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Information in Consumer Contracts: Reforming Consumer Protection Law in Malaysia

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Abstract

This article examines the effectiveness of the *Consumer Protection Act 1999* in ensuring that Malaysian consumers can make informed decisions and that their interests are adequately protected in modern electronic commerce (e-commerce) transactions. It first identifies the key elements required of a modern consumer protection framework and subsequently uses this model as a yardstick to assess the legal frameworks in two jurisdictions. The first jurisdiction is Malaysia, a common law country that, although considered a potentially important regional player in the development of e-commerce, has a relatively underdeveloped consumer protection framework. The second jurisdiction is England and Wales, which is likewise a common law jurisdiction but one whose consumer protection framework has been influenced by European Union consumer protection policy and legislation that has further provided the impetus for significant legal reform in both offline and online environments. This article examines the extent to which the laws in both jurisdictions provide appropriate protection, considering countervailing issues (eg, protection of commercial innovation and competition) and identifying potential gaps in provision (eg, inadequate regulation of new platforms or business methods). Based on these analyses, the article proposes an ‘evergreen’ consumer protection framework to improve the legal landscape of e-commerce in Malaysia.

The digital economy, centred on the internet, has transformed the business landscape and provides a global platform for the execution of e-commerce. However, due to the absence of face-to-face interactions, consumers are more vulnerable in e-commerce than in offline transactions. Consumers can deal directly with traders at their premises in offline commerce, whereas e-commerce transactions take place virtually, leaving consumers more susceptible to fraud. In addition, consumers cannot physically examine the products prior to making purchases; hence, they rely heavily on information provided online. In comparison, traders have greater information and knowledge about the products compared to consumers. A misallocation of resources is likely to occur where traders produce limited or irrelevant information, whereas consumers fail to act sensibly on the information they receive. This is a classic example of the market failure that results from information asymmetry.¹ Therefore, a duty of information serves as a safeguard to ensure a ‘parity of arms’ between traders and consumers.² As Geraint Howells emphasised:

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¹Brian Bix, *A Dictionary of Legal Theory* (1st edn, Oxford University Press 2004) 133. Bix described ‘information asymmetry’ as an example of a market failure that prevents the market from functioning normally.

²Academic literature have emphasised on information regulation due to information asymmetries between traders and consumers. See Iain Ramsay, ‘Framework for regulation of the consumer marketplace’ (1985) 8 *Journal of Consumer Policy* 353; Iain Ramsay, *Consumer Law* (Dartmouth Publishing Company Limited 1992); Peter Cartwright, *Consumer*

Consumers have less information than traders and so have difficulty in making decisions that reflect their true preferences. There are not sufficient incentives for traders to volunteer information, so the law needs to require that the information be provided. Once this information is provided, consumers can protect their own interests by selecting the goods or services closest to their preferences. Harm will be reduced by ensuring goods and services are more likely to be in line with realistic consumer expectations based on reliable information.³

The low-cost options for marketing products in e-commerce have also lowered the barriers to entry for fraudsters. Setting a website or other online presence is cheap and easy, allowing highly persuasive scammers to approach consumers.⁴ Given that consumers cannot always rely on traders to provide honest representation, the law plays a crucial role in providing protection against traders who may intentionally provide false, inaccurate, or misleading information to entice consumers to buy their products. For the law to be effective, it must be recognised and accepted by the general public, as well as enforceable, stable, consistent, and flexible.⁵ Therefore, key market players (eg, traders, consumers, or buyers) must first be informed of and understand the provisions of the *Consumer Protection Act 1999* (CPA) in Malaysia. Otherwise, these stakeholders will not be able to carry out their legal duty and exercise their statutory rights to the fullest. Second, law enforcers must be able to identify and arrest those who violate the CPA and bring them to justice. Third, the CPA itself needs to be stable and consistent. Therefore, lawmakers must avoid making unnecessary changes that confuse market players. Finally, the CPA must be flexible and adaptable to remain relevant and capable of protecting consumers despite the rapid changes in the e-commerce market.

Although the CPA is the primary legislation for consumer protection in Malaysia, it has been unable to keep pace with the technological advancements in e-commerce. In particular, it is outdated and has neglected the fundamental importance of ensuring informed consumers. This article identifies areas of the CPA that are in need of reform using a doctrinal approach to ensure that consumers can make informed decisions and are adequately protected in modern e-commerce transactions. In addition, this article takes a comparative approach, examining how the English legal framework provides comprehensive protection to consumers and addresses information duty in a rapidly changing and challenging e-commerce market. As a member of the European Union (EU) (before Brexit), the United Kingdom is bound to apply EU laws.⁶ The UK government and UK courts must apply, follow, and give primacy to EU laws and the decisions of the European Court of Justice (CJEU) in Luxembourg.⁷ Consequently, UK law has been influenced by EU

Protection and the Criminal Law: Law, Theory, and Policy in the UK (Cambridge University Press 2009); Michael G Faure & Hanneke A Luth, 'Behavioural Economics in Unfair Contract Terms' (2011) 34 *Journal of Consumer Policy* 337, 341; Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing Ltd 2012); Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar Publishing 2013); Peter Cartwright, 'Understanding and protecting vulnerable financial consumers' (2015) 38 *Journal of Consumer Policy* 119.

³Geraint Howells, 'The potential and limits of consumer empowerment by information' (2005) 32 *Journal of Law and Society* 349, 355.

⁴Patrick Quirk & John A Rothchild, 'Consumer Protection and the Internet', in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (2nd edn, Elgar 2018) 308.

⁵The Law Society of Western Australia, 'Francis Burt Law Education Programme' (FBLEP Characteristics of an Effective Law Teacher and Student Resource, 2015) <<https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/2015-FBLEP-Characteristics-of-an-Effective-Law.pdf>> accessed 4 Apr 2020.

⁶The UK joined the EU in 1973 where the European Communities Act 1972 was introduced to bring EU law within the UK legal system. Article 288 of the Treaty on the Functioning of the European Union (TFEU) provides a degree of discretion to Member States on how the directive is implemented and integrated into their national legal systems whilst EU regulations will be directly applicable in all Member States. Although the effectiveness of regulations does not depend on transposition by the Member States, changes to national law may be required to avoid a conflict with an EU Regulation, see Christian Twigg-Flesner, 'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?' - A way forward for EU Consumer Contract Law' (2011) 7 *European Review of Contract Law* 235, 243.

⁷TFEU, arts 251–281 (on the competences of the CJEU).

laws⁸ while the CJEU's decisions bind the UK courts on issues involving EU law. EU law operates in tandem with the laws of its Member States. Therefore, it is unsurprising that English consumer law today is an operational and doctrinal hybrid of common law and civil law systems.⁹

Comparisons with English law provides new insights and pragmatic suggestions for legal reform and regulatory improvements of consumer law in Malaysia. Furthermore, 'borrowing' legal rules and approaches that have already been successfully 'tested' abroad via legal transplants can be a more cost-effective alternative. Instead of guessing possible solutions and risking fewer effective approaches, Malaysia should consider the enormous wealth of legal experience from a more advanced jurisdiction.¹⁰ Specifically, the appropriate transplantation of English law may lower the costs of enacting new laws or switching from one set of rules to another. Indeed, '[T]he reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.'¹¹ The Malaysian legal system is also primarily based on the English common law resulting from colonisation by the British empire.¹² Although the Federation of Malaya (the polity that existed before the formation of Malaysia) attained independence from Britain in 1957, English law retains influence and its application remains permitted in Malaysia to a limited extent.¹³ Certain English statutes have also been modified to suit local circumstances.¹⁴ In addition, legal transplant is a common technique in the process of legal reform in Malaysia. The CPA itself draws extensively from consumer protection legislation in various countries such as New Zealand, Australia, and the UK.¹⁵

⁸Chris Willett, 'The Possible Impact of Brexit on Consumer Protection Law — Written evidence (CPR0003)' (2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-consumer-protection-rights/written/70882.html>> accessed 9 Sep 2019. Willett argues that EU law has significantly improved consumer protection in the UK whilst UK consumers are much better protected since the EU's rules were introduced.

⁹Unlike the common law where legal principles are developed by judges, civilian judges decide based on principles from a detailed code.

¹⁰The UK has an established reputation for having one of the world's strongest consumer protection regimes that ensure consumers' interests are safeguarded with modernised and comprehensive basic rights, strong advocates for consumer interests, and well-developed advice services. See Department for Business Energy & Industrial Strategy, 'Modernising Consumer Markets' (Consumer Green Paper, 2018) 6.

¹¹As translated in Konrad Zweigert, Hein Kötz & Tony Weir, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 17.

¹²Colonisation began in 1786 and lasted until the independence of the Federation of Malaya on 31 August 1957. When the British first occupied the island of Penang, they brought with them their own English legal system through the introduction of the First Charter of Justice in 1807, 1826 and 1855. See Tun Abdul Hamid Mohamad & Adnan Trakic, 'The reception of English law in Malaysia and development of the Malaysian common law' (2015) 44 *Common Law World Review* 123, 124.

¹³Civil Law Act 1956 (CLA), ss 3, 5. In *Lee Kee Chong v Empat Nombor Ekor (NS) Sdn Bhd* [1976] 2 MLJ 93, the Court clarified that when referring to the English common law, the courts are restricted to adopting English law as administered at its effective date; subsequent developments in English law are non-binding. However, in commercial matters, the English common law as administered in England at the corresponding period will still apply in Malacca, Penang, Sabah and Sarawak regardless of the cut-off dates: see CLA, s 5(2).

¹⁴For instance, to regulate trade activities, Malaysia has introduced the SOGA, which is a modified version of the Sale of Goods Act 1893 in the UK.

¹⁵Part II of the CPA 1999 on misleading and deceptive conduct, false representation and unfair practices is similar to the provisions in the Trade Practices Act 1974 of Australia and Fair Trading Act 1986 of New Zealand. Part III of the CPA 1999 dealing with the safety of goods and services is based on the Trade Practices Act 1974 of Australia, Fair Trading Act 1986 of New Zealand and the Consumer Protection Act 1987 of the UK. Furthermore, Parts V to IX of the CPA 1999 on guarantees in respect of the supply of goods and services, as well as rights of consumers against suppliers and manufacturers, are consistent with the provisions in the Consumer Guarantees Act 1993 of New Zealand. Part X of the CPA 1999 also applies the strict liability regime for defective products similar to that in the Consumer Protection Act 1987 of the UK.

The Preconditions of Effective Consumer Information

The duty of information is among the most fundamental regulatory instruments for achieving the objectives of consumer policy.¹⁶ Information duty can enhance consumer protection,¹⁷ whereas the absence of sufficient information may result in market failure.¹⁸ The law must ensure that the information provided to consumers is effective; namely, it is clear, understandable, engaging, and, most importantly, enables consumers to make informed decisions. However, determining the proper method of providing information and the appropriate information duty is not always straightforward. It is for the law and the courts to identify the solutions to these dilemmas.¹⁹ In general, there are three primary types of information that a consumer is likely to seek when considering making a purchase, namely, (i) the price of the product and other products (substitutes and complements), (ii) product quality, and (iii) the Terms & Conditions (T&Cs).²⁰ If consumers possess and understand these three types of information, they can make an optimal purchase and fulfil their economic role as a maximiser of their own utility.²¹

The importance of effective information has gained much attention from both government agencies and academic experts. The Financial Conduct Authority in the UK, for example, has identified several principles of smarter consumer communications. Among others, communication should be in plain and understandable language to meet the needs of the targeted audience. Furthermore, it must be made available at an appropriate time so that consumers can initiate prompt action.²² Similarly, the UK Office of Communications (Ofcom) has proposed seven potential characteristics for evaluating information; namely, awareness, accessibility, trustworthiness, accuracy, comparability, clarity, understandability, and timely.²³ Other scholars argue that information must be effective in terms of both contents and presentation, ie, communicated in a manner that consumers can understand to translate into action.²⁴ In addition, transparent information has been viewed as the primary approach to consumer protection. Transparency refers to 'an obligation to disclose (or not omit) certain information deemed needed by consumers to improve informed decision making'.²⁵ Information is therefore effective if it promotes transparency as it enables consumers to make informed and efficient choices.²⁶ What constitutes transparent information, however, varies according to the legal system of the respective country. Under English law, a written term or consumer notice is transparent if expressed in plain, intelligible language and legible.²⁷ Meanwhile,

¹⁶Jennifer Hamilton & Lorna E Gillies, 'The impact of e-commerce developments on consumer welfare-Information disclosure regimes' (2003) 11 *Journal of Financial Regulation and Compliance* 329, 331.

¹⁷Jules Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy on or beyond the Internal Market' (2000) 37 *Common Market Law Review* 367, 370.

¹⁸Ramsay (n 2) 55; Howells (n 3) 352.

¹⁹Christian Twigg-Flesner, 'Information Requirements and the Internet', in Evelyne Terryn, Gert Straetmans & Veerle Colart (eds), *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Intersentia 2013) 522.

²⁰London Economics, *Consumer Detriment under Conditions of Imperfect Information* (Office of Fair Trading 1997) 22; Howard Beales, Richard Craswell & Steven C Salop, 'The Efficient Regulation of Consumer Information' (1981) 24 *The Journal of Law and Economics* 491, 492.

²¹London Economics (n 20) 22.

²²Financial Conduct Authority, 'Feedback Statement: Smarter Consumer Communications' (Oct 2016) 14 <<https://www.fca.org.uk/publication/feedback/fs16-10.pdf>> accessed 14 Jun 2022.

²³Ofcom, 'A Review of Consumer Information Remedies' (12 Mar 2013) 2 <https://www.ofcom.org.uk/_data/assets/pdf_file/0033/91698/information-remedies.pdf> accessed 14 Jun 2022.

²⁴Natali Helberger, 'Form matters: informing consumers effectively' (Amsterdam Law School Research Paper, 2013) 4 <https://www.ivir.nl/publicaties/download/Form_matters.pdf> accessed 14 Jun 2022.

²⁵Chris Willett & Martin Morgan-Taylor, 'Recognising the Limits of Transparency in EU Consumer Law', in James Devenney (ed), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 147.

²⁶Jules Stuyck, Evelyne Terryn & Tom Van Dyck, 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market' (2006) 43 *Common Market Law Review* 107, 108; Willett & Morgan-Taylor (n 25) 147.

²⁷CRA 2015, s 68.

Table 1: The Essential Principles of ACCURATE Information²⁸

A	Awareness and Accessible The information is provided in such a manner that an average consumer would be aware of its existence and able to access the information to make informed decisions.
C	Clear and Comparable The information is clear and enables consumers to make a sensible comparison with similar or closely related products.
C	Comprehensive and Cost-beneficial The information provided is sufficient for consumers to make informed choices, whereas cost-beneficial refers to the time spent by consumers finding and processing the information they need. Consumers are likely to gather more information before making final decisions if the costs are lower and vice versa.
U	Understandable and User-friendly The information is understandable to an average consumer and presented in a manner that considers the technical competency of the consumers.
R	Relevant and Reliable The information is material to the transaction, trustworthy, neutral, and unbiased.
A	Accurate and Authoritative The information is accurate and authoritative to facilitate consumers in making informed decisions that reflect their exact preferences.
T	Transparent and Timely Vital information is given due prominence, such as information that affects consumers' interests and legal rights. Such information must be given at the right time and be readily available so that consumers have ample time to decide accordingly.
E	Educative and Empower The information is informative and improves consumers' understanding of the relevant product in addition to the consequences of their transactional decisions.

neither Malaysian law nor the CPA has any provision requiring consumer information to be transparent. This is the main issue that requires attention under Malaysian consumer law. Simply requiring traders to provide information is fruitless without clear guidance on the quality of the information itself. Accordingly, 'good consumer information' comprises transparency, comprehensibility, comparability, clarity, being fit for personal needs, and verifiability. Regrettably, the information that consumers currently receive hardly meet these requirements.²⁹

ACCURATE Information

This article argues that information is effective if it comprises crucial values encapsulated by the acronym ACCURATE. The ACCURATE framework proposed herein was developed based on the analysis of different key elements of effective information proposed by government agencies and academic experts as discussed above. The underlying principles of ACCURATE information are interrelated; thus, consumer information can be deemed effective if it displays most, if not all, of the ACCURATE aspects, as summarised in [Table 1](#) below.

The ACCURATE framework can be used as a benchmark to assess whether the CPA has mitigated the inequality of bargaining power between traders and consumers by ensuring that consumers have sufficient information to make informed purchase decisions. However, even if consumers are given ACCURATE information, they may not necessarily become well-informed

²⁸Table 1 was designed by the Author during her doctoral studies. See Junaidah Zeno, 'Information and Standard Terms in Consumer Contracts : Reforming Consumer Protection Law in Malaysia' (PhD, University of Bristol Law School, England 2019).

²⁹Andreas Oehler & Stefan Wendt, 'Good consumer information: The Information Paradigm at its (dead) end?' (2017) 40 *Journal of Consumer Policy* 179, 179.

buyers if they themselves do not read the information. Insights from behavioural economic studies have also noted that transparent information does not necessarily produce well-informed consumers.³⁰ First, when there is too much information to process prior to making a decision, consumers tend to focus exclusively on the core aspects of the transaction. Some consumers cease searching or will collect less information when it is costly (eg, time-consuming) to gather and process that information.³¹ Second, consumers may be overly optimistic, thus fail to anticipate future risks. This may be due to highly positive marketing techniques, prior psychological commitment to make purchases, and the risks and benefits of the transaction being framed in sophisticated ways. Third, consumers assume that traders are likely to disagree with any changes to the information in the T&Cs. Therefore, consumers frequently disregard the T&Cs, assuming that they are the industry standard and represent 'the law'.³² In essence, the core principles of the ACCURATE framework proposed herein may not necessarily serve as a legitimising factor for informed consumers or guarantee that consumers will act rationally and make wise decisions. However, it can represent a basis for consumers to give informed consent within the continually changing e-commerce environment. The ACCURATE information framework can also serve as a focal point for regulatory debates in Malaysia regarding the effectiveness of the CPA and the necessity of legal reform.

The Consumer Protection ACT 1999

The CPA addresses various consumer-related issues not considered by other prevailing laws in Malaysia, but it does not emphasise the duty of traders to provide information. Consequently, consumers are unable to make prudent buying decisions due to insufficient information.³³ The Act is also limited, irrelevant, and too outdated to deal with the complexities of e-commerce,³⁴ thereby increasing consumers' vulnerability. These lacuna are discussed in detail below.

The Duty of Information

Information duty is one of the most widely used tools in consumer law as it empowers consumers to make informed decisions.³⁵ It is, however, unfortunate that the CPA is less concerned with the role of information – the absence of which exposes consumers to the risk of making uninformed purchasing decisions. The CPA merely prohibits traders from making false or misleading representations about goods and services,³⁶ but it does not explicitly require traders to disclose material information before consumers make purchases. The Act is also silent on the obligation of traders to present information in a manner that average consumers can easily understand. Information

³⁰Helberger (n 24) 4; Anne-Lise Sibony, 'Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive' (2014) 6 *European Review of Private Law* 901; Fabrizio Esposito, 'A Dismal Reality: Behavioural Analysis and Consumer Policy' (2017) 40 *Journal Consumer Policy* 193; Seizov Ognyan, Alexander J Wulf & Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2019) 42 *Journal of Consumer Policy* 149; Seizov Ognyan & Alexander J Wulf, 'Communicating Legal Information to Online Customers Transparently: A Multidisciplinary Multistakeholderist Perspective' (2021) 33 *Journal of International Consumer Marketing* 159.

³¹Oren Bar-Gill, 'Consumer Transactions', in Eyal Zamir & Doron Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (1st edn, Oxford University Press 2014) 11.

³²Willett & Morgan-Taylor (n 25) 149.

³³Naemah Amin & Roshazlizawati Mohd Nor, 'Online shopping in Malaysia: Legal Protection for E-consumers' (2013) 5 *European Journal of Business and Management* 79, 80, 82.

³⁴ibid 80; Sakina Shaik Ahmad Yusoff et al, 'Consumer protection and the Malaysian Sale of Goods Act 1957' (2015) 9 *International Business Management* 452, 452, 453.

³⁵Christoph Busch, 'The future of pre-contractual information duties: from behavioural insights to big data', in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer Contract Law* (Elgar 2016) 222.

³⁶CPA 1999, s 10.

duty operates on an *ex-ante* basis to prevent consumers from experiencing harm (eg, receiving goods of unacceptable quality or non-mercantile goods), as shown in *Naza Motor Trading Sdn Bhd v Faizah binti Othman* (henceforth ‘Naza’).³⁷ Here, the consumer bought a Mercedes Benz car that had technical issues after five months of use. The car required a type of fuel called ‘Euro 5’ that was unavailable in Malaysia, but that requirement can be modified to allow the car to function in local settings. The Court held that the dealer was liable for failing to supply acceptable and merchantable quality goods as required under the CPA and the *Sale of Goods Act 1957* (SOGA).³⁸ Arguably, the purchaser would have been able to minimise the risk of economic loss and made an informed decision if the CPA had initially placed a duty on businesses to disclose material information before the consumer’s final decision. As illustrated in *Naza*, the purchaser would have decided otherwise if she was informed of the technical limitation from the outset.³⁹

The absence of information duty under the CPA gives traders discretion over what information to disclose and how to convey it to consumers. The information may be of poor quality, written in vague and complicated language, printed in small fonts, and mixed in with traders’ endless T&Cs. In these instances, consumers may not understand the information, let alone read it. Consumers are also prone to ‘bounded rationality’⁴⁰ whereby they can only process a limited amount of information at a time. The concept of ‘bounded rationality’ refers to actual human thinking and behaviour that differs from that which is expected of a rational consumer. Such biases include the habits and tendencies of humans that systematically underestimate or overestimate certain kinds of risks. Consumers, for example, tend to be overconfident in their abilities and their faith in the quality and reliability of the information given. Consequently, they might underestimate the probability of a dispute with the trader and thus ignore information such as disclaimers and T&Cs.⁴¹ Consumers also tend to rely on their personal heuristics⁴² to simplify their decisions when dealing with a significant amount of information. Nevertheless, they may develop cognitive biases,⁴³ cease reading material information, and make purchases against their best interests. Furthermore, consumers who wish to bring legal action against a trader in Malaysia must establish that the trader’s conduct or representations have led them into error.⁴⁴ For example, in *Euromobil Sdn Bhd v Nan Ya Hardware Sdn Bhd*, the Court held that ‘it is the Plaintiff who brought this suit, and in consumer protection claims, the burden is still on the Plaintiff to prove based on the balance of probability by

³⁷[2015] 5 LNS 122.

³⁸ibid para 58.

³⁹*Naza* (n 37) para 41. The Court also acknowledged the importance of disclosing relevant and material information to enable consumers to make informed decisions, ie, in this case, the functionality of the car in the local setting: see ibid para 57.

⁴⁰The concept refers to the limited capacities of the human mind to process complex information and remember facts: Herbert A Simon, ‘Theories of Decision-making in Economics and Behavioral Science’ (1959) 49 *The American Economic Review* 253; Christine Jolls, ‘Bounded Rationality, Behavioral Economics, and the Law’, in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts* (Oxford University Press 2017). Jolls described ‘bounded rationality’ as a situation where human have limitations in knowledge and decision-making capability.

⁴¹Fernando Gómez Pomar & Mireia Artigot Golobardes, ‘Rational choice and behavioural approaches to consumer issues’, in Hans-W Micklitz, Anne-Lise Sibony & Fabrizio Esposito (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar Publishing 2018) 134, 135.

⁴²Richard E Mayer, ‘Problem Solving’, in Daniel Reisberg (ed), *The Oxford Handbook of Cognitive Psychology* (vol 6, Oxford University Press 2013): Mayer described ‘heuristics’ as a process of problem-solving and general approaches to how to solve problems. cf Gerd Gigerenzer & Wolfgang Gaissmaier, ‘Heuristic Decision Making’ (2011) 62 *Annual Review of Psychology* 451, 454: Gigerenzer and Gaissmaier viewed heuristics as ‘strategies that ignore part of the information, with the goal of making decisions more quickly, frugally, and/or accurately than more complex methods’.

⁴³John Scott (ed), *A Dictionary of Sociology* (4th edn, Oxford University Press 2014): Scott defined ‘cognition’ (cognitive) as ‘[t]he process of knowing (thinking), sometimes distinguished from affect (emotion) and conation or volition (striving), in a triad of mental processes’.

⁴⁴CPA 1999, s 8(a).

following section 101 of the Evidence Act 1950'.⁴⁵ Arguably, it is challenging for consumers to prove that they were led into error if traders do not owe them a legal duty of information in the first place. Consumers also have to represent themselves before the Tribunal for Consumer Claims without the assistance of a lawyer.⁴⁶ As such, consumers must be well-versed in their statutory rights, which can be challenging if the CPA itself does not explicitly grant them the right to be informed.

Outdated Legislation

The CPA has been in force for two decades, yet it has not developed in line with modern e-commerce transactions. Most of the key provisions and scope of coverage has remained unchanged, thus raising doubts about its effectiveness in the digital age. The term 'in trade', for example, is the key concept which defines the protection offered by the CPA.⁴⁷ In general, 'trade' refers to '[t]he business of selling, [for] profits, goods which the trader has either manufactured or himself purchased'.⁴⁸ Meanwhile, the CPA defines 'trade' as 'any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services'.⁴⁹ Such a broad interpretation of 'trade' offers little assistance in identifying who is the trader acting 'in trade' within the scope of the CPA. In addition, the CPA does not clarify whether 'trade' that fall within its remit refers to commercial sale, private sale, or both. Judicial assistance is also limited regarding the term 'in trade' and the dividing line between commercial and private trade.⁵⁰ Arguably, private traders are unlikely more aware of consumer law requirements than professional traders, and subjecting them to the CPA may impose additional burden on law enforcement. Enforcement authorities, in particular, may struggle to police a larger number of small-scale traders in the e-commerce marketplace compared to a smaller number of large-scale traders.⁵¹

The fine line between a commercial and a private sale creates challenges in determining when a private trader qualifies as a commercial trader acting 'in trade' under the CPA. For example, many Malaysians generate extra income by selling handmade products on social media platforms (eg, Facebook). These individuals trade on occasion, and it is uncertain if their activities are considered 'in trade' during those periods and, therefore, should comply with the CPA. Furthermore, some individuals sell refurbished items (eg, laptops or iPhones) in addition to their used products, raising the issue of whether they are professional traders, private traders, or both. However, if private traders are not recognised as acting 'in trade' under the CPA, consumers who buy from them will have limited rights compared to those buying from professional traders in a commercial sale. Consumers may assert their rights under general contract law, ie, the *Contract Act 1950* (CA) or SOGA, but relying on these statutes put them at a disadvantage. Both are archaic laws, favouring the principles of freedom of contract and contain no provisions on consumers' right to information. If a private trader contests the consumer's claim, the parties may have to seek judicial redress, which could be

⁴⁵[2017] 1 LNS 2206 para 35. Another example is *Euro Rent A Car Sdn Bhd v Sunway Parking Services Sdn Bhd* [2017] MLJU 2279 where the Court held that the burden of proof rests with the claimant on the balance of probabilities to prove that the exemption clauses is contradicted to the CPA. See also the Federal Court's decision in *Letchumanan Chettiar Alagappan & Anor v Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 para 54.

⁴⁶CPA 1999, s 108.

⁴⁷CPA 1999, s 2(1) (the CPA shall apply to 'all goods and services that are offered or supplied to one or more consumers in trade including any trade transaction conducted through electronic means').

⁴⁸Mick Woodley (ed), *The Osborn's Concise Law Dictionary* (12th edn, Sweet & Maxwell 2013) 425.

⁴⁹CPA 1999, s 3(1).

⁵⁰This may be due to the scarcity of consumer-related cases brought before the Court under the CPA, as observed from the case reports published in the Current Law Journal, a Malaysian-owned legal publisher that provides subscribers access to databases containing cases, articles, practice notes, legislative forms, precedents, sample agreement and legislation. See CLJ, 'Home Page' <<https://www.cjljlaw.com/?page=home>> accessed 14 Jun 2022.

⁵¹Quirk & Rothchild (n 4) 308.

both costly and time-consuming. The burden of proof will be more complicated in a private sale because it is usually made informally with no written agreement or sale invoice. Furthermore, when purchasing goods from private traders, the principle of *caveat emptor* (let the buyer beware) is often applied, ie, it is the buyer's responsibility to check the quality and suitability of the goods or services prior to purchasing them.

The CPA also defines a 'consumer' as a person who 'acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption'.⁵² However, the Act does not further elaborate on this interpretation. Relying on the reason for which the goods were purchased and their intended use to determine whether a person is a consumer under the CPA does not reflect the actual state of today's transactions. The purpose of the purchase is difficult to deduce as it requires an assessment of the buyer's subjective state of mind prior to making a final decision. Although a purchaser who acquires goods for business purposes is not a 'consumer' under the CPA, in practice, many buyers nowadays purchase goods for both private and business purposes. For instance, some purchase laptops or smartphones exclusively for personal use, whereas others buy them for personal and business purposes. In the latter case, it is uncertain whether those consumers fall within the definition of 'consumer' under the CPA. Fortunately, the CPA's interpretation of the term 'consumer' is similar to that of the *Consumer Guarantees Act 1993* (CGA)⁵³ and *Fair Trading Act 1986* (FTA)⁵⁴ in New Zealand, another Commonwealth jurisdiction that share the same common law roots as Malaysia. Therefore, the New Zealand Court of Appeal's view in *Nesbit v Porter*⁵⁵ may shed light on the meaning of 'consumer' under the CPA. The Court held that 'ordinarily' is used in the sense of 'as a matter of regular practice or occurrence' or 'in the ordinary or usual course of events or things'.⁵⁶ This suggests that the phrase 'ordinarily acquired for personal, domestic or household purpose, use or consumption' focuses not on the dominant use of a product but what is considered 'ordinary'. For example, a business is a consumer and may seek protection under the CGA if they purchase a laptop – an 'ordinary' product – rather than, say, a photocopy machine.

In terms of scope, the CPA has also not been expanded to regulate the purchase of digital content, despite the fact that millions of consumers worldwide conduct such transactions daily.⁵⁷ The existing definitions of 'goods' and 'services' under the CPA are incompatible for describing digital content, ie, data produced and supplied in digital form. Such content includes software; computer games; applications ('apps'); ringtones; e-books; online journals; and digital media such as music, film, and television programmes.⁵⁸ Consumers can purchase digital content on a durable medium (eg, in a digital disc) or by downloading, streaming, or using a specific password to access these services. In addition, books and films that were previously exclusively available in a tangible form are now offered in digital formats (eg, e-books, Netflix), whereas digital goods with no visible

⁵²CPA 1999, s 3(1).

⁵³CGA 1993, s 2(1): A 'consumer' is defined as a person who '(a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption'.

⁵⁴FTA 1986, s 2(1): A 'consumer' is a person who '(a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption'.

⁵⁵[2000] 2 NZLR 465. This case involved the purchase of an eleven-year-old Nissan Navara four-wheel drive utility vehicle that brought a business within the scope of the CGA. Evidence of Nissan Navara sales in New Zealand showed that 80% of buyers purchased the vehicle for commercial purposes whilst only 20% bought it exclusively for private use. The Court, however, held that the said vehicle was a goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

⁵⁶[2000] 2 NZLR 465 para 29.

⁵⁷Lucie Guibault et al, 'The Regulation of Digital Content Contracts in the Optional Instrument of Contract Law' (2011) 19 European Review of Private Law 729, 730.

⁵⁸Department for Business Innovation & Skills (United Kingdom), 'Consumer Rights Act: Digital Content' (Guidance for Business, Sep 2015) 4; Consumer Rights Act 2015 (UK), Explanatory Notes, para 166 <<https://www.legislation.gov.uk/ukpga/2015/15/notes/contents>> accessed 14 Jun 2022.

precursor such as computer software and apps for smartphones (eg, game apps) have emerged. Given these novelties, the CPA requires reform to keep pace with technological advancements and provide comprehensive protection to domestic consumers in the modern e-commerce market. Otherwise, there will be legal uncertainties regarding consumer protection and rights in digital content transactions, including the right to be informed about the functionality of the digital content, the applicable remedies if the digital content are not of satisfactory quality or not as described, and the right to be protected against unfair T&Cs.

The Supplementary Status

The CPA is the primary legislation for consumer protection in Malaysia, but it is only supplemental to other laws governing contractual relations.⁵⁹ The Federal Court clarified in *Ong Siew Hwa v UMW Toyota Motor Sdn Bhd* that

[t]he effect of the words ‘without prejudice’ in section 2(4) of the CPA is that the application of the CPA is not to impair the force of any other law regulating contractual relations. The CPA does not override or repeal any other law on contractual relations ... any other law regulating contractual relations continue to apply together with the CPA.⁶⁰

The supplementary nature of the CPA has defeated its purpose as Malaysia’s main consumer protection legislation. It also indicates that the CPA is dependent on other laws regulating contracts (eg, SOGA) and is incapable of providing robust protection to consumers on its own. Decided cases show that the CPA will not override SOGA. Instead, they may apply synchronously when *pari materia* provisions are involved, such as the requirement that goods must be of satisfactory quality and match their description.⁶¹ For instance, in *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd*,⁶² the defendant was found guilty of violating the statutory guarantees under section 32 of the CPA due to the subject matter (a car) being of substandard or unacceptable quality.⁶³ In regard to the remedies, the Court cited section 12(2) of SOGA, which allows the Plaintiff to terminate the contract,⁶⁴ and section 45 of the CPA to reject and return the goods.⁶⁵ Arguably, the Court would have reached the same decision without referring to SOGA as the CPA itself contains provisions that have the same effects as section 12(2) of SOGA.⁶⁶ Likewise, in *Naza*,⁶⁷ the trader was found guilty of violating section 32 of the CPA and section 16 of SOGA by failing to supply goods of acceptable quality that were reasonably fit for its intended purpose.⁶⁸ Regrettably, the Court failed to recognise section 33 of the CPA, which is analogous to section 16 of SOGA.

These decided cases indicate that Malaysian courts are sceptical of the CPA’s ability to deal with consumer matters independently. It also reflects the courts’ reluctance to release themselves from the shackles of archaic law. The continued use of both Acts in consumer cases may result in legal uncertainty regarding which law shall prevail in the event of a conflict or overlap between the CPA and SOGA. It should be noted that SOGA is currently obsolete in the context of digital

⁵⁹CPA 1999, s 2(4).

⁶⁰[2018] 8 CLJ 145 para 36.

⁶¹CPA 1999, s 32 and SOGA 1957, s 16; CPA 1999, s 34 and SOGA 1957, s 15.

⁶²[2011] 9 CLJ 833.

⁶³*ibid* paras 26, 29.

⁶⁴*ibid* para 27.

⁶⁵*ibid* paras 27, 30, 48.

⁶⁶Part VI of CPA 1999 gives consumers the right to redress against suppliers. For example, a consumer may reject the goods and request a refund.

⁶⁷See *Naza* (n 37).

⁶⁸*ibid* para 58.

commerce. It was enacted in 1957 when the Federation of Malaya (as it was then) gained independence from the British Empire. Furthermore, SOGA is not a consumer protection-oriented piece of legislation. The principles therein are closely linked to the English law practices of the 18th and 19th centuries when the freedom of contract and application of the *laissez-faire* doctrine was prevalent. Therefore, it is unsurprising that SOGA contains provisions that directly contradict consumer expectations and interests.⁶⁹ In essence, SOGA is incapable of dealing with issues that arise in the modern and sophisticated 21st century society; thus, referring to that Act in consumer-related matters leads to injustice.

The Consumer Protection (Electronic Trade Transactions) Regulations 2012

The CPA was amended in 2007 to include e-commerce transactions within its purview. The amendment, however, does not impose a direct obligation on traders to provide consumers with information. The CPA later rectified this by introducing the *Consumer Protection (Electronic Trade Transactions) Regulations 2012* (CPETTR) to regulate information disclosure in e-commerce. The CPETTR requires traders to display eight types of information, namely (i) the name of the trader, business or company; (ii) their registration number; (iii) contact details; (iv) descriptions of the main characteristics of the goods and services; (v) final prices (including any other costs such as transportation and taxes); (vi) the method of payment; (vii) the T&Cs and (viii) the estimated time of delivery.⁷⁰ The CPETTR contains no penalties for violations of its provisions, but general penalties under the CPA may apply.⁷¹ The CPETTR also requires online marketplace operators to keep records for two years of the names, phone numbers, and addresses of traders who use their platform. Non-compliance will render the platforms liable and punishable under the CPA.⁷² However, operators are not required to verify the authenticity of such information; thus, fraudulent traders can still use the platform for scamming purposes.

The CPETTR mandates traders to provide consumers with certain information, but it is silent on how that information should be delivered. In particular, it does not require information such as, for example, descriptions of the main characteristics of the goods or services and the T&Cs, to be made transparent and understandable to the average consumer. The CPETTR also consists of only five regulations,⁷³ which are arguably insufficient to assist consumers in making informed decisions. First, the CPETTR fails to appreciate other essential information, such as the dispute settlement process representing consumers' right to seek redress. In *Naza*,⁷⁴ the Court recognised the importance of information on the right of redress and held that traders have a continuing obligation (even after the transaction has concluded) to provide consumers with sufficient information regarding available redress, ie, to reject or repair the goods. Second, traders need to keep consumers informed about the confidentiality of their data as this can boost consumers' confidence and trust in e-commerce. Regrettably, the CPETTR does not require traders to inform consumers of how their data are processed and used, despite the fact that privacy-related issues are relatively high among online

⁶⁹For example, section 15 of SOGA 1957 deals with the implied guarantee that goods shall correspond with their description, which is particularly crucial in e-commerce where consumers rely heavily on the descriptions and information provided online. However, the trader may waive this legal duty (and all other implied guarantees in SOGA 1957) as section 62 of the Act allows for the exclusion of implied terms and conditions by an express agreement. Therefore, SOGA 1957 is unsuitable for consumer contracts as it may put consumers in a vulnerable position. See also, Ahmad Yusoff et al, 'Consumer's Right to Redress Against Traders under the Law of Supply of Goods: A Comparative Study of Selected Jurisdiction' (2011) 2 *Journal of Global Management* 146, 147.

⁷⁰CPETTR, reg 3(1) and its schedule.

⁷¹CPETTR, reg 3; CPA 1999, s 145.

⁷²CPETTR, reg 5.

⁷³Namely, (1) citation and commencement, (2) interpretation, (3) disclosure of information, (4) rectification of errors and acknowledgement of receipt and (5) maintenance of record.

⁷⁴*Naza* (n 37) para 60.

shoppers in Malaysia. A survey conducted to understand consumers' characteristics and behaviours in e-commerce also revealed that most consumers (59.0 per cent) are concerned with how their data are treated, including their misuse for marketing purposes and browser tracking.⁷⁵

The Duty of Information Under English Law

English law has traditionally adopted a reluctant position towards the requirement of information duties.⁷⁶ However, following the implementation of EU law, the duty of information has become the most important regulatory instrument in the UK, mostly in consumer contracts.⁷⁷ The duty of information under English law is governed by the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (CCR), the *Consumer Rights Act 2015* (CRA), and the *Consumer Protection from Unfair Trading Regulations 2008* (CPUTR). Traders must provide the information specified under Schedule 2 of the CCR clearly and prominently prior to the consumer placing an order. It is based on this pre-contractual information that consumers can make an informed choice to be bound by the contract or otherwise. Information provided on a durable medium must also be legible.⁷⁸ The relevant information is deemed to have been made available when consumers can reasonably be expected to know how to access it.⁷⁹ The information required under the CCR is treated as a term,⁸⁰ and traders must prove that such information has been appropriately provided to consumers.⁸¹ The CCR does not provide penalties for breaches, but consumers may claim under the CRA if traders fail to perform their information duty specified under the CCR.⁸² Both pieces of legislation forbid any changes being made to the pre-contractual information unless expressly agreed between the contracting parties.⁸³ However, for digital content, traders may improve or add new features provided that it continues to match the original product description and conforms to the pre-contractual information previously disclosed.⁸⁴

The CPUTR, on the other hand, contains several provisions associated with information duty in commercial practices, namely (i) misleading actions and omissions and (ii) aggressive practices. Misleading actions⁸⁵ concern the act of giving false information to consumers. Although the information provided may be factually correct, it can still lead to misleading actions if delivered

⁷⁵Malaysian Communications and Multimedia Commission, *e-Commerce Consumers Survey 2018* (2018) 7, 15 <<https://www.mcmc.gov.my/skmmgovmy/media/general/pdf/ecs-2018.pdf>> accessed 14 Jun 2022.

⁷⁶Ruth Sefton-Green, 'General Introduction', in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press 2005) 25. Sefton-Green argued that English law applies the concept of misrepresentation, which cannot be equated to a duty to inform. Under the duty to inform, there is a positive or negative duty to tell or conceal the truth. In contrast, misrepresentation does not impose such duties to make an initial statement. The point of misrepresentation is that when statements are made, they must be truthful. See also Christian Twigg-Flesner, Reiner Schulze & Jonathon Watson, 'Protecting rational choice: information and the right of withdrawal', in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (2nd edn, Elgar 2018) 114; John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (4th edn, Sweet & Maxwell 2017) ch 17 (chapter titled 'Particular Duties of Disclosure').

⁷⁷Cartwright (n 76) 634.

⁷⁸CCR, reg 13.

⁷⁹CCR, reg 8.

⁸⁰CCR, reg 18.

⁸¹CCR, reg 17.

⁸²CRA, ss 12 and 19 (5).

⁸³CRA, ss 11(5), 12(3), 36(4), 37(3) and 50(4); CCR, regs 9(3), 10(5) and 13(6).

⁸⁴CRA, s 40; CRA. Explanatory Notes, paras 196–198: Pre-contractual information previously disclosed can be included in the T&Cs of the licence. In most cases this is for the benefit of consumers as digital content often require important updates to maintain its quality. Furthermore, requiring consent for every update would create problems for businesses due to the logistics of contacting every consumer to elicit their consent. Another problem can arise when some consumers do not accept the updates, resulting in many versions of a software in circulation. Unnecessary disputes may also arise between contracting parties if digital content stops functioning properly due to lack of updates.

⁸⁵CPUTR, reg 5.

deceptively. Meanwhile, traders are deemed to have committed misleading omissions⁸⁶ if they (i) omit material information, (ii) hide material information, (iii) provide material information in an unclear, unintelligible, ambiguous, or untimely manner, and (iv) fail to identify the commercial intent unless it is already apparent from the context.⁸⁷ Material information refers to the information that the average consumer requires to make an informed transactional decision in the given context, and any informational requirement that applies to a commercial communication due to an obligation under EU law.⁸⁸ The CPUTR also forbids aggressive practices to shield consumers against physical or psychological pressure while making decisions.⁸⁹ A commercial practice is aggressive if it will significantly (or is likely to) impair consumers' freedom of choice or conduct via harassment, coercion, or undue influence. The CPUTR does not expressly define harassment and coercion, but they may include physical and non-physical (eg, psychological) pressure.⁹⁰ Meanwhile, undue influence refers to the exploitation of power or position to pressure the consumer. It does not necessarily involve a threat or physical force as long as it significantly limits the consumer's freedom to make informed choices.

The Key Aspects under the CPUTR

Traders are deemed to have breached the CPUTR if their commercial practices cause (or are likely to cause) average consumers to make a transactional decision they would not have made otherwise.⁹¹ However, the courts will also consider several aspects before deciding whether a commercial practice constitutes a breach.

Standards of Protection

English consumer law considers average and vulnerable consumers within its regulatory framework. The origins of the average consumer standard can be traced to the case of *Gut Springenheide*.⁹² In that case, the CJEU adopted the opinion of the Advocate General, stating that the Court has always referred to the average, reasonably circumspect consumer as the benchmark of its consumer policy as opposed to the casual consumer.⁹³ From a legal perspective, the average consumer refers to the 'reasonably well informed, reasonably observant and circumspect' individual,⁹⁴ with each of these characteristics having its own significance. 'Well-informed' relates to 'the level of knowledge the consumer is assumed to have', 'reasonably observant' refers to 'the intensity and absorption of information', and being 'circumspect' is concerned with 'the degree of critical attitude the consumer should have when processing information'.⁹⁵ In *Office of Fair Trading v Purely Creative Ltd*

⁸⁶CPUTR, reg 6.

⁸⁷A clear commercial intent is required to prevent consumers from being misled by the nature of the advertised message. A clear indication of a commercial practice includes the presence of a price and keyword phrases such as 'buy', 'low price', 'discount', 'free shipping' and an obvious statement like 'this is a commercial advertisement'.

⁸⁸CPUTR, reg 6(3).

⁸⁹CPUTR, reg 7.

⁹⁰Office of Fair Trading and Department for Business Enterprise & Regulatory Reform, Consumer Protection from Unfair Trading: Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive (Office of Fair Trading 2008) 14 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf> accessed 14 Jun 2022.

⁹¹CPUTR 2008, reg 3.

⁹²Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-4657.

⁹³ibid paras 15, 31, 37.

⁹⁴CPUTR, reg 2(2).

⁹⁵Cătălin Gabriel Stănescu, 'The Responsible Consumer in the Digital Age: On the Conceptual Shift from 'Average' to 'Responsible' Consumer and the Inadequacy of the 'Information Paradigm' in Consumer Financial Protection' (2019) 24 *Tilburg Law Review: Journal of International and European Law* 49, 53.

(henceforth ‘Purely Creative’),⁹⁶ the English Court took the view that the ‘average consumers’ reflects consumers ‘who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer’.⁹⁷ Such an ‘average consumer’ is a hypothetical person and somewhat different from the legal tests used in other contexts, namely ‘the reasonable person’, ‘the fair-minded observer’, or ‘ordinary decent people’.⁹⁸ It is linked factually to a specific population of actual persons, namely, the consumers targeted by the relevant advertising.⁹⁹

An average consumer is a hypothetical person, or ‘legal construct’, created to balance between various competing interests, ie, the need to protect consumers, promote free trade in an openly competitive market, and establish a standard for national courts to apply.¹⁰⁰ The assessment is based on a qualitative judgement rather than a quantitative or statistical test. The courts may consider the generally presumed consumer’s expectations without requiring an expert report or consumer survey.¹⁰¹ Judges are not required to consider ‘the ignorant, the careless or the over-hasty’ consumers, as protecting such a demographic is not the purpose of the EU Directive on Unfair Commercial Practices (UCPD), which the CPUTR transposed.¹⁰² The bar set is higher, with judges expected to consider only reasonably well-informed, observant, and circumspect consumers.¹⁰³ Primarily, the law only protects consumers who exert some effort in informing themselves and make good use of the information made available to them. As the proverb goes, *vigilantibus non dormientibus iura succurunt*, which can be translated as ‘the law comes to the assistance of those who are vigilant with their rights, and not those who sleep on their rights’.¹⁰⁴

Certain consumers are more vulnerable than the average consumer in e-commerce transactions, even when they are placed in a good position to make informed decisions. These consumers are vulnerable due to characteristics beyond their control that prevent them from understanding and utilising the disclosed information, such as mental or physical infirmity, age, or credulity in a manner that traders could reasonably be expected to foresee.¹⁰⁵ Consequently, the standard of a vulnerable consumer is established to guard traders against using their superior position to exploit consumers’ behaviour and deficiencies.¹⁰⁶ Consumers’ vulnerability, however, is not limited to uncontrollable personal characteristics. Consumers can also be vulnerable in a variety of

⁹⁶[2011] EWHC 106 (Ch). In this case, the English Court had, for the first time, the opportunity to explain the key terms used to analyse the existence of unfair practices within the meaning of regulations 5 and 6 of the CPUTR. This case has been referred to by the CJEU in Case C-428/11 *Purely Creative Ltd and Others v Office of Fair Trading* [2012]. In para 55, the CJEU clarified that in examining whether the information obligation has been met, national courts shall consider (i) the availability of the information and how it is presented, (ii) the legibility and clarity of the wording, and (iii) whether it can be understood by the public targeted by the practice.

⁹⁷*Purely Creative* (n 96) para 62.

⁹⁸Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, rec 18. See also *Gut Springenheide* (n 92) para 37; Case C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] 1 CMLR 515 para 32.

⁹⁹*R (on the application of CityFibre Ltd) v Advertising Standards Authority Ltd and another (Hyperoptic Ltd intervening)* [2019] EWHC 950 (Admin) (henceforth ‘*CityFibre Ltd*’) para 107 (Murray J); CPUTR, reg 2(5)(b) (stating that where a commercial practice is specifically targeted at a particular consumer group, the average consumer will be referred to the average member of that group).

¹⁰⁰*Interflora Inc and another v Marks and Spencer plc (Interflora)* [2014] EWCA Civ 1403 paras 112–115, 118.

¹⁰¹*Gut Springenheide* (n 92) paras 31, 32, 36, 37. See also Case C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000], Opinion of AG Fennelly, para 28.

¹⁰²*CityFibre Ltd* (n 99) para 108 (Murray J).

¹⁰³*Interflora Inc and another v Marks and Spencer plc* [2014] EWCA Civ 1403 para 125 (Kitchin LJ); a similar definition can be seen under CPUTR, regs 2(2)–(6).

¹⁰⁴Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR I-0131, Opinion of AG Tesouro, para 9; and as translated in Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (1st edn, Hart Publishing 2016) 31.

¹⁰⁵CPUTR, reg 2(5).

¹⁰⁶Willem H Van Boom, ‘Unfair commercial practices’, in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Elgar 2016) 404.

interconnected contexts.¹⁰⁷ These vulnerabilities are classified as informational vulnerability (eg, information asymmetries), pressure vulnerability (eg, lack of confidence or knowledge), supply vulnerability (eg, where there is a situational monopoly in the market), redress vulnerability (eg, consumers have difficulties securing redress due to a lack of awareness of their rights or the settlement mechanisms available), and impact vulnerability (eg, where loss or harm impacts certain consumers disproportionately due to differences in their level of poverty or income).¹⁰⁸

Commercial Practices

The concept of ‘commercial practice’¹⁰⁹ that the CPUTR aims to govern is ‘concerned with systems rather than individual transactions’. The protection is mainly directed at commercial practices as a whole rather than to a specific commercial transaction.¹¹⁰ In *Nemzeti*,¹¹¹ the CJEU held that the sole criterion for ‘commercial practices’ under Article 2(d) of the UCPD is that the trader’s practice must be ‘directly connected with the promotion, sale or supply of a product to or from consumers’.¹¹² Meanwhile, in *Warwickshire County Council v Halfords Autocentres Ltd (Competition and Market Authority Intervening)* (henceforth ‘*Warwickshire*’),¹¹³ the English Court clarified that the UCPD focuses on commercial practices targeted at consumers rather than ‘a consumer’.¹¹⁴ Considering otherwise would do serious harm to the principal aim of the UCPD, ie, to achieve a high level of consumer protection.¹¹⁵ The Court also held that a commercial practice might be established through a test purchase of a product (including a service) that is generally promoted to and intended for purchase by consumers, even if the purchaser may not himself be a consumer (eg, a trading standards officer pretending to be a consumer). The English Court has sufficient confidence in its interpretation, which seems clear when a properly purposive approach is taken; thus, it denied the request for a referral to the CJEU.¹¹⁶

Transactional Decisions

A ‘transactional decision’¹¹⁷ does not exclusively refer to the decision to enter into a legally binding contract. It encompasses a wide range of potential consumer decisions that have been or may be taken by the average consumer concerning the product.¹¹⁸ In the e-commerce environment,

¹⁰⁷ibid 403; Cartwright, ‘Understanding and protecting vulnerable financial consumers’ (n 2) 121.

¹⁰⁸Cartwright, ‘Understanding and protecting vulnerable financial consumers’ (n 2).

¹⁰⁹CPUTR, reg 2(1): Commercial practices refer to ‘any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product’.

¹¹⁰*R v X Ltd* [2014] 1 WLR 591 (CA) para 23 (Leveson LJ); *Warwickshire County Council v Halfords Autocentres Ltd (Competition and Market Authority Intervening)* [2019] 2 All ER 69 (QB) paras 28–29 (Hickinbottom LJ).

¹¹¹Case C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft* [2015] (henceforth ‘*Nemzeti*’).

¹¹²*Nemzeti* (n 111) para 35, with references. In Case C 281/12 *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato* [2013] (henceforth ‘*Trento*’), the CJEU acknowledged that the limit for when a commercial practice is no longer ‘directly connected’ to the promotion of a product can be difficult to define. An analysis will need to be employed on a case-by-case basis: ibid para 35. In addition, the European Commission has provided the example where a trader has sold a street map not containing any promotional messages, and the consumer subsequently uses that street map to locate a particular shop. It would seem unreasonable to classify the sale of that street map as a commercial practice ‘directly connected’ to the promotion of a product in that given shop: European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (COM (2016) 320), 2016) 32.

¹¹³[2019] 2 All ER 69 (QB).

¹¹⁴ibid para 35.

¹¹⁵ibid para 37.

¹¹⁶ibid paras 44–45.

¹¹⁷CPUTR, reg 2(1): A ‘transactional decision’ is defined as ‘any decision taken by a consumer, whether it is to act or to refrain from acting, concerning (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or (b) whether, how and on what terms to exercise a contractual right in relation to a product.’

¹¹⁸Office of Fair Trading and Department for Business Enterprise & Regulatory Reform (n 90) 67.

‘transactional decisions’ may include the decision to visit a trader’s website first, rather than its competitors, and navigate to another page on a website to view further content.¹¹⁹ A ‘transactional decision’ also includes the decision to purchase a product and other related decisions. In *Trento*,¹²⁰ the consumer claimed that a supermarket advertisement was misleading because a laptop advertised at a promotional price was not available at the store during his visit. The question raised before the CJEU was whether the consumer’s decision to enter the store constituted a ‘transactional decision’ distinct from the decision to purchase the laptop. The CJEU confirmed the broad interpretation of ‘transactional decision’ to include the purchase of the laptop and other directly related decisions such as entering the shop.¹²¹ However, it is for the national court to determine, on a case-by-case basis, whether the information disclosed is sufficient to enable consumers to make informed transactional decisions.¹²²

In *Purely Creative*,¹²³ the Court noted that any decision taken by consumers with an economic consequence was a transactional decision, even if it was simply deciding between doing nothing and responding to promotions by posting a letter, making a premium rate call, or sending a text message.¹²⁴ The Court explained that the applicable test for the phrase ‘causes or is likely to cause’ is equivalent to the English standard of the balance of probabilities, whereas the phrase ‘to take a transactional decision, he would not have taken otherwise’ suggests a *sine qua non* test, namely, whether but for the relevant misleading action or omission of the trader, the average consumer would have made a different decision.¹²⁵ The Court also asserted that the causation test for misleading acts and omissions is the same and must be assessed simultaneously; an independent assessment could erroneously allow communication to escape from being classified as an infringement containing misleading acts and omissions – none of which would separately satisfy the causation test unless combined.¹²⁶

Materiality of Information

Traders are not required to disclose all the available information they possess, but only that which is material for consumers to make informed decisions. The purpose of information disclosure is primarily to protect less sophisticated consumers who may not understand what information is relevant to make wise choices. It is to these consumers’ needs that information disclosure and materiality of information should be tailored.¹²⁷ In *Purely Creative*,¹²⁸ the Court emphasised the concept of ‘need’ to clarify the requirements for ‘material information’ under the CPUTR. It is not a matter of whether the omitted information would assist the consumer or be relevant for them, but whether that information is necessary for the average consumer to make informed decisions.¹²⁹ Whereas the type of information required and its significance varies by

¹¹⁹Office of Fair Trading, ‘Online Targeting of Advertising and Prices: A market study’ (May 2010) 68 <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/business_leaflets/659703/OFT1231.pdf> accessed 14 Jun 2022. The European Commission states that the notion of transactional decision encompasses pre-purchase decisions (eg, travelling to a sales outlet or shops as a result of a commercial offer, agreeing to a sales presentation by a trader and clicking through a website as a result of a commercial offer) and post-purchase decisions made after purchasing a product or subscribing to a service (eg, to withdraw from or terminate a service contract and to switch to another service provider): European Commission (n 112) 37–38.

¹²⁰*Trento* (n 112).

¹²¹*ibid* para 36.

¹²²Case C-122/10 *Konsumentombudsmannen v Ving Sverige AB* [2011] ECR I-3903 para 48.

¹²³*Purely Creative* (n 96).

¹²⁴*ibid* para 68 (Briggs J).

¹²⁵*ibid* para 71.

¹²⁶*ibid* para 72.

¹²⁷Douglas G Baird, ‘Precontractual Disclosure Duties under the Common European Sales Law’ (2013) 50 *Common Market Law Review* 297, 308.

¹²⁸*Purely Creative* (n 96).

¹²⁹*ibid* para 74.

consumer,¹³⁰ it is for the Court to determine what constitutes material information in light of consumers' needs.¹³¹ In the latter case of *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd*,¹³² the Court provided further clarification on the 'need' test, holding that consumers' need for material information is contingent upon the availability of the information and whether consumers must obtain such information from the trader rather than finding it out themselves. The Court stated that inward-facing information (eg, about the trader and their products) might only be available from the trader. In contrast, information about alternative or competing products is generally available in the marketplace. It is restricted only by the extent to which an individual consumer desires to obtain it prior to making final decisions. In this case, the Court holds a general presumption that average consumers, ie, those who are reasonably well-informed, reasonably observant, and circumspect, would conduct their own research on alternative or competing products rather than relying on the trader for such information.¹³³

Comparisons of Malaysia (The CPA) and English Law

The CPA protects consumers in both offline and online transactions. Although the Act forbids traders from making false or misleading representations about goods and services, it does not directly compel traders to furnish consumers with material information. The CPETTR was then introduced via the CPA to govern information disclosure in e-commerce. However, the information required of traders is limited and insufficient to enable consumers to make informed decisions. Both the CPA and CPETTR also underestimate the importance of providing consumers with quality information to assist them in making efficient choices. In particular, there are no provisions mandating information to be provided in a transparent, prominent, or understandable manner. On the other side, English law recognises three distinct types of contract (ie, on-premises, off-premises, and distance contracts), each requiring a slightly different set of information. The duty of disclosure is a cornerstone of English consumer law, imposed on the premise that only an informed consumer is capable of acting rationally and making prudent transactional choices. The CCR and the CRA explicitly require traders to provide a set of material information in a clear and comprehensible manner prior to a consumer placing an order, whereas the CPUFR prohibits traders from engaging in three types of unfair practices related to information. These practices are misleading actions (eg, providing false information), misleading omissions (eg, omitting or hiding material information), and aggressive practices (eg, using harassment, coercion, and undue influence to impair consumers' freedom of choice to make purchase decisions).

The CPA also lacks a specific benchmark for assessing breaches of its provisions. The Act merely states that any conduct and representation that 'led consumers into error' is a form of unfair practice.¹³⁴ In contrast, as noted above, English law uses the average consumer as the standard of

¹³⁰Cartwright, 'Understanding and protecting vulnerable financial consumers' (n 2) 128.

¹³¹Consumers' need for a particular kind of information can range from simple to more detailed information. For instance, information that would not typically be considered as material would be the failure of a restaurant owner to inform a consumer who has made a reservation that the restaurant has added brand-new dishes to its menu for the same price. Such information, by rule, is unlikely to affect the consumer as he/she would have made the reservation in any case. However, the information is likely to be material if the restaurant owner fails to inform that the number of available dishes have been reduced, yet their prices remain unchanged.

¹³²[2015] EWCA Civ 76 (CA). In this case, the company had offered to eliminate unwanted marketing via unsolicited calls and junk mail in return for a monthly subscription. The service was performed by registering consumers with the Telephone Preference Service and Mail Preference Service. The fact that consumers can register themselves with both services for free has never been mentioned by the company. Therefore, the Court has to decide whether the fact that a consumer could sign up both services for free elsewhere was 'material information' and whether the failure to provide the information in question had caused (or likely to cause) the consumers to take a transactional decision they would not have taken otherwise.

¹³³ibid para 31 (Briggs LJ).

¹³⁴CPA, s 8 (a).

expected consumers' behaviour, characterised as a reasonably well-informed, reasonably observant, and circumspect consumer.¹³⁵ The average consumer also refers to consumers who take reasonable care of themselves, as opposed to the ignorant, careless, and over-hasty consumer.¹³⁶ In addition, English law recognises that some consumers are vulnerable due to characteristics beyond their control. Therefore, English law uses the standard of a vulnerable consumer to prevent traders from using their superior position to exploit consumers' behaviour and vulnerabilities. English law also emphasises the importance of providing information in a clear, intelligible, and timely manner so that consumers can reasonably be expected to understand how to assess it.¹³⁷ If the information is in a durable medium (eg, email), it must be legible. Furthermore, English law requires contracts to be transparent¹³⁸ and prominent,¹³⁹ especially if the T&Cs may be detrimental to consumers.¹⁴⁰

The CPA only applies to the sale of goods and services, whereas it is silent on transactions involving digital content. In contrast, English consumer law has expanded its scope of protection to digital content via the introduction of the CRA in 2015. The Act has separate chapters to deal with goods, services, and digital content¹⁴¹ as each requires a slightly different set of information. Such an arrangement also enables the CRA and enforcers to concentrate on consumers' diverse needs according to the products purchased. Lastly, several key terms (eg, 'trade', 'goods', 'consumer') in the CPA are vague and outdated. Since its introduction two decades ago, no revisions have been made, which has rendered the CPA outdated compared to the current state of e-commerce. Consequently, identifying the extent to which the CPA applies to private sales, auction-type websites, digital content, and consumers buying goods for dual purposes (private and business purposes) is legally challenging. By comparison, key definitions such as 'trader', 'consumer', and 'business' under English law are more straightforward and precise than the interpretations under the CPA. The CRA also defines goods and digital contents separately while specifying the types of regulated sales transactions that fall under its purview.

¹³⁵CPUTR, regs 2(2)–(6).

¹³⁶*Purely Creative* (n 96).

¹³⁷CPUTR, reg 6(1)(c); CCR, reg 8.

¹³⁸CRA, ss 64(3), 68. The UK Competition & Markets Authority states that 'transparent terms should be jargon free (as far as possible using ordinary words in their normal sense); unambiguous (clear and not open to misinterpretation or differing interpretations); reader-friendly (organised so as to be easily understood (using, for example short sentences and subheadings); legible (for example in a suitable font size and colour, and of appropriate print quality); comprehensible (for example, the meaning of the words or concepts uses, as well as the reasons for them, should be explained if they are not capable of being readily understood by consumers); informative (a consumer should, on the basis of the information provided, if necessary in pre-contractual literature – be able to foresee and evaluate the consequences of all wording used) and accompanied by pre-contractual literature as necessary – if for instance the contract is complex or lengthy': Competition & Markets Authority, 'Unfair contract terms explained' (CMA37(a), 31 Jul 2015) 9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf> accessed 14 Jun 2022.

¹³⁹CRA, s 64(4). The Competition & Markets Authority states that 'prominence is not merely about highlighting terms, but regard must also be given to whether the term itself is onerous, what a reasonable consumer would expect, how other contract terms are presented and what information has been given to the consumer before entering the contract. If a term could come as a surprise to the consumer, it will require more effort to ensure its prominence compared to other terms (and this applies not only in the contract but to all pre-contract information, for example brochures or webpages). When considering the level of prominence needed for such a term, account needs to be taken of the likely reasonable expectations of the average consumer when entering the contract, and whether the charge is, by reference to these expectations, disproportionately high compared to the charges imposed by other terms of a similar type in the contract': Competition & Markets Authority (n 138) 5.

¹⁴⁰For example, terms on return policies that require consumers to bear the cost of the return, administrative costs, termination costs or renewal fees.

¹⁴¹CRA, chs 2,3 and 4.

Proposed Legal Reforms

Introduce a Duty of Information

The increasing number of choices available in the e-commerce marketplace can cause consumers to feel overwhelmed and prone to making decisions inconsistent with their preferences. Consumers who are not fully informed are more likely to make purchases that do not suit their needs, resulting in disappointment and inefficient market transactions.¹⁴² On the other hand, traders are not entirely trustworthy as they tend to exaggerate claims while promoting and highlighting their products' positive attributes.¹⁴³ As such, legislation against misleading or deceptive advertising is vital to enhance the likelihood of consumers receiving quality information while protecting them from misinformation.¹⁴⁴ In view of this, the CPA should revise existing provisions or introduce specific information duty requirements to assist consumers in making informed decisions. Imposing disclosure duties will level the inequality of bargaining power and help 'lift' the consumer to be on a par with the trader.¹⁴⁵ As demonstrated under English law, there are several aspects for lawmakers to consider when revising the CPA and introducing information duty. First, the CPA can make businesses directly accountable for providing material information to assist consumers in making informed decisions. Otherwise, omitting and hiding material information can be regarded as unfair practice in the form of misleading omissions. Second, it should be forbidden to provide false information or present the information in any manner likely to deceive consumers. Businesses that engage in such commercial practices can be held liable for misleading actions. Third, the CPA should forbid businesses from using aggressive practices such as harassment, coercion, or undue influence when delivering information as these practices can impair consumers' freedom of choice. Aggressive practices also include exaggerating claims to stimulate fearful reactions concerning the nature and risks that consumers (or their families) may be exposed to if the consumer does not purchase the product.

The CPA itself should determine what information is considered material rather than letting traders decide which information they would like to give consumers. There is no consensus on what kind of information improves consumers' decision-making, the appropriate form of presenting information, and how much information is required.¹⁴⁶ From the English law perspective, the materiality of information is contextual. It depends on the consumer's 'need' for the information to make informed decisions,¹⁴⁷ which must be balanced with the availability of the information. If such information is obtainable elsewhere in the market, an average consumer who is reasonably well informed, reasonably observant, and circumspect is expected to search for that information independently without waiting for the trader to provide it. However, information alone is insufficient to empower consumers to make informed choices. Behavioural insights suggest that consumers are not always rational and are prone to biases, particularly when presented with information that exceeds their ability to process. Due to these 'cognitive limitations', consumers tend to make decisions based on incomplete or insignificant information highlighted by traders.¹⁴⁸

¹⁴²James P Nehf, 'Misleading and unfair advertising' in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Elgar 2018) 90; Twigg-Flesner, Schulze & Watson (n 76) 111.

¹⁴³Nehf (n 142) 90.

¹⁴⁴Cynthia Hawes & Christian Twigg-Flesner, 'Sales and Guarantees', in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (1st edn, Elgar 2018) 180; Nehf (n 142) 94.

¹⁴⁵Busch (n 35) 223.

¹⁴⁶Franziska Weber, 'US behavioural consumer research', in Hans- W Micklitz, Anne-Lise Sibony & Fabrizio Esposito (eds), *Research Methods in Consumer Law: A Handbook* (Edward Elgar Publishing 2018) 222.

¹⁴⁷The CPUTR defines 'material information' as 'the information which the average consumer needs, according to the context, to take an informed transactional decision': CPUTR, reg 6(3)(a).

¹⁴⁸Christian Twigg-Flesner, 'Does the codification of consumer law improve the ability of consumers to enforce their rights? – A UK-perspective', in Bettina Heiderhoff & Reiner Schulze (eds), *Verbraucherrecht Und Verbraucherverhalten: Consumer Law and Consumer Behaviour* (Nomos 2016) 8.

Therefore, a regulatory approach to disclosure should address the contents and quality of the information delivered in light of consumers' bounded rationality and the limits of their ability to process information.¹⁴⁹ Otherwise, traders may offer information on their website in ways that benefit them while making it hard for consumers to comprehend. The CPA, therefore, should mandate that information must be transparent, readable, and understandable to consumers, ie, avoiding small print, compact text formats, and complicated terminology. The information should also be prominently displayed, concise, and well-organised.¹⁵⁰ Alternatively, the CPA could refer to the ACCURATE information framework proposed herein as the focal point for establishing the information duty.

Introducing a statutory duty of information has novelty value to the CPA. To facilitate smooth legislative reform, the CPA can guide relevant stakeholders on what constitutes material information and provide examples of commercial practices related to information duty. To illustrate, Schedule 2 of the CCR under English law offers a detailed set of information that businesses must provide before consumers make their final choices. In a distance contract, for instance, the required information includes the details of the trader and their products,¹⁵¹ price-related matters (eg, final costs, additional charges, manner of calculating the price and the arrangements of payments and delivery),¹⁵² procedures for settling a dispute, refunds, and cancellation rights.¹⁵³ The information should also include a reminder that the trader is legally bound to supply goods according to the sales contract.¹⁵⁴ Such a reminder can increase consumers' confidence to transact via e-commerce while raising awareness of their statutory rights. English consumer law is also flexible in its information requirements. It recognises that the nature of the transactions will dictate what information is material, which is assessed on a case-by-case basis.¹⁵⁵

Information duty is futile in the absence of a benchmark to evaluate and assess its compliance. Furthermore, consumers respond to information differently; some may be reasonable, intelligent, and act sensibly, whereas others are gullible and careless with the information provided. As such, the CPA should establish a framework for evaluating and assessing the overall adherence to the information duty and its other provisions, eg, whether they will be assessed against the average, reasonable, or vulnerable consumer. English consumer law, for instance, uses the average consumer as the primary benchmark and vulnerable consumer as the subsidiary benchmark to assess compliance. The CPA could consider a similar parameter to balance the rights of market players. A defined framework of assessment will clarify the acceptable standard of information duty businesses must adhere to while protecting their interests when consumers do not use the information provided wisely. Essentially, laws can only assist consumers in making wise and informed decisions by imposing a duty on traders to provide high-quality information. Consumers, however, must also be reasonably prudent and observant in leveraging the information provided to make informed choices.

Modernise the Key Definitions

The CPA should update existing key provisions to reflect current developments in e-commerce transactions. First, the CPA must define who qualifies as a trader within the meaning of 'acting

¹⁴⁹Busch (n 35) 230.

¹⁵⁰Joasia Luzak, 'Who calls the tune? Stocktaking of behavioural consumer protection in Europe', in Hans- W Micklitz, Anne-Lise Sibony & Fabrizio Esposito (eds), *Research Methods in Consumer Law* (Elgar 2018) 258.

¹⁵¹CCR, sch 2, paras (a)–(e), (v)–(w).

¹⁵²ibid sch 2, paras (f)–(j).

¹⁵³ibid paras (k)–(o), (x). If applicable, traders must inform consumers of the possibility of having recourse to an out-of-court complaint and redress mechanism against them, and the methods for having access to it.

¹⁵⁴CCR, sch 2, para (p).

¹⁵⁵CCR, sch 2, paras (q)–(u).

in trade', ie, whether they are a professional trader, a private trader, or both. Consumers are, likewise, exposed to information asymmetry in private sales. They are unable to inspect the goods prior to completing the purchase, hence justifying the need for private traders to have the same disclosure obligation as professional traders. However, if the CPA does not apply to private traders, it should expressly exclude private transactions from its ambit. It could provide guidance for distinguishing private and commercial sales by offering examples of individuals acting 'in trade'. For instance, if Kokone sells her son's clothes that he has outgrown, she is not deemed 'in trade' as the garments were initially purchased for personal use. Similarly, if Kokone purchases books regularly, reads them, and sells them online, she is not 'in trade' as the books were purchased for personal use. However, if Kokone makes jewellery at home and sells them over social media, she is 'in trade' because she made the jewellery items with the intention of selling them. The CPA should also require traders to identify themselves when advertising goods or services for sale on the internet. For example, traders must inform potential purchasers that they are 'acting in trade' within the context of the CPA (or similar identification). The information enables prospective buyers to determine with whom they are dealing and be informed whether the CPA will govern the risks associated with the transactions. Such identification will also ensure that professional traders do not masquerade as private traders to avoid liability should the latter fall outside the remits of the CPA. Enforcing these requirements, however, can be challenging in e-commerce. Hundreds, if not thousands, of online transactions are performed daily, making it hard to supervise each sale. In addition, potential buyers may be uninterested in verifying with whom they transact or whether the traders have adequately identified themselves as a 'trader' within the meaning of the CPA.

Second, the archaic definition of 'consumer' should be revised to reflect modern commercial transactions while also clarifying the nature of the actual 'consumer' that the CPA aimed to protect. The CPA presently defines 'consumer' as a person who 'acquires or uses goods or services of a kind ordinarily acquired for personal, domestic and household purpose, use or consumption'.¹⁵⁶ Using these criteria to determine whether a consumer may rely on the CPA can lead to ambiguity. In practice, many consumers nowadays purchase goods (eg, a smartphone or laptop) for both business and personal usage. By comparison, English law uses a much more explicit description of 'consumer', which refers to 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.¹⁵⁷ For example, Zadio buys a kettle for her home. If she works from home one day a week and uses the kettle when working from home, Zadio is still a consumer under the CRA. In contrast, a sole trader operating from a private dwelling who buys a printer which is used for business 95 per cent of the time is unlikely to be considered a 'consumer'. That sole trader would have to rely on other legislation such as the *Sale of Goods Act 1979* for protections concerning the quality of the goods.¹⁵⁸ However, it is for the trader to prove that an individual was not acting wholly or mainly outside their trade, business, craft, or profession.¹⁵⁹

Third, the CPA must be transparent about its relevance in a variety of settings. For example, it does not explicitly include or exclude auction sites and charity sales from its remit. Therefore, it is debatable whether consumers buying from traders through these platforms have equivalent rights to those buying from professional traders on a general e-commerce website. Arguably, consumers rarely assert their rights when buying on auction platforms, either because they are unaware if they have any rights or they presume that purchases through an auction website were made at their own risk.¹⁶⁰ In addition, consumers may be hesitant to demand their legal rights against charity shops due to the fact that they sell goods for charitable purposes. However, if consumers do not

¹⁵⁶CPA, s 3(1).

¹⁵⁷CRA, s 2(3).

¹⁵⁸See CRA 2015, Explanatory Notes, para 36.

¹⁵⁹CRA, s 2(4).

¹⁶⁰Those who purchase through auction websites are also vulnerable to fraudsters and may encounter issues with product quality, delivery, and goods that are not as described.

raise concerns about these types of businesses, lawmakers may not see the need for laws to regulate them in Malaysia.

Re-evaluate the Scope of the CPA in Modern E-Commerce Transactions

The CPA needs to be expanded to govern digital content so that consumers are optimally protected in the challenging and ever-changing e-commerce market. Presently, the CPA has no provisions dealing with digital content. Existing provisions are also incompatible with digital content transactions as they are primarily concerned with physical products (eg, cancellation rights and rights to demand, repair, or return a product). Unlike physical goods, it is frequently difficult, if not impossible, for consumers to foresee certain features of digital contents (eg, game software) prior to experiencing them. In addition, digital content is often accompanied by various complicated technical jargon that can be difficult for consumers to comprehend. Digital content is also subject to specific licensing requirements that govern its functionality and usability. These complexities, therefore, justify the importance of greater transparency and high-quality information related to digital content purchases.¹⁶¹ In comparison, English law via the CRA defines 'digital content' as data produced and supplied in digital form.¹⁶² The CRA also has specific provisions that deal with digital content transactions.¹⁶³ The CPA can follow suit by either amending the current definition of 'goods' to include digital content or introducing provisions that explicitly define and address digital content transactions. These reforms will clarify consumers' rights when purchasing digital content, such as the right to information and protection against unfair T&Cs, while also reflecting the current landscape of the digital market.

Re-examine the Supplementary Status of the CPA

The CPA was the first Act enacted in 1999 that exclusively addresses consumers affairs in Malaysia. However, it operates in tandem with other laws governing contractual relations, even in consumer-related matters. Legislators may have reservations about its capabilities, which explains why the CPA was introduced as a supplementary to other laws. Arguably, the supplementary status of the CPA has undermined its credibility as the primary consumer protection legislation in Malaysia. Instead, it should function independently in matters involving consumer issues without operating as a supplement to other laws. Furthermore, the CPA has been law for twenty years, so it should be self-sufficient in its provision of robust protection to consumers by now. In essence, lawmakers need to revise the supplementary status of the CPA and consider making it a stand-alone legislation. If a matter in dispute involves consumer contracts, the CPA should take precedence over other legislation. Otherwise, it is pointless for the CPA to be the leading consumer protection law in Malaysia if lawmakers are not confident in its effectiveness alone.

Law Reform and Existing Consumer Protection Regimes

Other legislations in Malaysia also regulate the dissemination of information to consumers, such as the *Communications and Multimedia Act 1998* (CMA) and the *Trade Descriptions Act 2011* (TDA). Reforming the CPA to adopt the duty of information is unlikely to impede the CMA and TDA from performing their respective functions. Instead, these Acts could operate in tandem to ensure consumers receive optimal protection in Malaysia. These are discussed in detail below.

¹⁶¹Natali Helberger et al, 'Digital Content Contracts for Consumers' (2013) 36 *Journal of Consumer Policy* 37, 47.

¹⁶²CRA, s 2(9).

¹⁶³CRA, ch 3, ss 33–47.

The CPA and CMA

The CMA is under the jurisdiction of the Ministry of Communications and Multimedia Malaysia. It was enacted to govern the convergent communication and multimedia industries and incidental matters.¹⁶⁴ It focuses on the communications market¹⁶⁵ and digitised content¹⁶⁶ and only applies to network facilities¹⁶⁷ providers, network service¹⁶⁸ providers, application service providers, and content¹⁶⁹ applications services. These parties are required to deal reasonably with consumers and adequately address consumer complaints in the telecommunications industry.¹⁷⁰ The CMA defines ‘communication’ as any communication between individuals, things, or persons and things, whether by sound, data, text, visual images, signals, or any other form or combination of those forms.¹⁷¹ Such ‘communication’ may also include ‘telecommunication’.¹⁷² The CMA does not define ‘telecommunication’; however, in its ordinary meaning, ‘telecommunication’ refers to ‘the telegraphic or telephonic communication of audio, video or digital information over a distance by means of radio waves, optical signals, etc., or along a transmission line’.¹⁷³

In *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* (*‘Telekom’*),¹⁷⁴ the Court held that section 2(2)(g) of the CPA expressly excluded trade transactions by electronic means from its ambit.¹⁷⁵ Therefore, the Tribunal for Consumer Claims lacked jurisdiction to hear a dispute arising from the telecommunications industry. Section 2(2)(g) of the CPA was repealed in 2007 to include electronic transactions within its remit. However, the CPA and CMA were enacted to govern different industries, hence the removal of section 2(2)(g) of the CPA does not affect the CMA from performing its core objectives. As held in *Telekom*, the CMA was clearly enacted to protect consumers in the telecommunications industry. In contrast, the CPA was not meant to apply to the hearing of a dispute arising from the same industry.¹⁷⁶ Furthermore, the CPA is under the jurisdiction of a different Ministry, ie, the Ministry of Domestic Trade and Consumer Affairs, and was enacted to safeguard consumers in offline and online transactions involving the sale of goods and services.¹⁷⁷ The CPA also concerns consumers who bought products for personal use; traders who supplied the products; and the manufacturer who assembled, produced, and processed these products.¹⁷⁸

In addition, the CMA has its own Consumer Code of Practice that addresses the information, advertising, and representation of services, rates and performance to customers.¹⁷⁹ The Code

¹⁶⁴CMA, Preamble, s 3.

¹⁶⁵*ibid* s 6, ‘communications market’ is defined as ‘an economic market for a network service, or an applications service, or for goods or services used in conjunction with a network service or an applications service, or for access to facilities used in conjunction with either a network service or an applications service.’

¹⁶⁶*ibid* s 6, ‘content’ is defined as ‘any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically.’

¹⁶⁷*ibid* s 6, ‘network facilities’ is defined as ‘any element or combination of elements of physical infrastructure used principally for, or in connection with, the provision of network services, but does not include customer equipment.’

¹⁶⁸*ibid* s 6, ‘network service’ is defined as a ‘service for carrying communications by means of guided and/or unguided electromagnetic radiation.’

¹⁶⁹CMA, s 6: ‘Content’ means any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically.

¹⁷⁰CMA, ss 188, 190.

¹⁷¹CMA, s 6.

¹⁷²*Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 4 ILR 35, 41.

¹⁷³*Collins English Dictionary* (9th edn, HarperCollins Publishers 2007) 1656.

¹⁷⁴*Telekom* (n 172) 41.

¹⁷⁵CPA, s 2(2)(g): ‘[t]his Act shall not apply to any trade transactions effected by electronic means unless otherwise prescribed by the Minister’.

¹⁷⁶*Telekom* (n 172) 42.

¹⁷⁷CPA, s 2.

¹⁷⁸CPA, s 3.

¹⁷⁹CMA, s 190.

contains requirements¹⁸⁰ comparable to those proposed under the ACCURATE information framework. For instance, it requires that consumers be given sufficient, accurate, trustworthy, and up-to-date information in plain and straightforward language, with the use of technical jargon only when necessary. The information may be delivered verbally, in writing, displayed at the premises or on websites, or distributed electronically or through other mass media available to consumers. Disclaimers in advertising must be understandable, clear, and reasonably visible. Consumers must be able to distinguish in advertisements between contractual T&Cs, marketing, and promotional activities. Despite these parallels, reforming the CPA to introduce the ACCURATE information framework will not conflict with the Code. Both aim to empower consumers with information, but they concern different market players and subject matters. The Code applies solely to Licensed Service Providers and non-Licensed Service Providers who are members of the consumer forum¹⁸¹ in the telecommunications industry. In contrast, the ACCURATE framework proposed under the CPA is directed at traders, manufacturers, and those involved in advertising or marketing goods and services to consumers in both offline and online settings. Arguably, however, the Code and the ACCURATE framework can work in tandem to provide optimal protection to consumers without jeopardising their respective functions.

The CPA and TDA

The TDA was introduced to promote ethical trade practices by prohibiting false trade descriptions and false or misleading statements, conduct, and practices related to the supply of goods and services.¹⁸² The TDA resembles the CPA in many ways. First, both pieces of legislation prohibit false and misleading statements regarding goods and services.¹⁸³ Second, the aspects considered in assessing false and misleading representations of goods,¹⁸⁴ services,¹⁸⁵ and price¹⁸⁶ are practically identical. Third, the TDA closely follows the CPA concerning liability for making an advertisement containing false or misleading information,¹⁸⁷ and both provide similar defences for a person charged with the specified offences.¹⁸⁸ Fourth, both statutes offer rewards to whistleblowers who give information that leads to the conviction of offenders. The reward is in the form of monetary payment that is subtracted from the fine in an amount determined by the Court.¹⁸⁹ However, the CPA and TDA provide different mechanisms for addressing violations of their provisions. Under the CPA, consumers may seek redress from the Tribunal for Consumer Claims if it concerns the infringement of their rights.¹⁹⁰ In comparison, for breaches of the TDA, an action cannot be initiated directly against the relevant traders. Instead, a complaint must be submitted to the Assistant Controller for further investigation,¹⁹¹ and no prosecution under the TDA can be instituted without the consent of the Public Prosecutor.¹⁹² Therefore, an apparent downside of the TDA is that it has a relatively stringent requirement to initiate an action compared to the CPA.

The TDA also seems to correspond better with modern e-commerce transactions than the CPA in some respects. For instance, the TDA defines 'goods' in a broad sense by including all kinds of

¹⁸⁰CMA Consumer Code of Practice, pt 2.

¹⁸¹CMA Consumer Code of Practice, cl 6.

¹⁸²TDA, Preamble.

¹⁸³TDA, s 18; CPA, ss 10, 18.

¹⁸⁴TDA, ss 6, 7; CPA, s 10.

¹⁸⁵TDA, s 16 (1); CPA, s 10(1)(h)(i).

¹⁸⁶TDA, s 14; CPA, s 12.

¹⁸⁷TDA, s 19, which is in *pari materia* with CPA, s 18.

¹⁸⁸TDA, ss 22, 24 and 25; CPA, ss 26–28.

¹⁸⁹TDA, s 66; CPA, s 135.

¹⁹⁰CPA, pt XII.

¹⁹¹TDA, ss 30, 31.

¹⁹²TDA, s 62.

moveable property.¹⁹³ Although digital content is typically intangible, it may conform to the definition of ‘goods’ under the TDA as moveable property. However, for legal clarity, a proper definition of digital content must be included in Malaysia’s existing consumer protection regime. The TDA also governs trade descriptions concerned with, *inter alia*, the physical or technological characteristics of the goods,¹⁹⁴ whereas this requirement is not specified in the CPA. Regrettably, the TDA does not explain what descriptions correspond to technological features. The meaning varies based on one’s viewpoint and the context where the phrase ‘technological’ is used. For instance, it can describe the scientific elements of a product, such as the features and specifications of laptops (eg, processor speed, screen resolution, and wireless capability). Arguably, ‘technological characteristics’ can be used to describe the features of digital content. For example, device compatibility and graphics quality can be included in the descriptions of technological characteristics for software downloaded to a computer or mobile phone. However, in the absence of statutory explanations and given the limited judicial interpretations, one can only speculate on the applicability of the TDA to descriptions of digital content.

Revising the CPA is unlikely to affect the TDA as both Acts are directed at different individuals. The CPA considers conduct or representations as false and misleading if they lead a consumer, ie, an individual who purchases goods or services for personal purposes, into error.¹⁹⁵ In contrast, the TDA considers conduct or statements as false and misleading if they can lead *any person* into error.¹⁹⁶ Unlike the CPA, offences under the TDA are not restricted to interactions between a purchaser (consumer) and trader.¹⁹⁷ In particular, the TDA makes no explicit reference to ‘consumer’ in its provisions. The phrase *any person*¹⁹⁸ implies that anyone, not just the purchaser or those engaged with traders, can file a complaint with the authority if they believe that the trader’s conduct is capable of leading them into error. Given these distinctions, reforming the CPA to embrace the duty of information and the ACCURATE framework is unlikely to impair the TDA from performing its primary objectives. Instead, the TDA should consider the proposed ACCURATE framework when determining the violation of its provisions to ensure legal consistencies within Malaysia’s consumer protection framework.

Conclusion

This article examined the effectiveness of the CPA in ensuring that consumers can make informed decisions and that their interests are adequately protected in modern e-commerce. The outcomes of the doctrinal analysis revealed that the CPA does not emphasise the duty of traders to provide consumers with information. The Act is likewise limited in its scope and outdated compared to the current landscape of the e-commerce market. Consequently, consumers may have difficulty making informed decisions while their legal rights under the CPA remain ambiguous. Archaic laws are unsuitable for addressing contemporary legal issues. Thus, in a quest to modernise the CPA, this article explored English consumer protection law, which features advanced consumer regulatory regimes enriched by EU law. English law is also descended from a legal system fairly similar to Malaysia, namely the common law tradition. Accordingly, it serves as a valuable baseline for assessing the progress of Malaysian consumer protection law in the period since the country gained independence from the UK. English law initially adopted a reluctant position towards information duties. However, such obligation is now a cornerstone of English consumer law following the influence of EU law, demonstrating the feasibility of legal metamorphosis. The comparative analysis also

¹⁹³TDA, s 2.

¹⁹⁴TDA, s 6(1)(g).

¹⁹⁵CPA, ss 2(1), 3(1), 8.

¹⁹⁶TDA, s 13.

¹⁹⁷CPA, s 2(1); TDA, Preamble.

¹⁹⁸TDA, s 13.

provided new insights and inspiration for this article in developing the framework of ACCURATE information that the CPA can use as a focal point for regulatory debates regarding the implementation of information duty. In addition, this article identified aspects of the CPA that require reform, either via legal transplants or appropriate modifications. Reforms include revising outdated provisions, broadening the scope to regulate digital content, and reviewing the status of the CPA, which is currently supplementary despite being the primary consumer legislation in Malaysia.

Although these findings may be of interest to Malaysian lawmakers, the costs of rule formulation, enforcement, and compliance must be considered prior to reforming the CPA. Such an evaluation will enable lawmakers to quantify the potential costs and possible consequences while avoiding overly expensive rules. The rule formulation and enforcement costs refer to the funds and resources available prior to implementing the proposed reforms. Resources include skilled and expert professionals responsible for gathering the relevant data and analysing the appropriate measures to regulate the digital market. Transactions in e-commerce also require consistent monitoring as they are constantly evolving. Therefore, a specific enforcement body is essential for monitoring developments in e-commerce while ensuring that provisions of the CPA are complied with and remain relevant. Consumers are unlikely to act against traders who have violated their statutory rights because it is costly and time-consuming. They also lack the confidence and legal knowledge to do so, leaving public authorities with the incentives to pursue these traders. Adequate resources and funds are, therefore, highly crucial in ensuring successful enforcement. Otherwise, reforming the CPA can be challenging, let alone enforcing the proposed regulatory strategies.

On the flipside, compliance costs must also be considered. These refer to the expenses incurred by market participants, ie, businesses and consumers, in complying with the proposed reforms. Traders may refuse to provide ACCURATE information if it is costly and adversely affects their products' marketability. Traders may also need to hire legal experts to draft their T&Cs to conform with the specified legal standard. If traders experience high compliance costs, such costs might be transferred to consumers in the form of price increases. To avoid such issues, lawmakers will have to achieve an equilibrium between the need to protect consumers' interests and the costs incurred by traders. Meanwhile, compliance costs for consumers include, but are not limited to, their interest and willingness to spend time searching and processing information. When gathering and processing information becomes prohibitively expensive, some consumers will cease searching or gather less information. They are also unlikely to read T&Cs thoroughly if traders increase the level of complexity. Consumers, however, have a responsibility to overcome these compliance costs and their bounded rationality. Rather than depending entirely on the law to safeguard their interests, consumers should educate themselves about their statutory rights to minimise the risk of being manipulated by unscrupulous traders. Furthermore, due to its unique borderless nature, authorities do not have absolute control over the e-commerce environment. Therefore, consumers must be savvy by empowering themselves with their statutory rights to keep pace with sophisticated marketing strategies.