LIFTING THE BARRIERS TO INTERNAL TRADE AND CONSUMER PROTECTION: The Example of the European Union

Final Report of the Project
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6226 Saint-Hubert Street
Montreal, Quebec H2S 2M2

Telephone: 514 521-6820
Toll free: 1 888 521-6820
Fax: 514 521-0736

info@uniondesconsommateurs.ca
www.uniondesconsommateurs.ca

Union des consommateurs members
Appalaches-Beauce-Etchemins ACEF
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Editorial management
- Marcel Boucher

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Union des consommateurs is a member of
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a federation of 220 members from 115 countries.

The masculine is used generically in this report.

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Union des consommateurs: *Strength through Networking*

Union des consommateurs (UC) is a non-profit organization comprised of several ACEFs (*Associations coopératives d'économie familiale*), the *Association des consommateurs pour la qualité dans la construction* (ACQC), and individual members.

UC's mission is to represent and defend the rights of consumers, with special emphasis on the interests of low-income households. Its activities are based on values cherished by its members: solidarity, equity and social justice, and improving consumers' economic, social, political and environmental living conditions.

UC's structure enables it to maintain a broad vision of consumer issues while developing in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

UC acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: household finances and money management, energy, issues related to telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Lastly, in the context of market globalization, UC works in cooperation with several consumer groups in English Canada and abroad. It is a member of *Consumers International* (CI), an organization recognized by the United Nations.

1. Introduction

Internal trade is often promoted as an excellent means for ensuring the country's economic health. According to Canada's Public Policy Forum, enhanced internal trade would help businesses expand across regions, strengthen productivity, lower costs and attract investment[1]. But even in the absence of interprovincial tariffs, there remain numerous barriers to internal trade in Canada, such as differences between provincial regulations.

The Canadian federation, comprised of ten provinces and three territories, appears to some as a legislative labyrinth for Canadian businesses. To navigate between provinces, businesses have to comply with a multitude of laws and regulations that vary between provinces and territories. Those legislative disparities are notably rooted in the *Constitution Act, 1867*, which allocates certain fields of jurisdiction to the federal government and others exclusively to the provinces[2]. Consumer protection, for example, falls under provincial jurisdiction according to sections 92(13) and 92(16) of the *Constitution Act*. Each province is thus likely to adopt its own consumer protection laws or provisions, and to choose the level of consumer protection it deems appropriate. Absent a systematic harmonization mechanism, those frameworks can theoretically be extremely variable.

It follows that the obligation to meet the different standards set by the provinces' consumer protection measures may entail additional costs for businesses intending to offer their goods and services to all Canadians. All the more so because consumer protection laws govern contractual relations between merchant and consumer, whatever the object of the contract or the merchant's place of establishment, and because any merchant who wants to do business in a given province will be subject to the applicable laws in the consumer's place of residence. Nevertheless, it is not the existence of consumer protection laws that appears to constitute a barrier to internal trade or increase the burden, but their disparity.

To lower barriers to interprovincial trade as much as possible, an intergovernmental agreement between the Canadian premiers of provinces and territories, the *Agreement on Internal Trade* (hereinafter the AIT), was signed in 1995, with the following objectives:

> *TO PROMOTE an open, efficient, and stable domestic market for long-term job creation, economic growth and stability*
>
> *[and]*
>
> *TO REDUCE AND ELIMINATE, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada*[3]*.*

[1] **MCLEAN, James**. *Symposium on the Agreement on Internal Trade*, Canada's Public Policy Forum, Ottawa, January 2014, 25 pages. [Online] http://www.ppforum.ca/sites/default/files/AIT%20Framing%20Paper.pdf (document consulted on October 14, 2014).
[2] *Constitutional Act, 1867*, 30 & 31 Victoria, c. 3, arts. 91 and 92.
[3] **GOVERNMENT OF CANADA**. *Agreement on Internal Trade: A Consolidation*, Committee on Internal Trade, Winnipeg, 2007. [Online] http://www.ait-aci.ca/index_en/ait.htm (page consulted on September 29, 2014).

Attempts to harmonize consumer protection laws in Canada are led by the Consumer Measures Committee (hereinafter the CMC), formed by the AIT[4]. The CMC's mandate is, among other things, "*to identify any substantive measures to be included in future negotiations and to act as a forum for discussions among governments on consumer related issues*[5]."

Many claim that the AIT has fallen far short of having accomplished its primary mission to create an open, barrier-free internal market[6]. The Minister of Industry, Trade and Commerce, James Moore, seems to be of this view. In 2014, he intervened multiple times by condemning provincial protectionism, advocating the abolition of barriers, and announcing measures to update the *Agreement on Internal Trade*.

In that vein, how can the barrier of disparity between provincial consumer protection laws be lowered while adequately protecting consumers and preserving the exclusive jurisdiction of provincial lawmakers? The challenge is formidable, but other regional economic blocks have addressed it in the past.

The European Union (hereinafter the EU) faced this type of barriers, with most member states having elaborate consumer protection frameworks. Since the early seventies, the EU has been issuing directives requiring the harmonization of consumer protection laws between each member state. Among the issues exacerbated by the diversity of frameworks, and eventually addressed through harmonization, are unfair terms (also called abusive clauses), door-to-door sales, guarantees, and consumer groups' right of action.

Australia, constituted like Canada as a federation, has also harmonized consumer protection legislation. Before the *Australian Consumer Law* came into effect in 2011, each of the six Australian states and territories had its own consumer protection legislation. In 2008, the Council of Australian Governments, in an effort to liberalize internal markets, adopted the *National Partnership Agreement to Deliver a Seamless National Economy* and undertook a vast effort at deregulation[7]. On the other hand, regarding consumer protection, Australia has adopted 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.

Could the specific problems that certain groups of states have addressed, and the means they have adopted to lower trade barriers, suggest relevant solutions and models for Canada?

After describing the Canadian internal trade situation and the applicable legislative frameworks, our study will present the European and Australian approaches.

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[4] *Op. Cit., note 3*, **GOVERNMENT OF CANADA**, *Agreement on Internal Trade*, art. 807 and fol.

[5] **CONSUMER MEASURES COMMITTEE**. Page *About the CMC*, CMC website, Ottawa, latest update: 05/08/2011. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00013.html (page consulted on September 29, 2014).

[6] *Op. Cit.,* note 1, **MCLEAN,** *Symposium on the Agreement on Internal Trade*,
and
MACMILLAN, Kathleen & Patrick GRADY. *Interprovincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues*, Industry Canada, Ottawa, 2007-11 working paper, 2011, 29 pages. [Online] http://www.global-economics.ca/report_internal_trade.pdf (document consulted on October 14, 2014).

[7] **COUNCIL OF AUSTRALIAN GOVERNMENTS.** Page *A Seamless National Economy*, CAG website, Canberra, Australia, no date. [Online] https://www.coag.gov.au/a_seamless_national_economy (page consulted on March 30, 2015).

We will study the European Union directives to harmonize consumer protection regulations. We will identify the fields where the EU has harmonized regulations between member states in order to facilitate internal trade while ensuring a high level of protection for European consumers. And we will study the approaches adopted, substantively and in terms of recourses and sanctions.

Given that, like Canada, Australia is a federation of states and territories, we will also summarize the measures adopted there, so as to identify the good practices and harmonization opportunities that might inspire Canada.

We will try to determine whether the fields where harmonization was deemed essential abroad could or should be the objects of harmonization in Canada, and whether the approaches to harmonization and their implementation can serve as models for Canada. We will try to identify the issues that could result from the application of such harmonization solutions in Canada, and will discuss the current harmonization process prevailing in this country.

Our research is not intended as an economic or constitutional analysis of the effects of harmonizing interprovincial trade laws. Nor is it an in-depth study of the content of consumer protection laws, harmonization agreements in effect in Canada, or existing distinctions between the different consumer protection laws. Rather, we intend to map the sectors related to consumer protection that are likely, given what has been accomplished in Europe and Australia, to be the objects of harmonization in Canada, so that we may recommend realistic approaches to harmonization.

2. Internal Trade in Canada

2.1 State of Affairs and Legislative Framework

2.1.1 Internal Trade and Legislation

Canada's 150-year-old Constitution states the following in section 121:

> *All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.*

As we can see, the idea of fostering and facilitating internal trade is not new; it was already clearly expressed by the writers who constituted the country as a free trade zone and prohibited interprovincial tariffs. Despite the establishment of this principle of an absence of trade barriers, it appears that Canadian internal trade has not flourished to the extent expected by the founders.

Indeed, the duty-free trade provided in the Constitution only prohibits direct economic barriers. Today many deplore the existence of multiple barriers to internal trade – mainly regulatory barriers that the provinces have erected and that have an indirect economic impact: technical standards and regulations for production, road transportation, labelling, packaging, safety; restrictive standards for public contract bids; regulations for securities, corporate registration and reporting, provincial monopolies over certain products, non-recognition of professionals… Those are some of the aspects decried as barriers to internal trade. Of course, such condemnations echo the desire of some for unbridled deregulation. Some invoke the caricature that since Canada concludes various international free-trade agreements, it is easier for a foreign than a Canadian company to do business in another Canadian province.

The existence of internal trade barriers and their deplorable effects on the Canadian economy raise an anger that is not new. Some reproach the Supreme Court of Canada for having, in 1921, legalized the imposition of such barriers[8]: in *Gold Seal Ltd. v. Alberta (Attorney-General)*[9], the Supreme Court ruled that section 121 of the 1867 Constitution had a limited effect. In that case, an alcoholic beverage distribution company doing business in several Western Canada provinces was prohibited by a provincial law to pursue this type of activities in that province's territory. The Supreme Court deemed that section 121 did not have the effect of guaranteeing the free circulation of goods across Canada, but must have limited application because it only prohibited duties between provinces. Section 121 could therefore not be invoked to dismiss the application of measures adopted by a province within its jurisdiction, even if such measures hindered interprovincial trade.

[8] **Ian A. BLUE.** *Free Trade within Canada: Say Goodbye to Gold Seal*, The McDonald-Laurier Institute for Public Policy, Ottawa, May 2011, 36 pages. [Online] http://www.macdonaldlaurier.ca/files/pdf/Ian-Blue-Section-121-Free-Trade-within-Canada.pdf (document consulted on October 13, 2014).
[9] *Gold Seal Ltd. v. Alberta (Attorney-General)*, (1921), 62 S.C.R. 424.

In reality, what many identify as trade barriers in Canada results in large part from the Canadian federal system itself, particularly the shared exclusive powers of regulation. While the federal government holds, under section 91(2) of the *Constitution Act, 1867*, exclusive legislative jurisdiction on "the Regulation of Trade and Commerce," interprovincial trade remains subject to the provinces' exclusive jurisdiction on "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province" under 92(13) and 92(16)[10]. The provinces' legislative power regarding consumer protection is based largely on those exclusive jurisdictions.

Since the late sixties, the majority of Canadian provinces and territories have adopted specific consumer protection laws in their territories. Those laws are added to common law provisions applied in provinces other than Quebec. It takes a colossal effort to identify all the consumer protection laws and all the consumer protection provisions within laws of general application, originating from federal, provincial or territorial legislatures, and applied in each province and territory[11]. A company wanting to do business across Canada may well find it difficult to learn about all those laws, which may be disparate, and to comply with all those legislations, by adapting its practices to each province where it operates. The consumer protection laws adopted by the different provinces are thus likely, given their disparity, to constitute a barrier to internal trade. However, those laws are important for protecting consumers, who are most often the vulnerable party in relations with merchants. Those laws are also important as measures to establish a balance of power in the marketplace. Moreover, consumer protection laws are not simply a burden on merchants, but also ensure the legal security of transactions and reinforce consumers' trust, so that they foster business transactions while making the rules of the game uniform among merchants.

[10] In addition to jurisdictions over "licences" (92(9)), "incorporations" (92(11)), natural resources (92A), etc., section 94 of the *Constitution Act, 1867* provides that "the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick" but not in Quebec.

[11] I**NFOCONSOMMATION.CA**. page *Provincial and Territorial Legislation*, Industry Canada, Office of Consumer Affairs, Ottawa, latest update: 28/02/12. [Online] http://www.consumerinformation.ca/eic/site/032.nsf/eng/01173.html (page consulted on March 9, 2015). At first sight, there appear to be hundreds of laws on the subject across Canada. The Consumer Information Web portal, managed by Industry Canada's Office of Consumer Affairs, features links to the websites of provincial and territorial governments, thus enabling consumers to learn about the various existing laws.

2.1.2 A United Canadian Economy Free of Constraints

As mentioned above, an effervescent internal market is an asset for Canada's prosperity. According to the latest available data, internal trade is worth $366 billion annually, i.e., 20% of Canada's gross domestic product (GDP)[12]. Canada's Public Policy Forum estimates that "greater economic interconnectedness generates business opportunities, creates jobs and makes our country more globally competitive[13]." An internal market free of constraints would also contribute to the prosperity of local companies and give them access to the global market, thus improving the Canadian economy[14]. In fact, the *Agreement on Internal Trade* (AIT) was adopted in 1994 with those certainties in mind. However, the first negotiations in view of adopting the AIT took place in 1993 in a difficult sociopolitical context, following constitutional negotiations between the provinces and the federal government and amid growing pressure from international trade[15].

Even 20 years after coming into effect, the AIT does not appear to have met expectations. Already in 1998, the Canadian Chamber of Commerce gave it a grade of only "D" while making the following observation:

> *After getting off to a good start, the AIT has unfortunately gotten bogged down and performance has deteriorated significantly […] Timetables for action in almost all of the sectoral chapters are being missed. Governments need to renew their commitment to creating a barrier free internal market and get the process moving again more quickly on almost all fronts*[16]*.*

For their part, the Canadian governments express satisfaction "that past efforts have made it possible to attain real and concrete progress," but agreed in August 2014 to "continue to strengthen and modernize the *Agreement on Internal Trade*[17]."

Many critics claim that trade barriers cause interprovincial trade to perform poorly[18]. But as several authors point out, although the negative effects on businesses are identifiable, the trade barriers' effects on Canada's internal market are difficult to quantify[19]. So what are, generally, those barriers to internal trade, and how can they be eliminated to stimulate it?

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[12] **COUNCIL OF THE FEDERATION**. Press release: *Premiers will lead comprehensive renewal of Agreement on Internal Trade,* Premiers of the provinces and territories, newsroom, Ottawa, August 29, 2014. [Online] http://www.canadaspremiers.ca/en/latest-news/74-2014/396-premiers-will-lead-comprehensive-renewal-of-agreement-on-internal-trade (page consulted on March 10, 2015).
[13] *Op. Cit. note 1,* **MCLEAN,** *Symposium on the Agreement on Internal Trade*, p. 8.
[14] **James RICHARDSON.** *A new Vision for Interprovincial Trade in Canada,* Canadian Council of Chief Executives, Ottawa, August 6, 2014, 17 pages. See p. 4. [Online] http://www.dpac-atlc.ca/documents/AIT_Letter_Report_Aug2014_ENG_Complete_NS.pdf (document consulted on March 11, 2015)
[15] **G. Bruce DOERN**. *Free-trade Federalism: Negotiating the Canadian Agreement on Internal Trade*, University of Toronto Press, Toronto, March 8, 1999, 240 pages.
[16] **CANADIAN CHAMBER OF COMMERCE**. *The Agreement on Internal Trade: Taking Stock after Three Years*, Global economics, Toronto, May 1998, 42 pages. See p. 36. [Online] http://global-economics.ca/internaltrade.3years.pdf , (document consulted on March 10, 2015).
[17] *Op. Cit. note 12,* **COUNCIL OF THE FEDERATION**. Press release: *Premiers will lead comprehensive renewal of Agreement on Internal Trade*.
[18] For example*: Op. Cit. Note 14,* **Richardson, James.** *A new Vision for Interprovincial Trade in Canada*.
[19] *Op. Cit. note 8,* **MACMILLAN & GRADY**. *Interprovincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues*.

2.1.3 Interprovincial Trade Barriers and their Effects on Crossborder Trade

Although an appreciation of what constitutes an internal trade barrier may be subjective, several authors have attempted to define the contours and acceptability of such barriers.

Many recognize that the barriers simply result from the provinces' exercise of their jurisdictions on social and economic policies, under the existing federal framework[20]. In that sense, any specific provincial requirement, when imposed on a business that would not already have to meet identical requirements in its own province, would constitute a barrier to interprovincial trade.

The author George Vegh thinks that "interprovincial trade barriers should be characterized in terms of the disproportionate impact that provincial measures have on the flow of trade between the provinces. The term 'disproportionate impact' means the measures' impediments to the flow of trade which are not necessary to implement the objectives of provincial legislation[21]." A disproportionate impact should thus lead to the conclusion that the barrier (or the measure creating it) is unjustified.

The 2004 study by the Canadian Chamber of Commerce[22] appears to summarize quite faithfully the negative effects generally claimed by industry: interprovincial trade barriers increase costs, negatively affect competition, and offer no benefit to businesses. This type of barriers creates closed provincial economies, where businesses make strategic decisions largely based on the protection given them by those barriers, rather than on principles of healthy competition. In a world of liberalized markets, Canadian companies should rather benefit from an environment inducing them to develop further and thus measure up to international competition.

The internal trade barriers identified by industry in Canada are many. The Canadian Chamber of Commerce (CCC), following a survey of its members, reported that those barriers are varied, the most common ones being regulatory differences between provinces and territories, barriers to labour mobility, regional preferences in awarding public contracts, and the requirement to have a local establishment[23]. Among regulatory barriers, the following were identified by respondents as the greatest irritants[24]: construction safety programs; rules regarding vehicles; requirements to produce reports (regarding environmental matters, for example); regulations for truck sizes and weights; occupational accident insurance policies; safety measures; regulations for industrial equipment characteristics; permits; the obligation to incorporate; the obligation to have a place of business on the territory; etc. The CCC also mentions as an irritant the

[20] **CANADIAN CHAMBER OF COMMERCE**. *Obstacles to Free Trade in Canada: A Study on Internal Trade Barriers*, Global economics, Toronto, November 2004, 22 pages. See page 2. [Online] http://www.chamber.ca/download.aspx?t=0&pid=65cd767a-e905-e411-b0ed-000c29c04ade (page consulted on March 10, 2015).

[21] **George VEGH**. *The Characterization of Barriers to Interprovincial Trade under the Canadian Constitution*, 34 Osgoode Hall L. J. 355 (1996). [Online] http://digitalcommons.osgoode.yorku.ca/ohlj/vol34/iss2/5 (page consulted on March 10, 2015). The Agreement on Internal Trade states, in article 404, regarding legitimate objectives, that a measure creating barriers is allowed if "the measure is not more trade restrictive than necessary to achieve that legitimate objective".

[22] *Op. Cit. note 20,* **CANADIAN CHAMBER OF COMMERCE**, *Obstacles to Free Trade.* See page 2.

[23] *Ibid.* See page 3. As we have seen, the Agreement on Internal Trade provides in Part IV specific rules for two of the subjects mentioned here, i.e., public markets (Ch. 5) and labour mobility (Ch. 7).

[24] *Ibid.* See p. 5 and fol. It is noteworthy that some of those barriers (*licencing, registration, and certification fees* and *local presence and residency requirements*) are addressed specifically in Chapter 8 of the Internal Trade Agreement, to which we will return below.

obligation of wine producers to sell their products through provincial boards. Among the barriers considered less important, the CCC also identifies, notably: divergent regulations for the working hours of drivers and carriers, regulations for transporting hazardous materials, different regulations regarding road safety and the right to work, and the absence of provincial sales tax harmonization[25].

Internal trade barriers reported by other stakeholders, both governments and media, are similar, such as: sanitary, health and food safety regulations, recognition of professional qualifications[26], regulations prohibiting direct sellers of wine and beer to consumers of another province, company registration, the ethanol content of gasoline, etc.[27]

According to the Canadian government, those barriers to interprovincial trade have major harmful effects on the Canadian economy, thus depriving Canada of colossal amounts of money. While Minister Moore frequently claims the total amount is $50 billion annually[28], it must be recognized that this assessment is not unanimous, since several experts admit that the calculation has simply not been made[29]. So it is impossible to assess the economic losses related to internal trade barriers, absent empirical data and studies on the subject.

Another economic effect: internal trade barriers are said to seriously reduce the growth, prosperity and innovation of Canadian companies, and to affect the workforce as well. Barriers to interprovincial trade may also reduce the supply of goods and services to Canadian consumers.

According to Industry Canada, "In 2011, the majority of SMEs (94 percent) sold their goods and/or services within their local municipality and 44 percent made sales outside their local municipality but within their home province. Eighteen percent (or approximately 102,000[30]) of SMEs traded internally, selling goods and/or services to buyers in provinces other than their home province [...][31]." As Industry Canada reports, "interprovincial sales represented only 4 percent of revenues in 2011" of Canadian small and medium-size businesses[32].

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[25] *Ibid*. See pp. 19 and 20.
[26] **John GEDDES & Nick TAYLOR-VAISEY.** Home is Where the Trade Barriers Are, MacLean's, Toronto, October 29, 2013. [Online] http://www.macleans.ca/politics/home-is-where-the-barriers-are-weve-got-free-trade-with-europe-fantastic-now-how-about-all-those-trade-restrictions-between-the-provinces-2/ (page consulted on March 11, 2015).
[27] **INDUSTRY Canada**. *One Canada, One National Economy-Modernizing Internal Trade in Canada*, Industry Canada, Toronto, latest update: 06/03/15. See pp. 2 and 3. [Online] http://www.ic.gc.ca/eic/site/081.nsf/eng/h_00007.html (page consulted on March 11, 2015).
[28] **John IVISON.** *Harper Government aims for Deal to end Provincial Trade Barriers, which cost Canadian economy $50B annually*, National Post, Toronto, May 29, 2014. [Online] http://news.nationalpost.com/2014/05/29/harper-government-aims-for-deal-to-end-provincial-trade-barriers-which-cost-canadian-economy-50b-annually/ (page consulted on November 12, 2014).
[29] **Julian BELTRAME.** *Baloney Meter: Claims on interprovincial Trade Barriers range from $2B -$50B*, CTV News, Toronto, July 17, 2014. [Online] http://www.ctvnews.ca/politics/baloney-meter-claims-on-interprovincial-trade-barriers-range-from-2b-50b-1.1917898 (page consulted on October 15, 2014).
[30] **Andrea PIERCE.** *SME Profile: Interprovincial Trade*, Industry Canada, Ottawa, November 2013, 27 pages. See page 3. [Online] http://www.ppforum.ca/sites/default/files/AIT%20Framing%20Paper.pdf (document consulted on March 16, 2015).
[31] **INDUSTRY Canada**. *SME Research and Statistics*, Industry Canada, Toronto, latest update: 19/11/13 [Online] http://www.ppforum.ca/sites/default/files/AIT%20Framing%20Paper.pdf (page consulted on November 11, 2014).
[32] *Op. Cit. note 30,* **PIERCE.** *SME Profile: Interprovincial Trade*. See p. 3.

To reduce or eliminate the barriers' effects, several solutions have been considered. Interestingly, the Canadian Chamber of Commerce reports that the priority of respondents to its survey, regarding regulatory barriers, is not the elimination of provincial regulations, but their harmonization:

> *Specific priorities of the respondents in terms of the removal of trade barriers:*
>
> *Regulation*
> - *Achieve alignment in issues such as construction safety programs recognition and other such programs and regulation/permit issues.*
> - *Harmonize regulations that affect vehicle requirements.*
> - *Harmonize reporting at the provincial level (e.g. environmental reporting).*
> - *Focus on an effective series of national regulations in the food industry to deal with composition, labelling and sale.*
> - *Attain consistency in weights and dimensions (trucking), worker's compensation, safety measures and ratings.*
> - *Standardize equipment regulations, for industrial equipment, across all jurisdictions. This would significantly lower the costs to contractors and owners and would encourage increased "flow" which would increase efficiency and lower cost to the user/contractor and ultimately to the project owner*[33]*.*

As for barriers related to permits, the priorities were rather to eliminate provincial peculiarities (and, of course, the elimination of wine producers' obligation to sell only through provincial boards or companies[34]).

For governments, the priority appears to be to update the agreement whereby the provinces, territories and federal government committed themselves to implement measures facilitating the free circulation of goods, services and investments and the mobility of people across Canada, i.e., the *Agreement on Internal Trade*.

The Internal Trade Secretariat has been assigned under that Agreement to "provide administrative and operational support to the functioning of the Agreement [35]."

[33] *Op. Cit. note 20,* **CANADIAN CHAMBER OF COMMERCE**, *Obstacles to Free Trade.* See page 5.
[34] It should be noted that the *Agreement on Internal Trade* provides in Part IV specific rules for alcoholic beverages.
[35] **INTERNAL TRADE SECRETARIAT**, website of the Agreement on Internal Trade. [Online] http://www.ait-aci.ca/index_en/intro.htm (page consulted on November 11, 2014).

2.1.4 The Agreement on Internal Trade

Following a process undertaken during the eighties, the *Agreement on Internal Trade* (AIT) was adopted in 1994. Until the eighties, internal trade barriers had not been of concern to Canadian governments. Canadian businesses brought this problem to the fore, through merchant associations, by reporting that those barriers constituted a major hindrance to their efficiency, competitiveness and potential growth[36]. The necessity of an agreement on internal trade acquired more importance after the *Canada-United States Free Trade Agreement* in 1989, replaced in 1994 by the *North American Free Trade Agreement* (NAFTA).

In effect since 1995, the AIT's objective is to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market[37]." The Agreement aims at meeting its objectives through the application of six principles: (i) reciprocal non-discrimination (ii) right of entry and exit (iii) no obstacles (iv) legitimate objectives (v) reconciliation and (vi) transparency.

Part IV of the AIT establishes specific rules for 11 different sectors: (i) procurement (ii) investment (iii) labour mobility (iv) consumer-related measures and standards (v) agricultural and food products (vi) alcoholic beverages (vii) natural resources processing (viii) energy (ix) communications (x) transportation and (xi) environmental protection.

Chapter 8 of the AIT pertains to consumer-related measures and standards adopted or maintained by the Parties to the Agreement. Article 804 confirms that "Each Party may, in pursuing a legitimate objective, adopt or maintain measures establishing the level of consumer protection that it considers appropriate" and specifies in article 803 that those measures are permitted under the Agreement even though they may create certain barriers, subject to the following:

a) the purpose of the measure or standard is to achieve a legitimate objective;
b) the measure or standard does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;
c) the measure or standard is not more trade restrictive than necessary to achieve the level of consumer protection adopted or maintained under Article 804; and
d) the measure or standard does not create a disguised restriction on trade.

[36] **Robert H. KNOX.** "Economic Integration in Canada through the Agreement on Internal Trade*"*, in *Canada: The State of the Federation 1997- Non-constitutional Renewal*, directed by Harvey Lazar, Institute of Intergovernmental Relations, 1997, 200 pages. See p. 141. [Online] http://www.queensu.ca/iigr/pub/archive/SOTF/SOTF1997-part1.pdf (document consulted on March 12, 2015).
[37] *Agreement on Internal Trade*, art. 100.

The definition of "legitimate objective" in article 810 covers the protection of the "economic interests of consumers," those interests being defined very broadly and including aspects greatly exceeding purely economic aspects:

> *"economic interests of consumers" includes, but is not limited to:*
> *a) quality of goods, services and suppliers;*
> *b) accurate and timely information about goods, services and suppliers, including cost of credit;*
> *c) contractual fairness;*
> *d) access to redress mechanisms;*
> *e) security of consumer deposits;*
> *f) prevention of unfair trade practices; and*
> *g) protection of privacy*[38]*.*

It thus seems clear that according to the signatories to the Agreement, consumer protection measures are not in themselves barriers to internal trade, despite their diversity, because each Party remains free to guarantee the level of consumer protection it deems appropriate.

The Agreement also aims at eliminating discriminatory licensing, registration and certification fees[39] as well as the requirement that a supplier be resident in its territory as a condition of licensing, registration or certification[40].

Article 807 provides that certain standards, listed in Annex 807.1, should be the object of immediate reconciliation, not to lower consumer protections, but on the contrary to ensure a high and effective level of consumer protection. That provision specifies that harmonization of standards or measures does not entail that the Parties are obliged to lower the level of consumer protection ensured by those standards or measures.

The measures stated in Annex 807.1, which the Parties evidently estimated to be in urgent need of harmonization, were direct sellers, regulations for upholstered or stuffed articles, and cost of credit disclosure. The Agreement also provided that additional measures could be added to that Annex.

Other measures, set forth in article 808, were to be evaluated in view of an eventual harmonization: reciprocal investigative powers, enforcement of revocation rights, financial compensation for consumers and enforcement of judgments.

As can be seen, Chapter 8 of the Agreement does not pertain to the content or scope of consumer protection measures considered or adopted by the provinces, except to guarantee that those measures will not constitute disguised or unjustified restrictions of interprovincial trade. The primary objective is thus to ensure that differences between legislative measures adopted by the provinces to protect consumers do not hinder internal trade, and accordingly that those measures are as uniform as possible across Canada. To that end, the chosen approach is to harmonize related measures or those with a similar scope, in order to reduce the differences between provincial measures across Canada. The choice of this approach explains

[38] *Agreement on Internal Trade*, art. 810.
[39] *Agreement on Internal Trade*, art. 805.
[40] *Agreement on Internal Trade*, art. 806.

the establishment, under the Agreement, of the Consumer Measures Committee, on which we will focus in the next section.

Moreover, the Agreement's implementation is the responsibility of the Committee on Internal Trade, a permanent forum comprised of Cabinet-level representatives and mandated notably to supervise the Agreement's implementation, help settle disputes resulting from the Agreement's interpretation and application, and approve the annual operating budget of the Internal Trade Secretariat.

The AIT's chapters were also implemented by various Boards or Committees formed by the Agreement itself. For example: regarding environmental issues, the Canadian Council of Ministers of the Environment; in the transportation sector, the Council of Ministers Responsible for Transportation and Highway Safety; and the Committee on Communications-Related Measures.

Implementation of Chapter 8 of the AIT is entrusted to the Consumer Measures Committee.

2.1.5 The Consumer Measures Committee: Approach and Accomplishments

Created under Chapter 8 of the AIT, the Consumer Measures Committee (hereinafter the CMC), formed by representatives of the federal government, provinces and territories, is an interprovincial and intergovernmental forum working "to improve the marketplace for Canadian consumers, through harmonization of laws, regulations and practices and through actions to raise public awareness[41]."

The CMC's mandate is to:

> *a) monitor the implementation and administration of this Chapter, including the functioning of enquiry points established under Article 406(5) (Transparency);*
> *b) facilitate the process for reconciliation of consumer-related measures and standards, including the identification of such measures and standards for inclusion in Annex 807.1;*
> *c) provide a forum for discussions between the Parties on issues relating to Consumer-Related measures and standards, including any agreement referred to in Article 808, and the preparation of technical advice and recommendations to the Ministers;*
> *d) develop appropriate dispute resolution mechanisms before the date of entry into force of this Agreement; and*
> *e) submit to the Ministers an annual report on matters relating to this Chapter for transmittal to the Committee[42] [our underlined].*

The Committee supports and advises the Deputy Ministers who are members of the Federal-Provincial-Territorial Consumer Affairs Forum[43].

[41] *Op. Cit. note 5.* **CONSUMER MEASURES COMMITTEE**, page *About the CMC*.
[42] *Agreement on Internal Trade*, art. 809, par. 2.
[43] *Op. Cit. note 5.* **CONSUMER MEASURES COMMITTEE**, page *Structure of the CMC*. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00023.html (page consulted on October 14, 2014)

The CMC focuses on the specific fields covered by Chapter 8. Once the CMC identifies a subject of interest, a working group is formed to study the issue. In the past, working groups have studied subjects such as: collection agencies, cooperative enforcement, and cost of credit disclosure.

The AIT states that the CMC's mandate is to facilitate the process of reconciling provincial consumer protection regulations in the following three fields: 1) measures and standards for direct sellers, 2) cost of credit disclosure, and 3) upholstered or stuffed articles. Of course, the CMC also has the option to determine other fields where standards should be harmonized. In addition to the three fields of intervention provided in Annex 807.1, the CMC has agreed to harmonize measures in other fields, such as Internet sales contracts and prohibited collection practices.

Since its establishment in 1998, the CMC has completed studies of measures in several consumer sectors:

- Collection agencies;
- Cooperative enforcement;
- Cost of credit disclosure;
- Jurisdiction;
- Alternative consumer credit;
- Consumer redress;
- Consumer protection in e-commerce;
- Credit card charge-backs;
- Travel services;
- Direct sellers;
- Identity theft[44].

Among the CMC's remaining active files are those regarding enforcement best practices, credit reporting harmonization, and consumer awareness[45].

Despite the slowness for which the Parties to the Agreement are reproached in terms of the AIT's implementation, it should be noted that Chapter 8 is observed by critics to have been implemented the most extensively. R. H. Knox notes: "In summary, the consumer-related measures chapter is an example of step-by-step approach to economic integration that is appropriate to the diverse nature of the issues involved[46]."

Since the establishment of the CMC, the provinces and territories have reached five formal harmonization agreements: (i) the Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada (ii) the Cooperative Enforcement Agreement on Consumer-Related Measures (iii) the Internet Sales Contract Harmonization Template (iv) the direct sellers harmonization, and (v) the Harmonized List of Prohibited Collection Practices. As we have seen, two of the subjects addressed in those agreements (direct sellers and credit costs) were (among upholstered and stuffed articles) some of the priority measures provided in 1995 in Annex 807.1 of the Agreement.

[44] *Op. Cit. note 5.* **CONSUMER MEASURES COMMITTEE**, page *CMC Working Groups*. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00016.html (page consulted on February 3, 2015).
[45] *Ibid*.
[46] *Op. Cit., note 36.* **KNOX,** "Economic Integration in Canada through the Agreement on Internal Trade," p. 155.

It should be noted first that the harmonization agreements have no binding force. Although it is desirable to implement the principles set forth in those agreements, no enforcement mechanism has been established to compel implementation by the provinces and territories. The Parties usually commit themselves to observe the spirit of the agreements and to adopt laws or provisions reflecting the principles to which they have agreed, or, if applicable, to modify existing measures so as to adapt them to the terms of the agreements.

We will now consider the main aspects of those agreements and the approach taken in each one.

2.1.6 The Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada

The *Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada,* which came into effect on June 1, 1998, has several objectives: (i) harmonize laws (ii) develop uniform cost of credit disclosure requirements in order to reduce compliance costs (iii) provide *uniform consumer protection* across Canada (iv) clarify and simplify cost of credit disclosure rules, and (v) modernize laws to take account of developments in credit markets in recent years[47]. The approach advocated by the Agreement is to foster consumer information through clear, concise and logical disclosure of certain aspects deemed essential to informed decision-making. Accordingly, there is a list of information subject to mandatory disclosure. The Agreement, which presents a template for drafting legislation, provides: a method of calculating the annual percentage rate; the credit grantor's obligation to inform the borrower of any subsequent change in his interest rate; the obligation to deliver a statement, in the case of open credit; the borrower's possibility of making advance repayment of his loan; the information that must appear on a credit card application; the credit card holder's liability in the event that the card is lost or stolen; regulations for credit advertising.

In reading those measures, we observe that the desire to reduce internal trade barriers is not incompatible with the adoption of measures better protecting Canadian consumers. The key may be the determination to proceed with a reduction of compliance costs: measures offering greater protection uniformly across Canada are preferable to measures that are disparate in their level of protection and requirements.

i) Cooperative Enforcement Agreement on Consumer-Related Measures

Approved in 1998 by the CMC member parties, the *Cooperative Enforcement Agreement on Consumer-Related Measures*[48] aims at facilitating cooperative exchanges between the various consumer protection organizations in Canada. The objectives of this second formal Agreement are to facilitate the administration and implementation of legislative texts in whole or in part, and to monitor that the Parties to the Agreement do their best to meet demands for cooperation[49]. This Agreement thus manages the demands of cooperation made by one Party to another in

[47] **CONSUMER MEASURES COMMITTEE**. *Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada*, introduction, Ottawa, June 1, 1998, 52 pages. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/cost%20of%20credit%20disclosure.pdf/$file/cost%20of%20credit%20disclosure.pdf (document consulted on January 14, 2015)

[48] **CONSUMER MEASURES COMMITTEE**. *Cooperative Enforcement Agreement on Consumer Related Measures* (CEA), Ottawa, May 18, 1999, 5 pages. [Online] https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Coop_enforcement.pdf/$FILE/Coop_enforcement.pdf (document consulted on January 14, 2015).

[49] *Ibid*., art. 1.

view of obtaining assistance in administering the law, and in executing a judgment, sentence or fine[50]. The Agreement contains no specific consumer protection measure.

ii) Internet Sales Contract Harmonization Template

One of the agreements that have had the most impact is the 2001 *Internet Sales Contract Harmonization Template*. This harmonization template provides a framework for information to be disclosed, the form of contracts, a right of cancellation to the consumer's advantage, a charge-back obligation in the event of cancellation, and the creation of criminal offences. Since this Agreement was ratified, eight provinces have legislated to regulate e-commerce.[51] Given that the harmonization template provides that the members determine the scope they intend to give the template[52], three provinces have rules governing all distance contracts, including contracts concluded on the Internet. Three provinces only regulate electronic contracts, and two others separately regulate electronic contracts and the other types of distance contracts[53].

The harmonization template covers electronic contracts in great detail, particularly in the seven following aspects:

- Precontractual disclosure;
- Possibility of accepting or refusing;
- Copy of the contract;
- Right of cancellation;
- Cancellation obligations and effects;
- Recovery of refund;
- Recourses.

iii) Direct Sellers Harmonization

Although harmonization of provincial measures on direct sellers was prescribed for July 1, 1996[54], The CMC members ratified the *Direct Sellers Harmonization*[55] in 2001. This fourth formal agreement between the Parties concerns direct sellers, also called door-to-door sellers and door-to-door salespersons. The approach adopted for direct sellers consists of regulating the contractual content and provide an absolute right of cancellation in favour of the consumer for a determined period of reflection. Apart from issues of clear disclosure of the contract, this Agreement provides, as a major gain for consumers, a period of reflection allowing the consumer to cancel the concluded contract without giving a reason, within ten days following

[50] *Ibid*., art. 2.
[51] **DELAPETA, Ioana.** *Regulating Distance Contracts: Time to Take Stock*, Union des consommateurs, Montreal, June 2014, 194 pages. See pp. 27-28. [Online] http://uniondesconsommateurs.ca/docu/rapports2014/04-Contrats-a-distance-Eng.pdf (document consulted on March 26, 2015). The Maritime Provinces and the territories do not have regulations for electronic or other types of distance contracts.
[52] **CONSUMER MEASURES COMMITTEE**. *Internet Sales Contract Harmonization Template*, May 29, 2001, 7 pages. See sec. 2. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00157.html (page consulted on March 26, 2015). When these lines were written, the hyperlink to this Agreement, in the French version of the CMC website, led to an April 17, 2001 document that did not seem up-to-date. And the link indicating the *Modèle d'harmonisation sur la vente directe* led to the *Modèle d'harmonisation des règles régissant les contrats de vente par Internet* dated May 29, 2001.
[53] *Op. Cit., note 51.* **DELAPETA.** *Regulating Distance Contracts. See p.* 27.
[54] *Agreement on Internal Trade*, Annex 807.1, art. 1.
[55] **CONSUMER MEASURES COMMITTEE**. *Direct Sellers Harmonization*, Ottawa, 2001, 4 pages. When these lines were written, the hyperlink to this Agreement, in the French version of the CMC website, led to another document (the *Modèle d'harmonisation des règles régissant les contrats de vente par Internet*).

receipt of his copy of the contract (or of the seller's statement of cancellation rights, in cases where a written contract is not mandatory)[56]. A quick observation appears to indicate that every Canadian province and territory now has laws governing direct sellers[57].

iv) Harmonized List of Prohibited Collection Practices

The last formal Agreement concluded between the parties to the CMC, in 2003, pertains to prohibited collection practices[58]. This Agreement regulates in the provinces and territories a series of practices from which collection agencies should abstain. Such an Agreement not only offers the same level of protection to all Canadian consumers, but it also makes rules of law predictable across the country for companies operating in that sector. The approach advocated for this Agreement between the CMC members was to prohibit a series of practices. The Agreement covers, in particular: a prohibition to communicate with the debtor's entourage, to publish or threaten to publish that the debtor is in default, to provide false or misleading information, to threaten without foundation to take legal action.

In addition to the mandate to facilitate the process of reconciling consumer measures and standards, the CMC also has the mandate to serve as a tribunal allowing the Parties to discuss issues of consumer measures and standards[59].

Underlining the overall progress regarding Chapter 8, the AIT's 2001 and 2002 Annual Reports insisted on the success of this other function of the CMC:

> *It should be noted that the CMC and the Ministers' meetings have proved to be effective for issues of importance to consumers but which lie outside the strict limits of Chapter Eight. These areas include collection agencies, market-based consumer redress, electronic commerce, and the 'alternative consumer credit market'*[60].

The reports archived after 2002 no longer contain this section. It is thus impossible to monitor in this way the development of CMC discussion forums. The 2010-2011 annual report announced that the CMC Working Group on alternative consumer credit had completed the research and analyses of the policies entrusted to it, but that the CMC agreed to indefinitely continue exchanging information, informally, on the development of the alternative consumer credit market.

As for the collection agencies, we know that a harmonized list of prohibited collection practices was established as part of a harmonization project in 2001; the list was revised in 2003.

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[56] *Op. Cit., note 55*. **CONSUMER MEASURES COMMITTEE**. *Direct Sellers Harmonization*. See sec. 1.
[57] I**NFOCONSOMMATION.CA**, page *Door-to-Door Sales*, Industry Canada, Office of Consumer Affairs, Ottawa, latest update: 08/07/13. [Online] http://www.consumerinformation.ca/eic/site/032.nsf/eng/00041.html (page consulted on March 26, 2015).
[58] **INDUSTRY CANADA**. *Harmonized List of Prohibited Collection Practices, Revised – April 25, 2003*, Industry Canada, Toronto, latest update: 08/04/13. [Online] http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca01786.html (page consulted on October 21, 2014).
[59] *Agreement on Internal Trade*, Annex 809.2.
[60] **CONSUMER MEASURES COMMITTEE**. *AIT Annual Report 2001*, Ottawa, May 22, 2002. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00020.html (page consulted on March 26, 2015). This paragraph is reproduced verbatim in the 2002 report.

The subsequent reports contain no mention of the progress of work on "market-based consumer redress." However, the 2010-2011 report mentions that a CMC working group on best practices in the application of consumer protection laws, formed in 2006-2007, is focusing on the issue of administrative monetary penalties (AMPs).

It is surprising not to find reports subsequent to 2010-2011 on the CMC website, since article 809 of the AIT required the CMC to "submit to the Ministers an annual report on matters relating to this Chapter for transmittal to the Committee [on Internal Trade]."

Given the approach adopted for our research, we were interested in how the objects of formal agreements or discussions are chosen by the CMC. So we interviewed the Secretariat for the Consumer Measures Committee in order to learn more on this matter.

2.2 Survey of the Secretariat for the Consumer Measures Committee

To acquire fuller information on the CMC's work, we interviewed the Secretariat for the CMC on February 18, 2015[61]. The following is based on the information obtained during those discussions.

According to the Secretariat, the Consumer Measures Committee is above all a venue for discussions and exchanges of information between governments. This platform enables them to report on consumer issues on their territories and to state their priorities. It also enables members to work together while benefiting from the experience of the other Parties and to develop common solutions. If a matter is reported by the CMC members and two or three provinces show interest, a working group of experts can be formed. The matter studied may, depending on the working group's findings, be the object of a template submitted to the CMC members in view of reaching a harmonization agreement.

To harmonize consumer protection regulations across Canada, the collaborative approach advocated by the CMC is based on the good faith of the members, who agree to do what is necessary to eliminate various barriers that could hinder internal trade. To reach the above mentioned harmonization Agreements, the CMC has thus favoured a cordial and non-coercive approach. According to the Secretariat, this approach has met with a lot of success to date. The choice of such an approach is surely explained in part by the prudence and skill required by any Canada-wide policy that could affect the jurisdictions of the provinces and federal government under the Constitution or that risks being perceived as infringing on those jurisdictions. This way of proceeding allows for a reconciliation of provincial laws and regulations while enduring that the provinces and territories are reassured by retaining their autonomy over their jurisdictions.

As for the choice of subjects addressed by the CMC in view of the AIT's implementation, the Secretariat reminds us that, both for the subjects deemed by the Parties to be harmonization priorities[62] and for the others, several aspects are taken into account.

[61] Ms. Anne-Marie Monteith, Director of the Office of Consumer Affairs and Co-Chair of the CONSUMER MEASURES COMMITTEE (CMC), as well as Mr. David Clark, Senior Analyst of the Office of Consumer Affairs, were interviewed by Union des consommateurs on February 18, 2015. Among the subjects discussed were: the determination of issues addressed by the CMC; the absence of coercive mechanisms; the CMC's overall operation; and the possibility of harmonizing measures similar to those provided by European Union directives.

[62] I.e., cost of credit disclosure, direct sellers, and upholstered or stuffed articles. See Annex 807.1 of the AIT.

For example, the need to harmonize the rules for cost of credit disclosure has been a subject of discussions since the eighties. The fact that this subject implies a sharing of jurisdictions between the two levels of government made the approach of concerted harmonization appropriate.

Upholstered or stuffed articles constituted an issue reported by three provinces at the time. The Secretariat admitted not really knowing why the AIT's priorities included harmonizing the rules for upholstered or stuffed articles[63].

As for the rules governing distance contracts, the Internet and e-commerce were subjects of interest and concern, nationally and internationally. Canada had worked to develop guidelines, and the Ministerial Conference on Electronic Commerce of the Organisation for Economic Cooperation and Development (OECD) had been held in Ottawa in 1998. Those concerns obviously seemed to constitute priorities at the time of the AIT's development.

Some critics point out the non-coercive aspect of the Agreements concluded under the AIT. But the Secretariat reminds us that a settlement mechanism exists regarding Agreements on priority issues named in the ACI, such as cost of credit disclosure, direct sellers, and upholstered or stuffed articles. For the other Agreements, no mechanism exists; they are best-effort Agreements reached in good faith between the Parties. In that sense, it would not be appropriate for them to be coercive.

Critics have also emphasized the lack of resources invested in Canada to implement the AIT[64]. Our interlocutors preferred not to answer some of our questions about, for instance, the adequacy of resources made available to the CMC. The Secretariat points out that the CMC works according to Chapter 8 of the AIT and that it is not appropriate for it to answer such questions.

The Secretariat insists that, in the members' view, the CMC appears to operate well. It is an excellent forum offering governments an opportunity to share their priorities. Even if it does not appear that enormous progress has been made, for example in the number of formal agreements reached, the CMC's success should not be limited to those visible manifestations: the Committee plays a consensus-building role and enables dialogue between governments. The CMC's work also gives added presence to the voice and concerns of consumers.

[63] It should be noted that no formal agreement on the subject has been concluded.
[64] *Op. Cit. note 20,* **CANADIAN CHAMBER OF COMMERCE**, *Obstacles to Free Trade.* See page 2, for example.

2.3 Conclusion

More than twenty years after the AIT's adoption and despite the CMC's establishment, it appears that disparities between the consumer protection laws of the Canadian provinces and territories still pose certain obstacles to internal trade. Despite the five formal Agreements concluded between the Parties to the CMC, it must be acknowledged that numerous spheres regulated by provincial laws to better protect consumers are regulated disparately across Canada. For example, regulations for unfair terms can be found in consumer contracts across Canada, as well as regulations for advertising, distance contracts, legal warranty plans, and redresses available to consumer associations.

While the Canadian approach to harmonization of consumer protection laws presents advantages and is fully compatible with our federal system, the overall impression remains that the AIT does not appear to have met with the brilliant success that seemed to be hoped for when it was entered into. The CMC Secretariat thinks that this approach, fostering exchanges, discussions and best efforts, is operating very well.

Nevertheless, the occasionally lukewarm commitment of governments to consumer protection, as well as the resources allocated for harmonization initiatives – which observers deem insufficient – may partly explain the AIT's relative failure. As we have seen, the federal government has strongly expressed its desire to make internal trade a priority; will this be sufficient to give the AIT a second wind? And will the commitment reiterated by the current federal government to consumer protection translate into more substantial resources and a greater margin of manœuvre given to the CMC?

Other regional economic blocks have adopted different approaches than Canada's. Have those approaches succeeded, and what are their advantages? We will first study the approach taken by the European Union, which features, as in Canada, a cohabitation of civil law and common law. Then we will briefly examine the model of Australia, whose political structure resembles Canada's.

3. Internal Trade and Consumer Protection Abroad

In this section, we will present two harmonization models that take different approaches: that of the European Union, which issues directives setting objectives while member states are left to choose the means to attain them; and that of Australia, which instead of harmonizing the laws of its states and territories has preferred to adopt a national consumer protection law.

3.1 Europe: Single Market and Consumer Protection

After many years of reflection, the European Union made a crucial choice in order to establish an internal market free of constraints. It took almost 35 years of development for the European regional block to adopt in the nineties, with the signing of the *Maastricht Treaty*, a genuine consumer protection policy: each European Union policy must guarantee consumers a high level of protection.

Faced 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. Consumer protection measures have been subject to such directives, particularly on unfair terms, door-to-door sales, distance sales, package travel, and class actions. That harmonization aimed at guaranteeing to all European consumers a high level of protection across a homogenous market, and thus at creating an internal market free of the trade barriers posed by divergencies between national measures on those subjects.

During the creation of the European regional block in the fifties, the trade barriers between member states were very similar to those we have seen in Canada: taxes, subsidies to local companies, tax incentives, and other non-tariff barriers such as administrative and regulatory barriers, and restrictions to labour mobility. The European Union also found that the diversity of national consumer protection laws often posed an obstacle to trade between member states.

The regional block that began in 1952 as the European Coal and Steel Community, comprising six members, today numbers 28 member countries[65]. The member states preserve their national legal system, which is applied in compliance with the European Union's legal system. So when harmonizing laws, the European Union has to cope with the legal systems of 28 different countries, which apply rules rooted either in civil law or common law[66].

In an effort to accelerate the creation of an internal market, the European Union soon understood that it had to recognize the consumer as a key economic player, and that a special effort was needed to protect his economic interests. Accordingly, the EU has attempted to ensure that European consumers would benefit from a high level of protection that would be

[65] **EUROPEAN COMMISSION**. *6 to 28 members*, website of Europa, Brussels, Belgium, latest update 27/06/13. [Online] http://ec.europa.eu/enlargement/policy/from-6-to-28-members/index_en.htm (page consulted on October 24, 2014).

[66] **Francesco A. SCHURR.** The *Relevance of the European Consumer Protection Law for the Development of the European Contract Law*, (2007) 38 V.U.W.L.R., pp. 131-144. See p. 136. [Online] www.upf.pf/IMG/pdf/09-Schurr.pdf (document consulted on October 4, 2014).

equivalent across the European territory, and to protect their interests. The EU expected that well-protected consumers would have confidence in the European market and increase their business activities there. An overview of the first European measures adopted to give all consumers the highest level of protection reveals the importance of consumer protection in the EU ever since.

In 1957, when the *Treaty of Rome* was signed, with the objective of creating the European Economic Community (EEC), the EEC's first mandate was to create a common market and progressively harmonize national economic policies, in order to develop a harmonious European economic marketplace. Consumer protection was far from the member states' concerns when the treaty was signed.

Only in 1972, at the Paris Summit, did the Council of Ministers give the European Commission the mandate to determine the foundations of a European consumer protection policy. The member states then declared that "vigorous action in the social sphere is to them just as important [...] as achieving Economic and Monetary Union[67]." Those social interventions were to include measures regarding employment policies, in order to improve Europeans' working conditions and quality of life, while aiming at "closely involving workers in the progress of firms, at facilitating […] the conclusion of collective agreements at European level in appropriate fields and at strengthening and co-ordinating measures of consumer protection [68]."

This mandate given to the European Commission in the seventies resulted in the affirmation of a set of consumer rights: the right to the protection of health and safety, the right to the protection of economic interests, the right of redress, the right to information and education, and the right to representation. Those rights remain to this day in the EU treaties[69].

As mentioned above, only in 1992 with the establishment of the Treaty on European Union, also called the *Maastricht Treaty*[70], did consumer protection become a full-fledged policy in that regional block. Article 153 of the *Maastricht Treaty* sets forth the consumer protection policy and provides that each policy adopted by the European Union must henceforth ensure consumers a high level of protection[71].

> *Article 12 (ex-article 153, paragraph 2, ECT)*
>
> *Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.*

[67] *Statement from the Paris Summit (19 to 21 October 1972)*, Bulletin des Communautés européennes. October 1972, No. 10, Luxembourg, Office for Official Publications of the European Communities, p. 5.
[68] *Ibid*.
[69] *Treaty on the functioning of the European Union*, May 9, 2008. Official Journal of the European Union, No. C-115 (hereinafter the TFEU) or *Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union*, OJ No. C-326, of 26 October 2012, Art. 169, par.1.
[70] The *Treaty on European Union* was signed in Maastricht on February 7, 1992 and came into effect on November 1, 1993.
[71] It should be noted that the *Maastricht Treaty* has been amended several times since its adoption. It is one of the two founding treaties of the European Union, the second being the *Treaty on the functioning of the European Union*. The *Maastricht Treaty* was amended by the *Amsterdam Treaty* (which came into effect on May 1, 1999), the *Nice Treaty* (which came into effect on February 1, 2003) and the *Lisbon Treaty* (which came into effect on December 1, 2009). That provision is now found in article 12 of the *Treaty on the functioning of the European Union* (formerly article 153, par. 2 of the *European Community Treaty).*

The Treaty also provides the obligation to promote consumer interests and establishes a legal basis for a set of actions to be undertaken in the field of consumer protection:

> *Article 169 (ex-article 153 ECT)*
>
> 1. *In order to promote the interests of consumers and to ensure a high level of consumer protection, 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*[72].

The objectives of the *Maastricht Treaty* are thus much broader than those of the *Treaty of Rome*, which simply aimed at the creation of a common market. Consumer protection would henceforth play a major role in the European market. The *Treaty on the Functioning of the European Union* states in article 114 that, in pursuing the objective of creating an internal market without borders that allows the free flow of goods, persons, services and capital, the development of consumer protection proposals "will take as a base a high level of protection, taking account in particular of any new development based on scientific facts[73]."

In 2003, the European Commission issued the following finding:

> *The European Union is at a turning point in its history. It is preparing itself for an unprecedented wave of enlargement and, at the same time, within the context of the Convention, for a redefinition of its tasks and how its institutions operate under a new constitutional Treaty. It has also launched a development strategy based on the synergy between economic and social reforms with the added dimensions of sustainability and the environment*[74].

Those lines introduced the *Green Paper on services of general interest*, which launched a debate on the European Union's role in promoting the supply of services of general interest (hereinafter SGI), which are of the greatest importance in establishing a single internal market. When discussing SGI, the Commission refers "to services of an economic nature which the member states or the Community subject to specific public service obligations by virtue of a general interest criterion[75]." Those services are notably transportation, postal and energy services.

The Commission reiterated that consumer protection rules apply to services of general interest and that in that sector, action is necessary to ensure a high level of protection to all consumers[76].

[72] TFEU, art. 169.
[73] TFEU, art. 114.
[74] **EUROPEAN COMMISSION**, *Green paper on services of general interest*, OJ C 61 of 15 March 2007, Introduction, par. 1, website of Europa, Brussels, Belgium, no date. [Online] http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52003DC0270 (page consulted on October 24, 2014).
[75] *Ibid.*, Introduction, par. 17.
[76] *Ibid.*, Introduction, par. 60.

The 2004 *White Paper on services of general interest*, which is a continuation of the 2003 Green Paper, is in the same vein: services of general interest are pillars of European society and it is important to ensure the universal provision of quality and affordable SGI to all citizens and businesses of the European Union[77]. Among the principles guiding the White Paper, in addition to the one indicating that "services of general interest should be organised and regulated as closely as possible to the citizens," we find consumer protection explicitly affirmed:

> *2.4.5 Ensuring consumer and user rights: These include in particular the access to services, including to cross-border services, throughout the territory of the Union and for all groups of the population, affordability of services, including special schemes for persons with low income, physical safety, security and reliability, continuity, high quality, choice, transparency and access to information from providers and regulators*[78].

In another manifestation of the predominant status of consumer protection in the European Union, the *Charter of Fundamental Rights of the European Union* reiterated in its article 38 that "Union policies shall ensure a high level of consumer protection[79]."

The European Union's commitment to guarantee a high level of protection to all consumers in its territory is fortunately not limited to the adoption of principles. That commitment is also demonstrated by concrete actions such as the creation of the European Commission Directorate-General for Justice and Consumers, the adoption of the Consumer Policy Strategy 2007-2013, and the Consumer Programme 2014-2020.

Established in 1999, the objective of the European Commission's Directorate-General for Justice and Consumers, today known as the Directorate General of Health and Food Safety (DG SANCO), is to "make Europe a healthier, safer place, where citizens can be confident that their interests are protected[80]." Among the tasks of DG SANCO is to monitor and apply European laws for food safety, health protection and consumer rights.

The Consumer Policy Strategy 2007-2013 set forth by the European Commission sought "to establish equal levels of security and protection throughout the European Union (EU), as well as a more integrated internal market[81]." That goal would be reached through three objectives: (i) empowering consumers by creating a more transparent market, (ii) enhancing consumers' welfare in terms of price, quality, diversity, affordability, safety, etc. and (iii) protecting consumers from serious risks and threats[82]. The priority of that strategy remains to ensure a

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[77] **EUROPEAN COMMISSION**, *White paper on services of general interest*, website of Europa, Brussels, Belgium, May 12, 2004. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l23013b&rid=1 (page consulted on March 12, 2015).

[78] Opinion of the European Economic and Social Committee on the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the White Paper on services of general interest" [COM(2004) 374 final] (2005/C 221/04), website of Europa, Brussels, Belgium, no date. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005AE0121&from=FR (document consulted on October 24, 2014).

[79] *Charter of Fundamental Rights of the European Union*, OJ C 364 of December 12, 2000, art. 38, website of Europa, Brussels, Belgium, no date. [Online] http://www.europarl.europa.eu/charter/pdf/text_en.pdf (page consulted on October 24, 2014).

[80] **EUROPEAN COMMISSION**, *Health and Food Safety*, website of Europa, Brussels, Belgium, no date. [Online] http://ec.europa.eu/dgs/health_food-safety/about_us/who_we_are_en.htm (page consulted on March 31, 2015).

[81] **EUROPEAN COMMISSION**, *EU Consumer Policy Strategy 2007-2013*, COM2007 99, website of Europa, Brussels, Belgium, December 18, 2000, 22 pages. [Online] http://ec.europa.eu/dgs/health_food-safety/information_sources/docs/ca/cps_0713_en.pdf (document consulted on October 23, 2014).

[82] *Ibid*.

high level of consumer protection in the entire European territory and to ensure the application of European laws that seek to better protect consumers.

Published in 2014, the Consumer Programme is based on the Consumer Policy Strategy 2007-2013 and is intended as an implementation of that policy. The Consumer Programme, which will be maintained until 2020, has four major objectives:

> *(i) protecting consumers from serious risks or threats (safety principle)*
> *(ii) giving European consumers the power to make choices, based on clear, accurate and consistent information (consumer education and information principle)*
> *(iii) safeguarding the rights of consumers and giving access to fast and efficient ways of resolving disputes with traders (principle of consumer rights and effective redresses) and*
> *(iv) keeping consumer rights up to date with economic and social change, with a focus on the food, energy, financial, transport and digital markets*[83]*.*

In its presentation document, the European Commission recalled the two fundamental principles of the consumer policy that were stated in the *Treaty on the Functioning of the European Union*:

- *a complete range of actions should be taken at EU level to protect the health, safety and economic interests of consumers and promote their right to information and education;*
- *consumer protection requirements must be taken into account in defining and implementing other EU policies and activities*[84]*.*

For its Consumer Programme 2014-2020, the European Union earmarked a budget of 188.8 million euros.

The European Union and its member states thus share, to an extent, jurisdiction on consumer protection issues. To succeed in harmonizing national laws, the EU proceeds by issuing directives whose content is integrated afterward into the national legal system of each state; such integration of course constitutes an obligation, and defaulting on it can be sanctioned. As we will see, the number of directives adopted by the European Union to better protect consumers on its entire territory far exceeds that of agreements concluded in Canada to apply the AIT.

That begs the question: why has the EU decided to proceed, as opposed to Canada, for example, with harmonizing various sectors, notably consumer protection, through the coercive approach of directives? It may be explained by the member states' stronger commitment to creating a single internal market, and by the certainty that this cannot be achieved to the detriment of consumer interests. The primordial role of consumer protection in EU policies, as one of the founding principles of the single European market – i.e., that "Enabling consumers to play an active role in the single market can boost economic growth and help the EU recover from the economic crisis[85]" – may have something to do with it.

[83] **EUROPEAN COMMISSION**. *Putting the consumer first*, website of Europa, Brussels, Belgium, March 2014, 12 pages. See page 3. [Online] http://europa.eu/pol/pdf/flipbook/en/consumer_en.pdf (document consulted on March 31, 2015).
[84] *Ibid.*, p. 4.
[85] *Ibid*.

Consumers' well-being and the protection of their rights are thus a pillar of the internal market, and any European policy must ensure a high level of consumer protection on the entire European territory. The creation of an internal market with harmonized laws that, while respecting each member state's political structure, values and legal system, maintains consumers at the centre that internal market, may be the key to the success of that regional economic block. The expenditures of European consumers are equivalent to 57% of the European Union's GDP, so that regional block quickly understood the priority of allowing consumers, who support the economy, to benefit from adequate rights and redresses and to do business confidently in the internal market.

3.2 Australia: A Market Similar to Canada's

With its six States, three internal territories and multiple external territories, Australia's market greatly resembles Canada's in terms of political structure. It is a federation where the central government and the territorial governments have exclusive jurisdiction in some areas and shared jurisdiction in others. Chapter IV of the Australian Constitution[86] regulates internal trade. Article 92 specifies that exchanges, trade and relations between States must be free. Exchanges between Australian States are governed by the *Mutual Recognition Accord* of 1992. A similar agreement was reached subsequently, in 1997, with New Zealand[87].

In 2009, the Commonwealth of Australia, its states and territories signed an agreement on consumer law, the *Intergovernmental Agreement for The Australian Consumer Law* (hereinafter the IAACL[88]), as part of the implementation of the internal trade agreement, the *National Partnership Agreement to Deliver a Seamless National Economy.* The Council of Australian Governments created in 2008 a new national regulatory framework of consumer protection after the Productivity Commission issued recommendations in a report on the subject.

The objective of that new regulatory framework is to increase consumer protections, reduce the regulatory difficulties facing companies, and encourage the development of a homogenous national economy[89]. Among the subjects of that new national regulatory framework are: unfair contract terms, product safety, door-to-door sales, telephone sales, and new provisions for consumer redresses. That reform of the regulatory framework of consumer protection has the same essential features as the other reforms to unify Australia's internal market: great cooperation between the states and the Australian Commonwealth, and support ensured by the establishment of key institutions. In the next paragraphs, we will briefly describe the harmonization approach taken by Australia, and the main features of the 2010 reform.

[86] *Act to constitute the Commonwealth of Australia (63 & 64 Victoria, Chapter 12).* [Online] http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution (page consulted on September 29, 2014).
[87] *Trans-Tasman Mutual Recognition Act*, 1997, No 60. [Online] http://www.legislation.govt.nz/act/public/1997/0060/latest/DLM410793.html (page consulted on September 29, 2014).
[88] **COUNCIL OF AUSTRALIAN GOVERNMENTS**. *Intergovernmental Agreement for the Australian Consumer Law (IGAACL)*, cl. 3.2, 2009, 12 pages. [Online] http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_iga.pdf (document consulted on September 29, 2014).
[89] *Ibid.,* Recitals.

Under the *National Partnership Agreement* concluded in 2008 by the *Coalition of Australian Governments* (COAG), the Productivity Commission received a substantial mandate, to implement new regulations and reforms in several spheres of the Australian economy[90]. Among the reforms studied, the Commission had the mandate to review the consumer protection framework on the entire Australian territory. The Commission's specific mandate included proposing ways to improve the regulatory framework to the advantage of consumers. Another mandate was to identify internal trade barriers and find ways to better harmonize and coordinate the regulatory framework of consumer protection. The Commission also had to propose ways to optimize the development and administration of the regulatory framework in all Australian jurisdictions.

That desire to harmonize stems from an issue similar to the one encountered in Canada, i.e., the existence of diverse and disharmonious consumer protection legislation across Australia. As the Productivity Commission reported, the shared jurisdiction of the Australian government and the state and territorial governments yielded, in addition to parts IVA, V, VA and VC of the 1974 *Trade Practices Act*, state and territorial provisions also applicable to consumer protection. To those legislations were added specific laws governing industry – such as those pertaining to competition and originating from both the Australian government and territorial competition agencies – as well as industry self-regulation.

3.2.1 The Productivity Commission's Report

The Productivity Commission's report, published in 2008, indicates that a reduction of certain internal trade barriers and the reforms regarding competition have resulted in reducing prices, improving product quality and increasing the choices available to consumers[91]. In view of improving Australia's regulatory framework of consumer protection, the Commission issued a set of recommendations, based on the following findings:

- *The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making;*
- *There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers;*
- *These problems will make it increasingly difficult to respond to rapidly changing consumer markets, meaning that the associated costs for consumers and the community will continue to grow*[92].

Accordingly, the Commission concluded that it was necessary to set forth clear objectives and ensure the adoption of principles providing a solid foundation for the future development of the regulatory framework: "The overarching objective should be to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith[93]."

[90] **PRODUCTIVITY COMMISSION**. *Review of Australia's Consumer Policy Framework,* Vol. 1, No 54, Canberra, Australia, April 30, 2008, 84 pages. See p. vii [Online] http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf (document consulted on March 31, 2015).
[91] *Ibid.*, p. 14.
[92] *Ibid.,* p. 2.
[93] *Ibid*.

The Commission deemed it urgent to reach institutional agreements more compatible with current developments in the national market, and better able to adapt policies effectively and in a timely manner. To that end, the Commission concluded that the first step must be the adoption of a single generic consumer protection law, under the authority of the Australian government, applicable to the entire Australian territory and based on the *Trade Practices Act*, amended to correct the latter's deficiencies in scope and application.

The Commission stated that adopting the entire reform it was proposing regarding consumer protection could generate net gains of $1.5 to $4.5 billion annually for the Australian economy. This became the pillar of the Australian reform of consumer protection legislation. The new *Australian Consumer Law,* applied across the country, was adopted in 2010.

3.2.2 The Australian Consumer Law

The *Australian Consumer Law* (hereinafter ACL), which came into effect on January 1, 2011, is a new centralized vision of consumer protection in Australia. It aims at offering all Australian consumers the same protection and expectations regarding commercial practices[94]. As we will see in greater detail, that law would replace numerous consumer protection laws that had originated from the states and territories. The reform would also result in the implementation of a new administrative approach, because the same law would henceforth be applied across Australia. It should be noted that the law is not retroactive: it applies only to consumer transactions made as of January 1, 2011. As for transactions made before that date, the consumer protection laws in effect at that time in the states and territories would still apply.

The ACL's primary objectives are (i) to improve the well-being of consumers by valuing and protecting them; (ii) to encourage healthy competition; and (iii) to enable consumers to participate confidently in a market where consumers and suppliers trade fairly[95].

Those primary objectives can be met only through the following six operational objectives:

- That information standards be set and enforced;
- That goods and services be safe and serve their intended purpose;
- That unfair commercial practices be prevented;
- That protections meet the needs of the most vulnerable or disadvantaged;
- That wronged consumers have quick access to remedies;
- That the law's application be proportional and risk-based[96].

Although the law is coercive in all spheres of consumer protection in Australia, it does not govern all aspects of consumer protection. The new national law regulates aspects that already were regulated under the 1994 *Trade Practices Act*, while adding various measures originating from legislative measures that were in effect in the states and territories.

[94] **AUSTRALIAN GOVERNMENT**. *Australian Consumer Law: A Guide to provisions*, Canberra, Australia, November 2010, 82 pages. See p. 9. [Online] http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_guide_to_provisions_november_2010.pdf (document consulted on March 31, 2015).
[95] *Ibid*., p. 3.
[96] *Ibid*.

The ACL regulates the following:

- Unfair practices (Part 3-1): misleading and deceptive conduct, unconscionable conduct and other unfair practices such as bait advertising. Provisions regarding unconscionable conduct codify the common law principle of unconscionability;
- Guarantees (Part 3-2): guarantee relating to the supply of goods by description, guarantee as to fitness for any disclosed purpose, and guarantee as to acceptable quality;
- Consumer product safety and information (Part 3-3);
- Liability of manufacturers for goods with safety defects (Part 3-5);
- Unfair contract terms (Part 2-3);
- Door-to-door sales and sales by telephone (sec. 69 and fol.);
- Lay-by agreements (sec. 96-99).

The new law also provides for reinforcement of its application through cooperation and information-sharing between the Commonwealth, the states and territories.

As stated in the *Intergovernmental Agreement for the Australian Consumer Law* (ACL), the States and territories had to introduce a bill in their respective parliaments by December 31, 2010[97] to ensure the implementation of the new ACL[98]. To that end, the States and territories had to adopt a law to enact the ACL on their territory and replace, with this new law of 850 sections, the consumer protection laws adopted over the years by the States and territories. As a transposition control mechanism, the *Ministerial Council on Consumer Affairs (*MCCA) received the mandate to develop a review process identifying any inconsistencies between the ACL and the laws of the States and territories.

The ACL's administration and implementation involve the various Australian consumer protection institutions, such as the *Australian Competition and Consumer Commission* (ACCC) and the *Australian Securities and Investment Commission* (ASIC) as well as the consumer protection agencies of the states and territories. Their *Memoranda of Understanding* on the ACL's implementation and administration pertain to communication, cooperation and coordination between the various entities:

- Enforcing the Australian Consumer Law, including the exchange of information and intelligence;
- Informing the general public and educating consumers and business about the Australian Consumer Law;
- Monitoring of compliance with the Australian Consumer Law, including market surveillance;
- Ongoing reporting and review of the enforcement and administration of the Australian Consumer Law[99].

We find to date few criticisms of the new Australian consumer protection law. In addition to the Australian governments' laudable objectives to harmonize consumer protection laws and clarify the law regarding legal guarantees, the struggle continues. Professor Paterson of the University

[97] *Op. Cit., note 90*, IGAACL. See clause 3.2.
[98] *Ibid.*, clause 3.
[99] *Ibid.*, clauses 22 and fol.

of Melbourne estimates that the attainment of those two objectives by the new provisions on guarantees, for example, is uncertain[100]: according to her, not only was it unnecessary to adopt a new law to better regulate the field of guarantees, but although the new law includes in guarantees the pre-contractual representations made by businesses, the available redresses reduce the rights of consumers, particularly with regard to damages.

The ACL is above all a centralized approach to harmonization. The new national law becomes the foundation of the regulatory framework of consumer protection. It should be noted that the Australian plan's implementation in view of lowering internal trade barriers and give consumers equal protection across Australia is strongly based both on the assumption of great cooperation between the states and the federal government to meet the objectives set and on exceptional institutional support.

We have seen in detail the aspects regulated and thus harmonized by the ACL. Does the European Union take the same approach and address the same issues?

[100] **Jeannie Marie PATTERSON.** *The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions,* Melbourne University Law Review, Vol. 35, Melbourne, Australia, 2011, pp. 252-279. [Online] http://www.law.unimelb.edu.au/files/dmfile/35_1_8.pdf (document consulted on October 22, 2014).

4. The European Model for Harmonizing Consumer Protection Laws

Since the advent of consumer protection as a full-fledged policy in the European Union, the latter has adopted a series of directives to better protect European consumers across its territory. The EU has adopted a very different approach from those of Australia or Canada. All spheres of consumer protection can be subject to a directive that member states will be obliged to transpose in their national legal systems.

We have described the European Union's harmonization approach and the importance of consumer protection therein. In the following paragraphs, we will focus on the various directives identified on the subject. Then we examine some of them in greater depth.

4.1 Adoption of Directives and Transposition into the Laws of Member States

A directive is a legislative instrument used by the EU to have its standards and measures implemented across the entire European territory[101]. The European Union's secondary legislation contains regulations, recommendations and directives. In contrast to a community regulation, which applies automatically to all member states upon its adoption, a directive indicates, in principle, the objectives to be met and sets a period for the national governments to adapt their own regulations by transposing the directive's substance.

Before coming into effect, a directive must undergo several stages. After being adopted by the European Commission, it is proposed to the Council of the European Union and the European Parliament, which may adopt it in turn, generally after submitting it for advice to the Committee of the Regions or the Economic and Social Committee, the latter notably handling consumer protection directives.

Once the directive is ratified, the member states must transpose its measures in their national legal systems by adopting new laws or amending existing ones. In most cases, consumer protection directives have a precise deadline for transposition – two years on average. In principle, the directives include objectives to be met, and the ways of doing so are often left to the states' discretion.

Directives are coercive measures; failure to transpose them can have major consequences for member states. Infringement proceedings may be launched by the European Commission in case of default or even of a directive's poor transposition. This may result in financial sanctions determined according to the seriousness or duration of the infringement, and according to certain attributes of the member state in default, such as its GDP and the number of votes it has on the Council.

[101] *ECT,* art. 249(3).

The average number of open infringement proceedings is consistently around thirty per state. However, in a report published in 2014, the European Commission pointed out that sanctions rarely end up being levied[102]. Usually, the member state receiving a notice hurries to adopt necessary measures to comply with the directive before the Court of Justice is seized of the case. As an example of the major consequences that an infringement proceeding may have: in 2005, France was sentenced to pay almost 80 million euros for having tolerated, in 1984 and 1987, the sale of red hakes deemed too small under European regulations[103]. That is the largest financial sanction since the European regional block was created. In the event that a member state does not transpose a provision, an individual citizen of that State can also invoke the directive against the state in default; the primacy principle implies that a state maintaining rules contrary to a directive may be compelled to pay for damages thereby caused to individuals.

> *3. […] The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a member state can be held responsible. Such a possibility of reparation by the member state is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.*
>
> *It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty [104].*

Moreover, the EU has set itself a maximum non-transposition objective of 1% for each member state. According to the table produced by the Commission in 2014, only five countries have not been able to meet that target[105].

We surveyed 13 European directives explicitly intended to protect consumers[106]. That protection is ensured in several ways: by regulating contractual content, by providing an obligation to inform the consumer, by providing redresses to protect the collective interest of consumers, or by providing more-specific protection measures, other than the information obligation or regulations for consumer contracts. The subjects addressed in those directives vary enormously: travel, vacations and package tours, abusive clauses, timeshare properties, actions for injunctions, sale of goods, guarantees, financial services, unfair business practices and credit agreements.

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[102] **EUROPEAN COMMISSION**. *Internal Market Scoreboard*, website of Europa, Brussels, Belgium, July 2014. [Online] http://ec.europa.eu/internal_market/score/index_en.htm (page consulted on February 23, 2015).
[103] *Commission c. République française*, July 12, 2005, C-304/02 (hereinafter *Arrêt Merluchon*).
[104] *Francovich and Bonifaci v Italian Republic*, CJEC, November 19, 1991, C-6/90 and C-9/90. In this case, failure to transpose a European directive into Italian national law had caused prejudice to laid-off employees, who had not been able to avail themselves of protections provided by a directive.
[105] **TOUTELEUROPE.EU**. *Transposition des directives: Palmarès des États membres*, portal for European issues, Paris, France, February 23, 2015. [Online] http://www.touteleurope.eu/actualite/transposition-des-directives-le-palmares-des-etats-membres.html (page consulted on March 2, 2015).
[106] Our analysis pertained to directives directly intended for consumer protection. So we did not focus on those that are related tangentially, such as directives for sanitary or phytosanitary rules and for personal health and safety. For example, we ignored *Directive 2014/04/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC*.

4.2 European Directives Adopted to Better Protect Consumers

The directives we identified were adopted between the early nineties and 2014; this does not mean that no directive was adopted prior to the nineties. Many directives in effect today have replaced or abrogated prior directives, often when European laws were updated. We will discuss here only the European directives that pertain directly to consumer protection, and we will ignore those that only have a ricochet effect on consumer protection.

Usually, European directives have the explicit objective to harmonize national legislations on the entire European territory while ensuring a high level of consumer protection. To avoid redundancy, we will avoid systematically mentioning that consistent objective in the following description of the directives.

4.2.1 The Directives

1) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

Directive 90/314/EEC on package travel, package holidays and package tours[107] came into effect on December 31, 1992. Its objective is to protect consumers who purchase prearranged travel packages that include at least two of the three following aspects: transportation, lodging or any other tourism service unrelated to transportation or lodging.

The harmonization approach advocated in that directive concerns, among other things, the obligation to inform, the organizers' liability in providing the services agreed upon, and the consumer's right of cancellation in case the contract is amended.

2) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

This directive, which covers unfair contract terms likely to be found in consumer contracts[108], will be examined in depth in the following pages.

The directive defines the characteristics of a term that must be considered unfair, draws a list of contract terms that must be assumed to be unfair, harmonizes consumer information, and introduces consumer associations' actions for injunctions.

3) Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising

Directive 97/55/EC, which came into effect on November 12, 1997, amended Directive 84/450/EEC on misleading advertising[109] so that comparative advertising would be

[107] *Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours*. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0314:en:HTML (page consulted on October 1, 2014).
[108] *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0013&from=FR (page consulted on October 1, 2014).

considered henceforth, in certain circumstances, as misleading advertising; particularly if it does not compare similar goods, generates confusion, or denigrates or discredits brands, trade names or other distinctive signs.

The directive's objective is to "protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted[110]."

Accordingly, the directive lists specific conditions in which comparative advertising will be permitted, as well as the verification and sanctioning powers that the states must establish and use against that type of advertising, when necessary. The approach advocated is to ensure that consumers receive fair and adequate information enabling them to make a choice based on truthful claims, in a market of broadening choice.

4) Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

Directive 98/6/EC[111] on the indication of prices, which came into effect on March 18, 1998, provides specific obligations for improving consumer information and facilitate price comparison.

The directive requires businesses to indicate the sale price, i.e., the final and full price (including all taxes) for a single item or a given quantity, and for the unit of measurement, if applicable, and defines the specific cases in which those obligations may be divided (e.g.: only the unit price for bulk items) or the conditions allowing the states to exempt certain products. The directive provides no specific sanction, because the obligation to do so belongs to the states. The directive also requires the states to establish information measures for any person concerned.

5) Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

Directive 1999/44/EC of the European on certain aspects of the sale and guarantees of consumer goods[112] will be analysed in the following pages.

This directive regulates conformity guarantees and use guarantees, establishes the seller's presumption of liability if the lack of conformity appears within two years following delivery of the good, etc. The directive defines several criteria to be taken into account to

[109] *Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising*. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:en:HTML (page consulted on October 1, 2014)
[110] *Ibid.,* art. 1(2).
[111] *Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers*. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0006:en:HTML (page consulted on March 30, 2015)
[112] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999L0044&from=FR (page consulted on March 30, 2015)

evaluate conformity. It ties conformity both to the consumer's reasonable expectations and to public claims made about the good's concrete characteristics by the seller, the producer or its representative, particularly in advertising or labelling. The directive also determines consumer redresses: a right to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or have the contract rescinded with regard to those goods. It also regulates the information obligations related to the sale of additional guarantees, notably that of informing the consumer about the existence of the legal guarantee. Here too, the directive imposes the obligation to inform consumers about their rights.

6) Directive de 2002/65/EC concerning the distance marketing of consumer financial services

The European regional block has chosen to harmonize regulations of financial service distance contracts[113].

The harmonization approach is very similar to that advocated in previous directives, and rests essentially on the obligation to provide consumers with exact and clear information. The directive requires that certain types of information be disclosed before the conclusion of the contract and that contract terms be provided. It also grants the consumer a right of revocation within 14 days following the conclusion of the contract. Unsolicited services and communications are also regulated by the directive.

7) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council

In effect in the EU since June 12, 2005, Directive 2005/29/EC concerning unfair business practices[114] aims at prohibiting practices that are contrary to requirements of professional diligence and that alter or are likely to alter a consumer's economic behaviour toward a product.

In addition to setting criteria for determining the unfair nature of certain practices, the directive entitles organizations with a legitimate interest to launch legal actions against unfair practices.

[113] *Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services*. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0006:en:HTML (page consulted on March 4, 2015).

[114] *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.* [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0029&from=FR (page consulted on March 4, 2015).

8) Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

In effect since February 23, 2009, Directive 2008/122/EC on timeshare products[115] takes an approach that fosters consumer information in order to enable consumers to make informed economic decisions.

In that vein, the directive on timeshare products regulates advertising (prohibiting, for example, the solicitation of consumers under false pretences or the presentation of such products as investments), precontractual information (imposing standard forms), the form and content of contracts. The directive also allows cancellation of those contracts and gives consumers a right of withdrawal without penalty and without giving a reason, including for services provided before the directive was enacted.

9) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

In effect since June 11, 2008, Directive 2008/48/EC on consumer credit agreements[116] covers all aspects of a credit agreement concluded with a consumer.

Dealing notably with advertising and the mandatory precontractual and contractual disclosure of information, the directive also regulates prepayments, the calculation of the annual percentage rate of charge, and the obligation to assess the consumer's creditworthiness. The directive offers consumers an exceptionally high level of protection.

10) Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

The directive on injunctions gives certain organizations the right of access to justice, based on the importance of defending the collective interest of consumers[117]. It will be examined more fully in the next part of our study.

The injunction is a redress granted to certain qualified entities, so that they may go to court in order to (i) have any infraction cease or be prohibited; (ii) obtain that measures be taken, such as the publication of a court ruling to mitigate an infraction's persistent

[115] *Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts*. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0122&from=FR (page consulted on October 13, 2014).
[116] *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0048&from=FR (page consulted on March 4, 2015).
[117] *Directive 2009/22/ EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests*. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0022&from=FR (page consulted on March 13, 2015).

effects; or (iii) sentence a business to pay a fine for failure to execute a court ruling. The purpose of this directive is essentially to establish a framework for injunctions.

11) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

Directive 2011/83/EU on consumer rights concerning distance or off-premises contracts[118], in effect since December 12, 2011, aims at regulating the following aspects of that type of contract: information obligation, contract form and content, the consumer's right of withdrawal, risk transfer and extra payment.

This directive will be the last one to be analysed in greater depth in Chapter 5 of this report.

12) Commission Directive 2011/90/EU of 14 November 2011 amending Part II of Annex I to Directive 2008/48/EC of the European Parliament and of the Council providing additional assumptions for the calculation of the annual percentage rate of charge

This directive on the calculation of the annual percentage rate of charge[119] does not implement new consumer protection measures. Rather, it modifies existing tools in order to add new assumptions for calculating the annual percentage rate of charge, with the intention of better reflecting the credit offers on the market.

An example of a new assumption: "if a credit agreement gives the consumer freedom of drawdown, the total amount of credit shall deemed to be drawn down immediately and in full[120]."

[118] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0083&from=FR (page consulted on March 11, 2015).
[119] *Commission Directive 2011/90/EU of 14 November 2011 amending Part II of Annex I to Directive 2008/48/EC of the European Parliament and of the Council providing additional assumptions for the calculation of the annual percentage rate of charge,* art. 1. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0090&rid=1 (page consulted on March 13, 2015).
[120] *Ibid*., Annex.

13) Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010

The European Union describes as follows the subject matter of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property:

> *This Directive lays down a common framework for certain aspects of the laws, regulations and administrative provisions of the member states concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property, including an obligation to carry out a creditworthiness assessment before granting a credit, as a basis for the development of effective underwriting standards in relation to residential immovable property in the member states, and for certain prudential and supervisory requirements, including for the establishment and supervision of credit intermediaries, appointed representatives and non-credit institutions*[121] [our underlined]

In the forewords of the directive, the European Union recognizes that the financial crisis that occurred a few years before this directive came into effect demonstrates "that irresponsible behaviour by market participants can undermine the foundations of the financial system[122]." The EU counts on consistent, flexible and fair credit agreements in order to establish a more transparent, efficient and competitive European market[123].

To meet its objectives, the EU has chosen to regulate numerous aspects of consumer credit agreements relating to residential immovable property: rules of conduct for providing credit, requirements of professional knowledge and competence, disclosed information and precontractual practices, precontractual information, and information requirements for credit intermediaries and their appointed representatives. The directive also pertains to the calculation of the annual percentage rate of charge (APRC) and to early repayment, arrears and foreclosure. The directive emphasizes the lender's obligation to rigorously assess the consumer's ability to repay – an ability on which must depend the granting of a loan or any significant increase of the total amount of credit granted.

[121] *Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010,* art. 1. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0017&rid=1 (page consulted on March 30, 2015).
[122] *Directive 2014/17/EU,* whereas clause No. 3.
[123] *Directive 2014/17/EU,* whereas clause No. 6.

4.3 Conclusion

This overview of European directives leads us to the recognition that the harmonization approach is consistent among all the directives. The disclosure of precontractual and contractual information, the form and content of particular contracts, the existence of effective redresses – including the right of withdrawal without giving a reason in specific circumstances – are all elements that the EU has included and harmonized in national legal systems. These are the common threads we find in all the directives adopted to better protect consumers.

It should also be noted that the directives, although their primary goal is to indicate objectives to be met, while giving member states the choice of means to do so, pertain to very specific areas and often propose extremely detailed measures for regulating certain aspects of consumer transactions in a given sector. However, this detailed drafting approach to harmonizing consumer protection measures has not always been prevalent. The JurisPedia website points out that "Some directives are so precise that we may question the distinction between a result and the means to attain it[124]" and distinguishes between the different drafting approaches taken by the EU over the years:

- First period: freestyle drafting of directives;
- Second period (the late eighties and the nineties): the "new approach," favouring less detailed drafting of directives (following the *Cassis de Dijon* ruling that affirmed the principle of mutual recognition: when a good is lawfully produced and sold in a Member State, any legislation of another Member State that would not be justified by the general interest and would oppose the circulation of that good in the State constitutes a barrier to the free movement of goods[125]);
- Third drafting period: although detailed, the directive leaves options to Member States;
- Today: extremely detailed and precise drafting.

An in-depth study of certain European directives on consumer protection will enable us to know more about the harmonization approach reflected in specific directives.

[124] **JURISPEDIA**, *Directive communautaire (UE)*. [Online] http://fr.jurispedia.org/index.php/Directive_communautaire_(eu) (page consulted on February 23, 2015). Our translation.
[125] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon* ruling), ECJ, February 20, 1979, Case 120/78. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61978CJ0120&from=FR (page consulted on March 30, 2015).

5. In-Depth Study of Certain Directives and of Possible Harmonization in Canada

Among the 13 directives adopted by the EU specifically on consumer protection, we chose to study the following four more thoroughly: (i) Directive 93/13/EEC on unfair terms in consumer contracts; (ii) Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; (iii) Directive 2009/22/EC on injunctions; and (iv) Directive 2011/83/EU on distance contracts.

Our choice of directives we wanted to study more thoroughly is justified by several factors. First, the chosen directives propose measures addressing problems also encountered by consumers on the Canadian market. Some of those measures have also been somewhat harmonized in Canada or have been discussed among stakeholders. Second, the measures pertain to aspects that are of provincial jurisdiction in Canada. This preference, in our research, for subjects that fall under provincial jurisdiction (such as consumer protection, essentially) is related to the fact that those measures are therefore those likely to be harmonized – as opposed to measures that fall under federal jurisdiction and thus for which no harmonization would be necessary. Lastly, all those directives address an important aspect of consumer protection: better access to justice. Indeed, all the measures provide the adoption of efficient recourses and remedies, such as the right of withdrawal or the injunction, as well as effective, proportionate and deterrent sanctions.

5.1 Directive 93/13/EEC: Unfair Terms

Many think that among member countries of an economic and trading community, disparities in regulations on unfair terms constitute obvious barriers to internal trade, in the following ways:

- *The different benchmarks in member states when reviewing contractual terms.*
- *The different standards in member states when reviewing the transparency of contractual terms and the (not harmonised) consequences of lack of transparency*[126].

Faced with marked disparities between national legislations for unfair terms in consumer contracts, and with consumers' misunderstanding of national measures intended to protect them[127], the EU decided that the best way to protect European consumers adequately was partial harmonization, i.e., only of contractual terms that have not been negotiated between merchant and consumer[128].

[126] **Martin EBERS.** *Consumer Law Compendium – Comparative Analysis: Unfair Contract Terms Directive (93/13)*, 98 pages. See p. 8. [Online] http://www.eu-consumer-law.org/consumerstudy_part2c_en.pdf (document consulted on October 21, 2014).
[127] *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,* whereas clauses 3 to 5. [Online] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0013&from=FR (page consulted on October 1, 2014).
[128] *Directive 93/13/EEC,* whereas clause 12.

The directive, which came into effect on May 11, 1994, gave a new definition of unfair terms, henceforth that of all member states. A term would be considered unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer[129]" while being part of a pre-formulated standard contract (contract of adhesion).

The directive's Annex contains a list of contract terms assumed to be unfair, such as: those excluding or limiting the liability of a seller or supplier, those enabling the latter to terminate a contract unilaterally, and those automatically extending a contract[130].

As mentioned above, the EU maintained in the nineties a highly detailed drafting approach, as illustrated by this directive. Along with a definition and an explicit list, the directive offers criteria for evaluating a clause's unfairness: the nature of goods and services, the moment when the contract is concluded, the circumstances surrounding the conclusion of the contract and of any other provision on which the contract is based. In Europe, an unfair contract term contained in a pre-formulated standard contract (contract of adhesion) will not be binding on the consumer who signed it, although the contract's unrelated provisions remain binding[131].

The Compendium reports that, although some transposition shortcomings have been identified in certain member states, all member states had transposed this directive in their national legal systems by the deadline of December 31, 1994[132]. Among the shortcomings identified, the Compendium points out the cases of the Czech Republic, Latvia, Rumania and the Netherlands, whose laws stated that unfair terms were valid unless the consumer invoked their unfairness. However, this approach contradicts European law, whereby the court can recognize ex officio a term's unfairness.

The lawmakers go further in guaranteeing compliance with this directive's provisions. Article 7 provides that member states must ensure the existence of adequate and effective means for preventing the continued use of unfair terms in consumer contracts. Among those means, the EU allows injunctions, i.e., recognizes that organizations or persons with a legitimate interest in protecting consumers are entitled to take legal action in order to have the unfairness of a contract term declared and thus have its continued use prevented[133].

Transposition in Canada

Would it be possible to adopt in Canada a similar approach to regulating unfair contract terms across the country? In a 2011 report titled *Ending Abusive Clauses in Consumer Contracts*, Union des consommateurs, after observing a near-universal concern with the abuses that can result from consumer contracts, concluded that it would be essential for Canada to take the European Union's path in harmonizing the regulation of abusive clauses (unfair terms)[134].

[129] *Directive 93/13/EEC*, art. 3.
[130] *Directive 93/13/EEC,* Annex.
[131] *Directive 93/13/EEC*, art. 4(1), art. 6.
[132] *Op. Cit., note 126,* **EBERS**, *Consumer Law Compendium.* See pp. 385 and fol.
[133] *Directive 93/13/EEC*, art. 7(2).
[134] **UNION DES CONSOMMATEURS**. *Ending Abusive Clauses in Consumer Contracts*, Union des consommateurs, Montreal, September 2011, 106 pages. See p. 96. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/EndAbusiveClauses.pdf (document consulted on March 30, 2015).

Although the provincial lawmakers continually modernize their consumer protection laws, the regulation of unfair terms, like the rest, is done piecemeal. The common law's absence of specific rules for unfair terms does not mean that such terms cannot be challenged. This can be done, notably, by interpreting in the subscribers' favour any ambiguous pre-formulated standard contracts (contracts of adhesion), or by applying unconscionability rules.

As proof of the disparity of existing measures across Canada, whereas Ontario considers it an unfair practice to make an unfair claim before or during the conclusion of a contracts, but not in the contract itself[135], British Columbia considers that a "deceptive act or practice" is "(a) an oral, written, visual, descriptive or other representation by a supplier, or (b) any conduct by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor[136]." Thus, as opposed to Ontario law, whereby the measure does not pertain to contract terms, British Columbia law pertains both to oral or visual representations and to contract terms.

Leading at times to veritable incongruities, there are many more disparities in approaches to regulating unfair terms.

In Quebec, abusive clauses are specifically regulated in the *Civil Code of Québec,* which declares abusive "a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith" and states that an abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced[137]. However, Quebec's *Consumer Protection Act* (CPA[138]) provides no specific measure applicable to abusive clauses. Section 8, which introduces the concept of lesion in consumer law, allows the consumer to take legal action to demand the nullity of a contract or a reduction in his obligations where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer.

The CPA also prohibits, without qualifying them, certain provisions that other jurisdictions include in their lists of abusive clauses. Given that Canadian laws are not harmonized and that numerous companies from the rest of Canada do business in Quebec and use standard contracts, Quebec has had to accept a strange compromise: the law states that merchants using clauses prohibited in Quebec must have them preceded by an evident and explicit mention indicating that they are not applicable in Quebec[139]. The fact that clauses are deemed unacceptable and are prohibited in some provinces but tolerated in others, and that a legislature must work to establish a way for merchants to include clauses it prohibits them to use, hardly demonstrates an optimum level of consumer protection across the country.

The adoption in Canada of harmonized rules prohibiting abusive clauses (unfair terms), and of a list of prohibited clauses that would be shared by the provinces and territories, would have obvious advantages for consumers and companies alike: a high uniform protection for Canadian

[135] *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sched. A, sec. 15.
[136] *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, sec. 4.
[137] *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1437.
[138] *Consumer Protection Act* (hereinafter CPA), R.S.Q. c. P-40
[139] CPA, sec. 19.1. See also: **COMMITTEE ON CITIZEN RELATIONS**, *Journal des débats*, Vol. 41, No. 10, November 4, 2009, pp. 14-16. [Online] http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/CRC-39-1/journal-debats/CRC-091104.html#Page00014 (page consulted on March 30, 2015).

consumers, and the necessity for industry to adapt only to one set of clearer rules[140]. While Canadian legislative bijuralism (i.e., the coexistence of civil law and common law) may appear to pose an obstacle to harmonizing laws regarding abusive clauses (unfair terms), it is reassuring that Europe, which features this same duality, has succeeded in such harmonization. This type of harmonization work appears perfectly compatible with the mandate of the Consumer Measures Committee (CMC)[141]. In an interview with the CMC Secretariat, conducted as part of this study, the organization mentioned that during the many informal discussions between CMC members, the subject of abusive clauses has been addressed, but without official conclusions being drawn.

5.2 Directive 1999/44/EC: Legal Guarantees

Directive 1999/44/EC, intended to harmonize the legislative, regulatory and administrative provisions of member states on certain aspects of the sale of consumer goods and associated guarantees, came into effect in the European regional block on June 7, 1999[142]. The integration of this directive into national legal systems was not easy: whereas member states have generally met transposition deadlines, some transposition shortcomings have nevertheless been observed[143].

The chosen approach has been to regulate consumer goods' guarantee of conformity[144], which, as we will see, includes a use guarantee. The directive stems from the 1993 Commission Green Paper on guarantees and after-sales services with regard to spare parts[145], which summarized the state of the law in member states. The directive is based on a series of whereas clauses, such as: the consumer plays a fundamental role in the single internal market; the main source of conflict between consumers and sellers is the good's lack of conformity; the good's conformity with contract terms is essential; in the event of default, the consumer must be able to require repair or replacement.

The directive addresses two types of nonconformity: one related to the description made of a good, and the other to the fact that a good cannot be used in the expected or usual or specific way desired by the consumer.

[140] *Op. Cit., note 134.* **UNION DES CONSOMMATEURS**, *Ending Abusive Clauses in Consumer Contracts*. See p. 97.
[141] Our study recommended that the CMC work toward such harmonization. *Ibid*., p. 107.
[142] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,* art. 1. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:EN:PDF (document consulted on October 24, 2014).
[143] For a detailed analysis of each member state's efforts to integrate this directive into their national legal systems, refer to the Comparative Analysis: H. *Consumer Sales Directive (99/44)*, written by Christian Twigg-Flesner, in pages 646 and following of the *Consumer Law Compendium*. [Online] http://www.eu-consumer-law.org/consumerstudy_part2h_en.pdf (document consulted on April 5, 2015).
[144] *Directive 1999/44/EC,* art. 2.
[145] **COMMISSION OF THE EUROPEAN COMMUNITIES**. *1993 Green Paper on guarantees and after-sales services,* website of Europa, Brussels, Belgium, November 15, 1993, 150 pages. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0509:FIN:EN:PDF (document consulted on April 3, 2015).

The directive provides that the seller's liability is automatically engaged if a lack of conformity appears within two years following delivery of the good. The directive fosters better information to the consumer about his rights. The seller must also inform him that his rights are not affected by the additional guarantee he may obtain from the seller. The seller has the obligation to indicate to the consumer, in plain and understandable wording, the guarantee's content and all essential elements for its implementation (duration, scope, etc.).

Among measures to facilitate European the consumer's use of legal guarantees, we find that the consumer is entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price, or to have the contract rescinded. In another implementation innovation, the directive also states that the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts, or any other intermediary[146].

The directive takes a harmonization approach that leaves a certain latitude to member states. For example, the directive allows the latter to exclude from the application of those protections any used goods purchased in public auctions, or to include deadlines for the consumer to disclose the lack of conformity to the seller.

Transposition in Canada

Union des consommateurs studied this directive as part of its 2012 study on legal warranty plans in Canada[147]. Our analysis of Canadian legal warranty (guarantee) plans included a comparative study of foreign plans in effect, notably in Europe, Brazil and the United States. We concluded that Canadian legal warranty plans feature many of the essential aspects of adequate consumer protection, but that for various reasons, consumers were nevertheless not protected adequately[148]. We observed marked divergencies between the warranty plans of provinces, some of them having chosen to adopt legal warranty plans incorporated into statutory laws, while others still relied on the provisions of the *Sale of Goods Act* – a law that we think adapts poorly to the realities of consumer contracts and to the inherent power imbalance between the contracting parties. Some provinces have even adopted specific plans for certain goods (used vehicles, in Quebec, for example). Some provinces have notorious difficulties in applying the legal warranty through the courts, while others have decided to bypass the problem by entitling the consumer in certain circumstances, without court intervention, to refuse a good that does not meet his expectations.

Given the legal warranty's central role in consumer law, given that depending on their place of residence Canadian consumers may not benefit from the same protection measures, and given that merchants would have a greater sense of certainty when doing business with consumers across Canada if the laws were harmonized, Union des consommateurs recommended notably

[146] *Directive 1999/44/EC,* arts. 3, 4, 5 and 6.
[147] **Me Marcel BOUCHER and Me Yannick LABELLE**. *Adequacy of Legal Warranty Plans in Canada*, Union des consommateurs, Montreal, June 2012, 226 pages. [Online] http://uniondesconsommateurs.ca/docu/protec_conso/Garanties-Legales-en.pdf (document consulted on December 2, 2014).
[148] *Ibid*., pp. 146 and 147. Our study identifies problems of imprecision, problems in interpreting terms and concepts, consumer's poor knowledge of protection measures available to them, merchants' poor knowledge of and noncompliance with their own obligations, major difficulties in applying warranties and, generally, a clear disparity between the fully adequate theoretical protection and the reality experienced by consumers.

that "all provincial governments legislate to harmonize consumer protection laws regarding legal warranties [and] that the issue of legal warranties be submitted to the Consumer Measures Committee in order to harmonize provincial legislations[149]."

In our interview with the CMC Secretariat on February 18, 2015, the organization admitted that the issue of harmonizing legislations on legal warranties did not appear to have been addressed in the past.

5.3 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interests

Directive 2009/22/EC[150] was not new law, because it aimed at clarifying the former *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests,* which introduced, for the first time in Community law, a redress or administrative measure allowing consumer associations meeting certain precise criteria, as well as public consumer-protection entities, to take legal action requesting that the courts prevent the continued use of certain practices contrary to European Union rules in effect. Directive 98/27/EC was amended several times. For the sake of clarity, the EU decided in 2009 to codify those amendments in the new directive.

An injunction may be brought against infringements to the directives listed in Annex I of this directive, including directives on consumer credit, travel, package holidays and tours, unfair terms and legal guarantees[151].

As mentioned above, the injunction is a recourse available to certain entities meeting specific criteria, and it allows them to take legal action in order to have an infraction cease or be prohibited, or to have specific actions taken, such as the publication of a court ruling to mitigate an infraction's persistent effects. The injunction can also lead to a merchant being fined for failure to execute a court ruling. Such a measure seems bold: it broadens the principle whereby only a party with current and personal interest may go to court; and it recognizes, in order to establish a high level of consumer protection, that the defence of consumers' collective interest justifies of itself a recognition of sufficient interest.

Accordingly, the directive imposes the inclusion of such a recourse in the national legal systems of all member states. It specifies the injunction's framework and procedures, as well as the rules for recognizing the entities allowed to avail themselves of the recourse[152].

[149] *Ibid*., p. 154.
[150] *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests*. [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:110:0030:0036:EN:PDF (document consulted on March 13, 2015).
[151] *Directive 2009/22/EC,* Annex I.
[152] *Directive 2009/22/EC,* arts. 2, 3 and 4.

In June 2012, the European Commission reported that the former Directive 98/27/EC had been transposed in all member states and had yielded major effects on national lawsuits[153]. Although the Commission notes certain shortcomings in transborder lawsuits, it observes that the lawsuits' rate of success is generally high. The Commission indicates that "the Directive has had direct qualitative benefits for consumers, although it was not necessarily possible to express these benefits in monetary terms. This is due to the fact that, in many cases, it is not possible to establish the exact number of consumers who potentially suffer damage as a result of an illegal practice[154]."

In addition to the difficulties related to transborder recourses in Europe, the European Commission recognizes that the measure is not flawless[155]. Indeed, in 2013 we pointed out that difficulties related to the relative effect of rulings were likely to limit the scope of this type of legal actions considerably[156]. It remains that the usefulness and effectiveness of this type of measures are undeniable.

Transposition in Canada

Canada has nothing comparable to those injunctions. For many years, Union des consommateurs and other Quebec consumer associations have been advocating the establishment of such a measure[157]. We think this measure would likely better protect consumers: injunctions against certain practices avoid harm to consumers from merchants' use of doubtful practices, which also harm the collective interest of consumers. In fact, the European Commission recognizes the usefulness of this tool in protecting consumers' collective interest[158]. The bill that led in 2009 to amendments to Quebec's *Consumer Protection Act* (CPA) included a provision in that vein; unfortunately, last-minute amendments made to that provision before its adoption robbed it of any usefulness[159].

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[153] **EUROPEAN COMMISSION**. *Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest*, website of Europa, Brussels, Belgium, November 6, 2012, 16 pages. See p. 3. [Online] http://ec.europa.eu/consumers/enforcement/docs/report_inj_2012_en.pdf (document consulted on April 5, 2015).

[154] *Ibid*., p. 8.

[155] See the Commission's report to that effect, *Op. Cit., note 153*, **EUROPEAN COMMISSION**, *Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest.*

[156] **Me Yannick LABELLE**. *Proliferation of Redress Procedures*, Union des consommateurs, Montreal, June 2013, 116 pages. See p. 43. [Online] http://uniondesconsommateurs.ca/wp-content/uploads/2013/11/03-Multiplication-recours-rapport-V3-Eng-complet.pdf (document consulted on April 5, 2015)

[157] **Me Geneviève DUCHESNE and Me Yannick LABELLE**. *Les associations de consommateurs et la défense de l'intérêt collectif des consommateurs : réflexions sur l'introduction d'un nouveau recours en droit québécois*, in 'L'accès des consommateurs à la justice," under the direction of Pierre-Claude Lafond, Éditions Yvon Blais, Cowansville, Canada, 2010, pp. 49-67.
See also: **UNION DES CONSOMMATEURS**, *Contribution de l'Union des consommateurs portant sur le droit d'action des associations des consommateurs*, Union des consommateurs, Montreal, March 2008, 29 pages. [Online] http://uniondesconsommateurs.ca/protect/UC_OPC_phase2_080317.pdf (document consulted on April 5, 2015)

[158] *Op. Cit.,* note 153, **EUROPEAN COMMISSION**, *Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest*. See p. 16.

[159] Whereas the proposed provision allowed associations to take legal action against any prohibited practice or against a stipulation prohibited or inapplicable in Quebec, the provision as adopted (CPA, sec. 316) only allows, for all practical purposes, having the court recognize that expressly prohibited provisions are being used notwithstanding.

Although our organization had not previously considered the possibility of adopting and harmonizing such a measure across Canada, in 2013 we advocated measures to broaden the scope of traditional legal principles: "*such a review is possible, with political will. On a few occasions in the past, Quebec lawmakers judged that improving access to justice justified infringements on traditional principles – that of res judicata and of the necessary interest to act, notably. Today, we think the state of consumer access to justice is sufficiently alarming to warrant an immediate reassessment of consumer access to justice measures and a feasibility analysis for broadening such measures in Quebec*[160]*.*"

Accordingly, we think discussions should be held within the CMC on the relevance of adopting such a measure, i.e., the injunction, to better protect Canadian consumers and to improve access to justice for all Canadians in their individual and collective interest.

This failure is all the more unfortunate because by their provision, the lawmakers, demonstrating a welcome openness, still confer to the associations an interest to act in consumers' collective interest.

[160] *Op. Cit*., note 156, **Me Yannick LABELLE**, *Proliferation of Redress Procedures*. See p. 77.

5.4 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

Directive 2011/83/EU on consumer rights[161] aims at harmonizing certain aspects of member states' legislative, regulatory and administrative provisions for contracts concluded between consumers and professionals. The EU emphasizes the necessity of harmonizing certain aspects of distance and off-premises consumer contracts in order to promote a true internal market that offers a fair balance between the high level of consumer protection and the competitiveness of businesses, while observing the principle of subsidiarity[162]. The directive defines the distance contract as follows:

> […] any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded[163].

Directive 2011/83/EU is based on the following six principles:

- *pre-contractual disclosure of information;*
- *opportunity to accept, decline and correct;*
- *copy of the contract;*
- *right of withdrawal or cancellation;*
- *the effects of withdrawal or cancellation;*
- *remedies and recourses*[164]*.*

Based on those six principles, the directive imposes obligations of pre-contractual disclosure, as well as obligations related to the drafting of certain contract terms and to the delivery of the contract. Among other measures of those regulations are other rights or protections conferred to consumers, such as the maximum delivery period, a conditional right of cancellation (rescission) and a right of withdrawal without giving a reason[165].

Demonstrating the weight of European regulations and the importance attached to the objectives of this directive, the latter reaffirms its protective nature by stating that the consumer cannot waive the rights conferred to him[166].

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[161] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [Online] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF (document consulted on March 4, 2015).

[162] *Directive 2011/83/EU,* par. 4 of the whereas clauses.

[163] *Directive 2011/83/EU,* art. 2(7).

[164] See the following study for a complete analysis of the principles of Directive 2011/83/EU: *Op. Cit.*, note 51. **DELAPETA.** *Regulating Distance Contracts: Time to Take Stock*.

[165] *Directive 2011/83/EU,* arts. 6 to 18.

[166] *Directive 2011/83/EU,* art. 25.

Transposition in Canada

In a study published in 2014, Union des consommateurs performed a comparative analysis of Canadian laws governing distance contracts and of European Union Directive 2011/83/EU[167].

The Consumer Measures Committee considered regulations of Internet sales and developed the *Internet Sales Contract Harmonization Template,* ratified in 2001 by Canada's federal, provincial and territorial governments. This became the foundation of provincial laws adopted subsequently by the Canadian provinces.

Our study has identified disparities across Canada in the regulatory approach and in the content of laws on the subject. First, despite the ratification of the *Internet Sales Contract Harmonization Template*, only 8 of the 13 provinces and territories have legislated on the matter[168]: three have decided to regulate only electronic contracts[169], three others have decided to integrate e-commerce rules into the rules applicable to all distance contracts[170] and two others have decided to separately regulate electronic contracts and other types of distance contracts[171]. Our analysis of all the Canadian measures led us to conclude that provincial measures based partly on merchants' disclosure obligations and on related rights of cancellation are likely to improve the level of consumer protection. However, our comparative analysis with Directive 2011/83/EU leads us to think that modernizing and improving Canadian regulations would be desirable. Given that work to update provisions on the matter is underway internationally, the provincial governments should work in concert to modernize and harmonize the regulatory frameworks of consumer protection that are applicable to Internet sales contracts, particularly on issues of pre-contractual disclosure of information, on the presentation of such information, etc.[172]

[167] *Op. Cit*., note 51. **DELAPETA.** *Regulating Distance Contracts: Time to Take Stock*.
[168] *Ibid*., p. 27. The following provinces and territories have not adopted provisions for distance contracts: New Brunswick, Prince Edward island, Yukon, Nunavut and the Northwest Territories.
[169] They are Alberta, Manitoba and Nova Scotia.
[170] This is the case in British Columbia, Quebec, and Newfoundland and Labrador.
[171] Saskatchewan and Ontario separately regulate electronic contracts and other types of distance contracts.
[172] See the recommendations of: *Op. Cit*., note 51. **DELAPETA.** *Regulating Distance Contracts: Time to Take Stock*.

6. Conclusion

Those who advocate the elimination of interprovincial trade barriers argue that the latter entail major costs for the Canadian economy, slow down the expansion of local businesses in the market, and limit consumers' choice of products and services.

As early as the country's foundation, the Canadian Constitution expressed the will to create an internal market free of constraints, to ensure Canada's prosperity.

The *Agreement on Internal Trade* (AIT) was reached in 1995 at the request of associations representing Canadian companies wanting to offer their goods and services across the country and facing barriers, tariff or other, that they claimed slowed down their expansion or generated substantial costs. The Agreement has since been the object of 14 amending protocols.

The AIT was adopted in unfavourable political circumstances and while Canada was signing a series of international agreements to improve external trade. But the harmonization advocated when the AIT was adopted has not met expectations; it has had very few positive effects and benefits for Canadian consumers. Chapter 8 of the AIT provides a list of fields that should be the object of immediate harmonization in view of freeing the internal market from the barriers raised by the diversity of consumer protection measures in those fields. The AIT opened the door to harmonization measures on any consumer protection subject that the Consumer Measures Committee (CMC), established by the AIT, would choose to address. Part of the CMC's mandate is to work first to adopt agreements for harmonizing provincial measures on issues deemed priorities, and afterward to serve as a discussion forum between the various governments in efforts to implement those harmonization agreements.

It is understandable that the principle of "best effort agreements" is preferred by the CMC, where the provinces meet to discuss issues on which they have sovereignty and total discretion. As in all matters, a party that freely commits itself will probably act with more enthusiasm than under coercion. And as opposed to what we find in the EU, no superior level has jurisdiction in Canada to impose harmonization on matters of provincial jurisdiction. The EU's harmonization technique probably explains in part the greater dynamism of European harmonization measures. Unfortunately, in Canada, without the possibility of sanctions, there are no control measures for ensuring that the parties having ratified CMC agreements transpose, correctly, what is prescribed therein.

It seems likely that the EU's dynamism in adopting consumer protection measures is largely motivated by the importance attached to consumer protection, considered an essential condition for the common market's success. In contrast, the AIT, including its Chapter 8, seems intended above all to homogenize the rules in order to facilitate companies' expansion across Canada, while relegating consumer protection to the background. This is far from an approach that would impose the interest of consumers as the priority not only for measures specifically designed to protect consumers, but also for any harmonization measures.

It therefore appears that the AIT's adoption as a primary tool for creating a barrier-free market has not yielded the expected results. Since last year, the Canadian government has seemed willing to set as a priority this idea of a barrier-free internal market. However, various

stakeholders emphasize the absence of quantitative data and reliable research that would enable Canada to create a homogenous market in a deliberate manner. Taking into account the EU's priority principles would enrich the reflection that needs to take place in Canada.

If one cares at all about consumer protection in its various aspects, one may be concerned that an unbridled race to liberalize the markets will be considered a race toward deregulation; and that laws intended to offer consumers certain protections and remedies in the various provincial and territorial jurisdictions will be attacked as being among those internal trade barriers.

Apart from claims that consumers will necessarily benefit from market liberalization, it is difficult to see the place of consumer protection in the AIT'S full revision – with a "new approach" – planned by the current Minister of Industry.

If a new approach is sought for agreements to consolidate an open market, it would probably be useful to consider either the European regional block, where creating a single internal market has met with enviable success; or Australia, which has a political structure similar to Canada's and which has harmonized its consumer protection laws.

6.1 Australia: A Federation with a Single Legal System

Australia has chosen to adopt the *Australian Consumer Law* as part of a government plan to establish a homogeneous national economy. The Australian states and territories thus agreed to adopt national legislation replacing measures they had adopted under their own consumer protection jurisdictions. This approach constitutes a firm commitment to lift internal trade barriers, but also to improve consumer protection measures.

The adoption, regarding consumer protection, of a coercive national law that would have priority in the entire country is difficult to consider in Canada. On one hand, the provinces jealously defend their jurisdictions, including in consumer protection. On the other hand, such a project would probably be illusory in Canada because the cohabitation of common law and civil law would make excessively complex the development and application of such a supranational law. Indeed, the Australian states' *Trade Practices Acts* approximated the Australian *Trade Practices Act* of 1974, so that replacing state and territorial laws has been all the easier.

In addition, such an approach has been implicitly set aside by the AIT, which recognized in its section 804 that "Each Party may, in pursuing a legitimate objective, adopt or maintain measures establishing the level of consumer protection that it considers appropriate."

Nevertheless, it should be kept in mind that among the operational objectives of Australia's harmonization framework – as in the EU with its consumer protection directives – priority is given to consumer information, recourses, and measures against unfair practices, and also to protections meeting the needs of the most vulnerable or disadvantaged.

Those objectives have led Australia to focus on numerous subjects that are among EU priorities, such as unfair contract terms and new provisions for consumer redress procedures.

6.2 Europe: Reconciling Legal Systems with Sociopolitical Values

When the European regional block was created during the fifties, consumer protection was far from the concerns of member states. But the European Community quickly understood that the only way to succeed in creating that single market would be to protect the economic interests of consumers as key players. The Community then set the goals of ensuring a high level of protection to all European consumers and to defend their economic interests.

As early as the seventies, the European Union adopted its first consumer protection policy. It went further in the nineties, with the signing of the *Maastricht Treaty*, by adopting the principle that any European Union policy for harmonizing member states' legislative, regulatory and administrative measures would henceforth ensure a high level of protection to consumers. This principle remains a priority today: a new consumer protection policy, the *"Consumers" Program,* was adopted in 2014 with a budget of €188.8M.

The European approach involves harmonizing and improving consumer information; but the measures advocated by directives include positive rights conferred to consumers as well as strict prohibitions imposed on merchants, and provide the establishment of effective recourses and remedies.

The member states are required to transpose directives in their national legal systems, within the periods set by the directives. The transposition is closely monitored, and the European Commission as well as individuals have recourses in case of transposition failures.

Far from being perfect instruments, the directives we studied do offer consumers elaborate protections and recourses. Those harmonization approaches, not only to make uniform but also to improve consumer protection, could certainly serve as a template for harmonization projects in Canada.

Indeed, the models offered by the directives on unfair terms (1993/13/EC), on legal guarantees (1999/44/EC), on injunctions (2009/22/EC) and on distance contracts (2011/83/EU) could, if followed in Canada, have a positive effect on the level of consumer protection, while providing a proven foundation for harmonizing provincial and territorial laws.

Similarly, certain EU measures – for example, those providing mandatory forms for problematic sectors or types of transactions, or consumer credit measures strictly requiring lending institutions to verify a consumer's ability to pay – demonstrate a boldness that should certainly inspire Canadian lawmakers to find effective solutions to certain recurrent problems.

6.3 Harmonizing Consumer Protection Laws in Canada

Faced with the success of the EU's approach, Canada would be wise to take as a model the EU's various initiatives to harmonize consumer protection. But this implies recognition of consumers' importance in the success of a common market, and the necessity of establishing a balance between consumers and merchants across Canada, even if that means imposing greater obligations on industry and giving consumers the means to have their rights respected and enforced.

The consumer should be recognized as central in all efforts to develop the internal market, and the highest possible level of consumer protection should be ensured as a key principle in all spheres of economic activity.

The Parties that developed and signed the AIT estimated that forming a Committee to harmonize consumer protection laws would likely help eliminate certain trade barriers. We think this initiative retains all its relevance. We think the CMC should receive all necessary support to carry out its mandate with the necessary resources to do so. Given the highly positive results of the transposition of directives in the EU, it may be wise to consider the adoption of similar rules in Canada, to ensure, in the absence of mandatory transposition rules enforced by sanctions, the existence of measures to control the implementation of harmonized rules in provincial legislations. The harmonization principle of ensuring that the highest level of consumer protection becomes the minimum standard in all cases must of course be maintained at all costs.

Before even undertaking to update the *Agreement on Internal Trade*, it is important, in our view, to reflect on the ideal approach for harmonizing measures, while respecting the jurisdictions and choices of each party. Given the essential role of consumers and their crucial importance for creating an effective and durable common market, we remain convinced that a high level of consumer protection should prevail as one of the pillars of any future harmonization reform and policy.

Recommendations

- Whereas internal trade barriers are reported as major irritants by businesses wanting to conduct transborder trade in Canada;
- Whereas among the internal trade barriers are disparities between provincial and territorial consumer protection laws;
- Whereas not all Canadian consumers benefit from the same protection measures across Canada;
- Whereas the *Agreement on Internal Trade* has not yielded the expected results;
- Whereas other regional blocks, notably Europe and to a lesser extent Australia, have taken approaches to harmonize consumer protection laws while ensuring a high level of consumer protection;
- Whereas the success of the European approach rests partly on the choice made to consider the consumer as an economic player who is central to the internal market and whose economic interests must be protected above all, and on the higher importance given to consumer protection in the development of policies;
- Whereas despite the greater complexity presented by the presence of two legal traditions – civil law and common law – the EU has succeeded in developing functional and bold harmonization templates for certain primordial issues of consumer protection;
- Whereas Canada, faced with the same challenge of cohabitating legal traditions, would be well advised to model its initiatives on those harmonization measures;
- Whereas the success of the European approach is partly based on the establishment of monitoring, control and surveillance measures regarding the transposition and observance of harmonized measures, and on the allocation of adequate resources to harmonization initiatives;
- Whereas the two foreign jurisdictions we studied have included, among their priority subjects of harmonization, unfair terms, guarantees and access to justice, notably by means of recourses and rights of legal action;

1. **Union des consommateurs recommends** that consumers be placed at the centre of any process to lower interprovincial trade barriers, and that the protection of consumers and their economic interests be key to any harmonization policy or initiative;

2. **Union des consommateurs recommends** the adoption of a principle that harmonizing the legislative, regulatory and administrative measures of Canadian provinces and territories aim henceforth at ensuring at all times a high level of consumer protection;

3. **Union des consommateurs recommends** that the Canadian government ensure the institutional support and the necessary resources for concluding and implementing agreements to harmonize consumer protection measures;

4. **Union des consommateurs recommends** that the CMC take as a template the EU's relevant directives in view of harmonizing Canadian laws on priority issues of consumer protection, particularly guarantees, unfair terms and access to justice;

5. **Union des consommateurs recommends** that coming work on the AIT focus on developing and establishing monitoring, control and surveillance measures regarding the transposition and observance of harmonized measures;

6. **Union des consommateurs recommends** that the provincial governments work in concert to update the template for harmonizing consumer protection measures applicable to Internet contracts.

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ANNEX 1: List of European Directives[173]

1) *Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.*

2) *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.*

3) *Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.*

4) *Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.*

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11) *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.*

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