving and reviewing the IRC proposals from regulators and stakeholders[102].

Finally, IRC activities are carried out by regulatory departments and agencies in both countries. They participate in the development of sectoral initiatives and work plans and "establish technical working groups made up of departmental and agency officials"[103]. This participation is considered "essential to the RCC's work"[104].

3.2.3 The CFTA

As mentioned above, the CFTA's regulatory activities are organized around notification, reconciliation and regulatory cooperation, the latter allowing for the development of

[100] RCC MoU, point 1.
[101] RCC MoU, points 2 and 3.
[102] RCC MoU, Annex 1, point 7.
[103] RCC MoU, Annex 1, point 9.
[104] RCC MoU, point 5.

future regulatory measures. The reconciliation and cooperation processes are both voluntary.

However, as noted above, the CFTA seeks a mutually agreed balance between the rights and obligations of the signatory Parties in order to unify the various markets within Canada. The possibility of provinces and territories not participating in these processes is therefore subject to several conditions. The exceptions related to the regulatory reconciliation process are set forth in Articles 405 and 406. In fact, the application of Article 202, which allows a Party to "establish the level of protection it considers appropriate to achieve a legitimate objective"[105] and to derogate from a number of CFTA rules, does not apply to Article 403.[106]

Under Article 403.1, the Parties "shall enter into negotiations to reconcile regulatory measures, identified by a Party, that act as a barrier to trade, investment, or labour mobility within Canada."[107] On the other hand, a Party is not obliged to enter into reconciliation agreement provided that it identifies "its relevant regulatory measures as an exception to Article 403.2, in a form and manner established by the RCT."[108]

In this way, the exercise of sovereignty is preserved, since the Parties may decide not to enter into a reconciliation agreement. It is possible that reconciliation was excluded from the application of Article 202 with a view to ensuring maximum harmonization of regulatory measures. In fact, Article 202 would prevent the application of reconciliation agreements that would impose limits not to be exceeded for the level of protection. Excluding application of Article 202 could be beneficial to the consumer if the agreements signed are based on the highest level of protection, but could also be dangerous if the reconciliation agreements are based on low security levels that the Parties are required not to exceed.

Section 406 provides for the eventuality of a Party having no regulatory measure to reconcile in a field targeted for reconciliation. In this case, the Party is not subject to Article 403.2 (under Article 406.1), i.e. it does not have to proceed with reconciliation in accordance with the applicable reconciliation agreements. The Party may, however, participate in the negotiation of a reconciliation agreement in the status of observer. Finally, the third paragraph states, "If a Party that does not have a regulatory measure to be reconciled adopts a comparable regulatory measure in the future, it is encouraged to enter into any negotiation of, or become a party to, a reconciliation agreement."[109] It can also identify its regulatory measure as an exception.

[105] CFTA, *op. cit.*, art. 202.2.
[106] CFTA, *op. cit.*, art. 202.1.
[107] CFTA, *op. cit.*, art. 403.1.
[108] CFTA, *op. cit.*, art. 405.
[109] CFTA, *op. cit.*, art. 406.3.

It will be noted that according to Annex 404.14, the reconciliation agreement should contain "a process to address changes in circumstances." This addition seems necessary, and during the drafting of reconciliation agreements, great attention should be paid to the development of this process. It is important that laws, standards and regulations be adapted efficiently. For example, Option consommateurs made the following observation in 2015, when discussing the application of the rules governing the Internet Sales Contract Harmonization Template developed by the CMC under the AIT:[110] "Because the Template was created in 2001, it does not address new problems that have appeared as result of technological advancements. These include spyware and new ways of entering into agreements."[111] In addition to developments in technology, the very perception of what constitutes a "high level of consumer protection" can evolve due to changing circumstances. As the Consumers Union observes: [TRANSLATION] "It must be borne in mind that this level of protection can evolve. For example, the growth of electronic commerce has resulted in increased consumer awareness of environmental protection and privacy issues. Government and consumer groups will have to be able to identify and satisfactorily address the emerging concerns of Canadian consumers."[112]

Participation of the Parties in regulatory cooperation is more voluntary than in the reconciliation process, because, according to Article 408.2:

> A Party is not required to participate in the development of the future regulatory measure or adopt the future regulatory measure at the end of a joint development process.

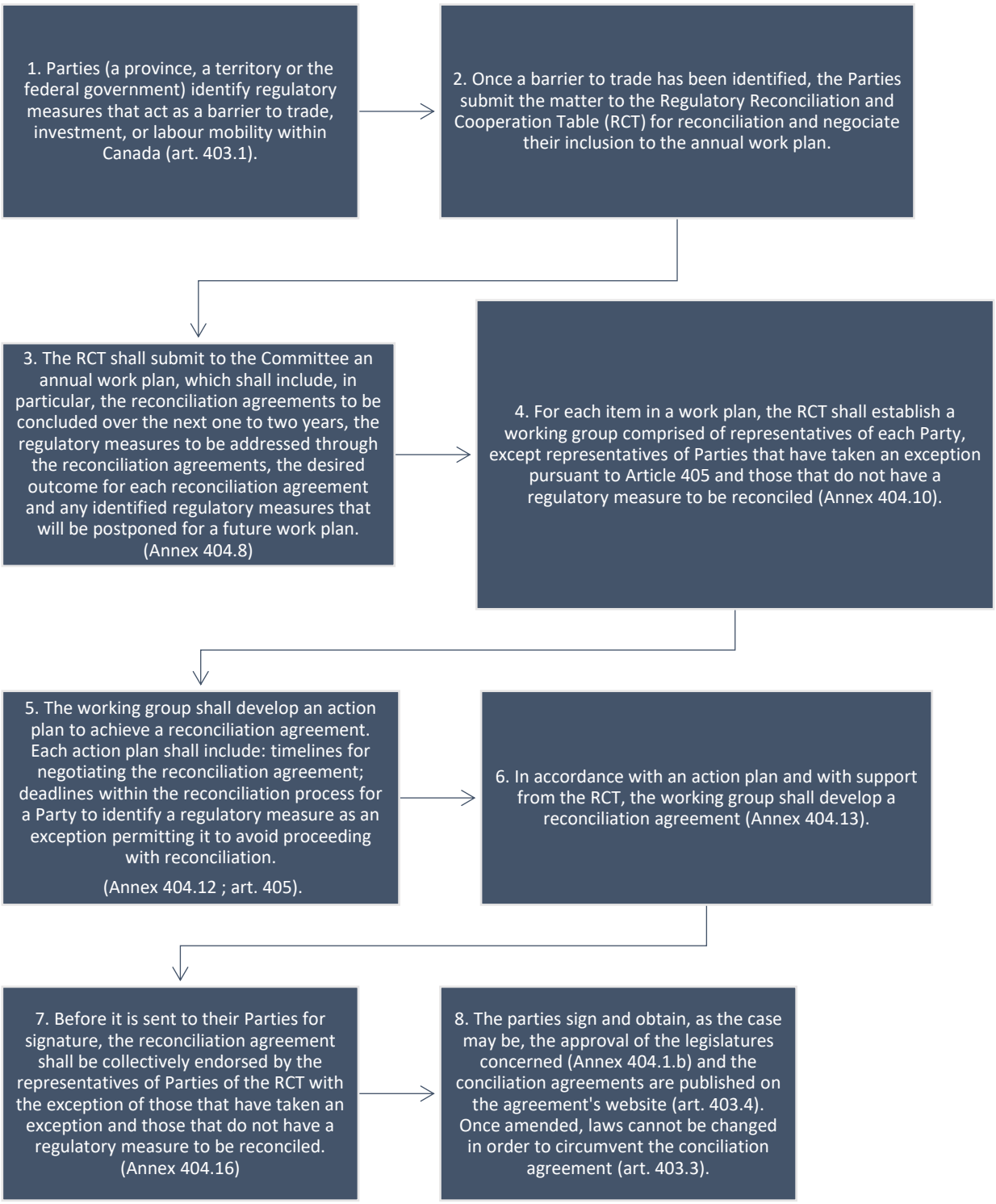
Thus, contrary to CETA, Parties to the CFTA do not have to justify why they do not participate in regulatory cooperation activities (N.B. under CETA, "cooperation" activities also include reconciliation activities).

Under the CFTA, cooperation and reconciliation issues are the responsibility of the Regulatory Reconciliation and Cooperation Table (RCT). While the AIT also included rules to reconcile standards and regulations within Canada, its effectiveness was limited by the fact that this reconciliation was not institutionalized. Consequently, under the CFTA, the RCT is established in virtue of Article 404 and is "mandated to oversee regulatory reconciliation and cooperation processes in accordance with Annex 404."[113]

The RCT is a federal-provincial-territorial entity made up of representatives appointed by the Premier of each of the Canadian provinces and territories as well as a federal representative. Note that the RCT plays a central role in the reconciliation process, as depicted in the following diagram:

[110] CMC, *Internet Sales Contract Harmonization Template*, *2001.*
[111] Option consommateurs, *The views of Canadians on the harmonization of consumer protection standards*, 2015, p. 18.
[112] Union des consommateurs, *Les consommateurs et la normalisation : des intentions à l'action,* 2006, p. 22.
[113] CFTA, *op. cit.,* art. 404.

Figure 2 - The RCT's reconciliation process



A province, territory or the federal government first identifies a regulatory measure that act as a barrier to trade, investment or labour mobility within Canada[114] "based on information provided by stakeholders or other sources."[115] Following the identification of regulatory measures, the Parties enter into negotiations to reconcile the measures identified.[116] During these negotiations, the parties involved in the reconciliation process should ensure that the measures are compatible with the CFTA[117] and with the relevant international obligations.[118]

Once the regulatory measure to be reconciled is identified, the RCT presents an annual work plan to the Internal Trade Committee established under Article 1100; this must include:[119]

a) the reconciliation agreements to be concluded over the next one to two years;
b) the regulatory measures to be addressed through the reconciliation agreements;
c) the desired outcome for each reconciliation agreement;
d) any recognized regulatory measures that will be postponed for a later work plan.

By consensus, the RCT may withdraw previously identified measures from a work plan.[120] The RCT will then set up a working group for "every element of a work plan" composed of representatives of all parties that have not made any exceptions. This working group should then present an action plan that includes:[121]

a) timelines for negotiating the reconciliation agreement;
b) deadlines within the reconciliation process for a Party to identify a regulatory measure as an exception pursuant to Article 405; and
c) any considerations to be brought to the attention of the RCT.

The reconciliation agreement must include:[122]

a) the regulatory measures being reconciled;
b) the obligations to achieve reconciliation through means such as:
c) the extent to which the reconciliation agreement addresses the barrier identified by a Party pursuant to Article 403.1;
d) a timeline for implementation; and
e) a process to address changes in circumstances.

[114] *Ibid*., art. 403.1.
[115] Online : https://www.cfta-alec.ca/regulatory-reconciliation-cooperation/, (Accessed January 1st 2019). See also CFTA, *op. cit.*, Annex 404.1.a.
[116] *Ibid*., art. 403.1.
[117] *Ibid*., art. 403.5.
[118] *Ibid*., art. 403.6.
[119] *Ibid*., art. 403.8.
[120] *Ibid*., art. 403.9.
[121] *Ibid*., art. 403.12.
[122] *Ibid*., art. 403.14.

Of course, the RCT has no real legislative power. The Provinces and Territories remain sovereign in areas of exclusive jurisdiction under the *Constitution Act.* Thus, according to Annex 404.16:

> The RCT representatives, excluding those representatives of Parties that have taken an exception pursuant to Article 405 and those that do not have a regulatory measure to be reconciled pursuant to Article 406.1, must collectively endorse the reconciliation agreement before it is sent to their Parties for signature.[123]

The role of the RCT is limited to proposing amendments to legislation. According to Annex 404.1 b), if the regulatory measure in question is of a legislative nature, the amendment "will require the approval of Parliament of Canada or of a legislature, as applicable".

Reconciliation agreements and exceptions are published on the CFTA website.[124] Once reconciliation has been achieved, no Party may amend this measure "in a manner that circumvents the reconciliation agreement"[125] and the Parties may decide to incorporate a dispute resolution mechanism within the reconciliation agreement under Article 404.15.

Finally, in order to represent consumer interests within the CFTA and to promote IRC in the field of consumer affairs, the Agreement continues the CMC that had been established under Article 809 of the AIT to its own Article 1103.3. The mandate remains essentially the same.

Among others, the functions of the CMC are to:

> a) provide a forum for discussions among the Parties on issues relating to consumer-related measures and standards;
> b) identify opportunities, and facilitate processes, for the reconciliation of consumer-related regulatory measures that could be considered by the RCT established under Article 404 (Regulatory Reconciliation and Cooperation Table);
> c) assist the Parties in their proposals to the RCT to cooperate in the development of future consumer-related regulatory measures under Article 408 (Joint Development of Future Regulatory Measures); and
> d) report to the Committee of Ministers Responsible for Consumer-Related Measures and Standards regarding any significant collaboration between the Parties on consumer protection initiatives or agreements, if appropriate, for transmittal to the Committee.

It should be noted that, unlike its successor, the AIT devoted an entire chapter to consumer-related measures and standards. The agreement also included a series of consumer protection measures to be dealt with on a priority basis by the CMC. In the CFTA, consumer protection does not have the same prominence, but rather is one of a

[123] *Ibid.,* Annex 404.16.
[124] *Ibid*., art. 403.4.
[125] *Ibid*., art. 403.3.

range of areas that can be the subject of regulatory cooperation activities.

3.2.4 Discussion

First, we can see that the IRC activities provided for in the three initiatives can take several forms. While the primary objective is to facilitate the exchange of information among responsible departments and agencies, governments are open on the possibility that broader IRC processes could eventually lead to regulatory harmonization in certain areas. However, the Government of Canada reminds us that, in the context of the RCF, the goal is first to ensure "effective regulation that facilitates trade."[126]

Second, it should be noted that the supervision and review of the progress of IRC processes are entrusted to central committees, while regulatory cooperation efforts are carried out on a sector-by-sector basis by the responsible regulatory departments and agencies. In general, these latter work with the central committees to identify priorities and develop work plans that can, as under the CFTA, be subject to negotiation.

In this regard, we note that considerable flexibility is left to the institutions that determine the issues to be subject of regulatory cooperation. The CETA notably provides for the exchange of information from the product safety alert systems of Canada and the European Union. The RCF, established by the CETA, and the CMC, renewed in the CFTA, are particularly interesting forums from a consumer protection perspective. However, it should be noted that despite the renewal of the CMC, the provisions of the CFTA do not make consumer-related measures and standards a priority as did those of the AIT.

3.3 Stakeholder participation

3.3.1 The CETA

There are several provisions of CETA that allow stakeholders to participate in the IRC process. These provisions are more or less precise, and more or less restrictive. Article 21.8 provides for the participation of interested parties. It reads as follows:

> In order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organizations, businesses, consumer and other organizations. These consultations may be conducted by any means the Party or Parties deem appropriate.

[126] Online: http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/canadian_statement-enonce_canadien.aspx?lang=eng#a26 (Accessed January 16th, 2020).

First of all, it should be noted that this consultation is voluntary ("may consult"). Second, no mechanism has been introduced to guide how this consultation is to be conducted ("may be conducted by any means the Party or Parties deem appropriate"). The term "stakeholder or interested parties" encompasses a large number of public or private actors. Finally, there is no provision to ensure that the interests of all stakeholders are represented in a balanced manner.

Other CETA mechanisms allow, at first glance, private entities to participate in discussions on the draft regulations. For example, Article 27.1.2 states:

> To the extent possible, each Party shall:
> a) publish in advance any such measure that it proposes to adopt; and
> b) provide interested persons and any other Party a reasonable opportunity to comment on such proposed measures.

Furthermore, the CETA Joint Committee, which is invested with decision-making powers under the Agreement and whose decision are legally biding under international public law, may, under Article 26.1.5.b, "communicate with all interested parties including private sector and civil society organizations." Here again, the participation of interested parties is not required, but remains voluntary.

Once more, it should be noted that no measures are taken to ensure that "interested parties" are fairly represented, as in the chapters on the environment and labour, where these types of measures are taken. For example, Paragraph 4 of Article 23.8 provides that the parties should refer to "domestic advisory groups" which "shall comprise independent representative organizations of civil society in a balanced representation of environmental groups, business organizations, as well as other relevant stakeholders as appropriate."

3.3.2 The RCC

The RCC MoU includes a number of provisions emphasizing the importance of stakeholder participation in the IRC process.

In general, the Preamble states that the participants are committed "to the promotion and implementation of good regulatory practices that are an essential prerequisite to effective regulatory cooperation." This aspect is reaffirmed in point 5 of the Annex to the RCC MoU. It should be recalled that "good regulatory practices" include consultation with stakeholders, a practice documented in Canada in the Directive and the Policy.

Moreover, point 1.ix of the RCC MoU declares that "transparency, participation by regulatory departments and agencies, and stakeholder engagement inform all RCC activities." Also, under point 3.iii, the Parties will coordinate the RCC activities,

"including interactions with departments, agencies, and stakeholders"and under point 6.i: "efforts towards regulatory alignment are expected to be led by the appropriate regulatory departments and agencies, under broad guidance from the RCC and in consultation with impacted stakeholders."

Similarly, according to point 7:

> The Participants intend to:
>
> i. meet with interested industry and stakeholders to foster discussion, engagement, and collaboration on regulatory cooperation issues and solutions; and
> ii. carry out other activities, including a biennial RCC regulator-stakeholder forum and online and face-to-face domestic engagements, to inform the planning and implementation of RCC initiatives.

Finally, point 10 of the Annex to the RCC MoU, which is devoted to "Stakeholder Engagement," states that:

> i. Members of the RCC, the RCC Secretariat, and representatives from regulatory departments and agencies may meet with interested industry and citizen stakeholders to foster discussion, engagement, and collaboration on regulatory alignment issues and solutions.
> ii. A regulator-stakeholder forum is intended to be held every two years to enable discussion between stakeholders and regulators on specific issues and themes as set by the Council.
> iii. Ongoing online and face-to-face domestic engagements are intended to take place throughout the two-year cycle as well as broad consultations to solicit new ideas for improved alignment using the *Canada Gazette* process and the *U.S. Federal Register* or other means as appropriate.
> iv. Each Participant intends to maintain a centralized RCC website with updates on cooperation activities and points of contact.

It should be noted that, as with the CFTA and CETA, there is no mention of a "balanced" representation of interests. Furthermore, unlike the CFTA and CETA, no example of "stakeholder" is given, nor are consumers' associations mentioned. The term "stakeholder" is very broad and may include private or public entities that may also have divergent interests as is in the CFTA and CETA.

3.3.3 The CFTA

In the CFTA, the refence to the participation of "interested stakeholders" in the RCT appears in Annex to the Article 404. The term "interested stakeholder" is very broad and may include private entities (representatives of industry, academia, consumer groups...) or the public sector (municipalities, etc.). Stakeholder participation is restricted to determining priorities and not to the entire regulatory process. The Annex only mentions "the importance of engagement with stakeholders" but puts no mechanism in place for doing this, or to ensure balanced representation.

As mentioned above, when a Party intends to adopt or amend a regulation which "may have a significant effect on trade or investment in Canada,"[127] a number of obligations apply. In particular, these obligations involve the participation of stakeholders in the regulatory process. Indeed, except if an urgent problem arises[128], the Party must publish its regulatory measure at least 30 days[129] ahead of time to permit interested persons to become acquainted with it[130] and submit comments that the Party is required to take into account.[131]

In addition to these obligations, the RCT process seems very opaque and offers no guarantees, *de jure*, of transparency or balanced stakeholder representation. Moreover, there is nothing in the Agreement, besides Article 402 discussed above, if indeed it does apply, to ensure that stakeholders will be invited to offer opinions and comments in the reconciliation process, except to indicate topics to be addressed to the RCT. Indeed, as stated on the website: "Based on information provided by stakeholders or other sources, a potential barrier to internal trade is identified by a province, territory or the federal government."[132] This participation in identifying topics is provided for in the first paragraph of the Annex to Article 404, which presents the reconciliation process and regulatory cooperation, according to which:

> With respect to regulatory reconciliation, each Party recognizes: (a) the importance of engagement with stakeholders to assist in identifying key priorities for its jurisdiction.

3.3.4 Discussion

Thus, the three regulatory cooperation initiatives studied emphasize the importance of stakeholder participation in regulatory cooperation processes. They encourage the involvement of relevant stakeholders in setting priorities and listening to their comments throughout the development of regulations. The CFTA, for example, obliges parties to take into account the comments of interested parties when developing or amending "a regulation that may have a significant effect on trade or investment within Canada."[133]

However, none of the initiatives specify the modalities of this participation. In practice, however, this has resulted in TBS-led consultations, discussed below, and the establishment of Internet portals to "report a barrier". In the case of CETA, stakeholders were also invited to participate in the first meeting of the RCF.

[127] CFTA, *op. cit.*, art. 402.1.
[128] *Ibid.*, art. 402.3.
[129] *Ibid.,* art. 402.1 c).
[130] *Ibid*., art. 402.1 a).
[131] *Ibid*., art. 402.1 b).
[132] Online: https://www.cfta-alec.ca/regulatory-reconciliation-cooperation/ (Accessed December 12, 2018).
[133] CFTA, *op. cit.*, art 402.a

The TBS portal[134] is of particular interest since it does not limit regulatory cooperation to the removal of trade barriers. Indeed, the TBS Internet site provides the opportunity to submit ideas to the TBS “to enhance health, safety, security and environmental protection through regulatory cooperation”. In addition, when an interested party proposes a way to address a regulatory barrier, it must explain "the impact on consumers, industry and other sectors".

The Global Affairs Canada portal also states: “Some regulations make sense, such as those aimed at protecting public health or the environment. In such cases, foreign governments may agree that Canada’s regulations provide equivalent protection or they may improve their own regulations to achieve the intended results without impeding international trade.”[135]

Of the three initiatives studied, only CETA, in Article 21.8, defines the term "stakeholders" / "interested stakeholders" / "interested parties". It is important to note that these are not limited to industry members and should allow, to the extent possible, for a balanced representation of interests.

In practice, however, ensuring balanced representation is difficult because despite the interest of consumer associations and civil society in issues related to IRC and standardization activities, they often lack the resources to participate[136]. For example, online portals are an interesting initiative for consumer associations, but consumers’ associations do not have the resources, human and financial, nor the expertise to effectively use them. In addition, while the TBS portal provides an opportunity to submit ideas "to enhance health, safety, security and environmental protection through regulatory cooperation," emphasis is placed on “trade barrier”.

On the other hand, IRC appears to open a path for lobbies with sufficient resources to influence decisions, notably through comment periods for regulations (under CETA, for example, European lobbies will be able to file their comments to Canadian regulators before regulations are put in place) and the creation of a single point of contact to influence regulations. In order to avoid too strong of an influence, real or perceived, by lobbies, the establishment of transparent systems seems therefore necessary.

3.4 Consultations held to date

As provided for in the agreements and arrangements, TBS consulted with stakeholders to identify regulatory areas that could be harmonized. Three separate consultation

[134] Online: https://www.canada.ca/fr/secretariat-conseil-tresor/services/cooperation-matiere-reglementation/signalez-obstacle.html (Accessed December 15, 2019).

[135] Online: https://www.international.gc.ca/gac-amc/campaign-campagne/trade_barriers-barrieres_commerciales/index.aspx?lang=eng (Accessed December 15, 2019).

[136] Union des consommateurs, *La voix des consommateurs en normalisation – Étude de faisabilité*, 2011.

processes therefore took place under RCT, RCF and RCC between November 2017 and April 2018. The results of these consultations are available on Canada's open data portal.

A total of 101 submissions were received during the three consultations, the majority of which were from sectoral business groups such as the Dairy Processors Association of Canada or the Canadian Vehicle Manufacturers' Association. Only two consumer organizations participated: the CCC and the Coalition des associations de consommateurs du Québec (CACQ).

In its presentation to the RCT, the CCC refers to the study published in 2015 that suggested that the federal and provincial governments provide funding to Canadian consumer associations to enable them to participate in IRC activities. The CCC noted in its letter that "the inaction of the provinces and the federal government to act to assist organized and experienced consumer groups to develop the capacity to participate in the complex processes associated with internal trade harmonization is one contributor to the growing disadvantage of middle class and vulnerable consumers in the economy." The organization added that "not only has there been there no action to ameliorate the growing deficit in fair consumer representation Indicated in our 2015 report, the crisis of representation has deepened since then with one of two major consumer organizations operating nationally, Public Interest Advocacy Centre, indicating national policy has pushed it to the brink of existence."

For its part, the CACQ suggests that [TRANSLATION] "consumer protection issues should be given priority attention by the Regulatory Cooperation Forum" and that IRC between Canada and the European Union should aim for "upward harmonization." The CACQ emphasized the potential for such harmonization in the financial and privacy sectors. Finally, it suggests that TBS [TRANSLATION] "conduct in the coming months a specific consultation with stakeholders, including consumer representatives, to formulate such a permanent mechanism, which would effectively involve these stakeholders in the work of RCF."

Note also that the European commission held a similar consultation in the context of CETA. Two consumer associations from the European Union attended the consultations: the European Consumers Organization (BEUC) and the Federation of German Consumer Organizations (VZBZ). BEUC and VZBZ recommended first of all that IRC respect the capacity of States to regulate, as well as the health protection objectives set forth in Chapter 21 of CETA[137]. The organizations noted several potential areas for harmonization: information sharing between the RAPEX system and RADAR on product safety, information sharing on pharmaceutical products, harmonization of food product warning systems, adoption of dispute resolution mechanisms, the abolition of roaming

[137] BEUC, *Regulatory Dialogues in CETA*, 2018, p. 1 and VZBZ, *Regulatory Cooperation Forum in CETA*, 2018, *p*. 1. Online: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=248 (Consulté le 15 décembre 2018).

charges, connected devices and privacy protection, and responsible production and consumption.

Following the consultations, the RCF, the RCT and the RCC adopted their work plan. It is interesting to note that the RCF included five areas of cooperation that cover some of the topics suggested by the European consumer organizations: cybersecurity and the Internet of Things, animal welfare, cosmeceuticals, inspections related to the manufacture of pharmaceuticals, and information sharing between the RAPEX and RADAR systems. It is expected that the work plan will be reviewed annually and that the RCF will meet again in February 2020.

The RCT and RCC work plan contains a far greater number of topics than RCF work plan.[138] These include workplace health and safety, transportation, codes and standards, agriculture, mobility of labour, and drug classification and registration requirements. Since the establishment of the RCT, two reconciliation agreements have been signed by the parties in the areas of organic labelling for aquaculture products and inspection of fruits and vegetables, and a few others have been approved by the RCT. It should be noted that the CMC members have met several times, but the committee has so far "not submit recommendations to amend the agreement"[139].

[138] Online: https://www.cfta-CFTA.ca/wp-content/uploads/2018/07/TCCR-Plan-de-travail-2018-2019-Liste-des-%C3%A9l%C3%A9ments-Final-20 -July-2018.pdf (Accessed December 13, 2018).
[139] CFTA, *Annual report 2018-2019*, 2019, p. 4.

4 IRC and consumers abroad

4.1 The European Union

4.1.1 Regulatory cooperation and the internal market

The European Union is a *sui generis* supranational and intergovernmental organization that brings together 28 countries[140] in the pursuit of common economic and political goals. The European Union has long identified regulatory cooperation as necessary for the realization of its objective: the creation a single, internal market through the integration of the national markets present within its borders. While the premises of this regulatory cooperation can be found in the *Treaty of Rome*, today it is institutionalized and firmly enshrined in European Union law. Annex 1 provides a more in-depth presentation of the evolution of the importance of consumers and its link with the evolution of regulatory cooperation in the regional bloc.

Although the Treaty of Rome paved the way for Community action in the field of consumer protection, this area was not defined as falling within the competence of the Community, since, "[c]onsumer protection was far from the members states' concerns when the treaty was signed."[141]

In the 1970s, the evolution of the regional and international context, notably the reduction of tariff barriers and the new interest for consumer protection on the international scene, as well as several decisions by the European Court of Justice (CJUE)[142], led to the evolution of IRC in the regional bloc, while at the same time prompting the European Commission to consider a common policy for consumer protection. Indeed, in interpreting the Treaty of Rome, the CJUE concluded that regulatory differences could be regarded as measures having an effect equivalent to "quantitative restrictions on imports", thereby making them prohibited between Member States. Thus, a mutual recognition regime, governed by the so-called "Cassis de Dijon principle", was established in the regional bloc. The CJUE also introduces new exemptions from this rule: "mandatory requirements", of which consumer protection is a part. Thus, according to this principle still in force today, in the absence of common rules at Community level, "Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are

[140] 27 once the Brexit process is finalized.

[141] Union des consommateurs, *Lifting the barriers to internal trade and consumer protection: the example of the European Union*, 2015, p. 25.

[142] Formerly known as the Court of Justice for the European Communities.

customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter."[143]

Derogations are, however, possible for measures that:

- are necessary, i.e. are appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.)
- serve a purpose in the general interest which is compelling enough to justify an exception to a fundamental rule of the *Treaty* such as the free movement of goods,
- are essential for such a purpose to be attained, i.e. are the means which are the most appropriate and at the same time least hinder trade.

Following the establishment of this principle, in order to prevent Member States from lowering their standards to attract investment, to prevent new non-tariff barriers from being erected and to restore consumer confidence in a market that was now intended to be common, the "new approach" was established.

Under the "new approach", the European Community would seek to harmonise regulations on certain "essential aspects" while the rest of the Community trade would be governed by the principle of mutual recognition established in the *Cassis de Dijon* case. A number of steps are taken to implement the new approach, including the creation of European standards organizations, allowing for the separation of the technical and the political, and the adoption of the Single European Act.

Whereas Article 100 of the Treaty of Rome required the Council to act unanimously on a proposal from the Commission to adopt Directives for the reconciliation of laws and regulations, giving *de facto* a right of veto to the Member States, Article 100a introduced by the adoption of the Single European Act requires only a qualified majority of the Council to issue Directives "which have as their object the establishment and functioning of the internal market".

Under paragraph 3, the Directives issued under Article 100a on consumer protection must "take as a base a high level of protection." This will prevent harmonization of regulations based on the lowest common denominator. Note also that, contrary to Article 100, Article 100a allows Member States to derogate from the Directives issued under certain conditions.

Paragraph 3 illustrates the fact that [TRANSLATION] "the emergence of Community consumer law came about with the clearly stated intention of reconciling the economic

[143] European Communities Commission, Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon').

objectives linked to the completion and proper functioning of the European internal market with the aim of building a Europe with a human face."[144] From that moment on, "social Europe and the Europe of the citizen found in consumer protection a privileged field of action. The harmonization process thus serves a policy that is confirmed by its own objectives and priorities, not merely attaining but going beyond the completion of the internal market."

Thus, from the entry into force of the *Single European Act,* a number of Directives aimed at consumer protection were issued. These Directives incorporated a "minimum harmonization" approach, which means that Member States would be able to exceed the levels of protection provided for in the Directives, but would not be able to circumvent them. Many of these Directives also contain a mutual recognition clause, allowing goods and services that meet the requirements of the Directive to be accepted in the Member States.

Only in 1992, when the *Treaty on European Union* (also known as the *Maastricht Treaty*) was signed, did consumer consumer protection "become a full-fledged policy in that regional block."[145] Indeed, Article 129a of the *Treaty*, which is devoted to consumer protection, is a horizontal provision that brings consumer protection into all the activities of the European Union. Article 129a (Article 153 since the entry into force of the *Amsterdam Treaty*) urges the Community "to contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the attainment of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers."

Article 3 of the *Maastricht Treaty* also extends the Community's scope of action to "a contribution to the strengthening of consumer protection." Thus, since Maastricht, "consumer protection is not merely one of the means of accomplishing an internal 'frontier-free' market: it now exists in its own right."[146] Of course, as the Commission notes: "The Internal Market will never be completed. The attempt to maximize performance is a process, not an event."[147] Thus, the maintenance and evolution of this market continue to take place through Article 100a (now, 95) and takes into account a high level of consumer protection. For example, after the entry into force of the *Maastricht Treaty*, a Directive was adopted on unfair terms in consumer contracts (93/13/EEC), another on the protection of purchasers with regard to the acquisition of the right to use immovable properties on a timeshare basis (94/47/EC) and another on distance selling (97/7/EC).

[144] T. Bourgoignie, Vers un droit européen de la consommation: unifié, harmonisé, codifié ou fragmenté ?, 2005, p. 160.

[145] Union des consommateurs, 2015, *op. cit.*, p. 27.

[146] Twigg-Flesner, 2007, *op. cit.*, p. 3.

[147] Online: https://ec.europa.eu/internal_market/score/docs/score11/score11-text_en.pdf (Accessed December 15, 2018)

These directives contain "minimal clauses" such as the following:

> 24. [...] Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection.[148]
> or
> 1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.
> 2. Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.[149]

These clauses are an illustration of minimal harmonization: States can go beyond the level of protection afforded by the Directive, but may not fall short of this level.

In addition to harmonising laws and regulations across Europe, Community regulations and Directives may also contain provisions encouraging Member States to carry out other IRC activities such as formal exchange of information, use of regional and international standards, mutual recognition or the establishment of dialogue forums.

For example, *Directive 2001/95 /CR of the European Parliament and of the Council of 3 December 2001 on general product safety* ensures "that products placed on the market are safe."[150] Article 10 advocates IRC between Member States and the Commission in the form of an early warning system, RAPEX, that would permit national authorities to be rapidly informed of the existence of a dangerous product. Note that according to Article 21.7.4 of CETA, "Canada may receive access to selected information from the European Union RAPEX alert system." In 2016 alone, the RAPEX system received 2044 notifications.[151]

In 2003, the Commission issued the Communication "Enhancing the Implementation of the New Approach Directives"[152] which illustrates the new phase of regulation in the European Community. In this document, the Commission recognizes the need to update its regulations in order to improve, in particular, coherence, transparency, the notification process, CE marking[153] and market surveillance.

One of the most important documents in the recent evolution of consumer protection policy issues in Europe was the *Review of the European Consumer Acquis*.[154] This document, commissioned by the European Commission, is an analysis of the

[148] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, art. 14.

[149] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer good and associated guarantees, art. 8.

[150] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, art. 1.1.

[151] European Commission, *RAPEX Annual Report 2016*, 2017, p. 4.

[152] European Commission, Enhancing the Implementation of the New Approach Directives, COM/2003/0240.

[153] Marking applied to products in accordance with EU norms.

[154] Online: http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf (Accessed December 20, 2018)

transposition into national law of certain consumer protection Directives. The analysis performed in the report shows that when transposing the Community minimum harmonization Directives into national law, the Member States used the minimum clauses, raising the possibility of departing from the Directives and resulting in a fragmented market despite harmonisation efforts. However, these differences are often minimal and do not substantially enhance consumer protection. Thus, the authors of the report conclude that "there is no, or at least not a very strong, argument against a selective shift to full harmonization in those areas where the use of minimum clauses by the Member States has clearly caused barriers to trade without substantially increasing consumer protection."

The study also highlights a discrepancy arising from translation problems. Indeed, variations in national laws and regulations "tend to be caused by ambiguities or inconsistencies in the relevant directives. On occasion, it seems that these problems may have been caused also by variations in the substantive meaning of particular provisions in the different language versions of the directives," a problem that could arise despite full harmonisation.

Although it advocates greater harmonization, the study recognizes the problems that could arise. The researchers conclude:

> Some, but not as many as may be expected, aspects are likely to be controversial for some Member States, where full harmonisation would force them to reduce their established level of consumer protection. Should the shift to full harmonisation become reality, it would have to be considered whether these areas should not be subject to this approach, and remain subject to minimum harmonisation.

Thus, each method seems to have its advantages and disadvantages for consumer protection. This protection in a fragmented market poses two problems: the diversity of the laws as such, and the different levels of protection. While mutual recognition can accommodate diversity of laws and cultures, it does not solve the problem of varying levels of protection, which can lead to a downward levelling and reduce market confidence. Minimum harmonization reduces the diversity of laws and establishes a base level of protection while preserving a certain amount of sovereignty for States, but without eliminating the obstacles.

Maximum harmonization, on the other hand, while it helps solve two problems, may result in reducing protection in some countries and limiting its ability to respond to the vagaries of the market, since "Consumer law is a dynamic area of law and consequently needs continuously to be kept under review if it is to be responsive to the changing requirements of the modern market."[155] Moreover, maximum harmonization does not entirely settle the problems posed by the diversity of laws since laws and regulations

[155] Twigg-Flesner, 2007, *op. cit.*, p. 233.

may differ on corollary aspects of the Directive,[156] and does not erase the problem of translation. Another problem with maximum harmonization of consumer protection is its relationship to the principle of subsidiarity. The limits of the policy of maximum harmonization have been revealed in particular with the "Consumer Rights Directive" which has been opposed by the European Parliament, the Council and the legal literature[157] since Article 4 states: "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive." However, according to the principle of conferral: "The Union shall act only within the limits of the competences conferred upon it by the Member States."[158] Thus, if the States can attain the goal of better consumer protection, the European union should not intervene.

As summarized by Christian Twigg-Flesner, one of the analysts who have worked on the review of the Community Acquis:

> Although significant chunks of consumer law are now based on EU legislation, many issues are still for national law to resolve—either because a directive expressly provides for this or because a directive does not cover a particular issue at all, and so national law still has to step in. As a result, national law continues to have a role to play in supplementing the harmonised legal rules, and so whilst harmonisation has reduced the substantive differences in the legal rules, the resulting picture is far from uniform.[159]

Issues relating to the degree of harmonization and approach (vertical, horizontal, mixed alignment or no legislative action) have not yet been resolved. The European Union still seems to favour maximum harmonization to enable better integration of markets, but adapts its approach to the context. Note also that the chosen instrument will make European Union law more or less fragmented. For example, unlike the Directives, whose methods of application and implementation may differ from one country to another, the regulation must be transposed, unaltered, into national law. It will therefore be the preferred regulation when it comes to achieving maximum harmonization. The political context, however, may push for the adoption of Directives that require less political support.

Following the publication of the Green Paper on the Review of the Community Acquis on consumer protection, the European Economic and Social Committee concluded:

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[156] For example, the CJUE noted in paragraph 26 of its judgment on the case of *Besançon University Hospital Center v. Thomas Dutrueux & Primary Fund Jura health insurance* that "Directive 85/374 [on defective products] brings about complete harmonization only so far as the producer's liability for defective products is concerned, without, however, regulating the supplier's liability" thus leaving the States the choice of applicable regulations"

[157] S. EDGAR, *Cross-border B2C e-commerce in the EU and the introduction of the Consumer Rights Directive: A Cure for Fragmentation?*, 2012, p. 36. Online: https://lib.ugent.be/fulltxt/RUG01/001/892/204/RUG01-001892204_2012_0001_AC.pdf (Accessed December 20, 2018)

[158] *Treaty on European Union,* Title I : common provisions, art. 5.

[159] C. Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU*, 2012, p. 20.

> "Minimum harmonisation" combined with a positive approach by Member States to adopt consistently higher standards on consumer protection is likely to form the basis for the major part of the consumer acquis for the foreseeable future. For various (and varying) social and economic reasons, Member States will either wish to retain the level of consumer protection they already enjoy or move in a measured way, at a pace of their own choosing, towards a different level of protection. This position respects and is much easier to reconcile with the principle of subsidiarity. Nevertheless, it also recognises the view that various categories of consumers throughout the EU are disadvantaged in their current level of protection or capacity to seek redress and action is needed at both EU and Member State level.[160]

Nevertheless, minimum harmonization remains at the heart of the Community acquis on consumer protection and contract law. *Regulation (EC) 593/2008 on the law applicable to contractual obligations* is illustrative, since it governs the choice of law when signing a consumer contract. The purpose of this law is to recognize existing differences in levels of protection and legislative methods within the European market. The General Data Protection Regulation[161](GDPR) is an example of EU legislation through full harmonization, which has led to a substantial increase in consumer protection. Individually, the Member States could probably not have gone this far in protecting the consumer. Indeed, the RGPD goes much further than existing national legislation, allowing, for example, consumers to exercise new rights, such as the right to be forgotten.

4.1.2 Participation of consumer organizations

As early as 1975, the European Community recognised the existence of several inherent rights for consumers, including the right to representation (the right to be heard).[162] This principle is also enshrined at the international level in the United Nations Guidelines for Consumer Protection. The Charter of Fundamental Rights of the European Union also reasserts this right: Article 11 guarantees freedom of expression and information, while Article 12 promotes freedom of assembly and association. The Treaty establishing the European Community also sates that "the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests."[163]

Thus, to enable consumers to assert their right to be represented and heard, a set of institutional provisions has been put in place in Europe. Since 1973, developments have taken place, beginning with the creation of a service that would be responsible for

[160] Opinion of the European Economic and Social Committee on the Green Paper on the Review of the Consumer Acquis COM (2006) 5.3.

[161] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[162] European Council, *Annex to the Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy*, J.O., C-92/1, April 25 1975. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31975Y0425(02)&from=EN (Accessed January 10, 2019)

[163] Treaty establishing the European Community, Part Three: Community policies – Title XIV: Consumer protection, art. 153.

consumer protection, the environment and nuclear energy. September 23, 1973 saw the establishment of a Consumers' Consultative Committee. Parliament nonetheless considered that "specific consumer organizations are not represented strongly enough on the Consumers' Consultative Committee."[164]

The Preliminary Programme of the European Economic Community for Consumer Protection and Information Policy (1975), stated, "[w]hen decisions which concern them are prepared, consumers should be consulted and allowed to express their views, in particular through organizations concerned with consumer protection and information." In addition, the Commission sought to "encourage organizations representing consumers to study certain matters of particular importance for consumers, to make known their views and coordinate their efforts."

This initiative was warmly welcomed by the European Parliament, which considered it "highly desirable for consumer organizations to be strengthened sufficiently to enable them to influence the formulation of policy with the necessary expertise." The Parliament also felt that "financial support from public sources could be very useful in this connection, provided it did not in any way curtail the autonomy of consumer organizations."[165]

Today, there are still consumers contact committees in Europe, such as the European Parliament Committee on Internal Market and Consumer Protection, or the European Consumer Consultative Group established under Decision 2009/705/EC, which includes one member representing national consumer organizations from each Member State and one member from each European consumer organization[166] and "may be consulted by the Commission on all issues related to consumer interests at Community level."[167] It "ensures consumer participation in all relevant policy groups"[168].

The evolution of the importance of consumers within the European Commission also illustrates the growing European interest in consumer protection as well as the evolution of the importance of consumers in decision-making at the Community level. Consumer policy in Europe was initially the responsibility of a small unit within Directorate General V (DGV).[169] This responsibility was subsequently outsourced "to a single-standing service that became DG XXIV only in 1995."[170] This DG "significantly

[164] European Parliament, Opinion of the European Parliament on the proposal from the Commission of the European Community to the Council for a preliminary Community programme for consumer information and protection, O. J., C-62, May 30 1974.

[165] Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1974:062:FULL&from=EN (Accessed January 10, 2019)

[166] Commission Decision 2009/705/EC of 14 September 2009 setting up a European Consumer Consultative Group, art. 3.1.

[167] *Ibid.*, art. 2.1.

[168] P. Rott, *The EU Legal Framework for the Enforcement of Consumer Law*, 2018, p. 261 in H-W. MICKLITZ and G. SAUMIER (eds.), *Enforcement and Effectiveness of Consumer Law*, 2018.

[169] The Commission itself being divided into units that deal with specific areas, called "directorates-general."

[170] M. Hartlapp, J. Metz and C. Rauh, *Which Policy for Europe - Power and Conflict Inside the European Commission*, 2014, p. 161.

promoted the involvement of consumer associations, but lacked its own legislative capacity."[171]

It was only when DG XXIV became the Commission's Directorate General for Health and Consumer Protection (DG SANCO) in 1999 that it gained influence in policy-making. The creation of DG SANCO reflects the growing importance accorded to consumer protection in the European Community. Today, DG SANCO has delegated some of its powers "to other directorates, namely, first, DG MARKT who acquired the (internal) lead in the area of financial services and electronic commerce and, nowadays, to DG Justice that has taken over responsibility for civil justice but also for contract law including consumer contract law." Furthermore, "each Commission department with a significant consumer interest has a consumer liaison officer to monitor the impact of its policies on consumers. "[172]

The European Union is still facing a crisis of legitimacy. There are many problems related to citizen participation and the transparency of this international institution that is so removed from its citizens. Especially since "with the EU integration process increasingly making Brussels a hub of European policy-making, there is a growing professionalisation of the lobbying industry there."[173] In fact, even in 2010, in resolution 1744 (2010), the Parliamentary Assembly stated that it was "concerned by the declining level of public interest and involvement in politics and by the loss of citizens' confidence in state and political institutions."[174] It said, in particular:

> 7. The Assembly strongly supports political pluralism as one of the key principles of a genuine democracy. Therefore, it notes that, under some conditions, the activities of extra-institutional actors may be beneficial for the functioning of a democratic political system in so far as these actors:
> 7.1. provide a framework for individuals to associate among themselves and jointly express views and defend their interests;
> 7.2. encourage wider participation in public life and provide opportunities to engage in the political process;
> 7.3. offer a link between the people and the political institutions;
> 7.4. allow a better representation of specific interests and needs, including those of minorities;
> 7.5. provide expert information in the field of their activity, which is necessary for informed political decision making;
> 7.6. provide additional channels of public oversight over political decisions.[175]

The European Union continues to provide "support through financing of Union-level consumer organizations and through capacity building for consumer organizations at Union, national and regional levels, increasing transparency and stepping up exchanges

[171] *Idem*.

[172] ROTT, 2018, *op. cit.*, p. 261.

[173] Transparency International, *Lobbying in Europe*, p. 7.

[174] Resolution 1744 (2010) of the Assembly of June, 23 2010 on Extra-institutional actors in the democratic system, point 2.

[175] *Idem.*, point 7.

of best practices and expertise."[176] The financial envelope for the implementation of today's consumer protection program (2014-2020) is €188,829,000.[177] The criteria for qualifying for these grants are listed in Regulation (EU) 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer program for the years 2014-20.

The primary recipients of this support are BEUC and the European Association for the Co-ordination of Consumer Representation in Standardisation (ANEC), the two non-governmental non-profit organizations representing consumers at the European level.

BEUC, founded in 1962, is formed of 43 consumer associations from 32 countries.[178] It is the main consumer association in Europe and "has been very effective in contributing to EU policy-making"[179] and has represented consumers to European institutions for years, "in particular the Commission and European Parliament." BEUC is also active in IRC and participates in international initiatives such as the Transatlantic Consumer Dialogue.[180] In 2018, its total income of around €5.5 million was made up of 36% from member associations, 30% from the Consumers Program and 19% from projects funded by the European institutions.

ANEC is an international non-profit association founded in 1995. It defends consumer interests in standardisation and certification processes, mainly within European standards development organisations. It operates in partnership with CEN and CENELEC and is recognized under European Regulation 1025/2012 on European standardization. According to a report submitted to the European Commission "ANEC is facing pressures on its budget. More or at least stable EU funding is therefore critical to ensure the continuing viability of ANEC."[181]

Negotiations are currently under way to examine the amounts to be awarded under the "Multiannual financial framework for the years 2021-2027." In its proposal, the Commission recognizes the important role played by consumer organizations and proposes to renew funding essentially similar to that of the 2014-2020 program. Overall, the proposal is viewed positively by BEUC, which notes that "[t]his translates into the EU spending on average each year 5 (five) eurocents for each EU consumer."[182]

[176] Regulation (EU) 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision 1926/2006/EC, art. 4 b) 5.

[177] *Ibid*., art. 6.

[178] Online: https://www.beuc.eu/about-beuc/who-we-are (Accessed February 20, 2019)

[179] Van Dijk Management Consultants et ICF GHK, *Evaluation of EU 2007-2011 financial contributions to EU-level consumer organisations: BEUC*, 2013, p. 71.

[180] Online: http://tacd.org/ (Accessed February 20, 2019)

[181] Van Dijk Management Consultants et ICF GHK, *Evaluation of EU 2007-2011 financial contributions to EU-level consumer organisations: ANEC*, 2013, p. 10

[182] Online: https://www.beuc.eu/publications/beuc-x-2018-085_beuc_analysis_of_mff_2021-2027.pdf (Accessed February 20, 2019)

4.2 Switzerland

4.2.1 Regulatory cooperation and the internal market

The Swiss Confederation, composed of 26 cantons,[183] has been a federal State since 1848. The current constitution, the Federal Constitution of the Swiss Confederation (the Constitution), is the third Swiss constitution and was adopted on 18 April 1999. The Constitution organizes the functioning of the federal State, divides powers between the federal State, the cantons and the communes and confers a number of "fundamental rights" on citizens.

Switzerland's federal structure has three levels, each of which has legislative and executive powers: the Confederation (the central State), the cantons and the communes. The Confederation and the cantons also have judicial powers, and it is the cantons, by virtue of the principle of indirect administration contained in Article 46 of the Constitution, that are responsible for implementing federal law.

Under Article 3 of the Constitution, "The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation."[184] Since January 1, 2008, the principle of subsidiarity, as applied, for example, in the European Union, has also applied to relations between the cantons and the federal State. Indeed, under Article 5a, "the principle of subsidiarity must be observed in the allocation and performance of state tasks"[185] and, under Article 43.a.1, "The Confederation only undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the Confederation."[186]

In addition, under Article 45.1, "the Cantons shall participate in the federal decision-making process, and in particular in the legislative process"[187] and have voting rights in the cases provided for in Articles 140 and 141. The cantons may also propose legislation at the federal level[188] or establish a referendum[189] and shall be consulted when new federal laws affect their interests.[190] The implementation of federal law is ensured by the cantons[191] and the "widest possible" scope for action is accorded to them "taking

[183] The Cantons of Zurich, Bern, Lucerne, Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, Freiburg, Solothurn, Basel City and Basel-Landschaft, Schaffhausen, Appenzell Ausserrhoden and Appenzell Innerrhoden, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva and Jura.
[184] Federal Constitution of the Swiss Confederation of April 18, 1999 (Status 1 January 2018), SR 101, art. 3.
[185] *Ibid*., art. 5.1.
[186] *Ibid*., art. 43a.1.
[187] *Ibid*., art. 45.1.
[188] *Ibid*., art. 160.
[189] *Ibid*., art. 141.
[190] *Ibid*., art. 45.2.
[191] *Ibid*., art. 46.1.

into account their particularities."[192] It is up to the Confederation to ensure that the cantons respect federal law,[193] which overrides cantonal law in the event of conflict.[194]

Among the powers of the Confederation, two articles in particular deserve attention: Article 95 and Article 97. Under Article 95:

> 1. The Confederation may legislate on professional activities in the private sector.
> 2. It shall seek to create a unified Swiss economic area. It shall guarantee that persons with an academic qualification or with a federal or cantonal educational qualification or an educational qualification recognized by a Canton are able to practice their profession throughout Switzerland.

As the National Council's Committee for Economic Affairs and Taxation points out: [TRANSLATION] "In accordance with the prevailing doctrine, this provision confers on the Confederation comprehensive authority to regulate by means of policing measures issues related in particular to the marketing of products by private economic actors."[195]

Just as in Canada and Australia, the division of powers between different levels of government has given rise to several markets in Switzerland. In the 1990s, and inspired by European integration, Switzerland undertook several regulatory cooperation initiatives at both the national and international levels, unilaterally, bilaterally and multilaterally. The aim was [TRANSLATION] "to combat the partitioning of markets, reduce barriers to competition and strengthen the Swiss economy."[196]

Among these initiatives was the adoption of the 1995 Law on the Internal Market (*loi sur le marché intérieur* - LMI) to improve the conditions of competition. This law defines the general principles and an approach, similar to that of the EU, based on mutual recognition of different regulatory regimes, aimed at ensuring free, non-discriminatory market access throughout the territory by liberalizing the conditions of access to cantonal and municipal markets.

The LMI is a framework law that encourages the cantons [TRANSLATION] "to create or contribute to establishing common framework conditions, whether by means of concordant solutions or autonomous adaptation of their legislation."[197] The choice of framework legislation over harmonization was made because of uncertainties as to the constitutionality of this approach and rejection by the cantons. The National Council's Control Committee nonetheless notes that [TRANSLATION] "If the LMI does not impose a uniform solution, it remains that the residual nature of the law does not exempt the

[192] *Ibid*., art. 46.3.
[193] *Ibid*., art. 49.2.
[194] *Ibid*., art. 49.1.
[195] National Council's Committee for Economic Affairs and Taxation, *Initiative parlementaire Loi fédérale sur les entraves techniques au commerce: Exclure les denrées alimentaires du champ d'application du principe du « Cassis de Dijon »,* 2014, p. 11.
[196] Online: https://www.weko.admin.ch/weko/fr/home/themes/marche-interieur/loi-federale-sur-le-marche-interieur.html (Accessed January 25, 2019).
[197] National Council's Control Committee, *Effets de la loi fédérale sur le marché intérieur (LMI) sur la libre circulation des services et des personnes en Suisse - Rapport de la Commission de gestion du Conseil national établi sur la base d'une évaluation de l'Organe parlementaire de contrôle de l'administration du 27 juin 2000*, 2000, p. 5607.

cantons from adapting their legislation to the principles set forth in the LMI." The LMI counted on cooperation between the federal government, cantons and communes.

In particular, the LMI establishes mutual recognition of rules along the lines of the *Cassis de Dijon* principle, based on the analogy of equivalence of Swiss regulations with European law, under Article 2. Exceptions to the principle of mutual recognition are clearly set out in Article 3 and are similar to those set out in the case law of the Court of Justice of the European Union [TRANSLATION]:

> 1 Freedom of access to the market cannot be denied to external suppliers. Restrictions must take the form of charges or conditions and are only permitted if they:
> apply in the same way to local suppliers;
> are essential to the preservation of overriding public interests;
> comply with the principle of proportionality.
> .

According to the Federal Law on Technical Barriers to Trade (*loi fédérale sur les entraves techniques au commerce* - LETC), [TRANSLATION] "overriding public interests" include "consumer protection and fairness in commercial transactions."

Article 3 authorizes a number of restrictions on market access, and as a result, some market operators have been denied access to the markets of certain cantons. Furthermore, [TRANSLATION] "the existence of divergent cantonal regulations creates a legal situation that is not very transparent, while economic actors need clear and transparent framework conditions. […] The impact on construction products provides an illustration of this problem: the requirements for certain works can render certain construction products unusable, since they are incompatible with the requirements for such works. An example of this is that of quality standards for cement (the product) used in the construction of a bridge (the structure) that may not meet the specifications required to ensure the quality of the structure."[198]

Such requirements may be considerable. According to the think tank, Avenir Suisse:

> [TRANSLATION] Cantonal legislation as a whole has been known only since 2013. It currently includes 16,619 prescriptions, but the discrepancies among them are significant (Lüchinger, Roth Schelker and Uhlmann 2015). The canton of Bern, with 618 requirements, occupies middle ranking, while Appenzell Outer Rhodes has only half this number. The record is held by Neuchâtel, with 1118 prescriptions. These differences are enormous if one starts from the idea that every canton has to address more or less the same problems and follow the same federal regulations. As yet, no study has been conducted on this matter.[199]

So, very quickly, [TRANSLATION] "the State Council considered that the *Cassis de Dijon* principle, that is anchored in law on the internal market was insufficient to facilitate

[198] Conseil d'État, *Rapport du Conseil d'État au Grand Conseil à l'appui d'un projet de décret portant adhésion du canton de Neuchâtel à l'accord intercantonal sur l'élimination des entraves techniques au commerce du 14 août 2002*, 2002, p. 6.
[199] Avenir Suisse, Peter Buomberger et Tobias Schlegel (2016), *Sortir de la jungle réglementaire II*, p. 14. Online : https://www.avenir-suisse.ch/files/2017/03/Sortir_de_la_jungle_reglementaire_II.pdf (Accessed December 31, 2018).

trade in goods between cantons."[200] Indeed, as we have seen, these differences therefore appear to be barriers to trade, i.e. , [TRANSLATION] "barriers to cross-border trade in products resulting from differing requirements or technical standards, the inconsistent application of such requirements or standards, or non-recognition of particular tests, conformity assessments, registrations or approvals."[201]

This situation cannot be resolved by a federal law harmonizing the requirements for works since, according to the Federal Constitution, the regulations governing placing products on the market are the responsibility of the Confederation, while the regulations governing the requirements for works is the responsibility of both the Confederation and the cantons. The mutually agreed solution to remedy this situation took the form of an inter-cantonal agreement that encourages cooperation among the cantons with the aim of [TRANSLATION] "eliminating the remaining technical barriers to trade between Switzerland and foreign countries and between cantons": the Intercantonal Agreement on the Elimination of Technical Barriers to Trade (*Accord intercantonal sur l'élimination des entraves techniques au commerce*), signed in October 1998.

This agreement regulates cooperation between the cantons, and as such establishes inter-cantonal authority on technical barriers to trade, thus enabling the establishment of a common procedure for the drafting of future regulations. Since 2004, every canton in Switzerland has signed onto the agreement. An inter-cantonal authority has been established, which reaches decisions based on a qualified majority of 18 votes (70% of the cantons).

Despite such efforts, significant differences persist in Switzerland. As the OECD noted in 2006, while one of the founding principles of the Swiss Confederation was the establishment of a single Swiss market, "it remains extremely fragmented in practice […]. Despite some progress, the law has not been very effective, and substantial barriers to competition still exist."[202]

To address this concern, since 2010, Switzerland has been applying "a Swiss version" of the *Cassis de Dijon* principle[203] which permits products that do not meet Swiss requirements, but which meet those of an EU country, to be sold in Switzerland.

In fact, Switzerland reformed the LETC in 2010 to make it easier to import products from its main trading partner: the European Union. Changing the LETC was a substantial development because it extended the *Cassis de Dijon* principle already in force within the Swiss market under the LMI, to Member States of the European Union. Since the LETC was amended, most products lawfully marketed in the European Union can in

[200] Conseil d'État, 2002, *op.cit*., 2002, p. 6.
[201] Accord intercantonal sur l'élimination des entraves techniques au commerce (AIETC) du 23 octobre 1998, RS 946.513, article 2a.
[202] OECD, *Switzerland - Seizing the Opportunities for Growth*, 2006, p. 57.
[203] Fédération romande des consommateurs, *Dossier: Suisse et UE- Le Cassis de Dijon sous la loupe*, 2018.

principle also circulate freely in Switzerland, without prior control. To support the implementation of the *Cassis de Dijon* principle, in response to recommendations from consumer organizations, the Federal Statute on Product Safety was introduced, which among other things, requires companies to recall hazardous products.

There is a negative list of products and services that are not subject to the *Cassis de Dijon* principle.[204] As Messerlin notes in discussing the mutual recognition agreement between Australia and New Zealand: "[t]he 'negative' lists exempting certain goods or regulations from mutual recognition have the huge additional advantage of making such exemptions very visible, hence putting strong pressure [...] to review them regularly."[205]

As Switzerland's Federal Department of Economic Affairs pointed out in 2016:

> [TRANSLATION] The *Cassis de Dijon* principle applies to about one third of imports from the EU. Since the LETC was amended in 2010, a good 80% of EU imports are in principle no longer hampered by technical barriers to trade, whether under the CdD principle, bilateral Switzerland-EU agreements, or by Switzerland's unilateral application of EU law.[206]

Note that although the *Cassis de Dijon* principle is applied unilaterally, the LETC still allows some trading partners to be "punished" if market access for Swiss products is not authorized in accordance with Article 16a.3:

> [TRANSLATION] If the EC or an EC Member State or EEA hinders the marketing of Swiss products that meets the technical requirements of the destination country, the Federal Council may order that s. 1 does not apply to the products, or to certain of the products, of the trading partner.

In general, Swiss consumer associations such as the Federation romande des consommateurs have expressed criticism of Switzerland's application of the *Cassis de Dijon* principle, although they acknowledge the federal government's efforts to avoid certain abuses.[207] The Federation romande des consommateurs had also requested that certain products be excluded from the application of the principle. They noted: [TRANSLATION] "several exceptions requested by the Federation romande des consommateurs have been retained, such as a mandatory indication of country of origin of foodstuffs, warnings printed in the language of the region of sale, indications of battery-laid eggs, or GMO-related provisions."[208]

Some effects of the *Cassis de Dijon* principle have been denounced by the press or by consumer groups. These include:

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[204] Online: https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Technische_Handelshemmnisse/Cassis-de-Dijon-Prinzip/Ausnahmen_Cassis-de-Dijon-Prinzip.html (Accessed January 25, 2019)
[205] P. Messerlin, *The European Union's single market in goods: Between mutual recognition and harmonization*, 2011, p. 429.
[206] Département fédéral de l'économie, de la formation et de la recherche, *Entraves aux importations parallèles : Rapport du Conseil fédéral du 22 juin 2016 en réponse au postulat 14.3014 « Simplifier les formalités douanières et favoriser les importations parallèles grâce à la reconnaissance d'autres documents permettant d'attester de l'origine d'un produit »,* 2016, p. 28.
[207] Fédération romande des consommateurs, *Article: Politique- 2019: changements notoires*, 2018.
[208] Fédération romande des consommateurs, *Dossier: Suisse et UE- Le Cassis de Dijon sous la loupe*, 2018..

> [TRANSLATION]The Migros group marketed 26 tonnes of rice whose pesticide content exceeded that prescribed by Swiss standards.[209]
> Electronic cigarettes containing nicotine levels that meet the requirements of EU or EFTA members can now be sold in Switzerland, while Switzerland has no regulations in this area.[210]
> The removal of the Swiss obligation to include a warning on the labels of energy drinks not to mix them with alcohol, despite WHO recommendations and requests from BEUC and RCF.[211]

Finally, the Federation romande des consommateurs now encourages the Swiss government to work with the EU to obtain access to the RAPEX early warning alert system.[212] It will be recalled that Canada's adherence to this system is negotiated in the context of its regulatory cooperation in CETA.

4.2.2 Regulatory cooperation and the international market

With regard to the international market, according to the State Secretariat for Economic Affairs:

> Switzerland has three instruments to reduce technical barriers to trade:
>
> 1. the autonomous harmonization of Swiss technical regulations with those of the most important trading partners;
> 2. the conclusion of international agreements to this effect, and
> 3. the autonomous application of the "*Cassis de Dijon* principle."[213]

In order to facilitate trade by autonomously harmonizing Swiss regulations with those of its major trading partners, Switzerland often finds inspiration in European legislation. However, [TRANSLATION] "no complete adaptation of Swiss law to EU provisions can eliminate all technical barriers to trade. Indeed, not all the technical requirements of neighbouring countries are harmonised between them or are only partly so."[214]

Another way to align the Swiss requirements is to use regional or international standards for product requirements. For example, Article 4.5b of LETC, which lays down the principles for the technical prescriptions with regard to product requirements indicates that "as far as possible, [the competent authority] shall designate international harmonized standards" when it comes to setting the technical standards for the implementation of essential requirements. Agencies are encouraged not only to use harmonized international standards, but in addition, Switzerland has recently reviewed its national technical provisions to assess their differences with those of the European

[209] 20 Minutes (Switzerland), *Migros vend du riz hors des normes suisses,* 2011.
[210] Office fédéral de la sécurité alimentaire et des affaires vétérinaires, *Cigarettes électroniques*, 2018.
[211] Fédération romande des consommateurs, *Article: santé - Energy drinks : l'OMS demande d'instaurer des limites,* 2014.
[212] Fédération romande des consommateurs, *Baisse des prix et sécurité renforcée pour les consommateurs*, 2009.
[213] Online: https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Technische_Handelshemmnisse.html (Accessed January 25, 2019).
[214] Département fédéral de l'économie, de la formation et de la recherche, *op. cit.,* 2016, p. 28.

Union[215] with a view to harmonizing national standards it considers equivalent, or inferior, to those in force in the European Union. According to the Federal Department of Economic Affairs:

> This process has triggered a new round of harmonization with the EU, which is ongoing, especially as regards the reform of food legislation. Approval procedures have also been reviewed and simplified. According to SECO's assessment, these legal adjustments were even more important, economically speaking, than the introduction of the CdD principle itself.[216]

In addition, the European Free Trade Association (EFTA), composed of Switzerland, Iceland, Norway and Liechtenstein, is also interested in international standardization and, more specifically, European standardization,[217] since the EU is its biggest trading partner. For example, EFTA participates financially in European standardization. In fact, it has an annual budget of nearly €1 million which it shares between annual operating subsidies to CEN, CENELEC and ETSI but also to ANEC and ECOS, who represent the interests of consumers and environmental protection respectively.[218]

Furthermore, Switzerland has concluded multiple more or less binding international agreements aimed at reducing technical barriers to trade. Most of these were negotiated within the framework of EFTA. Bilateral agreements have been concluded with the EU, China, Japan and the Faroe Islands.[219]

Among these agreements are the Mutual Recognition Agreements signed with Canada, the WTO Agreements,[220] the Comprehensive Economic Partnership Agreement with Indonesia, which includes some regulatory cooperation activities,[221] and a series of agreements signed with the European Union.[222]

4.2.3 Consumer protection

Consumer protection has occupied a special place in Switzerland since it was added to the Constitution in 1981. According to Article 97 of the Constitution, the Confederation is required to take "measures for consumer protection."[223] The Constitution also provides that the Confederation shall "legislate on the remedies available to consumer

[215] Conseil Fédéral, *Examen des divergences entre les prescriptions techniques suisses et le droit en vigueur dans la CE Rapport en exécution des postulats 05.3122 du groupe socialiste et 06.3151 Baumann*, 2017.
[216] Département fédéral de l'économie, de la formation et de la recherche, *op. cit.,* 2016, p. 28.
[217] Online: http://www.efta.int/eea/policy-areas/goods/standardisation-mra-technical-cooperation/standardisation (Accessed January 25, 2019).
[218] Online: http://www.efta.int/eea/policy-areas/goods/standardisation-mra-technical-cooperation/standardisation (Accessed January 25, 2019).
[219] Online: https://kdk.ch/fr/themes/politique-economique-exterieure/accords-de-libre-echange/ (Accessed January 25, 2019).
[220] WTO, Technical Barriers to Trade Agreement, 1994; WTO, Agreement on the Application of Sanitary and Phytosanitary Measures, 1994.
[221] Comprehensive Economic Partnership Agreement (CEPA) between the Republic of Indonesia and the EFTA States of December 16, 2018.
[222] The complete list of agreements is available here: https://www.eda.admin.ch/dam/dea/fr/documents/publikationen_dea/accords-liste_fr.pdf (Accessed January 25, 2019).
[223] Federal Constitution of the Swiss Confederation of April 18, 1999 (Status as of 1 January 2018), SR 101, section 97.1.

organizations."[224] The first federal legislation dealing specifically with consumer protection is the Federal Act on Consumer Information, adopted on October 5, 1990, which regulates, among other things, funding for private organizations for consumer protection.

This aside, Swiss consumer protection regulations are scattered across various areas of law. Accordingly, significant provisions relating to consumer protection can be found in in numerous primary and subordinate laws. For example:

- The Regulation of the Federal Consumer Commission of 1 February 1966;
- The Ordinance of 1 April 1992 on Financial Assistance to Consumer Associations;
- The Federal Act of 18 June 1993 on Package Travel;
- The Federal Act of 23 March 2001 on Consumer Credit;
- The Federal Act of 12 June 2009 on Product Safety;
- The FDJP Ordinance of 29 November 2017 on the Maximum Interest Rate for Consumer Loans.

As summarized by the OECD in 2006, in its report *Switzerland - Seizing the Opportunities for Growth:*

> Consumer protection is, in legal terms, fairly comprehensive. But it is scattered across several mechanisms, the institutional framework lacks a single strong focal point, and there is some overlap of responsibilities. The competition authority has no direct role in consumer protection (although a consumer representative sits on the decision-making body of the authority, and consumer associations may solicit Comco's views on an issue). The low level of resources given to the federal structures and their low profile imply (and are perceived to mean) that a low priority is attached to this issue in the political system.[225]

According to the Federal Consumer Commission (FCC):

> [TRANSLATION] First of all, Swiss law does not provide sufficiently consistent consumer protection. There is no reason why Swiss consumers should now enjoy overall protection equivalent to that of European consumers when it comes to package travel, door-to-door sales or consumer credit, but not in other contracts that are at least as essential to the satisfaction of their private needs, such as property sales, remote contracts or e-commerce. This inconsistency stems in part from the sectoral approach that has been followed so far, which is now clearly showing its limitations and should be replaced by horizontal rules, incorporated as far as possible within the General Provisions of the Code of Obligations (CO), since contracts are the instrument by which consumers transact with professionals. Otherwise, we run the risk of seeing the emergence of separate legal regimes for consumer contracts, which can only undermine the security and predictability of the law and, consequently, consumer confidence[226]

[224] *Ibid*., art. 97.2.
[225] OECD, 2006, *op. cit.*, p. 78.
[226] FCAB, *30ans - Article constitutionnel sur la protection des consommatrices et consommateurs*, 2016, p. 148.

According to the FCC [TRANSLATION] "Swiss law remains for the time being below the minimum standards of European law with regard to protecting the economic interests of consumers."

In Switzerland, consumer interests are protected by the federal administration, through the Federal Consumer Affairs Bureau (FCAB) and the Federal Consumer Commission (FCC) which the FCAB serves as secretariat, and private entities that act on behalf of consumers. The FCC is the Confederation's central authority over consumer matters. It seeks to [TRANSLATION] "promote exchanges between the federal government, consumer associations, and between trade and industry."[227] The FCAB, however, has a relatively small staff "of only 6 or 7 officials at its disposal. [C]ompared with other countries, consumer protection remains at a fairly embryonic stage in Switzerland."[228] The FCAB works in collaboration with the business community on issues of standardization.

The FCAB participates as an observer in the Working Group on Consumer Issues,[229] and also in the Expert Group on Consumer Product Safety and Market Surveillance. It also monitors the discussions of the UNECE Working Party on Regulatory Cooperation and Standardization Policies.

The FCC [TRANSLATION] "serves as an advisory body to the Federal Council and departments on all questions submitted to it concerning consumer policy. It may also make recommendations on its own in these matters. [... It may also], in accordance with the economic groups concerned, encourage research on, and the application of, concerted solutions to problems affecting consumers."[230]

As mentioned above, the foundation for the financing of consumer associations by the Confederation is laid out in the Federal Act on Consumer Information (FACI)[231]. As stated in Article 5:

> [TRANSLATION]1 The Confederation may grant financial assistance to organisations whose activity is of national importance and are statutorily and exclusively devoted to consumer protection, within the limits of the appropriations allocated with up to half of the costs taken into account, for:
>
> a. objective and relevant information for consumers through the press or electronic media;
> b. comparative tests on the clearly distinguishable essential characteristics of the goods and the essential elements of the services; and
> c. the negotiation of agreements on the information to be provided.

[227] Institut de Sociologie, *Pratiques de consommation en Suisse romande : enquête auprès des membres de la* Fédération romande des consommateurs, 2012, p. 11.
[228] OECD, *Regulatory reform in Switzerland- Regulatory authorities for air transportation, railways, telecommunications and postal services*, 2006, p. 72.
[229] FCAB, 2016, *op. cit.*, p. 46.
[230] Règlement de la Commission fédérale de la consommation du 1er février 1966 (Status as of 1 January 2013), RS 944.1 art. 1.
[231] Loi fédérale sur l'information des consommatrices et des consommateurs (LIC) of 5 October 1990 (Status as of 1 January 2013), RS 944.0.

> 2 The Confederation may also grant financial assistance within the meaning of par. 1 to other organizations whose activities are of national importance and statutorily dedicated to consumer information.

This provision is complemented by the Ordinance on financial support for consumers of 1 April 1992. Articles 1 and 2:

> Art.1
> Financial assistance may be given to the following consumer groups:
> Associazione consumatrici della Svizzera italiana (ACSI) ; Fédération romande des consommatrices (FRC); Konsumentinnenforum Schweiz (KF); Stiftung für Konsumentenschutz (SKS).
>
> Art. 2
> Other organizations seeking financial assistance within the meaning of art. 5, para. 1, FACI should contact the Federal Consumer Affairs Bureau (FCAB) and prove that they meet the requirements set by the FACI.

The FCAB is responsible for distributing financial assistance to consumer information or protection organizations, in accordance with the Federal Act on Consumer Information. Until 2012, financial assistance was 750,000 Swiss francs and now stands at 1 million.[232] According to the FCAB, "Compared to other financial assistance granted by the Confederation, support for these organizations remains modest." The Economic Affairs and Taxation Committee of the Council of States said in 2018 that it was favourable to a freeze on the financial aid granted to consumer organizations.[233]

Of this assistance, in 2015, the Federation romande des consommateurs received 300,000 Swiss francs (about $CAN400,000), about 20% of its total revenues. Nevertheless, in survey on about 2000 of its members, a majority said they were mostly dissatisfied with the commitment of communal, cantonal and federal elected officials to the defense of consumer rights.[234]

Finally, we should note the creation, in 2010, of an alliance of consumer organizations formed of the Associazione consumatrici della Svizzera italiana, the Stiftung für Konsumentenschutz and the la Fédération romande des consommatrices,[235] three of the four largest consumer organizations in Switzerland. The Alliance of Consumer Organizations is responsible for the Price Barometer.[236]

[232] FCAB, 2016, *op. cit.*, p. 41.
[233] Swiss Parliament, *La Commission a décidé, à l'unanimité, d'entrer en matière sur le projet fiscal 17,* 2018.
[234] Institut de Sociologie, *op. cit.*, 2012, p. 53.
[235] Alliance des organisations de consommateurs, *Trois organisations se rapprochent au niveau national – Plus de force pour les consommateurs* 2010.
[236] Online: https://www.barometredesprix.ch (Accessed January 26, 2019).

4.3 Australia

4.3.1 Regulatory cooperation and the internal market

Like Canada, the Commonwealth of Australia is organized as a federation. The Constitution of the Commonwealth of Australia Act (the Australian Constitution), which was adopted in 1900 and came into force on 1 January 1901, is the most important piece of legislation for the country. The Australian Constitution organized the six Australian colonies into States within a federation and defines the division of powers between the federal government (the Commonwealth Government) and the various States. Australia is also made up of Territories, which unlike the States, are constitutionally subject to the jurisdiction of the federal government.

The Australian Constitution, like the Canadian Constitution, contains a clause limiting the power of the federated States in issues relating to internal trade. Chapter IV of the Constitution (Sections 81 to 105A) contains provisions, *inter alia*, about trade and commerce in the territory of Australia. Notable among these is Section 92, which states that trade between the States is "absolutely free." The interpretation of this article, as in Canada, has long been debated.

The contemporary interpretation of this provision is the one established by the Australian High Court, in its judgment of May 2, 1988 in *Cole v. Whitfield*.[237] Relying on a historical and contextual interpretation, the Court held unanimously in *Cole v. Whitfield* that the provision was inserted to make the Australian territory a protectionist-free zone. Section 92 of the Australian Constitution therefore prohibits any protectionist measures, which includes regulatory measures.

However, as in Canada, the Constitution permits the establishment of trade barriers as long as they have a legitimate purpose and are not a disguised restriction on trade. The High Court also subsequently added the principle of proportionality, thereby essentially creating a test similar to the one used by the Supreme Court of Canada in the *Comeau* case. Note also that in 2008 the High Court specified that it no longer considers only the objectives of the measures, but also their effects, and emphasizes the principle of proportionality.[238]

Consequently, Section 92 of the Australian Constitution did not prevent the erection of regulatory differences between jurisdictions. As the Productivity Commission of Australia points out: "Regulatory differences among Australian jurisdictions exist for historical reasons and because individual States and territories have the power under the Australian constitution to regulate many policy areas independently." The Australian

[237] High Court of Australia, *Cole v Whitfield*, Decision of May 2, 1988, 165 360 CLR.
[238] High Court of Australia, *Betfair Pty Limited and Anor v State of Western Australia*, Order of March 27, 2008, HCA 11, paras. 47, 101, 110 and 113.

economy found itself being "balkanized" over time, which had negative consequences for the national economy.

It was not until the 1990s that regulatory reforms were adopted to improve the efficiency and competitiveness of the Australian market by removing barriers to trade and mobility, both within Australia and across the Tasman sea that separates Australia from New Zealand. An institutional project was launched to promote the integration of the Australian market and create institutions to manage jurisdictional disputes. Growth needed to be stimulated "*through the related processes of 'micro-economic' reform and 'New Federalism.'*"[239] And to accomplish this: "First, the diagnosis–overlap, duplication and balkanization; and second, the remedy–cooperative federalism."[240]

In order to establish better cooperation between the Australian States and territories, the governments agreed, in May 1992, to sign the Intergovernmental Mutual Recognition Agreement. This agreement gave rise, in the same year, to the Mutual Recognition Act 1992 (MRA). The goal of the Mutual Recognition Agreement was to "promot[e] the goal of freedom of movement of goods and providers in the national market service in Australia."

Efforts were also undertaken with New Zealand. 1996 saw the signing of the Trans-Tasman Mutual Recognition Arrangement, and in 1997 Australia adopted the Trans-Tasman Mutual Recognition Act 1997 (TTRMA). The objective of the Trans-Tasman Mutual Recognition Arrangement was to: "remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business."

As with the EU, the TTMRA is focused on the mutual recognition of the rules. Accordingly, the Act is formulated around the principle that "a good which may lawfully be sold in one jurisdiction may also lawfully be sold in another jurisdiction, without needing to comply with additional requirements of the other jurisdiction."[241]

It should be noted that, unlike the in European Union and the *Cassis de Dijon* principle, the mutual recognition principle applies equally to goods imported into a State, since the TTMRA and MRA apply not only when a product is lawfully "produced and marketed" but also when a product can be "lawfully sold."

[239] J. Leslie and A. Elijah, *From One Single Market to Another: European integration, Australian Ambivalence and construction of the Trans-Tasman Single Economic Market*, 2015, p. 91.
[240] M. Painter, *Reshaping Australian Institutions: Collaborative federalism: Economic reform in Australia in the 1990s*, 2009, p. 10.
[241] Productivity Commission (2015), *Mutual Recognition Schemes, Research Report*, Canberra, p. 63.

As in Europe, the MRA does not affect all aspects of the sale of goods. For example, it does not affect "the operation of any laws of the second State that regulate the manner of the sale of goods in the second State or the manner in which sellers conduct or are required to conduct their business in the second State (including laws set out in the examples below), so long as those laws apply equally to goods produced in or imported into the second State." [242] Consequently, contractual consumer protection obligations are applicable to imported products as well. The same is true of the TTMRA.

The model adopted is in "the lower end of the cost spectrum even when compared to other mutual recognition schemes. It is particularly light handed for goods, largely relying on case law for enforcement."[243] Indeed, unlike in the European Union, mutual recognition in Australia is unconditional, and only a few categories of products are excluded. According to Messerlin, Australia and New Zealand have applied the principle of mutual recognition more effectively than in Europe. In addition, he remarks that, "The 'negative' lists exempting certain goods or regulations from mutual recognition have the huge additional advantage of making such exemptions very visible, hence putting strong pressure on both sides to review them regularly."[244]

Both the MRA and TTRMA specify categories of goods and services that are excluded from the agreement. These exceptions are either temporary or permanent and concern firearms and other offensive weapons, fireworks and pornographic material, or certain regulations, such as those intended to protect the environment. As the Productivity Commission observes: "Mutual recognition should not impede a jurisdiction's ability to make laws and regulations that meet the needs and preferences of its citizens, such as in the area of public standards of decency."[245]

4.3.2 Consumer protection

The creation of a federal law

In the 1970s, consumer protection in Australia was only assured by the common law and by legislation respecting the sale of property (Sale of Goods Legislation).[246] The *Trade Practices Act* (1974) was the first national law that dealt specifically with consumer protection. It introduced "prohibitions against misleading or deceptive conduct and unfair practices, and imposed certain non-excludable terms and conditions into all consumer contracts."[247]

Over the years, this law was amended several times in order to extend its scope. For example, in 1986, an amendment was made permitting the inclusion of a prohibition on

[242] Section 11 (2).
[243] Productivity Commission, *op. cit.*, 2015, p. 46.
[244] Messerlin, 2011, *op. cit.*, p. 249.
[245] Productivity Commission, *Mutual Recognition Schemes*, 2009, p. XXVIII.
[246] Productivity Commission, *Review of Australia's Consumer Policy Framework*, 2008, p. 17.
[247] *Ibid*.

business engaging in “unconscionable” conduct; in 1992, provisions were added to regulate product liability and in 1998 labeling provisions were added with regard to the country of origin.[248]

This law, however, was subject to limitations imposed by the Australian Constitution, and generally applied only to trade across national or subnational borders.[249] In 1983, the State and Territorial governments agreed to ensure consumer protection in a consistent manner across the country and in the 1980s and 1990s, they introduced provisions equivalent to those contained in the Trade Practices Act (1974). However, the benefits of the Trade Practices Act (1974) did not last long, since the jurisdictions “have all pursued their own improvements to consumer laws, leading to divergence, duplication and complexity. The net result is that businesses and consumers are not able to fully understand their rights and obligations under the law, which leads to costs–in terms of time, money and reduced confidence in markets.”[250]

In October 2005, in the wake of the regulatory changes observed in the 1990s, the Prime Minister and the Australian Treasurer announced the creation of a Taskforce on Reducing Regulatory Burdens on Business because businesses had become “increasingly vocal about compliance and other burdens associated with [the] regulatory inflation.”[251] One of the recommendations the Taskforce made to the government was to: “initiate an independent public review into Australia’s consumer protection policy framework and its administration.”[252]

In response, the Australian government decided to ask the Productivity Commission to “undertake a public inquiry into Australia's consumer policy framework.”[253] This commission is an “important feature of the Australian landscape.”[254] It is a statutory body whose mandate is to provide advice and independent information to the Commonwealth Government on social, economic and environmental issues that affect Australians.

The Productivity Commission report published in 2008 concluded that, despite efforts in the 1980s and 1990s, the provisions contained in the various laws were not uniform and that inconsistencies existed. The Productivity Commission pointed to inconsistencies in the regulation, including:

- the definition of a 'consumer' and hence coverage of the statutes across jurisdictions;
- standards for what constitutes harassment or coercion and definitions of pyramid selling schemes;

[248] *Ibid*.
[249] *Ibid*., p. 18.
[250] Commonwealth of Australia, *An Introduction to the Australian Consumer Law*. Online: http://consumerlaw.gov.au/the-australian-consumer-law/consumer-policy-in-australia/resources/an-introduction-to-the-australian-consumer-law/ (Accessed February 5, 2019)
[251] Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce is Reducing Regulatory Burdens on Business,* 2006, p. i.
[252] *Ibid*., p. 52.
[253] *Ibid*., p. 24.
[254] P. Pumford, *Regulatory Cooperation,* 2018, p. 152.

- requirements for door-to-door selling and telemarketing activities;
- enforcement powers available to regulators. (For instance, some have the power to issue warning and infringement notices and notices requiring a trader to substantiate claims or representations); and
- redress mechanisms for consumers and fines and penalties for breaches of the law.[255]

As mentioned above, the Productivity Commission also noted that several differences emerged after the adoption of the Trade Practices Act (1974), creating new inconsistencies and varying levels of consumer protection within the national market. The report calls for greater accountability of the federal government in consumer protection and concludes that "Growing divergence in consumer protection regulations goes against the original intent of governments in amending Part V of the Trade Practices Act 1974 in 1983 to have nationally consistent laws."[256] The Productivity Commission therefore considers the need for rapid national reform in order to prevent legislative and regulatory differences from continuing to increase, thereby undermining national market integration. According to the Productivity Commission:

- Australia's consumer markets are becoming more national in character, with variations in consumer laws and enforcement practices across jurisdictions resulting in unnecessary compliance burdens for businesses and differences in protection for consumers.
- Mechanisms to promote responsive policy making within the current multijurisdictional regime have often been ineffectual, leading to lengthy delays in progressing worthwhile consumer reforms.
- Given rapidly changing consumer markets, these costs will increase over time.[257]

In a meeting in Perth on October 2, 2008 the Council of Australian Governments (COAG), the main institution of collaborative federalism, "agreed to a new national consumer policy framework to enhance consumer protection, reduce regulatory complexity for businesses and encourage the development of a seamless national economy."[258] Thus it was, in 2009, that the Intergovernmental Agreement for the Australian Consumer Law (the "Intergovernmental Agreement") was signed, which sets out the terms for the adoption of a national consumer protection law: the *Australian Consumer Law* (ACL).

The new national consumer protection framework "draws on the recommendations of the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework."[259] The objective of this intergovernmental agreement is presented in its Preamble:

> The objective of the new national consumer policy framework is to improve consumer well-being through consumer empowerment and protection, to foster effective competition and to enable

[255] Productivity Commission, 2008, *op. cit.*, p. 18.
[256] Regulation Taskforce, 2006, *op. cit.*, p. 51.
[257] Productivity Commission, 2008, *op. cit.,* p. 47.
[258] Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law*, 2009, recital-A.
[259] *Ibid*., recital-B.

> the confident participation of consumers in markets in which both consumers and suppliers trade fairly[260]

To achieve this goal, six operational objectives have been defined:

> 1) to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
> 2) to ensure that goods and services are safe and fit for the purposes for which they were sold;
> 3) to prevent practices that are unfair;
> 4) to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
> 5) to provide accessible and timely redress where consumer detriment has occurred; and
> 6) to promote proportionate, risk-based enforcement.[261]

Section 6 of the Intergovernmental Agreement provides that the text of the ACL would be developed "by the agreement of all the Parties"[262] and completed and adopted by all legislatures before the end of 2010.[263] Thus, the ACL presents itself as "a new centralized view of consumer protection within Australia."[264] Australia has therefore chosen "a single national law, in order to offer the same protections to all Australians, whatever their region, while eliminating differences between the laws of the States and territories."[265]

The ACL has replaced nearly 900 provisions in some twenty laws, such as "legislation adopting the ACL in Queensland, simultaneously amended 25 other pieces of legislation, including the *Chicken Meat Industry Committee Act* 1976 (Qld) and the *Tourism Services Act* 2003 (Qld)."[266] The ACL is presented as a "maximum harmonization" of consumer law in Australia. In fact, Section 5 of the Intergovernmental Agreement states that, "Except as agreed by the Parties, a Party will not submit a Bill to its legislature which would be inconsistent with or alter the effect of the *Australian Consumer Law*."[267]

As a transposition control mechanism, the Ministerial Council on Consumer Affairs (MCCA) was mandated to develop a review process to identify any inconsistencies between the ACL and State and Territory laws[268] and ensure that none remained. The MCCA has since become the Legislative and Governance Forum on Consumer Affairs (CAF), an institution that supports the framework created by the Intergovernmental Agreement: "CAF's role is to undertake the functions under the Inter-Governmental Agreement for the *Australian Consumer Law*, the *Trans-Tasman Mutual Recognition Act*, the *Mutual Recognition Act* 1992, or delegated by the Council of Australian

[260] *Ibid*., Recital-C.
[261] *Ibid*., Recital-D.
[262] *Ibid*., section 1.2.
[263] *Ibid*., section 3.2.
[264] Union des consommateurs, 2015, *op. cit.*, p. 33.
[265] *Ibid*., p. 6.
[266] Productivity Commission, *Consumer Law Enforcement and Administration*, 2017, p. 43.
[267] Council of Australian Governments, 2009, *op. cit.*, section 5.
[268] *Ibid*., section 3.2.

Governments (COAG) on CAF."[269] It generally meets twice a year[270] and its other committees may meet regularly throughout the year.

Note that relations with New Zealand also gave rise to Consumer Affairs Australia & New Zealand (CAANZ), the principal forum for cooperation and coordination between the regulatory bodies of the ACL. CAANZ is a forum for the various agencies responsible for consumer protection in Australia and New Zealand. CAANZ "brings together senior officers of the Commonwealth, State, Territory and New Zealand consumer affairs and fair trading agencies at least three times per year. Three committees meet on a monthly basis to provide support to CAANZ."[271]

Accordingly, while the COAG holds decision-making power, the CAF and CAANZ are the institutions that ensure continued regulatory cooperation between governments. Although, as mentioned above, the ACL was developed "with the agreement of all the Parties,"[272] its modification depends on a system of voting by qualified majority. In fact, the Intergovernmental Agreement includes a mechanism to modify the contents of the ACL by vote (or, in the case of a minor change, by Commonwealth intervention). The Commonwealth is responsible for coordinating the process.

Under Sections 8 and 9 of the Intergovernmental Agreement, the Parties may propose amendments to the ACL by sending the Commonwealth and other Parties a "valid proposal"[273] which must:

> 9.1. include a description of the problem to be addressed by the proposal;
> 9.2. include a description of the key features of the legislative provisions by which it is proposed to address that problem;
> 9.3. include a discussion of alternative methods of addressing the problem, including non-regulatory methods; and
> 9.4. provide supporting material that, so far as practical, complies with the Commonwealth's best practice regulation requirements, including by provision of a draft Regulation Impact Statement, if required. [274]

The Commonwealth must then, within 4 months of filing the amendment request, begin consultation with the Parties, who have 3 months to respond to the proposal. The Commonwealth may also, on its own initiative, propose amendments and is also required to consult with Parties, but no time limit is prescribed. If the amendment is minor, in accordance with Section 13, the Commonwealth is not required to consult the parties but must give "sufficient notice of its intention to make amendments." If four

[269] *Legislative and Governance Forum on Consumer Affairs and Consumer Affairs Australia and New Zealand (2015), Charter 2015-2017*, p. 15.
[270] Online: http://consumerlaw.gov.au/consumer-affairs-forum/ (Accessed February 24, 2019).
[271] Productivity Commission, 2017, *op. cit.*, p. 53.
[272] Council of Australian Governments, 2009, *op. cit.*, section 1.2.
[273] *Ibid*., section 8.
[274] *Ibid*., section 9.

Parties believe that the amendment is not minor, they have 21 days to transmit their opinions, which will put the amendment to a vote.

At the end of the consultation period, a vote will be held on the amendment. The parties have 35 days to vote and any Party that abstains from voting is considered to be in favour. No amendments shall be proposed to the Commonwealth Parliament for ratification if the federal government and four other Parties to the Intergovernmental Agreement (including at least three States) have not approved the amendment. However, the Intergovernmental Agreement is subject to the Australian Constitution and therefore remains voluntary: the courts have deliberately chosen to transfer part of their sovereignty to the federal level, but the parties may withdraw from the agreement at any time. A withdrawal becomes effective 6 months after notification.

For the administration and application of the ACL, COAG has chosen a model based on the involvement of multiple regulators. Under Section 48 of the Intergovernmental Agreement, governments are also required to cooperate with New Zealand:

> Parties will review in due course with New Zealand the potential benefits,[...] of participation by New Zealand in the Memoranda of Understanding referred to in clause 21, for the purpose of providing for improved communication, cooperation and coordination between the administration and enforcement of consumer law in Australia and New Zealand.

And the New Zealand Commerce Commission and the New Zealand Ministry of Consumer Affairs did indeed become Parties to the Memorandum of Understanding signed in 2010[275] between the various agencies responsible for the implementation and administration of the ACL.

Note that the ACL completes the mutual recognition mechanism by incorporating a means of temporarily prohibiting certain products or establishing mandatory standards. In fact, Section 28 gives "the power to develop and implement interim product bans within their respective jurisdictions"[276] that automatically apply within the jurisdiction. Also note that, unlike the European Union with its Consumer Product Safety Directive,[277] which requires producers to "put only safe products on the market,"[278] there is no horizontal provision in the ACL to ensure product safety. Indeed, product safety is regulated by Part 3-3[279] of the ACL and allows safety standards to be applied only to products or services "of a particular kind."[280]

[275] *Australian Consumer Law, Memorandum of Understanding*, 2010.
[276] Council of Australian Governments, 2009, *op. cit.*, section 28.
[277] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.1.2002, pp. 4–17.
[278] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.1.2002, pp. 4–17, art. 3.1.
[279] *Competition and Consumer Act 2010*, C2018C00437, Schedule 2, sections 104-133.
[280] *Ibid*., section 104.

Under Sections 120 and 121 of the ACL, products temporarily banned under the ACL are also automatically considered exceptions to the MRA and TTMRA. This addition was made following the recommendations of the Productivity Commission in 2009.[281]

In conclusion, we should highlight the fact that the Productivity Commission recently issued a statement on the evolution of the ACL in a report entitled *Consumer Law Enforcement and Administration*. This report is similar to the one published in 2008 that led to the harmonization of consumer law in Australia. In this report, published in 2017, the Productivity Commission acknowledges that the ACL has substantially reduced the differences between jurisdictions, but concludes that the consumer protection system in Australia is still too complex: "It includes generic consumer laws and the bodies that administer and enforce them, complemented by a multitude of product- and industry-specific consumer protection regulation and licensing regimes."[282]

Much of this complexity is attributed to the use of the model based on the participation of multiple regulatory bodies. Indeed, the Commission noted that despite the existence of a national consumer policy, the chosen model involves multiple organizations and regulatory agencies, which creates obstacles: "With 10 regulators involved at different levels of government, there are gaps or overlaps of risks in investigations and enforcement, and of inconsistent approaches to interpreting, administering and applying the law."[283]

The Commission notes for instance that the State of Victoria has established an independent regulatory body - Energy Safe Victoria - "to oversee the design, building and maintenance of electricity, gas and pipeline networks to gas and electrical appliances meet energy efficiency standards."[284] The Commission also notes, however, that "the multi-regulator model for the ACL appears to be operating reasonably effectively given the intrinsic challenges in having 10 regulators administer and enforce one law."

Consumer participation

The Productivity Commission drew attention in its 2008 report to the importance of consumers being able to make their voices and preferences heard in terms of public policy:

> Another element of consumer empowerment is the ability of consumers to influence government policies that affect them. Advocacy is one means of providing consumers with such influence. Most obviously, it can help to identify problems faced by consumers that may warrant government action[...], and to ensure that policy makers properly consider the effects of policy proposals on consumers. Several participants argued that robust consumer advocacy is also

[281] Productivity Commission, *Mutual Recognition Schemes*, 2009, p. XXIX.
[282] Productivity Commission, 2017, *op. cit.*, p. 39.
[283] *Ibid*., p. 34.
[284] *Ibid*., p. 58.

> particularly important to counter what they perceived as the better-resourced and more powerful voice of business.[285]

The 2006 Task Force had also stressed that a survey conducted in 2005 by the Australian Public Service Commission revealed that only 25% of regulatory agencies consult the public when developing regulations.[286] The Task Force noted that:

> Consultation practices for developing regulations seem to vary appreciably, for no apparent reason. At one extreme, some regulatory bodies have stringent consultation requirements formally laid down in legislation or guidelines. At the other extreme, there appears to be almost total discretion in many areas of government regarding if and when to consult. This has led to a patchy record of consultation that has often not been commensurate with the potential impact of a regulation.

In its 2008 report, the Productivity Commission draws several conclusions about the state of consumer participation in public policy and regulation. It indicates that the government could go further to improve consumer confidence and empowerment in the markets. It suggests in particular that the lack of consumer confidence may be due to "a limited individual capacity to affect consumer policy."[287] On consumer representation in policy and research on consumer policy, the Productivity Commission notes that "government funding explicitly for the purposes of policy advocacy is limited"[288] and argues that there is "a case for additional government support."[289]

In its report, the Productivity Commission also presents some of the concerns of consumer groups and community organizations about provisions for consumer participation in the development of public policy and regulation. The Consumers' Federation of Australia (CFA), Australia's largest association, that brings together about 40 organizations, explains that approaches to consumer participation differ from one agency to another and from one State to the next. The Consumer Action Law Center explains as follows: "A key missing link in Australian consumer policy is the inability for governments and other decision-makers to meaningfully consult consumer representatives."

The Productivity Commission acknowledges that "consumers have not always had opportunities to make meaningful policy input."[290] CHOICE, Australia's best-known consumer association, says that while governments regularly offer consumer associations the opportunity to participate in the development of policies and regulatory measures, organizations are often funded for services other than advocacy, "or do not receive government funding at all." On this point, the Productivity Commission states:

[285] Productivity Commission, 2008, *op. cit.*, p. 274.
[286] Regulation Taskforce, 2006, *op. cit.*, p. 152.
[287] Productivity Commission, 2008, *op. cit.*, p. 259.
[288] *Ibid*., p. 279.
[289] *Ibid*., p. 279.
[290] *Ibid.,* p. 277.

> As well as having opportunities to contribute to policy making, consumers or their representatives also need to have the means — time, money and know-how — if they are to make input that is effective.

Nevertheless, CHOICE "receives no government funding and yet is able to make high quality and influential contributions on a range of policy matters." It obtains a large part of its funding from voluntary contributions from individuals, but also from subscriptions and sales of its magazine, which contains tests and product comparisons. It occupies an influential place in the public debate but does not always have the necessary resources to respond to appeals from the government. The association sums it up thus:

> This demand for our input demonstrates a real need expressed by government and parliamentary inquiries for consumer advocacy. It is time that appropriate advocacy was funded at a level sufficient to meet this need.

In addition to representing the interests of consumers and participating in public policy, the Productivity Commission also looked at the state of research on consumer issues. In 2008, it concluded that it was necessary that the government establish and fund a national research center on the consumer (National Consumer Policy Research Center), while granting additional funding to support research activities on specific problems of consumer policy.

In response to the recommendations of the Productivity Commission in 2009, the Intergovernmental Agreement emphasized the importance of research and consumer participation. According to Section 47 of the Agreement, the parties "recognize the importance of evidence-based policy supported by robust research and effective stakeholder advocacy."[291] Section 47 further provides that the Commonwealth shall work with States and territories "to develop further the effectiveness of consumer representation and consumer policy research nationally." In the same year, the federal government conducted consultations on the issues of funding for consumer organizations and the possible creation of a national research center. Despite the many pleas received, no action has been taken.[292]

Since 2008, funding has been provided on an *ad hoc* basis. The Productivity Commission notes, for example, that "in 2014 consumer affairs Ministers approved the provision of a consumer advocacy and research grant to CHOICE to fund the development of a Consumer TravelHub."[293] The Commonwealth Government has awarded CHOICE a grant of $2.8 million over four years "to undertake a mix of research, tailored information, education campaigns and advocacy to improve the experiences of consumers in the travel market."

In 2017, the situation had changed little; the Productivity Commission concluded:

[291] Council of Australian Governments, 2009, *op. cit.*, section 47.
[292] Productivity Commission, 2017, *op. cit.*, p. 213.
[293] *Ibid*., p. 216.

> There do not appear to have been any general developments since 2008 that would challenge the economic basis for the Commission's recommendation to increase funding. For example, while social media has significantly changed the way consumers are able to voice their concerns, it is not a substitute for organized and informed consumer advocacy. Being able to make an effective contribution to the policy debate requires time, resources and know-how.

Various associations such as CFA have asserted that they would like to participate in more government processes, but the lack of resources forces them to select which topics to prioritize. In 2016, the CFA declined more than 15 requests for contributions to political or regulatory processes due to lack of resources. The CFA also noted the need for a "funded peak body with capacity to both coordinate diverse consumer organisations as well as undertake or commission consumer research will facilitate better consumer policy outcomes, because the consumer interest will be strongly articulated in policy debates."[294] Consumer Action, another consumer organization, commented that the recommendations of the Productivity Commission of 2008 had simply not been implemented.

[294] *Ibid*., p. 217.

5 Discussion

We have made the case throughout this report that consumer protection should be considered an integral part of IRC activities. Not only is it important that IRC not be conducted to the detriment of consumers, it should even become a privileged tool, as specified in the United Nations Guidelines for the upward harmonization of laws and regulations that protect consumers. Indeed, consumer protection must be seen as a way to strengthen consumer confidence in the market and not simply as a barrier to trade.

The acceleration of IRC activities appears inevitable with the ever-greater interconnectedness of economies. As we have shown on several occasions, Canada is strongly committed to this path. CETA, that Canada established with its European partners, is particularly innovative and makes IRC a priority. The CFTA, meanwhile, came out of a desire to accelerate reconciliation and regulatory cooperation between provinces. And that's not counting the numerous other IRC initiatives in which Canada is involved.

Our analysis of the legal provisions of CETA, the CFTA and the RCC shows that Canada and its trading partners are focusing on reducing non-tariff barriers in order to increase economic growth and foster innovation while the issues addressed by IRC are [TRANSLATION] "everything, except strictly commercial"[295]. However, the presence of articles guaranteeing the maintenance of consumer protection levels is reassuring. For example, the CETA interpretative instrument states that the agreement will not result in weaker consumer protection standards and regulations.

There are other provisions that consumers should find encouraging. Article 400 of the CFTA opens the door to strengthening regulatory measures for the protection of consumers. In addition, the agreement renews the CMC, which in the past has allowed harmonization agreements to be concluded between the provinces improving consumer protection across Canada. However, we note that the CFTA does not give the same impetus to the work of the CMC and, more broadly, to the consumer protection IRC initiatives as its predecessor. It should also be noted that the objective set for IRC in CETA goes beyond economic priorities. Moreover, the work plan adopted by the RCF illustrates the openness of the parties to discuss consumer protection issues such as cybersecurity and product safety.

Consumer confidence in IRC activities in Canada and its provinces, however, will only be guaranteed if the legal provisions of treaties and agreements are accompanied by a stakeholder consultation process that is transparent and allows for a balanced representation of interests. As we have seen, experts consider it essential that stakeholders, which include consumer groups, be involved throughout the process.

[295] C. Deblock, *L'Accord Économique et Commercial Global : Un accord mal compris mais pourtant novateur*, 2018, p. 98.

In this regard, it is gratifying to note that Canada has included clear regulatory requirements in the Cabinet Directive on Regulations, which requires that federal departments and agencies consult with stakeholders. Of note is the creation of the External Advisory Committee on Regulatory Competitiveness of which the CCC is a member[296]. However, it is in practice that problems can arise, as illustrated by the results of the consultations on three initiatives studied in this report. The participation of consumer associations has remained marginal, particularly when it comes to the participation of sectoral business groups.

The reason is simple: Canada's consumer associations do not have the resources at their disposal to develop the expertise necessary to understand the complex issues raised by IRC, nor the ability to mobilize quickly when the consultation process is under way. This situation is exacerbated by the proliferation of trading partners and by consumer issues that are becoming increasingly globalized, such as electronic commerce or privacy protection.

This situation is not new and has been widely documented in the past. For example, in 2006, Bruce Doern, professor emeritus at Carleton University, pointed out a problem[297] that limits funding of the consumer movement by a membership system. At the time, he stressed that "Both sets of players [federal departments and agencies and consumer associations] agree that consumer input overall is very thin, relative to the modern challenges of markets and technological change and to the global and networked nature of markets and hence of consumer interests and consumer lobbying and input. Both see the need for increased funding for consumers associations as a partial counterweight and voice to business and producer interests who are infinitely better funded, can play the long game of lobbying to a much greater extent, and whose lobbying expenses are typically tax deductible."[298]

As was shown when analyzing the cases of the European Union, Switzerland and Australia, the issue of harmonization of consumer protection and participation of consumer associations in IRC is not unique to Canada. Over the years, all three jurisdictions have conducted several regulatory reforms aimed at harmonizing consumer protection regulations. Although the analysis shows that regulatory differences remain, the initiatives of these States demonstrate the central role to be accorded to consumers in terms of IRC.

The European Union and Switzerland recognize in particular the importance of political pluralism and the competence necessary for consumer associations to fully exercise their influence, which they back up by providing annual funding for the associations' missions. For example, spread out across Canada, the European funding would

[296] Online: https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/external-advisory-committee-regulatory-competitiveness.html (Accessed December 15, 2019).
[297] Commonly known as the "Free-rider problem."
[298] G.B. Doern, *The Adequacy of Consumer Input in Federal Policy Processes*, 2006, p. 52.

represent about $3 million per year.[299] Such funding would allow Canadian consumer associations to work together, as illustrated by the existence of BEUC in Europe, and participate in IRC activities.

Obviously, foreign models of regulatory cooperation in consumer protection and agency funding cannot be exactly replicated in Canada, which has its own distinctive institutions and culture. In particular, the existence of significant provincial legislation in certain provinces makes the adoption of a national law like that of Australia impracticable. However, there are several elements that Canada could learn from.

As mentioned previously, IRC activities should continue to multiply in the coming years. The existence of significant regulatory differences in Canada shows how much remains to be achieved. This is an opportunity that governments and consumer associations in Canada should seize. As Hale points out, high-level political attention may be needed to initiate and sustain the momentum of IRC activities. This is the case, in our view, in the area of consumer protection.

Thus, we formulate below a set of recommendations aimed at ensuring balanced stakeholder participation in the future, maintaining gains and advancing consumer protection through IRC activities.

We therefore recommend that:

- **TBS and Canadian departments and agencies make it a priority to harmonize and enhance consumer protection across all IRC activities.**

- **The Government of Canada provide the multi-year funding required to develop expertise and mobilize consumer associations in Canada, as is done in the European Union and Switzerland, to permit them to participate in IRC activities.**

- **The CMC considers new initiatives for regulatory reconciliation and harmonization of consumer protection laws and regulations, in particular by:**

    - **Developing a comprehensive inventory of regulatory differences in consumer protection in the Canadian provinces and territories.**
    - **Forming a working group, made up notably of Canada's major consumer associations, to set priorities for regulatory harmonization.**
    - **Using tools to analyze the impact of regulatory changes on Canadian consumers and ensure increased consumer protection.**
    - **Establishing a review committee to ensure the implementation of harmonization agreements.**

[299] Per Canadian resident, about 0.075 dollar.

- **An advisory committee be formed within the RCF to consolidate consumer organizations in Canada and establish future regulatory harmonization priorities with the European Union.**
- **In the longer term, the formation of a committee specialised in consumer protection be considered within the framework of CETA under the auspices of the Joint Committee.**

Appendix 1 – Brief history of consumer protection law in the European Union

The European Union is a *sui generis* supranational and intergovernmental organization that brings together 28 countries[300] in the pursuit of common economic and political goals. The European Union has long identified regulatory cooperation as necessary for the realization of its objective: the creation a single, internal market through the integration of the national markets present within its borders. While the premises of this regulatory cooperation can be found in the *Treaty of Rome*, today it is institutionalized and firmly enshrined in European Union law.

As we shall see, market integration, the creation of the single market and regulatory cooperation within the European Union have largely been driven by the institutions the Member States have created with the aim of establishing a common market. Europe has therefore constructed itself, in many respects, as a federation of States. As the Court of Justice of the European Union[301] (CJUE) noted as early as 1964:

> By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.[302]

Ever since the creation of the European Economic Community, the Member States have therefore agreed to transfer competencies to the European Union bodies in order to facilitate economic integration.

The European Union, which has come a long way in its integration process, is now seeking to connect its market to new partners. It is no longer a question of creating political proximity while creating a common market, but of facilitating the connection of markets between and around certain sectors [TRANSLATION] "with the result that regional agreements overlap, intersect and intertwine to produce the familiar spaghetti bowl effect."[303]

The consumer in the Treaty of Rome

Consumer protection was not a priority in the formation of the European regional block. *The Treaty of Rome Establishing the European Economic Community (Treaty of Rome)* had only a few provisions that mentioned the consumer. Noteworthy are Article 39

[300] 27 once the Brexit process is finalized.
[301] Formerly known as the Court of Justice of the European Communities.
[302] *Costa v. ENEL*, 6/64, [1964] E.C.R. 1141, p. 1159.
[303] M. Arès, É. Boulanger and C. Deblock, *Intégration ou interconnexion?,* 2016, p. 2.

(1)(e), which states the aim of the common agricultural policy as "to ensure reasonable prices in supplies to consumers;" Article 40(3), which excludes "any discrimination between producers or consumers within the Community" in the common organization of agricultural markets; and Article 85(3), which allows companies to derogate from the prohibition against entering into agreements if, *inter alia*, they "reserve to users an equitable share in the profit resulting therefrom."

Note also Article 86, which prohibits abusive practices, consisting in particular of "a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions; b) the limitation of production, markets or technical development to the prejudice of consumers;" or Article 92 (2) (a) identifying "aids of a social character granted to individual consumers, provided that such aids are granted without any discrimination based on the origin of the products concerned" as "compatible with the Common Market." Since the entry into force of the *Amsterdam Treaty*, these Articles have been reworked, to become Articles 33, 34, 81, 82 and 87 respectively.

Besides the direct link that can be established between consumer protection and the common market, the Preamble to the *Treaty of Rome* also opened the way for cooperation in this area between the signatory States, which set themselves to "directing their efforts to the essential purpose of improving the living and working conditions of their peoples,"[304] while Article 2 gives the European Economic Community the mission of promoting "a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States."[305]

Nevertheless, consumer protection was not defined as falling within the competence of the Community, since, "[c]onsumer protection was far from the members states' concerns when the treaty was signed."[306] Thus, there was no provision in the Treaty giving the power to create a legal framework for consumer protection in the common market: the assumption was that consumers would benefit from European integration through a more efficient, competitive market.

Today, however, a wide range of instruments have been deployed within the European Union to ensure consumer protection and rights. We need to analyze how this recognition of the importance of consumer protection for Europe was arrived at. We will see that the interest in consumer protection within European Law was born from the combination of the need to abolish non-tariff barriers to trade and the need to promote a Europe with a human face.

[304] *Treaty of Rome (1957)*, 1957, Preamble.
[305] *Ibid.*, art. 2
[306] Union des consommateurs, *Lifting the barriers to internal trade and consumer protection: the example of the European Union*, 2015, p. 25.

The European Economic Community and the *Cassis de Dijon* principle

The *Treaty of Rome* illustrates the desire of the States of the European Economic Community to establish a free trade area in which the flow of goods, services, people and capital will encounter no obstacles. Indeed, Article 3 of the *Treaty* gives as one of the Community's prime objectives: "the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect."[307] Article 3 also states the Community's objective of "the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital."[308] According to CJUE case law, the absence of these obstacles is the intrinsic feature of the "internal market."[309] This goal was to guide the evolution of consumer law in the regional bloc.

Articles 30 to 34 of the *Treaty of Rome* are among the most significant for the establishment of the internal market in Europe. They provide in particular that:

> Article 30.
> Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States.
> Article 31.
> Member States shall refrain from introducing as between themselves any new quantitative restrictions or measures with equivalent effect.
> Article 34.
> 1. Quantitative restrictions on exportation, and all measures with equivalent effect, shall hereby be prohibited as between Member States.

These provisions are, however, subject to exceptions, which are listed in Article 36 of the *Treaty*. As a derogation from the rule of general application, and in accordance with to the legal maxim *exceptio strictissimae interpretationis*, the CJUE interpreted Article 36 of the *Treaty of Rome* of 1957 in a strict sense. Thus, according to the CJUE, "the exceptions listed therein [Article 36] cannot be extended to cases other than those specifically laid down."[310] However, since "neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in Article 36, those grounds cannot be relied upon as such in connexion with that Article."[311]

Very quickly, the CJUE, mandated by Article 164 of the *Treaty* to ensure "observance of law and justice in the interpretation and application of this Treaty" had to interpret the term "measures with equivalent effect" which is found in particular in Articles 30, 31 and 34 of the *Treaty*.

[307] *Treaty of Rome (1957)*, *op. cit.*, art. 3a.
[308] *Ibid.,* art. 3c.
[309] *Federal Republic of Germany against European Parliament and Council of the European Union*, C-406/01, [2002] E.C.R. I-04561, item 82.
[310] *Commission v. Ireland*, 113/80, [1981] E.C.R. 1625, item 7.
[311] *Ibid.*, item 8.

In 1972, in the case of *Public Prosecutor v. Dassonville*, the CJUE ruled that "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[312] This case therefore resulted in the idea that some regulations were measures that should be eliminated. In this landmark decision, the CJUE therefore interpreted the term "measure with equivalent effect" very liberally.

It was, in fact, a much broader interpretation than that given, for example, by the Canadian Supreme Court to the meaning of Section 121 of the *Canadian Constitution Act* in the Comeau case.[313] According to the Supreme Court of Canada, "similar measures" are those that block the movement of goods "by their essence and purpose," while, according to the CJUE, "equivalent measures" are those that are "likely to hinder" intra-Community trade "directly or indirectly," "actually or potentially." These differences can be explained by the fact that unlike the *Treaty of Rome*, the main objective of the *Constitution Act* was not the establishment of a common market, but the division of powers between the federal, provincial and territorial governments.

The year 1979 marked a turning point in the approach to regulation in Europe, but also for consumer protection, with the *Cassis de Dijon* case.[314] In this case, the CJUE not only re-interpreted Article 30 by providing new derogations that are intrinsic to it (that is to say, independent of Article 36), but also laid the foundation of the principle of mutual recognition in Europe through the *Cassis de Dijon* principle.

In its decision, the CJUE explained that:

> [...] Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer;
>
> [...] the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

This meant that the CJUE was now considering new exemptions from the fundamental rules of the European Community. These exemptions, other than those stated in the *Treaty*, must be necessary to satisfy "mandatory requirements" or pursue "an aim of general interest such as to override the requirements of free movement." These

[312] *Procureur du Roi v Benoît et Gustave Dassonville*, 8/74, [1974] E.C.R. 00837, item 5.
[313] *R. c. Comeau*, 2018 CSC 15, par. 53.
[314] *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 120/78, [1979] E.C.R. 00649.

exemptions are therefore subject to the test of "necessity" and "proportionality"[315] and, of course, should not be discriminatory in nature or a disguised restriction on trade. In this way, the CJUE was offering new ways of preserving the sovereignty of the State in matters of regulation.

Note that among the "essential requirements" that make it possible to derogate from the principle of free movement, the CJUE cites "the defence of the consumer." While consumer law does not inherently prevent free trade, it can easily hinder it, particularly through the need for companies to comply with various rules. In the absence of any mention in Article 36, its inclusion among the possible exceptions in Article 30 was therefore welcome. It thus follows from the *Cassis de Dijon* case that if an equivalent measure to a quantitative restriction is set in place, it may be justified, especially in connection with the protection of public health or the consumer.[316]

Following this case, consumer interests have been repeatedly invoked to justify certain actions that went against the principle of the internal market, with varying degrees of success. The consumer defense, for example, was subsequently invoked in the case of *Alpine Investments BV v. Minister van Financiën*. In fact, the prohibition on "cold calling" deprived Alpine Investments of a "rapid and direct technique for marketing and for making contact with potential customers in other Member States." The Dutch government justified the ban, citing the need to protect the consumer from the "most aggressive selling techniques." The CJUE concluded that "the prohibition of cold calling does not appear disproportionate to the objective which it pursues" and that "the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law." The measure was therefore deemed necessary and proportionate to meet the mandatory requirement to protect Dutch consumers and thus derogate from the fundamental rule of free trade.

The second reason why the *Cassis de Dijon* case is so important is the fact that it gave rise to the principle of mutual recognition, still in force between Member States. This principle is summarized by the CJUE a few years later:

> 'in the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle…to intra-Community trade' and that 'it is only where national rules which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to… the fairness

[315] These tests can be summarized as follows: a measure "is not compatible with the principle of free movement of goods provided for in the Treaty unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law." *Cinéthèque v. National Federation of French Cinemas*, 61/84, [1985] E.C.R. 02605, para. 22.
[316] *Officier van Justitie v. Koninklijke Kaasfabriek Eyssen BV*., 53/80, [1981] E.C.R. 00409, para 15.

> of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under article 30'.[317]

Following the judgment by the Court, the Commission published a Communication[318] in which it sets out the following principle:

> Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter.

The Commission also reiterates the possible exceptions, i.e. the regulations that:

- are necessary, i.e. are appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.)
- serve a purpose in the general interest which is compelling enough to justify an exception to a fundamental rule of the *Treaty* such as the free movement of goods,
- are essential for such a purpose to be attained, i.e. are the means which are the most appropriate and at the same time least hinder trade.

The *Cassis de Dijon* case prompted the Commission to focus on the principle of mutual recognition and harmonization of standards and regulations. Following the CJUE's ruling, the Commission began a process of harmonization to remove what remained of barriers to intra-Community trade. This was the beginning of full economic integration[319] and the creation of the single internal market. This need to harmonize regulations is also born of the mutual recognition principle itself. Indeed, if States are trying to attract investment in their territory, they will tend to lower the levels of protection provided by their legislation in order to be more competitive. It is therefore necessary that Member States be prevented from deregulating markets and to at least impose a common, minimum level of protection.

Although its scope was reduced by the number of goods that are subject to harmonization at the European level, the principle arising from *Cassis de Dijon* still has a deep impact on intra-Community trade. As stated on the European Union's own website:

[317] Commission v. Ireland, 113/80, [1981] E.C.R. 1625, para. 10.
[318] EC Commission*, Communication de la Commission sur les suites de l'arrêt rendu par la Cour de justice des Communautés européennes on February 20, 1979 in Case 120/78.*
[319] In opposition to partial economic integration, [TRANSLATION] "Economic integration can then be partial or complete. It will be partial if it is seen as a process limited to the movement of goods and services, capital or people, and complete if it also commits the policies, regulations, currency, etc., ie the sovereignty of States involved." (See Deblock and Wells, *op. cit.*, 2016)

> Where no EU-wide specifications exist (about 15% of product rules are not harmonised in the EU), different specifications might apply in different EU countries. In such cases, you must only comply with the rules valid in your country. Other countries cannot forbid the sale of your product nor oblige you to modify it or do additional testing, provided you can prove that your products fulfil all the technical and quality requirements in your own country and offer a similar level of safety: this is the principle of mutual recognition.[320]

The mutual recognition principle bears some risks as, for example, illustrated by *C-184/96 case*. A Hungarian company had moved to Germany to produce *foie gras*, since no regulations existed in Germany about the manufacture of this product. The company complained about the French legislation and the CJUE concluded:

> In the light of the foregoing considerations, it is declared that, by adopting the Decree without including in it a mutual recognition clause for products coming from a Member State and complying with the rules laid down by that State, the French Republic has failed to fulfil its obligations under Article 30 of the *Treaty*.[321]

European companies can therefore set up operations in the States with the lowest level of protection, therefore often the least contraint, and market their products in all European countries as long as the countries in question do not prove that the regulations they put in place are justifiable under Article 36 or the *Cassis de Dijon* test. This may well lead some States to lower protection levels to attract investment, which could have an impact on all the countries of Europe. Added to this is the fact that certain regulations, which, although justified by "imperative requirements" such as consumer protection, do not meet the other criteria of lawfulness established by the Court (proportionality, etc.) and may be considered a violation of the *Treaty of Rome*. In addition to "forcing" States to lower their levels of protection, the principle established by the Court could have the effect of reducing consumer confidence in products from other Member States and thus encourage them to avoid buying imported products. It was in order to avoid consequences such as these that the European Commission took action, as we will see below.

From the Common Market to the Single Market

At the Paris Summit in 1972, Heads of State or Government expressed their desire to proceed further toward European integration and to lay the foundations of the European Union as it exists today. In the Council declaration, following the Paris Summit, the Heads of State or Government expressed their desire to review the decision-making procedures and functioning of the European institutions "in order to make them more effective."[322]

[320] Online: https://europa.eu/youreurope/business/index_en.htm (Accessed December 3rd, 2018)
[321] *Communities Commission v. French Republic*, C-184/76, [1998] E.C.R. I-06197, item 28.
[322] Statement from the Paris Summit, October 1972, item 15.

Moreover, "[f]aced with trade barriers between its Member States, including those created by divergent national consumer protection laws, the European Union decided as early as the seventies to harmonize the rules applicable in Member States, by issuing Directives on numerous subjects,"[323] and [TRANSLATION]"[s]ince the first measures were adopted in 1975, the EU has consistently worked to provide a high level of health and safety protection for all, from the manufacture to the end use of a product."[324]

The presence of references to consumer protection in CJUE case law or in the *Single European Act* is also explained by the international and European context. States in the 1970s responded with increasing concern about consumer issues and the role of the European Community in addressing them. The Commission notes several reasons for this growing concern:

- experience during the first fifteen years of the Community began to show that market mechanisms alone were not sufficient to achieve a "Europe with a human face";
- consumers' organisations were starting to be active in the Member States around that time;
- new countries applied to join the Community, in two of which the consumer movement was particularly strong (the UK and Denmark).[325]

Internationally, significant developments were also taking place. In the US, President Kennedy put forward the idea of a *Consumer Bill of Rights,* while at the United Nations, discussions began leading to the adoption in 1985 of Resolution A/RES/39/248 on Guidelines for Consumer Protection.

The first significant change came about at the Paris Summit held on October 19 and 20, 1972, where the issue of consumer protection was explicitly addressed. The Heads of State and Heads of Government of the Member States invited the institutions of the Community to prepare an action program that would include measures aimed at "strengthening and coordinating measures of consumer protection."[326] The recognition of the importance of consumer protection therefore came about as a corollary of the emergence of the idea of reviewing the functioning of European integration.

In 1974, the European Parliament applauded the European initiatives in consumer protection and stated that the harmonization of legislation was a good idea and "should be based on the most advanced legislation."[327] The work begun after the Paris Conference culminated in the adoption of the Council Resolution of 14 April 1975 on a *Preliminary Program of the European Economic Community for a Consumer Protection*

[323] Union des consommateurs, 2015, *op. cit.*, p. 24.
[324] European Commission, *Comprendre les politiques de l'Union européenne: Consommateurs*, 2013, p. 5.
[325] Online: http://europa.eu/rapid/press-release_MEMO-92-68_en.htm (Accessed December 3, 2018). E.g. the UK's association Consumer International was created in 1960.
[326] Statement from the Paris Summit, *op. cit.*, item 6.
[327] Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1974:062:FULL&from=EN (Accessed December 3, 2018).

and Information Policy.[328] In the Annex to the *Program*, the European Council declares that:

> 3. [...] Consumers' interests may be summed up by a statement of five basic rights:
> a) the right to protection of health and safety,
> b) the right to protection of economic interests,
> c) the right of redress,
> d) the right to information and education,
> e) the right of representation (right to be heard).[329]

In 1981, a second resolution by the Council of Ministers reasserted these consumer rights.[330] That was the first time anyone had referred to the "rights" of consumers under European law. This resolution was strongly inspired by the aforementioned *Consumer Bill of Rights* which recognized the existence of four consumer rights: the right to safety, the right to choose, the right to information and the right to be heard.

Note, however, that the European Union policy on consumer protection could not be implemented independently of other Community policies. It should be reminded that under Article 4 of the *Treaty of Rome* in 1957, the institutions of the European Community were obliged to act "within the limits of the powers conferred by this Treaty."

Now, as mentioned above, consumer protection is not specified as falling within its jurisdiction, except, of course, as a corollary of the principle of free trade. However, "[t]he 1975 resolution was therefore significant, because consumer protection was firmly put on the agenda."[331] Although these instruments were "soft law" (being neither a directive or a regulation[332]), they were instrumental in the gradual development of a common consumer protection policy in Europe and still have legal effect, particularly in the interpretation of texts by the European Court of Justice.

As summarized by Christian Twigg-Flesner:

> The difficulty [...] was that there appeared to be no obvious basis on which the then EEC could develop a coherent legislative consumer protection programme, and very little of significance happened in the immediate aftermath of this programme. But the adoption of this programme was undoubtedly of immense symbolic value, because it confirmed that consumer protection was an area on which the EEC should focus some of its activities[333]

[328] Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31975Y0425(01)&from=EN (Accessed December 3, 2018).
[329] Council of the European Union, Annex to the resolution of the Council of April 14th 1985 concerning a preliminary programme of the European Economic Community for a consumer protection and information policy, J.O., C-92/1, 25 Avril 1975, item 3 e).
[330] Online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31981Y0603%2801%29 (Accessed December 3, 2018).
[331] C. Twigg-Flesner, *The Yearbook of Consumer Law* 2008, 2007, p. 366.
[332] *Treaty of Rome* (1957), *op. cit.*, art. 189.
[333] Twigg-Flesner, 2007, *op. cit.*, p. 366.

It was not until the *Maastricht Treaty* that legislative and regulatory action could be taken that was specifically intended to protect the consumer at the regional level. Although the lack of an appropriate legal basis "meant that the Community's good intentions were difficult to put into practice,"[334] some initiatives, in the form of Directives, were emerging. These included *Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labeling and presentation of foodstuffs for sale to the ultimate consumer*, and *Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.*

The new approach

In 1985, new initiatives for regulatory convergence, harmonization and mutual recognition were launched to accelerate the creation of a common European economic area. The principle of mutual recognition that was born out of CJUE case law, strongly influenced this development. In fact, the *Cassis de Dijon* case nullified the effort led by the Commission to encourage intra-Community trade with a set of Directives to harmonize European legislation.

For example, the Commission developed a number of both technical and vertical Directives (i.e. that regulating specific aspects in depth) on food requirements. One example is *Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption*. This "was warranted by the fact that differences between national laws on several kinds of cocoa and chocolate products could hinder the free movement of this product, and thereby have a direct effect on the establishment and functioning of the common market."[335]

In 1985, the European Economic Community adopted a "new approach" to enable the transition to the internal market. The Commission described this new approach in a *White Paper*[336] in which it explains the new European vision: "Unifying this market presupposes that Member States will agree on the abolition of barriers of all kinds, harmonization of rules, approximation of legislation and tax structures."

Several measures were taken in the context of the new approach. First, the Commission delegated part of its normative authority to private standardization companies, thereby separating the technical from the political. International (ISO, IEC, Codex Alimentarius) or European (CEN, CENELEC, ETSI) standards were thus integrated into many directives. The Commission also proposed to make its Directives, which were highly vertical, more

[334] Online: http://europa.eu/rapid/press-release_MEMO-92-68_en.htm (Accessed December 3, 2018)
[335] Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption.
[336] Online: http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf (Accessed December 12, 2018)

flexible and horizontal, leaving the more technical aspects up to national and international standardization bodies.

The "new approach" was also "an attempt to speed up EU rule-making."[337] The White Paper proposed to reformulate the way that Directives were adopted under Article 100. Indeed, the requirement for unanimous adoption of Directives was inadequate for promoting the internal market, since the Member States had a *de facto* veto and could therefore block any proposals from the Commission on which they disagreed.

Moreover, the "new approach" was based on CJUE case law with regard to mutual recognition: the idea was that harmonization would apply only to certain "essential aspects" while the rest of the Community trade would be governed by the principle of mutual recognition established in the *Cassis de Dijon* case.

Very soon, consumer protection came to be viewed in the context of the proper functioning of the internal market. The White Paper refers in particular to "many other areas of Community policy that interact with the internal market in that they both affect its workings and will benefit from the stimulus that will be provided by its completion. This is particularly true of transport, social, environment and consumer protection policy."[338]

In the Council Resolution 86/C 167/01 of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests,[339] the Council confirmed that consumer protection should be a corollary of economic integration rather than a policy as such. The Resolution does not mention the "fundamental rights" of the consumer, but recognizes "the value of consumer education and information in protecting consumers' interests and enabling them to derive maximum benefit from the completion of the internal market." This document also makes the link between the "new approach" and consumer protection, as the Council states: "Where there is a need for harmonization at Community-wide level, proposals for such harmonization should be identified with the spirit of the 'new approach' set out in the Council resolution of 7 May 1985."

In 1986, the adoption of the *Single European Act,* which came into force in 1987, accelerated the issuing of Directives "which have as their object the establishment and functioning of the internal market." Note that, under paragraph 3, the Directives issued under Article 100a on consumer protection must "take as a base a high level of protection." This will prevent harmonization of regulations based on the lowest

[337] T. Buthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, 2011, p. 220.
[338] Commission of the European Communities, *Completing the Internal Market, White paper from the Commission to the European Council*, item 20.
[339] Council Resolution 86/C 167/01 of June 23rd 2986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31986Y0705(01)&from=EN (Accessed, December 12, 2018)

common denominator. Note also that, contrary to Article 100, Article 100a allows Member States to derogate from the Directives issued under certain conditions.

Paragraph 3 illustrates the fact that [TRANSLATION] "the emergence of Community consumer law came about with the clearly stated intention of reconciling the economic objectives linked to the completion and proper functioning of the European internal market with the aim of building a Europe with a human face."[340] From that moment on, "social Europe and the Europe of the citizen found in consumer protection a privileged field of action. The harmonization process thus serves a policy that is confirmed by its own objectives and priorities, not merely attaining but going beyond the completion of the internal market."

Thus, from the entry into force of the *Single European Act,* a number of Directives aimed at consumer protection were issued. These Directives incorporated a "minimum harmonization" approach, which means that Member States would be able to exceed the levels of protection provided for in the Directives, but would not be able to circumvent them. Many of these Directives also contain a mutual recognition clause, allowing goods and services that meet the requirements of the Directive to be accepted in the Member States.

Only in 1992, when the *Treaty on European Union* (also known as the *Maastricht Treaty*) was signed, did consumer consumer protection "become a full-fledged policy in that regional block."[341] Indeed, Article 129a of the *Treaty*, which is devoted to consumer protection, is a horizontal provision that brings consumer protection into all the activities of the European Union. Article 129a (Article 153 since the entry into force of the *Amsterdam Treaty*) urges the Community "to contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the attainment of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers."

Article 3 of the *Maastricht Treaty* also extends the Community's scope of action to "a contribution to the strengthening of consumer protection." Thus, since Maastricht, "consumer protection is not merely one of the means of accomplishing an internal 'frontier-free' market: it now exists in its own right."[342] Of course, as the Commission notes: "The Internal Market will never be completed. The attempt to maximize performance is a process, not an event."[343] Thus, the maintenance and evolution of this market continue to take place through Article 100 (now, 95) and takes into account a high level of consumer protection. For example, after the entry into force of the

[340] T. Bourgoignie, *Vers un droit européen de la consommation: unifié, harmonisé, codifié ou fragmenté ?*, 2005, p. 160.
[341] Union des consommateurs, 2015, *op. cit.*, p. 27.
[342] Twigg-Flesner, 2007, *op. cit.*, p. 3.
[343] Online: https://ec.europa.eu/internal_market/score/docs/score11/score11-text_en.pdf (Accessed December 15, 2018)

Maastricht Treaty, a Directive was adopted on unfair terms in consumer contracts (93/13/EEC), another on the protection of purchasers with regard to the acquisition of the right to use immovable properties on a timeshare basis (94/47/EC) and another on distance selling (97/7/EC).

These directives contain "minimal clauses" such as the following:

> 24. [...] Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection.[344]
> or
> 1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.
> 2. Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.[345]

These clauses are an illustration of minimal harmonization: States can go beyond the level of protection afforded by the Directive, but may not fall short of this level.

We will now also look briefly at *Directive 2001/95 /CR of the European Parliament and of the Council of 3 December 2001 on general product safety*. The aim of the Directive is "to ensure that products placed on the market are safe."[346] Article 10 advocates IRC between Member States and the Commission in the form of an early warning system, RAPEX, that would permit national authorities to be rapidly informed of the existence of a dangerous product. Note that according to Article 21.7.4 of CETA, "Canada may receive access to selected information from the European Union RAPEX alert system." In 2016 alone, the RAPEX system received 2044 notifications.[347]

[344] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, art. 14.
[345] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer good and associated guarantees, art. 8.
[346] Directive 2001/95 /CR of the European Parliament and of the Council of 3 December 2001 on general product safety, art. 1.1.
[347] RAPEX, *Annual Report 2016*, 2017, p. 4.