

Effect on Trade between Member States: Is this Requirement a Fundamental Necessity in Cross-Border Consumer Law Enforcement?

Article by Willard Mwemba*

The concept of effect on trade between Member States in the context of competition laws has been widely discussed and rich discourse promoted as a consequence thereof. However, there is very little discourse if any, within the context of consumer law. There could be various reasons for this. The main ones could be that consumer violations are so specific to individual weak consumers and therefore satisfying the criteria of effect on trade between Member States would render the protection of consumers within the framework of regional consumer law virtually absent. The argument here is that laws should be interpreted purposefully. Clearly, it could not be the intention of law and policy makers that consumer protection should be almost impossible to execute given that consumers are the weakest unit in the market and in economic interactions. The second reason could be that consumer law is so fragmented and remains not so developed compared to competition law. This is even more true for regional consumer laws. National authorities in most cases have remained with jurisdiction to enforce consumer laws whereas regional and international bodies play an advisory role, are responsible for coordination and propose policy and legislation for national authorities to implement. If this is accepted to be true, then jurisprudence with regard to regional consumer laws has and would not develop at the same pace as jurisprudence on regional competition laws.

This article engages in an intellectual discourse on whether there is need to satisfy the requirement of effect on trade between Member States in consumer law violations or in fact, this criterion lacks merit and therefore irrelevant in this context.

Reference shall be made to some regional jurisdictions. For purposes of this work, reference shall be made to the Common Market for Eastern and Southern Africa, European Union, East Africa Community and Caribbean Community and Common Market. These have been selected for the following reasons:

- a) mandate on consumer protection in their economic blocks;
- b) simplicity of exposition; and
- c) requirement of having a realistic sample from which reasonable inferences can be drawn.

The Common Market for Eastern and Southern Africa

The Common Market for Eastern and Southern Africa (COMESA), is a regional economic community established under Article 1 of the Treaty establishing the

* Willard Mwemba is a scholar and enforcer of Competition and Consumer Laws. He has enforced both laws at regional and national level for over twenty years. He holds a PhD in Competition law. He is currently the Chief Executive Officer at the COMESA Competition Commission and a Senior Adjunct Lecturer at the University of Cape Town.

Common Market for Eastern and Southern Africa (the Treaty). It is composed of 21 Member States of Southern, Eastern and Northern African countries, and the Indian Ocean Islands.¹ The Preamble of the Treaty is deliberate when it provides that these Member States are conscious of the overriding need to establish a Common Market for Eastern and Southern Africa and have therefore resolved to strengthen and achieve convergence of their economies through the attainment of full market integration. To achieve these ends, the Treaty under Articles 9(2)(d) and 10(1) empowers the Council of Ministers (the Council) to make regulations in accordance with the provisions of the Treaty. Pursuant to Article 10(2), these regulations are binding on all the Member States in their entirety. Further Article 55(1) of the Treaty is instructive when it provides that Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited (**emphasis**). To this end, Member States agree to prohibit any agreement between undertakings or concerted practice which has its objective or effect the prevention, restriction or distortion of competition within the Common Market. Article 55(3) empowers the Council to make regulations to regulate competition within the Member States. The foregoing provisions of the Treaty paved the way for the development of the now repealed COMESA Competition Regulations of 2004 (the 2004 Regulations) which were replaced by the COMESA Competition and Consumer Protection Regulations of 2025 (the Regulations).

The European Union

The European Union (EU) is an economic and political union of 27 democratic European nations established in its current form by the 1992 Maastricht Treaty, following post-World War II integration efforts. It operates a single market enabling the free movement of goods, services, capital, and people.² The notable difference between the EU and COMESA is that while COMESA is just an economic union, the EU is both a political and economic union. It is for this reason that we observe a greater degree of cohesion and integration in the EU compared to COMESA. The political integration effort in the context of the EU is explained in part from the historical context of the need to ensure the security of Europe post post-World War II. COMESA does not have a similar history, therefore, the need for political integration was not immediate.

The EU has its foundations on the European Economic Community (EEC). The EEC was created by the Treaty of Rome of 1957. In 1993, the Maastricht Treaty renamed the EEC to the European Community (EC) and embedded it into the European Union (EU). Until 2009, the EC was the EU's main component, but the Lisbon Treaty eliminated the EC and established the EU as its institutional successor.

¹ Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe.

² Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

The East African Community

The East African Community (EAC) is an economic grouping of 8 countries in East Africa.³ With its headquarters in Arusha, Tanzania, it focuses on regional economic integration, including a Customs Union, Common Market, and future Monetary Union. The EAC is established under Article 2 of the Treaty establishing the East African Community (the “EAC Treaty”). Pursuant to this Treaty the Contracting Parties establish among themselves an East African Community hereinafter referred to as “the Community”. In accordance with the protocols to be concluded in this regard, the Contracting Parties shall establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the Community. The objective of region economic integration in the EAC is therefore undeniable and is unequivocally made clear by the contracting parties who are the Partner States.

The Caribbean Community and Common Market

The Caribbean Community and Common Market (CARICOM) was established by the Treaty of Chaguaramas which was signed on 4 July 1973. It is one of the oldest regional economic communities. It became effective on August 1, 1973, with an original membership of Barbados, Jamaica, Guyana, and Trinidad & Tobago. In 2001, the Treaty of Chaguaramas was revised and renamed the organisation to CARICOM Single Market and Economy (CSME). The Preamble of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (the “Revised Treaty”) is very deliberate in its desire to establish an integrated market. It in part provides as follows:

“Recalling the Declaration of Grand Anse and other decisions of the Conference of Heads of Government, in particular the commitment to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States...”

According to Article 3 of the Revised Treaty, CSME has 14 Member States.⁴

Is Consumer Protection an Essential Component of Regional Economic Integration

It has long been recognised that a consumer is the most vulnerable unit of an economic system given their weaker position and individuality in business interactions. Therefore, the need to protect their interests in business dealings is not only paramount but indispensable. Among the first formal recognition in the 20th century of

³ Burundi, Democratic Republic of Congo, Kenya, Rwanda, South Sudan, Somalia, Tanzania and Uganda.

⁴ Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and, Trinidad and Tobago.

the need to protect consumers in the economy was by the late President of the United States of America, John Fitzgerald Kennedy who on 15 March 1962 famously delivered a historical speech to the United States of America Congress. President Kennedy observed that if consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers. He went on to state that on the other hand, increased efforts to make the best possible use of their incomes can contribute more to the well-being of most families than equivalent efforts to raise their incomes.

President Kennedy's remarks cannot be more true in today's sophisticated world largely due to globalisation and the rapid technological advancement which with all the benefits it has brought, can be blamed for some of the consumer harm we are witnessing today. One notable point to pick from President Kennedy's speech to Congress is that if consumers are not adequately protected, national interest suffers. What was on President Kennedy's mind when he observed that national interest could suffer? An economic and psychological imperative can help to explain this. Dissatisfied consumers are likely to lose confidence in the marketplace, a situation that has a higher risk of causing serious economic turbulence and collapse. Consumers are the engines of any economy and if that engine becomes rusty because of collapsed confidence, the economy suffers and national interest and goals are threatened. Further, consumers who are abused by market actors and systems have their welfare eroded and wealth decimated. Such a situation thwarts efforts to achieve and enhance prosperity. This general observation can be made in any geographic dispensation where consumers are involved in Commerce i.e. local, national, continental or even global.

The foregoing observations in the preceding paragraph are even more true in regional economic communities where different countries come together to form a single market. Consumer distrust in regional integration is the single most risk to its durability. Regional economic communities are formed to expand markets with the recognition that with the elimination of barriers to trade, consumers from any part of an economic grouping are free to interact with business firms in any other part of the economic grouping and that business firms have an expanded market and opportunities for their goods and services. However, for this objective to be realised, consumers should have faith in the system that it would safeguard their interests and where they are harmed, the system would provide effective and efficient redress including reparation and restitution. Absent this belief in the system, regional integration would be a far-fetched dream. Any conduct that frustrates the movement of goods, services and people either by design like *de jure* and *de facto* barriers to trade or psychological like loss of trust in the system are a danger and inimical to the single market imperative and should be decisively thwarted.

It is therefore, the position of this article that consumer protection is an indispensable component for the successful realisation of the fundamental objectives of regional

integration. To support this supposition, a thorough inspection of some legal instruments of the four regional economic communities referred to in the earlier sections of this article was undertaken.

In COMESA, the need to protect the consumer within the Common Market was very clear under Article 2 of the 2004 Regulations which provided that:

“The purpose of these Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of consumers in the Common Market, and to protect consumers against offensive conduct by market actors”.

The Regulations were promulgated pursuant to Articles 9(2)(d), 10(1) and 55(3) of the Treaty. The COMESA Competition Commission (the “CCC”) was established under Article 6 of the 2004 Regulations and succeeded by the COMESA Competition and Consumer Commission (the “CCCC”) established under Regulation 8 of the new Regulations as an institution to administer and enforce the regional consumer law.

Emphasis on the consumer is very clear. The implication in the first part of Article 2 is that consumers are the prime focus of competition regulation. Markets should be competitive to enhance consumer welfare (*otherwise known as the consumer welfare standard*). Competitive markets should result in lower prices, better goods and services and wider choices for consumers among others benefits. Without the promise of such benefits, consumers may not have an incentive to participate in the envisaged bigger market. In addition to the adherence and focus on the consumer welfare standard, which is a consequence of competition regulation, the 2004 Regulations under Article 2 were cognisant that the welfare standard is in most cases an indirect approach to enhancing the welfare of consumers and usually long term. Injured consumers can rapidly lose faith in regional markets. Therefore, in the last part of Article 2, the 2004 Regulations provided for the direct and immediate protection of consumers against economically strong business firms when the later engage in offensive conduct against the consumer. This provision can never be and was not accidental. It was carefully and deliberately thought through. The pioneers of the law were very aware that consumers are the essential foundation and bedrock of regional integration and that without their participation, the entire regional integration agenda would be doomed. To implement this purpose of the 2004 Regulations, Part 5 was dedicated to provisions protecting the consumer from various infringements like false and misleading advertising, unconscionable conduct, supply of dangerous products among other protections. The new Regulations of 2025 have continued and amplified the mandate of the law to protect the consumers by including emerging threats from technology and environmental considerations. For example, protections against dark patterns, supply of harmful digital content and green washing are prominent in the new Regulations. This continuation and expansion in the focus on the consumer demonstrates the importance of consumer protection in COMESA. Consumer violations are not only discouraged but are also punishable by fines to deter would be

offenders and recidivists. The new Regulations have also increased the punitive measures against errant firms which is a demonstration of the seriousness that consumer protection is accorded in the Common Market.

In the EU, consumer protection is also a fundamental component of the integration project. The Directorate-General for Justice and Consumers (DG JUST) is the department responsible for consumer policy in the EU. Although the DG JUST does not have enforcement powers like the CCC, it plays a vital role in the development of harmonised EU Consumer Policy which contributes to the durability of the EU project. Consumers can shop in any Member State of the EU with the same confidence so that trade in the EU is not frustrated.

The DG JUST oversees the development and implementation of EU-wide consumer protection legislation aimed at ensuring fair commercial practices and effective remedies for cross-border disputes. Central to this framework is the Unfair Commercial Practices Directive (2005/29/EC), adopted in 2005, which prohibits misleading actions, omissions, and aggressive practices by traders toward consumers, establishing a harmonized baseline across member states to prevent deceptive marketing. Complementing this, the Consumer Rights Directive (2011/83/EU), enacted in 2011, standardizes information requirements for contracts, right of withdrawal for distance and off-premises sales and delivery obligations, thereby reducing disparities in national consumer contract laws.⁵ These directives form the core of horizontal consumer safeguards applicable to most sectors, excluding financial services and certain regulated professions. Enforcement relies on cooperative mechanisms, notably the Consumer Protection Cooperation (CPC) Regulation (EC) No 2004/2003, which facilitates joint investigations and coordinated actions among national authorities for cross-border infringements. The DG JUST also ensures harmonised policy on product safety in the EU.

The East Africa Community Competition Act (the EAC Act) is also very clear regarding its mandate on consumer protection. The preamble in the EAC Act reads:

“An Act of the Community to promote and protect fair competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Authority and for related matters”.

Even in the EAC, focus on the consumer is unmistakably evident in the early parts of the EAC Act. This focus and inclusion of consumer matters is to ensure that consumer protection contributes to strengthening the foundations of the single market. Further, the EAC Act has under Part VIII provided for the implementation and enforcement of consumer safeguards pronounced in the preamble. Again, this demonstrates the deliberate inclusion of consumer safeguards in the EAC Act. The architects of the law

⁵ https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-contract-law/consumer-rights-directive_en

clearly had in mind the important role the consumer would have in the creation of a single market.

CARICOM does not have a consumer enforcement mechanism like COMESA or EAC. Its model is similar to that of the EU where it plays a fundamental role in developing harmonised consumer law and policy in the Member States. This way, it makes it easy to address consumer concerns through a regional approach. Articles 184 and 185 of the Revised Treaty gives CARICOM influence on consumer matters. Pursuant to the aforementioned Articles of the Revised Treaty, Member States are obliged to promote the interests of consumers in the Community by taking specific and appropriate measures. The Member States are also obliged to enact harmonised legislation to ensure consumer protection.

What is clear in all the regional economic communities referred to above is that they are all deliberate regarding their emphasis on consumer welfare. They all realise that without adequate safeguards on consumers, the regional integration experiment is likely to fail due to wrong or inappropriate reagents.

Effect on Trade between Member States

The final question to address is whether it is necessary to establish that a consumer violation has the effect on trade between Member States before consumer laws are applicable.

This can be both a legal and factual matter. It is a legal matter depending on the construct and wording of the statute or policy or factual depending on the mischief that is intended to be addressed. An excursion through these issues will have far reaching implications where there is not much jurisprudence on the enforcement of regional consumer laws compared to regional competition laws. This article is intended to give guidance on how such issues should be approached without circumventing the laws and policies and without regional economic communities failing to achieve the objectives and the mischief their respective laws and policies intended to address. The article initially looks at whether this requirement is necessary. If it is argued that it is necessary, the article then proceeds to its interpretation.

Is this Requirement Necessary?

Within the narrow meaning of the term trade⁶, it can be argued that this requirement is *stricto sensu* not necessary. According to Investopedia, international trade is the purchase and sale of goods and services by companies in different countries. International trade allows countries to expand their markets and access goods and services that otherwise may not have been available domestically. As a result of international trade, the market is more competitive.⁷ Monash University has stated that at its core, international trade represents the exchange of goods or services between at least

⁶ In this article, reference to trade means to international trade and not domestic trade, which is trade within a country.

⁷ <https://www.investopedia.com/insights/what-is-international-trade/>

two different countries. These exchanges are divided into two main types of operations: exports and imports.

- Exports refer to the exit of products from a country through their sale to the foreign market.
- Imports refer to the entry of foreign products into the country through their acquisition or purchase.⁸

The above definitions of trade have their foundations in the works of early and renowned economists like Adam Smith and David Ricardo. Adam Smith in 1776 defined trade as the exchange of goods and services between different countries or regions.⁹ In 1817, David Ricardo expanded and improved Smith's definition of trade by introducing the concept of comparative advantage. Ricardo theorised that trade allows countries to specialize in the production of goods and services in which they have a comparative advantage and to exchange these for goods and services produced by other countries.¹⁰

From the foregoing discourse, it is clear that the concept of trade is simple and only encompasses the movement of goods and services across borders. It is also unequivocally clear that among the fundamental goals of regional integration is to expand trade among the contracting parties. Therefore, the question to address within this simple definition of trade is whether it is necessary to establish an effect on trade between countries to protect consumers whose rights and interests have been violated? It does appear that it is not necessary. If this was a strict requirement, it would then render futile any efforts to protect consumers who are injured as a result of regional trade activities because demonstrating how consumer injury has resulted in effect on trade between Member States would be possible but highly improbable. Proving an effect on trade between Member States may require proof that trade between countries has been substantially undermined as a result of harm on individual consumers. This interpretation leads to an absurd outcome as it implies that there is a trade off between consumer harm and trade harm and that consumers can only be protected when harm on trade is significant. With the exception of COMESA, this could explain why reference to effect on trade between Member States in consumer protection has not been made in the case of EAC, EU and CSME. In both the EU and CSME, the fundamental requirement is that there is harmonisation in consumer legislation of their Member States to address consumer protection matters that presumptively occur as a consequence of national and regional activity. In the EU and CSME instruments, there is no reference or requirement of proving an effect on trade between Member States to address regional consumer violations within the laws of Member States. In the case of the EU, it is deliberately clear that this requirement was

⁸ <https://www.monash.edu/indonesia/news/international-trade-definition-benefits-and-current-issues>

⁹ Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations*. London: W. Strahan and T. Cadell.

¹⁰ Ricardo, D. (1817). *Principles of Political Economy and Taxation*. London: John Murray.

not intended. This is because with regard to competition, this requirement is expressly clear under Article 101 of the Treaty of the Functioning of the European Union. That similar requirements are not necessary on consumer protection in the EU is not an accident but deliberate.

It can be argued however, that CSME and EU were not meant to have a centralised enforcement mechanism on consumer protection. The considered view in this article is that this same argument is what negates the requirement of proving an effect on trade between Member States. The EU and CSME were mindful that focus should be on the harm suffered by a consumer as a result of business firms operating in the regional block and not the rigid requirement of proving an effect on trade between Member States which may not change the situation of vulnerable consumers. In any case, an inspection was made in the EAC Act which provides for an enforcement model. As observed in the preceding paragraphs, it can be observed that with regard to consumer protection there is no reference to effect on trade between Member States in the preamble, Part VIII or anywhere in the Act. Again, this is not accidental but deliberate to ensure that consumers are adequately and effectively protected without subjecting them to rigid requirements that may negate any envisaged protections on consumers.

However, the 2004 COMESA Competition Regulations presents an interesting case. They appear to enervate the argument that proof of an effect on trade between Member States is required before invoking the jurisdiction of the CCC to intervene in consumer violations by business firms. The relevant provision in this context is Article 3(2) of the 2004 Regulations which provides that:

“These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market”.

Literally read, Article 3(2) is troubling. Part 5 relates to consumer protection. This means that for the CCC to assume jurisdiction in a consumer violation case, it should be demonstrated that such a violation has an appreciable effect on trade and restricts competition in the Common Market. Such an interpretation negates effective consumer protection in the Common Market. This could not have been the intention of the drafters of the 2004 Regulations. The approach that an effect on trade and a restriction on competition should be demonstrated in a consumer violation case is unusual and peculiar. It could explain why the other instruments referred to in this article never made this a requirement in a consumer case. To establish a literal effect on trade between Member States and a restriction on competition in the simple movement of goods and services across borders is improbable. The wording of Article 3(2), its interpretation and implementation results in an absurd outcome, i.e. usurping the 2004 Regulations effective jurisdiction on consumer protection which definitely could not have been the intention of the architects of regional integration. There is need to interrogate this matter a little deeper.

In view of this absurd outcome from the literal interpretation of Article 3(2), some important questions should be answered.

1. *What mischief was intended to be addressed by the 2004 Regulations with regard to consumer protection? What is the purpose of this legal provision?*

In the interpretation of Statutes, it is not unusual to go beyond the literal reading and words of a legal provision to give it effect and address the mischief it was intended to address. Two rules of statutory interpretation may be helpful, i.e. the mischief rule and the purposive approach.

The mischief rule looks to the rationale of the legislation for interpretation to avoid an absurd outcome. The underlying reason why the legal provision or instrument was enacted is paramount than the words used and their construction. This approach aims to suppress the mischief which the legal provision is seeking to redress and advance the appropriate remedy.¹¹ It seeks to give effect to the reason why the law was passed. The mischief intended to be addressed or purpose of the 2004 Regulations with regard to consumer protection is incontrovertible as explicated above. In a regional economic block, there are expanded levels of commerce and therefore increased consumer vulnerability. Business firms domiciled in one country supply their goods and services to consumers resident in another country. In the absence of regional consumer laws or harmonised national consumer laws, it would be difficult to effectively redress consumer matters in a regional economic community because national laws would have inadequate jurisdiction. To address this mischief, it could not have been the intention of the law to require the fulfilment of close to impossible requirements as this would render regional consumer protection redundant. It is difficult to imagine that the drafters of the 2004 Regulations intended to make consumer protection very difficult even when it is universally agreed that consumers are very weak and vulnerable. Why would the drafters require such a requirement even in the wake of serious and imminent danger to the life of consumers? There is no reasonable conclusion other than that Article 3(2) did not intend to obliterate consumer protection in the Common Market by demanding such rigid requirements.

2. *Would the system have given confidence to consumers that it is effective if this rigid requirement that would lengthen the process was entertained?*

Consumer confidence in the market is paramount for smooth operations of commerce. Since time immemorial, it has been evident that whenever consumers lose confidence in the market, the economy collapses. Consumers are very sensitive to market dynamics and small pockets of negative developments may result in tides that leave damage in their path. For regional integration to be successful, consumers in different parts of the regional economic block should have confidence in the system. Therefore,

¹¹ <https://www.lexisnexis.co.uk/legal/glossary/mischief-rule>

any indication that their grievances would not be resolved urgently and effectively would make consumers lose faith in such a system and frustrate its success. Indisputably, consumer laws, unlike competition laws generally, are intended to quickly resolve consumer concerns. This is very true at national level and should be more true at regional level.

3. Why did the new Regulations expunge reference to effect on trade between Member States and restriction of competition in the Common Market?

It is noteworthy that the 2025 Regulations have removed any reference to effect on trade between Member States and a restriction of competition in the Common Market as requirements for the CCC to assume jurisdiction in consumer protection. The reason was to remove any absurdity that these terms were causing. The relevant section in the new Regulations for these purposes is Articles 5(1) and 5(2)(c) on the scope of applications on consumer matters. Article 5(1) provides that these Regulations apply to all economic activities conducted by an undertaking within, or having or likely to have an effect in two or more Member States within the Common Market or in a substantial part of it. Further, Article 5(2)(c) provides that these Regulations have exclusive application with respect to unfair trade practices¹² which have or may have an effect on consumers in the Common Market. The absence of the terms '*effect on trade between Member States and restriction of competition in the Common Market*' is unmistakable. The realisation by policy and legislative organs of COMESA that consumer protection should be swift and effective without the requirement of academic arguments and fulfilment of conditions that in practice do not make consumer protection better but negate it, seals any mechanical argument otherwise.

Therefore, in conclusion it is not necessary to establish an effect on trade between Member states for the CCC or its successor the CCC to afford protection to consumers in the ordinary course of commerce.

Without running the risk of forum shopping as this article has already argued and concluded that this requirement is not necessary, what if one wanted to engage in an intellectual argument that this is a requirement, would this argument be defensible?

What if the Requirement Argument is Sustainable?

To address the above hypothesis, the article takes an intellectual excurses in the subsequent sections.

¹² Regulation 2 of the COMESA Competition and Consumer Protection Regulations defines "*unfair trade*" practices to include any conduct or practice that is deceptive, unethical, unconscionable, fraudulent, or which causes injury, damage of property or loss to a consumer or has the effect of denying the consumer any of the rights protected under the aforementioned Regulations.

Reference can be made to the EU Notice on the effect on trade concept. This Notice explicates that the requirement that there must be an effect on trade "between Member States" implies that there must be an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State.¹³ In the same way, the Regulations may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable. To the extent that it is required to establish effect on trade between Member States before the CCCC can assume jurisdiction in a consumer violation case, not all is lost because in the context of regional economic blocks, the concept of trade is broad to go beyond imports and exports among nations. David Ricardo's theory of comparative advantage can in fact support this. According to Ricardo's theory, countries should only produce products in which they have a comparative advantage. This should trigger the free movement of capital across borders including cross border establishment of business firms who would produce and export from countries where they are established. Further, consumers can import from their countries but if the behaviour of firms in the exporting countries towards consumers is bad, it may frustrate consumers importing from those countries. Ultimately firms would have no incentive to establish in foreign countries, consumer movement would also be frustrated, thereby affecting trade between Member States. If establishment of firms is frustrated as a consequence thereof, the natural conclusion is that competition is also likely to be restricted because there would be fewer firms competing among themselves. As a result of international trade, the market is more competitive.¹⁴ Deductively, without trade in a regional trade block, markets are not competitive. These suppositions are further supported by Article 55(1) of the Treaty that in part provides that any practice that negates the objects of free and liberalised trade and that prevents, restricts or distorts competition. It can be argued that within the regional trade system, competition and consumer behavior are inherently connected.

To support the case in the preceding paragraph, an observation should be made that there is sufficient precedent on the concept of '*effect on trade between Member States*' within the context of regional economic blocks. Worth noting also is that the concept is replete with precedent within the framework of regional competition framework. However, this precedent still provides useful guidance as the concept is only paramount within the framework of regional economic integration.

The concept of trade is wide and does not only encompass the physical movement of goods across borders but should also capture services and establishment. The foundational pillars of regional integration include free movement of goods, free movement of services, free movement of people and free movement of capital. Any conduct that negates the sustainability of these pillars should not be permitted.

¹³ European Commission Notice - Guidelines on the effect on trade concept

¹⁴ <https://www.investopedia.com/insights/what-is-international-trade/>

Regional institutions such as the CCCC, EAC, CSME and EU should be seen to contributing to the achievement of these freedoms, and detect and correct conduct that negate these freedoms to the extent permissible by law. Free movement of goods and trade is likely to increase business activity with the likelihood of undertakings engaging in anti-competitive activity that may result in an effect on trade between Member States. Similarly, direct violation of consumer rights and interest is likely to limit their participation in the regional integration system thereby having an effect on trade between Member States.

As has been observed by some scholars, the establishment of the Single Market is not an end in itself, but a means to enhance people's well-being in accordance with the goals and values embedded in the founding legal instruments.¹⁵ In the case of the EU, it has been further observed that the approximation of national laws has led to important progress for consumers across Member States. The Single Market should not be seen as a mere instrument for economic growth (often measured on the basis of intra-EU trade between Member States) but as a vehicle to achieve better conditions for consumers in post-liberalised markets. And by this it does not only mean more choice and better prices but also the economic and social model that should thrive in Europe.¹⁶ With this argument, it is difficult to imagine how it can then be argued that consumers are not a fundamental factor to the regional integration system and how anything that distorts their welfare and decimates their confidence may in fact result in the demise of the entire system.

In the case of **Societe Technique Miniere v. Maschinenbau** the Court of Justice of the European Union held that for there to be an effect on trade between Member States, it should be possible to foresee, with a sufficient degree of probability on the basis of a set of objective factors of law or fact, that the '*conduct*' may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.¹⁷ This precedent has elements that need to be explained regarding the application of the concept of effect on trade between Member States. The conduct under consideration does not need to have an actual effect on the pattern of trade between Member States. It is sufficient that the conduct has the likelihood of having such an effect. This conclusion is consequential. It implies that even in consumer cases, it is enough to show that firm conduct may cause an effect on trade between Member States. As observed in the earlier sections of this article, conduct like unconscionable behaviour, dark patterns, supply of dangerous products, misleading and misrepresentation are likely to disincentivise consumers to participate in the regional economic system, thereby having a negative effect on trade between Member States. Eroded trust in the system due to unfair trade practices by business firms may considerably dwarf the confidence of consumers in the single market or a regional

¹⁵ <https://eu.boell.org/en/2023/02/15/consumer-perspective-single-market>

¹⁶ Ibid

¹⁷ Case 56/65 Societe Technique Miniere v. Maschinenbau [1966] ECR 337

economic block. Such an occurrence may inhibit and frustrate the realisation of full potential of a single market.

Consumer perception is a complex concept involving many aspects. The most important of these is the consumer's evaluation and experience of the purchased goods. If consumers perceive that the value of the purchased goods is not in line with their expected value or there are other defects, they will have negative feelings towards the goods, which will in turn reduce their trust in the merchant.¹⁸

The next requirement to look at is that the influence on the pattern of trade does not need to be direct in all cases. It is sufficient that the influence is indirect. To illustrate this point better, it is imperative to define the terms '*direct*' and '*indirect*'. The dictionary meaning of the word '*direct*' is that there are no intervening factors or intermediaries. In the context of the ruling in the **Societe Technique Miniere v. Maschinenbau**, this implies that the conduct in question has to cause the influence on the pattern of trade between Member States without the contribution of any other factor. For example, in the case of e-commerce, consumers lack of trust in the platform and credibility of the seller may directly result in a reduction or elimination of cross border trade. However, as stated above, this influence should not always be direct. An indirect influence is enough. The dictionary meaning of the word '*indirect*' is that an occurrence is not directly caused by or resulting from something. This implies that not a single factor, but a combination of factors would cause an influence on the pattern of trade between Member States. This argument is supported by the European Commission Notice on the effect on trade. The said Notice provides that assessment under the effect on trade criterion depends on a number of factors that individually may not be decisive. The relevant factors include the nature of the practice, the nature of the products covered by the practice and the position and importance of the undertakings concerned.

The final consideration to make is the appreciability of the conduct for the CCC to intervene in a consumer violation case. In the 2004 Regulations, the term appreciable was not defined. It means that the CCC had the discretion to determine what was appreciable on a case by case basis taking into account the objective factors of law and fact. To support this view, the European Commission Notice on the Effect of Trade Concept is instructive. This Notice provides that the effect on trade criterion incorporates a quantitative element, limiting Community law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. Agreements and practices fall outside the scope of application of the TFEU when they affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question. Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned.¹⁹

¹⁸ Exploring the Factors Affecting Consumer Trust in Cross-Border E-commerce: A Comparative Study by Zhang Xiaoyan and Thillai Raja Pertheban

¹⁹ European Commission Notice - Guidelines on the effect on trade concept

The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned. The stronger the market position of the undertakings concerned, the more likely it is that an agreement or practice is capable of affecting trade between Member States can be held to do so appreciably. The determination of the strength of the market position of the undertaking is made and should be made by the authority, of course not arbitrarily but within the parameters of objectivity and reasonableness.

Conclusion

The concept of effect on trade between Member States was without a doubt intended to be applied in competition and not in consumer cases. Reference can be made to the most advanced and experienced regional economic block, i.e. the EU. It is important to bear in mind that since the creation of the common market, EU consumer protection standards have been adopted under the Single Market competence of the EU (Article 114, TFEU). Consumer protection has always been closely linked to the Single Market, in accordance also with Article 169 of the TFEU regarding the promotion of consumer interests.²⁰ However, even with this, reference to the concept under consideration have never been made in the context of consumer cases but competition matters in the EU. The same is true for other regional economic blocks except COMESA. The reason for this is simple. Consumers are so fundamental to the survival of the system, yet so vulnerable and opinionated that any negative perception of unfair trade practices that cannot be addressed urgently and effectively may erode their confidence and collapse trade between Member States and ultimately the whole system. It can be observed that in the EU, the concept has only been used within the framework of competition enforcement. Therefore, within the context of COMESA, it does appear that it was not the intention that an effect on trade between Member States must be established before the CCC can assume jurisdiction to protect consumers. Such an interpretation would be nefarious to the enterprise of consumer protection. Additionally, such an interpretation would lead to an absurd outcome where consumer protection would be virtually absent in COMESA and would not address the mischief that was intended to be addressed i.e. consumer protection within an expanded regional trade block. It is therefore the conclusion of this article that an effect on trade between Member States need not be established to assume jurisdiction in a consumer violation case in a regional economic block.

An excurses was conducted to make the case for the concept within COMESA. The case was made that even with this narrow interpretation, it is possible to establish an effect on trade between Member States within the context of consumer cases. It was established that the concept does not only encompass the physical movement of goods and services across borders. It encompasses all cross-border economic activity including establishment. This view supports the fundamental pillars of market

²⁰ <https://eu.boell.org/en/2023/02/15/consumer-perspective-single-market>

integration namely, free movement of people, capital, goods and services. Therefore, any conduct that negates cross-border economic activity would be considered to influencing the pattern of trade between Member States. Unfair trade practices by business undertakings are likely to make consumers lose confidence in the system and withdraw their participation in it. The ultimate effect is a reduction in trade between Member States and the eventual collapse of the entire system. The effect on trade between Member States should be appreciable. Appreciability should be determined on a case-by-case basis taking into consideration objective factors of law and fact.

In conclusion, it is not possible to expunge consumer protection in regional economic blocks whether or not one argues that there should be proof of effect on trade between Member States. Consumer protection is fundamental to the durability of the entire enterprise of regional integration!