

Consumer Protection in the



Global Electronic Marketplace

Looking Ahead

Bureau of Consumer Protection
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TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
BACKGROUND	1
FTC Workshop	1
OECD Guidelines for Consumer Protection in Electronic Commerce	3
LOOKING AHEAD	4
Work Towards Developing a Viable International Framework for Applicable Law and Jurisdiction	4
Challenges Posed by the Current Legal Approach	4
Concerns Raised by the Proposed Country-of-Origin/Prescribed-by-Seller Approach	7
Problems with the Deference Approach	10
Encourage the Development of Alternative Dispute Resolution	11
Pursue Partial Convergence of National and International Consumer Protection Laws	12
Encourage Initiatives to Better Inform Consumers and Prevent Disputes	14
Facilitate Cross-Border Judgment Recognition and Enforcement	14
Foster Law Enforcement Cooperation	15
Develop Compatible, Hybrid Approaches	15
CONCLUSION	16
ENDNOTES	17
APPENDIX A: Summary of June 8-9, 1999 FTC Public Workshop, “Consumer Protection in the Global Electronic Marketplace”	
APPENDIX B: OECD Guidelines for Consumer Protection in the Context of Electronic Commerce	

EXECUTIVE SUMMARY

The electronic marketplace continues to grow dramatically. For the first time, consumers can shop around the clock from merchants around the world. Likewise, businesses can reach customers worldwide quickly and at low cost. But the global nature of the marketplace poses challenges: Consumers face concerns about the availability of legal protections and avenues for redress. Businesses face concerns about the costs and unpredictability of the regulatory environment.

Cross-border e-commerce is still in its infancy. But we need to look ahead. Dealing appropriately with these concerns today will ensure that the pro-consumer benefits inherent in a global marketplace are realized fully.

Federal Trade Commission (FTC) staff has worked with consumer groups, businesses, academics, and government agencies for the past two years to explore how to work together to develop a global electronic marketplace offering safety for consumers and predictability for business. In June 1999, the FTC held a public international workshop to consider a broad spectrum of views on proposed guidelines on consumer protection in e-commerce. The guidelines, adopted in December 1999, represent the views of the 29 countries of the Organisation for Economic Co-Operation and Development (OECD) and offer a framework for governments building online consumer protections, for the private sector developing self-regulatory regimes, and for consumers shopping online.

As the OECD guidelines are implemented, the challenge is to develop an international system that protects online consumers and is fair and predictable for online businesses. Although there are no easy solutions, we believe consumers, industry, and government working together can make progress toward a shared goal. Informed by the FTC's 1999 public workshop, the OECD guidelines, and the related public dialogue on these issues, the FTC's Bureau of Consumer Protection offers the following recommendations in moving toward this goal:



Develop a workable framework for jurisdiction and applicable law without moving to adopt a country-of-origin or prescribed-by-seller approach.

Developing a workable framework for jurisdiction and applicable law is only one part of ensuring consumer protection on a global scale. Marketplace competition, alternative dispute resolution, partial legal convergence, private sector initiatives, and cross-border cooperation are also key to developing a safe global electronic marketplace. However, jurisdiction and applicable law are complicated and likely will affect related issues. Accordingly, this subject warrants thoughtful consideration and is given special emphasis in this report.

Some favor the current “country-of-destination” jurisdictional systems, which generally allow consumers to rely on core protections available in their countries. Others support a “country-of-origin” or “prescribed-by-seller” rule, which would subject companies only to the laws, courts, and law enforcers in their own country or as prescribed in the contract, respectively.

The country-of-origin/prescribed-by-seller rule addresses key concerns of businesses, most notably the need for a predictable regulatory environment and reduced compliance costs. In e-commerce, businesses do not always know the location of customers or the geographic areas they are reaching; the country-of-origin rule would clarify and limit the laws and courts that govern their online sales.

At the same time, the country-of-origin/prescribed-by-seller regime raises serious concerns from the consumer perspective. It risks undermining consumer confidence in e-commerce by: (1) encouraging a “race to the bottom,” which would reduce consumer protections on a global scale; (2) frustrating the ability of law enforcement to protect its citizens; (3) impeding informed decision-making by consumers; (4) putting U.S. companies at a competitive disadvantage; and (5) depriving consumers of meaningful access to judicial recourse.

There are no easy answers to the range of legal challenges raised by determining applicable law and jurisdiction. Nonetheless, developing an international framework for these issues that both protects consumers and is fair and predictable for business is key to the long term growth of e-commerce. This report does not purport to define that framework. Rather it seeks to outline key policy considerations to be contemplated in reaching any solution.



Encourage the development of alternative dispute resolution.

Alternative dispute resolution (ADR) will play a key role in international consumer protection and must be promoted. International private litigation over small-value Internet transactions generally does not make practical or economic sense. ADR can be a practical way to provide consumers with fast, inexpensive, and effective remedies, and can reduce businesses’ exposure to foreign litigation.



Pursue partial convergence of national and international consumer protection laws.

Common core consumer protections should be identified and partial convergence of laws should be pursued. Achieving complete uniformity of consumer protection law across borders is not feasible in the short term. It would not be desirable in any event,

to the extent it erodes protections to the level of the least common denominator. But pursuing *partial* convergence – common legal requirements in appropriate areas – could substantially reduce compliance burdens for business, and clarify the rules for consumers as well. Governments can begin by defining areas where overlap already exists; aligning technical compliance requirements for similar laws; agreeing on common protections, such as those against fraud and deception, that could be enforced across borders; and developing uniform protections for specific sectors and types of transactions, like cross-border contracts for the sale of products.



Encourage continued development of private sector programs that better inform consumers and prevent disputes.

Other private sector initiatives that have begun to address consumer concerns, like certification programs, rating systems, codes of conduct, and escrow and insurance programs, must be encouraged. Programs that help consumers make informed choices and prevent disputes are key to the continued growth of e-commerce.



Encourage the development of arrangements for cross-border judgment recognition and enforcement for both private and public actions.

Judgments obtained by consumers and consumer protection agencies against foreign companies must be enforceable and effective across borders. These ends can be achieved through international agreements on judgment recognition and enforcement.



Develop effective ways for consumer protection agencies worldwide to share information and cooperate.

Effective enforcement of consumer protection laws in the international online environment depends on extensive and systematic information sharing and coordinated action across borders. No government can do it alone.

BACKGROUND

The global e-marketplace raises new and complex consumer protection issues. Until recently, consumer protection in most countries has been largely a domestic concern: U.S. consumers, for example, traditionally have done business with U.S. firms, relied on familiar protections, and sought relief in nearby courts. U.S. companies, which may have faced numerous hurdles in retailing directly to consumers in foreign markets, generally have directed sales mostly to U.S. consumers and dealt mostly with U.S. marketing laws. And U.S. consumer protection agencies at the state and federal level have focused their efforts on U.S. fraudsters that target U.S. consumers.

With global online commerce promising to grow at a stunning rate, the world of consumer protection is changing. Just as television, mail order sales, and telemarketing transformed a once local market into a national one, the Internet has created a global marketplace. Consumers can learn about and buy goods and services anytime, from almost anywhere, without leaving home. And businesses have immediate and inexpensive global advertising reach, making possible a worldwide customer base. This new marketplace challenges national consumer protection regimes and creates the need for a framework that provides consumers with effective protection and businesses with a predictable legal environment. Without the confidence of consumers and business, the marketplace will fall far short of its full potential.¹

FTC Workshop

In June 1999, the FTC facilitated a dialogue on how government, industry, and consumer groups together can address this important challenge with a workshop on “U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace.”² Appendix A summarizes the workshop testimony and the 69 public comments received.³

The Workshop brought together industry members, consumer advocates, academics, and domestic and foreign government officials, who grappled with many difficult questions: What information disclosures do online consumers need to make informed decisions? What are fair business practices online? What are appropriate roles for government and the private sector in securing effective consumer protection? For cross-border business-to-consumer transactions, which countries’ laws should apply, and which countries’ courts should hear disputes? How can stakeholders best work together internationally to protect consumers?

Although workshop participants agreed that online consumers should be afforded effective protection that is not less than the protection afforded to offline consumers, they identified three special concerns of online consumers: the anonymity of sellers who may be difficult to trace; consumers’ inability to examine products or labels; and

obstacles to resolving disputes. Accordingly, participants recognized a heightened need for disclosures about online businesses, the goods and services they offer, and the terms and conditions of transactions. They also identified the need for order confirmation mechanisms, to ensure that consumers clicking through a Web site are not held to the terms of an online contract they never intended to make. Consumer advocates also pushed for cancellation rights, protections related to merchandise delivery, and appropriate allocation of the risk of loss in connection with authentication technology.⁴

The Workshop highlighted innovative private sector initiatives to address consumer concerns, including certification programs, public rating systems, industry codes of conduct, and escrow and insurance programs. While participants disagreed about whether industry efforts alone would be enough to address such concerns, they saw value in business practices that foster informed decision-making and consumer confidence in e-commerce.⁵

Establishing a workable framework for applicable law and jurisdiction appears to be the most vexing problem. Some participants argued for a country-of-origin framework, which would subject companies only to the laws and courts of their own country, regardless of the location of their customers. Advocates of this approach promoted it as the best way to address business concerns about the difficulty of applying the current legal system to e-commerce, an unpredictable regulatory environment, and compliance costs that could impede market entry by small- and medium-sized enterprises.

Others favored a country-of-destination approach, under which consumers would be protected by their own laws, law enforcers, and courts. Proponents argued that this approach would ensure that consumers had effective protection and access to redress.⁶

The participants agreed that some form of alternative dispute resolution might provide a practical solution that can be achieved in the short term. Even if consumers could sue foreign businesses in the consumers' home courts applying local laws, they suggested, litigation over small-value Internet transactions generally makes no practical or economic sense. Even if a consumer obtained a judgment at home, it would be difficult, if not impossible, to have it enforced abroad.⁷

Workshop participants also saw a need for enhanced international cooperation. They generally agreed that stakeholders should pursue efforts toward convergence of substantive consumer protection laws; strive for cooperation and information sharing among consumer protection law enforcement agencies; and work toward arrangements for recognizing and enforcing judgments in cross-border consumer cases.⁸

OECD Guidelines for Consumer Protection in Electronic Commerce

Staff of the FTC and Department of Commerce relied on the Workshop's record to help develop voluntary international guidelines for consumer protection in e-commerce. The OECD issued the Guidelines in December 1999. They reflect consensus among 29 countries on a blueprint for governments building online consumer protections, private sector organizations developing self-regulatory schemes, and consumers shopping online.⁹

The Guidelines address many of the concerns raised at the Workshop. Indeed, the overarching principle in the Guidelines echoes a theme repeated throughout the Workshop – that consumers should be afforded effective and transparent protection in e-commerce that is no less than the protection afforded in other forms of commerce.

The Guidelines also are consistent with specific Workshop recommendations on business practices, dispute resolution, and global cooperation. They describe basic fair business, advertising and marketing practices, such as avoiding deception and having substantiation for advertising claims. They identify what disclosures suffice to allow consumers to make informed choices, including clear and accurate disclosures about the businesses themselves, their goods and services, and their terms and conditions of sale. They also call for secure payment mechanisms and clear processes to confirm transactions. The Guidelines do not dictate whether these protections should be implemented by law or through private sector initiatives. Rather, they recognize that effective consumer protection in the e-marketplace will require a combination of education, law enforcement, and private sector initiatives.

In addition, the Guidelines acknowledge the new issues raised by the international nature of the emerging marketplace. They call for international law enforcement cooperation, cross-border judgment recognition, and consumer education on laws in different countries. In the short term, they call for developing alternative dispute resolution mechanisms that provide consumers meaningful access to redress without undue cost or burden. Finally, they acknowledge the importance and complexity of applicable law and jurisdiction, but offer no definitive resolution of these issues.

LOOKING AHEAD

The challenge is to ensure that consumers have an effective level of protection and meaningful access to dispute resolution and that businesses have a regulatory environment that is predictable and not unduly burdensome. Movement on several fronts is necessary. Looking ahead toward meeting this challenge, the FTC's Bureau of Consumer Protection makes the following policy recommendations:



Work Towards Developing a Viable International Framework for Applicable Law and Jurisdiction

The legal challenges raised by determining applicable law and jurisdiction have no simple solutions. Various countries and regions have various frameworks for handling these issues. Developing an international framework that protects consumers and is fair and predictable for business is key to supporting the long-term growth of e-commerce. Although a workable framework for applicable law and jurisdiction is only part of the global solution, it warrants careful consideration. The existing law on international transactions and arguments pro and con are summarized in Appendix A. This report expresses the views of the Bureau and cautions against moving to a country-of-origin approach, notwithstanding the problems posed by current systems which incorporate a country-of-destination approach for consumer protection.

Challenges Posed by the Current Legal Approach

As the OECD Guidelines and the Workshop participants have acknowledged, e-commerce poses challenges to the current jurisdictional framework. The current framework in many instances provides for country-of-destination rules, which permit consumers to rely on core substantive protections afforded at home and to have access to courts where they live.¹⁰ There are two fundamental challenges to this framework: (a) the use of physical borders to determine rights in a borderless medium; and (b) the costs of compliance.¹¹

Applying Traditional Legal Concepts in a Borderless Medium

Any framework that applies the laws of nation-states defined by physical borders poses some problems in a borderless medium. One argument offered for a country-of-origin regime is that the current jurisdiction framework artificially and unnecessarily grafts the geographic boundaries of the offline world onto a borderless one. But even on the Internet, borders exist for both companies and consumers. With very limited exceptions, merchants selling goods online still have to incorporate in, order goods from, store goods in, and ship goods to a physical space located within a national border.

Moreover, a country-of-origin scheme is no less defined by physical world borders than is the rule of destination; it simply applies a different formula for selecting which borders are relevant.

One difficulty posed by the borderless medium is the inability in certain instances for a company to know where its customers are. If a company is to be subject to a country's laws and courts, the company should be directing its business to or knowing that it is doing business with people in that country. It is necessary to distinguish between the marketing phase (before a contract has been entered into) and the transaction phase of business-to-consumer dealings.

Transaction Phase: Where there is an actual business-to-consumer transaction, identifying consumer locations is a challenge, but not an insurmountable one. Businesses can face difficulties in identifying consumer locations for both tangible and electronic products. Sales of tangible goods are less of a problem, because ultimately, they are delivered to an identifiable physical location. But there are complications: offline delivery is made to someone other than the buyer (a U.S. consumer buys a gift for a friend in France), or a customer accesses a merchant's Web site while away from home (from an Internet café or a cellular phone). Such scenarios are not unique to the online world (a French consumer calls a mail order house from a pay phone to order a gift for a friend in New Jersey). More challenging are transactions where goods or services (like information and software) are delivered electronically, that is, not to a physical location.

A look at private sector uses of high- and low-tech means to determine consumer location suggests that these concerns do not warrant revamping the current jurisdictional framework. In many instances, businesses simply can ask the customer where they are located; rules could be developed to give companies some comfort in relying on the information a consumer provides. Indeed, businesses have incentives to know where their customers are and where their products are going: It helps to ascertain marketing preferences, to do follow-up sales and service, and to ensure payment. In addition, technology is evolving that can automatically convey to the seller all necessary information about customers.¹² Finally, consumers face similar difficulties in determining where an online company is located, because the consumers may have to rely on what the company itself discloses about its location and because companies, as artificial legal entities, may exist in many places and in no place at all.

Marketing Phase: The pre-transaction phase poses more difficulties for merchants. The challenge is determining when a merchant is directing its marketing to, or "targeting," a given jurisdiction. Targeting is relevant in the U.S. to establish specific personal jurisdiction, which allows a court to enter a judgment against a nonresident defendant.¹³ In the European Union, it is necessary to establish whether an online company has made a specific invitation to a foreign consumer, because this is a

determining factor for applicable law and jurisdiction.¹⁴ In many cases, making this determination is not difficult: online companies often seek out customers in a particular country, by advertising their Internet addresses in offline media targeted to a given country (through mail order catalogues, magazines, billboards, television, etc.); registering their sites with search engines geared to people in a given country; tailoring the content of their sites to people in a given country (“special discount for U.S. consumers”); and indicating the countries where they do business.

At the same time, the fact that a consumer anywhere can access a Web site makes it difficult to determine where an online company is seeking to market its goods or services. If a country-of-destination approach were stretched to its extreme, online companies simply posting a Web site could be subject to courts and conflicting laws around the world, regardless of where they intended to do business. This approach would be profoundly unfair and unpredictable for businesses. *Thus, a critical first step for legislators and policy makers should be to define when the content of a Web site by itself can subject a merchant to a country’s courts and laws, especially those laws prescribing marketing rules with certain disclosure and advertising requirements.*

In addition to distinguishing the marketing phase from the transaction phase, it is important to distinguish legitimate practices from those that are fraudulent and deceptive. Even in the marketing context, there is little legitimate interest in reducing compliance burdens for companies making fraudulent or deceptive claims on their Web sites. These companies should be subject to prohibitions on these practices regardless of where they are located.

The framework for both jurisdiction and applicable law should provide guidance to businesses about their liability exposure in both the marketing and transactional phases, so they can clearly predict when their practices could subject them to the application of foreign laws or jurisdiction by foreign courts. It also should ensure that this liability exposure is not disproportionate to the business’ connection to the relevant forum’s laws and courts. For example, companies should not be subject to foreign courts or foreign laws for pre-transactional, non-deceptive online practices (such as non-deceptive, non-interactive advertisements) that could not reasonably have been expected to affect the citizens of that jurisdiction.

Compliance Costs

Subjecting companies to the laws and courts of the jurisdictions where they do business imposes compliance costs. The more jurisdictions and laws the company must contend with, the higher its compliance costs. Dealing with such costs is not new for companies doing international – or even interstate – business. The Internet may offset these costs to some degree by making marketing to consumers worldwide cheaper and easier.

While government needs to be cognizant of compliance costs, concerns about such costs can be overcome, assuming the system is predictable and fundamentally fair. In the domestic context, companies that want to do business nationally have successfully sorted out and complied with 50 different state consumer protection laws, and may be sued in any one of the 50 states. Even internationally, in the offline world, multinational businesses have a long history of complying with international legal regimes and defending lawsuits around the world to take advantage of an international customer base. Trade associations and other organizations have been available for years to help businesses reduce compliance costs.¹⁵

In addition, the Internet facilitates compliance with different laws by making it easy to access information about different countries' consumer protection laws. In the past year, for example, more online companies have posted different Web sites tailored to consumers in different jurisdictions. Similarly, a growing number of entities are offering international compliance services for online companies.¹⁶ The cost of such services is likely to decrease. Governments should play a leading role in educating businesses about their laws and law enforcement policies.¹⁷

Compliance burdens also can be reduced by increasing convergence of consumer protection laws and by making available alternative dispute resolution mechanisms that are convenient to both parties.

Concerns Raised by the Proposed Country-of-Origin/ Prescribed-by-Seller Approach

Shifting to a pure country-of-origin approach to address challenges inherent in the current system risks undermining consumer protection, and ultimately consumer confidence in e-commerce. The same would be true under a "prescribed-by-seller" approach to the extent it would allow contractual choice-of-law and choice-of-forum provisions dictated by the seller to override the core protections afforded to consumers in their home country or their right to sue in a local court.¹⁸

Race to the Bottom

Workshop participants noted that a pure country-of-origin or prescribed-by-seller framework would create incentives for business to operate from – or have transactions be governed by the laws of – jurisdictions with lax consumer protections. Even legitimate companies have incentives to minimize compliance burdens, although competitive pressures and concern about reputation may mitigate this effect. This framework could encourage the worst in industry to evade compliance with consumer protection laws altogether.¹⁹

The result – a “race to the bottom” – would hurt consumers around the world. For example, for U.S. consumers, it would erase protections not widely available elsewhere, including requirements for the disclosure of key information about loans, requirements for the pre-transactional disclosure of warranty information, protections regarding the delivery of goods, and protection of children’s online privacy.

Ineffectiveness of Law Enforcement

If a country-of-origin/prescribed-by-seller regime applied also to public consumer protection law enforcement, as some advocates propose, companies would be subject only to law enforcement authorities where the companies are located (or in the jurisdiction designated in the contract), regardless of where their customers are. Governments – both national and provincial – would be expected to refrain from protecting their own citizens from foreign wrongdoers, passing off this responsibility to foreign governments, even where local consumers were victimized by deceptive marketing or shipping of dangerous products from abroad.

Unscrupulous business operators could easily exploit such a system. They could establish themselves in (or select by contract) jurisdictions with a lax or non-existent consumer protection environment, evading law enforcement altogether. They could also operate in (or select by contract) jurisdictions enforcing consumer protection laws, but target only foreign consumers, knowing that local authorities would be hard-pressed to devote scarce resources to protecting foreign consumers at the expense of protecting domestic ones.

The FTC has seen this situation for 10 years, with fraudulent telemarketers setting up boiler rooms in Canada and targeting only U.S. consumers.²⁰ This trend has posed an enforcement challenge, even though Canadian and U.S. law enforcers are determined to cooperate, share information, and take action.²¹

Even if a foreign government agency had the necessary incentives and resources to act, it is not always aware of consumer injury occurring in other countries. In addition, without some novel enforceable international arrangement in place, the consumers’ government would have little recourse if the business’ government did not effectively enforce its own consumer protection laws against wrongdoers.²²

It is worth noting, though, that simply allowing governments to assert jurisdiction over foreign entities to protect their citizens is not itself sufficient. Actions to halt activities originating abroad are likely to be more effective when those practices violate domestic law and domestic authorities are willing to cooperate. Indeed, as discussed in more detail below, increasing cross-border law enforcement cooperation and increasing convergence of consumer protection laws are key elements to solving this puzzle.

Although the current system needs to be improved, moving to a pure country-of-origin/prescribed-by-seller approach for public consumer protection laws likely would have corrosive effects on consumer confidence in the global marketplace. It likely would prevent government agencies in participating countries from effectively protecting their citizens from foreign perpetrators of fraud and deception.

Uninformed Decision Making

Market economies work best when consumers can make informed purchasing decisions. Therefore, if consumer protections for cross-border Internet transactions were weakened in exchange for legal and/or practical benefits – the case under a country-of-origin/prescribed-by-seller framework – it would be imperative that consumers *knowingly* choose to give up certain protections. This is particularly true in an international context, where choice-of-law and choice-of-forum clauses could have profound effects on consumer rights.

A knowing choice would require that a consumer know at least which country's laws and courts would govern the transaction. A country-of-origin approach would require a disclosure of where the company was located. A prescribed-by-seller approach would require clear disclosure of the applicable law and jurisdiction as selected by the seller.

Moreover, simply knowing which laws and jurisdictions govern the transaction does not enable consumers to make a knowing choice. The more difficult issue is ensuring that consumers understand how the governing law or forum would affect their rights. While the Internet makes it easier to access information about the laws of various countries, the issues are not often easily understood by consumers. Consumers would need to understand how the substantive protection of the company's chosen jurisdiction differed from those conferred at home and whether the procedural rights would enable them to invoke those core protections. Though businesses have legitimate concerns about the burden of determining what consumer protection laws apply in any given jurisdiction, individual consumers would have a comparatively more significant burden under country-of-origin rules.

Competition Concerns

Under a country-of-origin approach, U.S. business could be at a competitive disadvantage. In many instances, foreign companies doing business with U.S. consumers would have to comply with their own countries' legal standards, many of which are less onerous than U.S. standards. That would put U.S. companies at a competitive disadvantage when dealing with U.S. customers. For example, U.S. car dealers and manufacturers offering car leases to consumers over the Internet would have to comply with the disclosure requirements in the Truth in Lending Act. Non-U.S.

companies, on the other hand, could disclose much less information, causing their deals to appear better to potential customers.

A pure country-of-origin regime could also splinter the integrally linked areas of consumer protection and antitrust. In the United States, as in many other market-oriented countries, consumer protection and antitrust laws are enforced in tandem. A market-oriented approach seeks to ensure the proper functioning of the marketplace by enforcing laws promoting competition (antitrust) and laws promoting free and informed consumer choice (consumer protection). Coordinating the two areas ensures that consumer protection provisions do not have unintended competitive effects, and competition provisions promote consumer welfare. They cannot, however, be coordinated as well if the "marketplace" for competition purposes is the country where products are purchased, while the "marketplace" for consumer protection purposes is the country where the products originate.

Access to Courts

Requiring consumers to travel to a foreign and often times remote forum to seek redress in an unfamiliar legal system – either through a country-of-origin approach for jurisdiction, or by allowing companies to impose an exclusive forum by contract – would in many cases effectively deny consumers access to judicial redress. For example, a U.S. consumer who buys but does not receive \$500 worth of pottery from an Italian Web site is unlikely to buy a \$700 plane ticket to travel to Italy to pursue relief through a foreign judicial system.

One argument used to support the country-of-origin approach is that country-of-destination also fails to ensure consumers meaningful judicial recourse for most cross-border transactions. Even if consumers can sue in their home courts, it often is impossible for them to get their judgments recognized abroad. Under any system, it is important to make judgment recognition easier to ensure that judicial redress is meaningful. At the same time, further development of private law remedies such as alternative dispute resolution can offer companies and consumers a practical and convenient mechanism to resolve cross-border disputes. The importance of judgment recognition and alternative dispute resolution are discussed in more detail below.

Problems with the Deference Approach

A variation on the country-of-origin/prescribed-by-seller approach involves deferring to the laws (and perhaps the law enforcement agencies) selected by the business, as long as they provide an adequate overall level of protection.²³ This approach is referred to as the "deference" approach. The approach raises troubling substantive and logistical concerns. While it seeks to address the "race to the bottom" problem, it does not

address other country-of-origin concerns outlined above, namely the negative impact on consumer protection law enforcement, informed consumer choice, and competition.

The deference approach also appears difficult, if not impossible, to implement. It would require reaching international agreement on benchmark “deference” standards, and thus would not circumvent the extensive and time-consuming process necessary to reach any sort of international agreement. If agreement could be reached, either a court or a government agency would then have to determine which countries’ laws satisfied the standards.

This determination would pose several problems. First, both national and local laws in each country would have to be analyzed to determine whether they are adequate. Within a single country, some, but not all, might be adequate. Second, it would be necessary to assess the effectiveness of consumers’ procedural rights and whether consumer protection laws were actually enforced adequately. Third, it would require an ongoing evaluation to account for changes to a country’s laws or policies. Fourth, it would require a determination as to whether a country should be excluded altogether from deference even where its laws were unsatisfactory only for certain types of transactions. Finally, these sweeping analyses would be extremely burdensome for governments, and the task would be virtually impossible for courts, especially small claims courts resolving small-dollar disputes.

In conclusion, as the electronic marketplace evolves, competition among Web site operators, further development of alternative dispute resolution, technological innovation, and effective private sector initiatives may help mitigate concerns about these approaches. However, such concerns – involving inequities in information, differences in bargaining power between consumers and businesses, and the possibility of a race to the bottom – caution against moving to a country-of-origin, prescribed-by-seller, or deference approach at this time.



Encourage the Development of Alternative Dispute Resolution

As acknowledged by Workshop participants and the OECD Guidelines, ADR will be a key component to effective international consumer protection. The same technology that enables e-commerce can provide consumers with practical access to redress without unduly burdening business. The Internet makes it possible to resolve disputes – especially those involving low-value electronic transactions – in a forum convenient to both parties – cyberspace.

Private sector initiatives that offer consumers meaningful access to fair and effective redress can provide a practical solution in the short term. A variety of promising programs are already in place that help resolve online consumer disputes, such as online mediation, seal programs, and credit card chargebacks. More are appearing on the horizon.

Recognizing the importance of ADR, the FTC, together with the Department of Commerce, held a public international workshop on ADR in June 2000.²⁴ This workshop is part of an ongoing international dialogue on how to encourage the development of fair and effective ADR programs.



Pursue Partial Convergence of National and International Consumer Protection Laws

The value of working toward building consensus on core consumer protections on the national and international levels was recognized at the Workshop and in the OECD Guidelines. Building consensus can take many forms, including the identification of common core protections; conforming of laws, so that different countries have common legislation; agreement on internationally applicable minimum standards that cannot be contracted away; and agreement on conventions or codes that govern cross-border transactions. It can address both private and public law, and be approached multilaterally or bilaterally.

Defining and expanding these areas of convergence has a number of benefits. First, the more commonality among different consumer protection regimes, the less burdened merchants are in figuring out different, and potentially conflicting, marketing rules. While ADR can reduce business concerns about exposure to foreign litigation, it does not completely alleviate or clarify compliance burdens. Second, it promotes consumer protection, because consumers are more likely to understand the rights available to them, regardless of a merchant's location. Third, it promotes consumer confidence in cross-border transactions, to the extent that consumers know they have the same core protections as they do at home. Fourth, it is easier for governments to engage in joint law enforcement efforts when their cross-border colleagues are enforcing the same protections. Fifth, judgment recognition is more predictable and less problematic when both countries involved have rules reflecting the same public policy choices. Finally, it is particularly appropriate given the scope of Internet retailing: international rules for an international marketplace. While complete convergence is nearly impossible in the short term, and on certain subjects may not even prove desirable, incremental and sectoral convergence is possible and worth pursuing.

At the same time, pursuing convergence presents challenges. One is to reach a degree of international consensus without reducing protections to the lowest common

denominator. Another is to maintain some flexibility to respond to new threats on the consumer protection horizon. Still another is to reach agreement in a timely manner.

The OECD Guidelines reflect existing consensus among 29 countries on some basic fair business practices online, including general prohibitions against fraud, deception, and unfairness, and protections specifically linked to online transactions, such as pre-sale disclosure of key information and fair confirmation processes.

Still, different countries may apply the Guidelines differently. For example, the Guidelines call for a mix of law and private initiatives, without dictating which protections are provided in what manner. In the U.S., laws that prohibit fraud, deception and unfairness online are enforced vigorously.²⁵ Private sector initiatives are addressing other recommendations in the Guidelines, such as the online disclosure of contact information. Other countries have a different mix of regulation and self-regulation.

The time is right for legislators and policy makers around the world to begin work toward convergence of substantive consumer protection laws in specific areas. This process should avoid reducing existing protections to the lowest common denominator. Potential starting points for such international discussions include:

- (1) identifying areas where substantive protections are equivalent but *technical compliance requirements* differ (e.g., different formatting requirements for similar disclosures) and working toward convergence on those requirements;
- (2) working toward agreement on defined aspects of core protections, such as *fraud and deception*, that governments could enforce across borders;
- (3) working toward agreement on core protections in *specific sectors* (e.g., minimum disclosure standards for consumer lease agreements); and
- (4) drafting an international code that would govern contracts for the cross-border sale of goods and/or services to consumers.²⁶

Finally, countries could increase uniformity of consumer protection laws within their own borders. This approach could preserve a role for state and regional authority, by having states and regional authorities enact provisions for compliance and enforcement in a way that does not impose varying compliance obligations.²⁷ While it is not something to be undertaken lightly, increasing domestic uniformity should be considered.



Encourage Initiatives to Better Inform Consumers and Prevent Disputes

Private sector initiatives can play a critical role in preventing disputes. Industry codes of conduct, rating systems, certification programs and escrow and insurance programs are important complements to the current legal system and often provide protections that consumers want but that are not required by law.

As seal and other types of reliability programs develop, it will be important to ensure that they can work together across borders. An additional challenge will be to ensure that the different types of emblems and seals do not confuse or mislead consumers.

Technological solutions also will play an increasingly important role. Those that have been developed to protect privacy interests and the safety of children, such as software that can be set to filter out sites without effective certification programs or alternative dispute resolution programs, can serve as models.



Facilitate Cross-Border Judgment Recognition and Enforcement

Cross-border recognition and enforcement of judgments in consumer cases is important both to give consumers access to real remedies and to hold businesses accountable for their practices. Every version of the country-of-destination rule requires consumer victims to be able to enforce judgments obtained in a forum outside the wrongdoer's country. Efforts are underway through the Hague Conference on Private International Law toward an international agreement on judgment recognition for civil actions. It is crucial to ensure that any such agreement takes into account the special characteristics of e-commerce and that it includes a role for ADR in international consumer transactions.

FTC staff also encourage developing arrangements for the mutual recognition of judgments for injunctive or monetary relief obtained in consumer protection law enforcement actions. The number of cases involving a wrongdoer in one country harming consumers in another is rising.²⁸ If consumer protection law enforcement agencies are not able to stop harmful practices originating abroad, they will be unable to protect their consumers at home. An international arrangement narrowly tailored to enable law enforcement to effectively combat harmful, cross-border commercial conduct would benefit consumers everywhere. The more governments can effectively protect against the core consumer protection problems such as fraud, deception, and failure to deliver, the less stakeholders will need other, more regulatory protections and the attendant compliance costs.

The issue of judgment recognition could be addressed alone, or as part of other initiatives, such as the development of an international code for contract law, international law enforcement cooperative agreements, and cross-border programs for private sector dispute resolution.



Foster Law Enforcement Cooperation

Effective enforcement in the global context requires strengthening and expanding information sharing and cooperative arrangements. Bilaterally, the FTC continues to work with its counterparts informally, through task forces and on a case-by-case basis. It is also pursuing more formal agreements. Multilaterally, the FTC works with organizations like the International Marketing Supervision Network, an association of national consumer protection agencies from 29 countries. The FTC assumes the presidency of this organization for a one-year term beginning in Fall 2000. The FTC is working with member countries to expand information sharing, cooperation, and efforts to combat fraud and deception online. The FTC sees additional opportunities to collect consumer complaints over the Web, which it has done since 1998. It also will expand the *Consumer Sentinel* complaint database, which is shared through an encrypted system with more than 240 U.S., Canadian, and Australian law enforcement agencies.



Develop Compatible, Hybrid Approaches

To address the legitimate concerns of business and consumers, it is likely that a combination of initiatives will be needed – private sector programs, international agreements, and overarching rules on applicable law and jurisdiction. Consumer protection initiatives must be compatible to avoid creating confusion for both consumers and business.

One current development in the U.S., the Uniform Computer Information Transaction Act (UCITA) creates areas of conflict with international consumer protection efforts. UCITA, now pending before many state legislatures and adopted by certain others, fixes a prescribed-by-seller approach for consumer contracts or licenses of software and information products and a country-of-origin default rule for applicable law.²⁹ Certain UCITA provisions contradict the approach of the OECD Guidelines by endorsing post-transaction disclosure of material contract terms for computer information transactions (i.e., "money-first, terms later" forms of business). These provisions raise substantial consumer protection concerns that require close review.³⁰

Compatible hybrid approaches must be explored. For example, stakeholders could implement a voluntary program that offered real and practical consumer protections and redress for cross-border transactions with effective enforcement mechanisms and law

enforcement backstops. If such a program proves effective, governments might agree to a safe harbor, i.e., to deem compliance with the program as compliance with at least some of their own countries' consumer protection laws.

CONCLUSION

Protecting consumers in the e-marketplace is complicated, but the foundation is in place to develop an effective and fair system.

- Representatives from government, industry and consumer groups must continue to work together to address the problems posed by current jurisdictional systems without rushing to impose a country-of-origin regime.
- Stakeholders must pursue incremental efforts toward convergence of substantive protections.
- Stakeholders must work toward international arrangements for cross-border judgment recognition and enforcement for both private and public actions.
- Governments must continue to develop effective arrangements for cross-border information sharing and law enforcement cooperation.
- Business and consumer representatives must continue to develop effective programs to prevent and resolve disputes.
- Governments must support their efforts.

These steps will be challenging and take time, but the promise of the new marketplace will make the journey worth the effort.

ENDNOTES

1. See, e.g., Transcript of the June 8, 1999 main session of the FTC's Public Workshop on "U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace," testimony of FTC Chairman Robert Pitofsky at pp. 4-8; Secretary of Commerce William Daley at pp. 9-18; U.S. Trade Representative, Ambassador Charlene Barshefsky at pp. 15-20; Under Secretary of the International Trade Administration of the Department of Commerce, Ambassador David Aaron at pp. 303-15. There are four transcripts for the Workshop proceedings, one for each of the main sessions on June 8 and June 9 and one for each of the breakout sessions on those days. These transcripts are available at <http://www.ftc.gov/bcp/icpw/index.htm>. Throughout this document, references to testimony presented at the Workshop will include the date of the session, whether it was a breakout session, the last name of the participant, and the relevant page numbers, e.g., June 8, Pitofsky at 4-8.
2. 63 Fed. Reg. 69,289 (December 16, 1998). Two subsequent notices were published, providing further information regarding comment submission and details about the Workshop: 64 Fed. Reg. 5,062 (February 2, 1999) and 64 Fed. Reg. 19,782 (April 22, 1999).
3. These comments can be found on the FTC Web site (available at <http://www.ftc.gov/bcp/icpw/comments/index.htm>). Throughout this document, references to comments submitted pursuant to the FTC's *Federal Register* notice will include the name of the entity that submitted the comment followed by "Comment."
4. For a detailed summary of the Workshop discussions of this issue, see the section on "Fair Business Practices" in the Workshop Report, attached as Appendix A.
5. For a detailed summary of the Workshop discussions of this issue, see the section on "Private Sector Initiatives" in the Workshop Report, attached as Appendix A.
6. For a detailed summary of the Workshop discussions of this issue, see the section on "Dispute Resolution" in the Workshop Report, attached as Appendix A.
7. *Id.*
8. For a detailed summary of the Workshop discussions of this issue, see the section on "International Cooperation" in the Workshop Report, attached as Appendix A.
9. The Guidelines can be found on the FTC Web site (available at <http://www.ftc.gov/opa/1999/9912/oeedguide.htm>), and are attached as Appendix B. The Guidelines benefitted from an open drafting process, which solicited input from consumers, industry, and academia. The U.S. delegation, led by FTC Commissioner Mozelle Thompson, also included an industry and a consumer representative.
10. For a brief synopsis of the current approach to jurisdiction and applicable law, see the section on "Dispute Resolution" in the Workshop Report, attached at Appendix A. For a more detailed analysis of the current approach to jurisdiction and applicable law, see Workshop Transcript, June 9, Goldsmith at 73-92; 31 A.L.R. 4th 404, and cases cited therein; Restatement (Second) of Conflict of Laws §§ 6, 80, 188; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980); ABA Project on Internet Jurisdiction Web site (available at <http://www.kentlaw.edu/cyberlaw>). John Rothchild, *Protecting the Digital Consumer: The Limits of*

Cyberspace Utopianism, 74 Ind. L.J.893, 911-42 (1999).

11. Some argue that a system in which the consumer's law and courts govern poses another drawback – it motivates dot com companies to place geographic limitations on the availability of their goods and services to avoid having to comply with too many legal regimes. Companies may choose not to make their products available globally, thus denying consumers the benefits of a truly global marketplace. Consumers in less attractive markets (perhaps smaller, poorer, or more remote places) would be hurt the most, as companies may choose not to do business there. However, such countries could avoid this result (and still protect their consumers) by passing national legislation to attract foreign business. Each country would decide how best to protect its own consumers and might through its own laws even incorporate consumer protections existing elsewhere.

12. As noted by Professor Goldsmith, some jurisdictional complications purportedly caused by the difficulties in determining the location of a consumer are based on technological assumptions that are already outdated. Workshop Transcript, June 9, Goldsmith at 77.

13. To establish personal jurisdiction under U.S. law, the defendant must have purposefully directed, or targeted, its activities or performed some act by which the defendant purposefully availed itself of the privilege of conducting business in the forum, thereby invoking the benefits and protections of its laws, such that the defendant could have reasonably anticipated being haled into the forum. In the context of the Internet, to determine whether an online company has purposefully availed itself of the benefits of doing business in a particular jurisdiction through its Web site, U.S. courts have identified three categories of Web sites (referred to as the "Zippo Continuum"). First, courts generally exercise personal jurisdiction over businesses that directly enter into contracts through the Internet with residents of the forum because the requisite purposeful availment has occurred. *See, e.g., Thompson v. Handa-Lopez*, 998 F. Supp. 738 (W.D. Tex. 1998) (federal court in Texas could exercise jurisdiction where Texas consumer entered into contract with business on business' Web site). Second, courts decline to exercise jurisdiction where a defendant simply posts information on an Internet Web site that is accessible to users in their jurisdiction. *See Resnick v. Manfredy*, 1999 U.S. Dist. LEXIS 5877 (E.D. Pa. Apr. 26, 1999) (breach of attorney-fee agreement case); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (trademark infringement case); *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest*, 35 F. Supp. 2d 507 (E.D. La. 1999) (trademark infringement case). Because a business cannot purposefully direct information to any particular jurisdiction merely through maintenance of a passive Web site, courts state that the exercise of personal jurisdiction is improper in these situations. Third, occupying a gray area are cases in which a user can exchange information with the host computer but cannot directly enter into contracts through the Internet. In these cases, personal jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *See, e.g., Zippo Manufacturing Co. v. Zippo.Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (trademark infringement case).

In addition, this issue is relevant to applicable law. One factor of several that is considered in determining whether a country can apply its own public laws to conduct outside its territory is whether that conduct has or *is intended to* have substantial effect within its territory. Restatement (Third) Foreign Relations § 402. Other factors include the place of contracting, negotiation, and performance. Restatement (Second) Conflict of Laws § 188. While there is not yet a definitive answer as to how such factors apply to electronic contracts, these questions can be resolved in a way that is consistent with policies outlined here and in a way that is predictable for business and consumers. Courts also take into account the following more general criteria for determining which law should apply: (1) the needs of interstate and international systems; (2) relevant policies of the forum; (3) relevant policies of other interested states; (4) protection of justified expectations; (5) basic policies underlying a particular field of law; (6) predictability and uniformity of result; (7) ease in determination and application of law to be applied; and (8) reciprocity. *Id.* § 6.

14. See discussion on page 13 in section on "Dispute Resolution" in the Workshop Report, attached as Appendix A. Policy makers in Europe are grappling with how to apply this concept in e-commerce. See, e.g., Second Draft Report on the Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(1999)348-C5-0169/1000-1999/0154 (CNS), 13 April 2000.
15. See, e.g., DMA Comment at 4 (discussing compliance aids the Direct Marketing Association provides to its members).
16. See, e.g., www.privacycouncil.com, a Web site that seeks to assist businesses in complying with international laws relating to privacy.
17. Business compliance guides on various topics are available on the FTC's Web site (at <http://www.ftc.gov/ftc/business.htm>).
18. These concerns are reflected in U.S. case law dealing with enforcement of choice-of-law clauses in consumer contracts for offline distance sales. Many U.S. courts refuse to uphold such clauses because it would be contrary to the fundamental public policy of the consumer's home jurisdiction. See Appendix A at 13.
19. See also Presentation of Andrew J. Pincus, General Counsel, U.S. Department of Commerce at "Internet Law & Policy Forum 1999 Annual Conference" (Montreal, Canada, July 27, 1999) (available at <http://www.ilpf.org/confer/trans99/conf99d2.htm>).
20. The difficulties of cross-border telemarketing fraud enforcement are discussed in "United States-Canada Cooperation Against Cross-Border Telemarketing Fraud: Report of the United States -Canada Working Group to President Bill Clinton and Prime Minister Jean Chrétien," (1997) (available at <http://www.usdoj.gov/criminal/fraud/uscwgrtf.htm>).
21. See Debra A. Valentine, "Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions" remarks before Canada/United States Law Institute, Case Western Reserve University School of Law (April 15, 2000) (available at <http://www.ftc.gov/speeches/other/dvcrossborder.htm>).
22. The European Union (EU) has attempted to address this issue through its Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest, Official Journal L 166, 11/06/1998 p. 0051-0055. Once implemented, this Directive will enable certain public bodies and consumer organizations within the EU to initiate proceedings in other EU member states to enjoin violations of numerous European consumer protection laws. See http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0027.html.
23. See, e.g., Presentation of Susan P. Crawford, Wilmer, Cutler & Pickering at "Internet Law & Policy Forum 1999 Annual Conference" (Montreal, Canada, July 27, 1999) (available at <http://ilpf.org/confer/present99/blackmer-crawfordpr/sld020.htm>).
24. The FTC and the Department of Commerce joint public workshop to further explore ADR for consumer transactions in e-commerce was held on June 6-7, 2000. Information about this workshop can be found on the FTC's Web site (available at <http://www.ftc.gov/bcp/altdisresolution/index.htm>).

25. Since its first Internet case in 1994, the FTC has brought over 120 cases challenging online fraud and deception. See <http://www.ftc.gov/os/1999/9912/fiveyearreport.pdf>.

26. For example, the United Nations Convention on Contracts for the International Sale of Goods, 1980, establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. However, the Convention does not apply to consumer contracts: Article 2(a) excludes the sale of goods "bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." See <http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/doc.html>.

27. The National Association of Attorneys General recently adopted a resolution calling on the U.S. Congress to recognize the important role that state law enforcers play in protecting their citizens from consumer fraud and to refrain from preempting state consumer protection laws. National Association of Attorneys General, "Resolution Opposing Preemption of State Law Enforcement Authority," adopted at the Spring Meeting, March 22-24, 2000 in Washington, DC.

28. Workshop Transcript, June 8, Stevenson at 102-03. In fact, increasing numbers of the FTC's cases against U.S. defendants have involved harm to foreign consumers. As a result, the FTC is increasingly seeking and obtaining redress for consumers in other countries. Indeed, as of October 1999, FTC actions resulted in the distribution of \$1.8 million in redress to more than 6,000 foreign consumers from 66 countries.

29. In contracts for electronic delivery, UCITA allows merchants to select the applicable law. Absent an enforceable choice-of-law clause, UCITA provides for the rule of origin as the default rule. UCITA also allows merchants to choose an exclusive judicial forum unless the choice is unreasonable and unjust; the Reporter's Notes to UCITA state that a lack of consumer bargaining power is not to be considered a factor in determining whether a choice is unreasonable and unjust. UCITA was drafted by the National Conference of Commissioners on Uniform State Laws and can be found at: http://www.law.upenn.edu/bll/ulc/ulc_frame.htm. It has been adopted by Maryland and Virginia. See <http://www.ucitaonline.com/whathap.html>.

30. FTC staff advocacy letters expressing concerns about UCITA can be found on the Commission's Web site at <http://www.ftc.gov/be/v990010.htm> and <http://www.ftc.gov/be/v980032.htm>. Other ways in which UCITA may have an adverse consumer impact include, among others, defining "conspicuous" in a manner inconsistent with FTC interpretation – "likely to be noticed and understood by consumers"; allowing licensors to disclaim certain warranties; allocating excessive risk to consumers in the event of fraud or transaction error for electronic records and signatures that fall within its scope; limiting a consumer's right to sue for a product defect; allowing licensors to avoid liability for known product defects; allowing licensors to place restrictions on the transfer of a software product that conflict with a consumer's reasonable expectations; limiting a court's ability to apply a flexible public policy restriction to invalidate terms in appropriate cases; and allowing licensors to use non-judicial process, or self-help, to enforce their licenses in a manner that may intrude on a consumer's reasonable expectation of privacy and without adequate warning to consumers. *Id.*