

November 4, 2005

**BY EMAIL AND FACSIMILE**

Hassan Qaqaya  
Chief, Advisory Services and Capacity Building Section  
Competition Law and Consumer Policy Branch  
UNCTAD

Dear Mr. Qaqaya:

The staff of the Federal Trade Commission (FTC) appreciates the opportunity to provide the United Nations Conference on Trade and Development (UNCTAD) with comments on the draft *Manual on Consumer Protection*. The Manual contains a great deal of material, and will be a useful resource for countries developing their consumer protection frameworks, as well as countries that already have a framework in place. We commend you for undertaking this formidable project.

These comments reflect the views of FTC staff, and not necessarily the views of the Federal Trade Commission, any individual Commissioner, or the United States government. Please note that these comments are not exhaustive. Given the timing and length of the document, we make more global points for you to reflect upon when revising the document. There may be additional items in the Manual on which we believe revisions may be warranted that are not discussed in this document.

As a general comment, in some areas, the manual takes a very prescriptive approach, when in fact an approach that offers multiple options may be more advisable. Given the vast differences in consumer protection frameworks around the world, a “one size fits all” approach may not be appropriate. For example, the Chapter on Consumer Credit (Chapter 12) states that “[t]he regulation of consumer credit should be assigned to a single agency that can enforce the law.” In the United States, which has a complex credit system, multiple state and federal government agencies regulate different types of creditors, for example, banks, credit unions, and finance companies. Because these regulatory agencies have expertise in their industries’ operation, and in some instances conduct routine financial soundness inspections, they are ideally suited to enforcement of consumer protection laws and regulations. Multiple formal and informal mechanisms exist to ensure coordination. This may be the case in other countries; therefore, a prescriptive recommendation of a single regulator may not be the best approach.

In addition to this general comment, we provide specific substantive comments in two main areas: the underlying rationale for consumer protection and consumer redress.

1. Rationale for Consumer Protection.

The first part of the Manual includes some discussion of the rationale behind the development of a consumer protection framework. In this opening section, it would be important to highlight the need for consumer protection policy to be informed by competition law principles.

A vigorous, competitive marketplace benefits consumers. Competition among sellers and providers will lead to greater availability of products with the qualities desired by consumers at the lowest prices. At a fundamental level, the opportunity for consumers to choose among sellers and providers is one of the most important protections consumers have in a market economy.

Competition principles remind us that some consumer protection measures - even those motivated by the best of intentions - can create barriers to entry that limit the freedom of sellers to provide what consumers demand. For example, a few years ago, the FTC participated in a court challenge to a state law that banned anyone other than licensed funeral directors from selling caskets to members of the public over the Internet. In an amicus brief, the FTC noted that there was no evidence that “licensing” of funeral directors furthered any consumer protection purpose; rather, it insulated funeral directors from competition, thus decreasing choice for consumers and undermining the very consumer protection benefits the law was supposed to further. There are many similar examples, including restrictions on truthful advertising of prices or professional services.

In addition to including more material up front about how competition contributes to consumer protection, some other parts of the document could benefit from a more competition-based analysis. For example, in the E-commerce Chapter, the following statement appears:

*[i]t is important that consumers should have the right to return goods within a specified time frame and that all sites should have a clear policy on returning goods.*

In the United States, companies are permitted to sell products on a non-returnable basis. Our view is that mandating particular terms of sale could increase costs for businesses or deter their entry into the marketplace. Small businesses in particular may not be able to afford to implement this provision, which may lead them to decide not to sell their products over the Internet. This could in turn increase prices for consumers and decrease consumer choice. Indeed, we believe consumers should be given a choice to buy a cheaper, non-refundable product or a more expensive, refundable one. Because of competition, in practice, this has resulted in an Internet marketplace in which most sellers have policies of accepting returns.

Similarly, in the area of Advertising (Chapter 9), the Manual suggests mandating specific advertising requirements. For example, the Manual states that advertising should “not play[] on consumers’ fears or emotions to promote products.” We believe that governments should be very cautious in placing restrictions on truthful advertising. If the government allows truthful and non-misleading claims to be made, consumers will

receive the information they need to make better informed purchasing decisions, and companies will have an incentive to include features in their products that consumers want. But if the government imposes undue restrictions on truthful and non-misleading claims, these benefits will decrease. For example, if companies marketing burglar alarms can advertise how their products can make consumers feel safer, such companies have a greater incentive to include safety-enhancing features in their products. Similarly, vigorous competition over the relative safety of motor vehicles is desirable. An outright prohibition on advertising that preys on consumer fears could thus be detrimental to consumers. Rather than recommending prohibitions on truthful advertising, a more advisable approach might be to focus the advertising sections of the Manual on the importance of governments' enforcing laws against deceptive and misleading advertising.<sup>1</sup>

## 2. Consumer Redress.

The Chapter on Consumer Redress discusses some of the mechanisms through which consumers are able to seek redress. We believe that this Chapter should include a more extensive discussion about government-facilitated redress. In the United States, the Federal Trade Commission (FTC) uses its law enforcement authority to obtain monetary redress for consumers. Redress is obtained on behalf of consumers in a variety of cases, including fraud cases, false and misleading health claims, and bogus business opportunities. With the help of third-party contractors and, in some cases, responsible defendants, the FTC distributes millions of dollars in redress funds to wronged consumers, both domestic and foreign. Indeed, from September 30, 2001 through June 30, 2005, the FTC has distributed more than \$7.3 million to approximately 100,000 consumers in approximately 107 foreign countries.

Governmental redress authority is a critical part of an effective redress system for consumers who have been defrauded. While injunctive relief is critical to protecting the public from future harm, redress remedies the injury already inflicted and deprives a defendant of his or her ill-gotten gains. Critically important, redress can help rebuild consumer confidence. Consumers who have been defrauded, or who hear of others who have been, lose faith in the economic system. By returning at least a portion of their out-of-pocket losses, consumers are shown that society is determined not to allow fraudsters to get away with their deceptions. The ability of governments to obtain redress for victims of cross-border fraud is becoming increasingly important to maintain and increase consumer trust in the global marketplace.

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<sup>1</sup> For a more extensive discussion of the principles contained in this section, see Deborah Platt Majoras, Comment on Proposed Consumer Trading and Standards Authority, available at <http://www.ftc.gov/bc/international/docs/majorasresponsedti.pdf>; Timothy J. Muris, Remarks at the Fordham Annual Conference on International Antitrust Law and Policy (October 24, 2003), available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

While different jurisdictions have different consumer protection systems and legal tools, national consumer protection agencies have a unique role to play in obtaining compensation for consumers who have been the victims of fraud. As a government law enforcer, a national consumer protection agency typically has the incentive, resources, and expertise to bring complex lawsuits against fraud operators who have harmed large numbers of consumers, particularly in the cross-border context. By contrast, individual consumers may not have an incentive to attempt to seek redress for themselves if their amount of loss due to fraud is small. Small monetary losses experienced by thousands of consumers, however, can be redressed through government enforcement.

We hope that these comments are helpful. Please feel free to call Yael Weinman at 202 326-3748 if you would like to discuss these comments further.

Sincerely,

Maneesha Mithal  
Acting Associate Director for  
International Consumer Protection

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