
Practices of Consumer Protection in Perú

Selected Issues in Honour of Pradeep Mehta

Pradeep Mehta, the founding father of the Consumer Unity & Trust Society, CUTS, is celebrating his 65th birth anniversary. An intellectual, activist and internationalist, Pradeep has contributed to the spread of competition and consumer protection rights in India and in the world. His tenacity and firmness to defend the weak and protect the poor and fight against market failures and asymmetries has gone offshore in his own land, making him well known in non-governmental, academic and intergovernmental international organisations. In this short essay, we honour him making a critical analysis of selected issues of consumer protection practices in Peru.

Consumer protection was born in Peru with the opening of markets as a way to ensure the idoneity of goods and services and correct imperfections brought about by information asymmetries between suppliers and consumers. Its main objective was to improve the functioning of the market.

Reasonable and Diligent versus Good Faith Consumer

From this perspective, the Peruvian Consumer Protection Commission, CPC, decided to institute in its verdicts the guardianship of the so-called 'reasonable consumer', that is the consumer that acts with 'ordinary diligence', which responsibly searches, informs, compares and selects goods and services in the markets.

But what has been the implications of this defining interpretation of whom to protect?

How many 'non-reasonable' consumers may have been refused to receive protection by consumer authorities? A borrower who has no knowledge of financial mathematics, will hardly understand that 4 per cent 3-month interest rate may be equivalent to a 17 per cent effective annual rate or to 50 per cent overall credit rate, if cost of valuation of collateral and other commissions are included. Nor would they understand that by paying 95 per cent of its debt with their credit card, interests will be charged next month to the 100 per cent of the debt and not to the 5 per cent of the balance. Or if somebody is paying the total of the principal of a loan arranged under a quota system, the payment pays off future quotas and not the capital balance with the respective discount of interest, as he had anticipated. Many of these cases have been discarded by the CPC in Peru under the name of 'diligence', that is, consumers should know and understand what they buy.

In countries with low reading and writing understanding, long working hours and other obligations that leaves no time to read extensive and dense contracts or check quality of goods and services, one can reach the conclusion that interpreting consumers as diligent actors is severely unprotecting them from providers. Consumers will be blamed of what they bought for not acting in a diligent way.

This applies to technical services in general, parcel pick up, medical services and infinity of other goods or services. It is extremely complex for the customer to prove evidence, even if the commercial transaction is quite simple. Technical services always put the consumer in a situation of vulnerability. When the consumer leaves the good for repair or when he goes back to collect the supposedly repaired good, he usually gets a note from the provider alluding a clause of exclusion of guarantee because of artefact's misuse. The same happens in the case of picking up intact packages from a terminal and on arriving home finding nothing inside. In both cases, protection is not provided to the consumer due to lack of evidence. The burden of proof is of course on the consumer but the system of protection does not assess if the supplier provides mechanisms to facilitate consumers with the proof that they need. It is worth pointing out that during an investigation only 2 out of

14 transportation companies gave the consumer the possibility to list the goods of their luggage. In other words, if a consumer has something of value that he wants to report, he cannot do so. But if the good is lost, who assumes the value of the lost good? The consumer has no proof.

This is not to protect irresponsible consumers at the expense of firms, nor to conceive consumer protection only as an information problem. There is a need to be more open and be able to incorporate other criteria in the analysis of consumer protection. One cannot close the tutelage to the consumer under the argument that he was well informed or must be diligent.

Consumer protection is about protecting the vulnerable consumer, one who does not read or fully understand but trust the institutionalism and the good faith of the market. This is something consumer protection law and internal rules in Peru should institute.

Abusive Contracts

While standard contracts are an important tool that enables mass commercial transactions, they incorporate contractual imbalances in favour of those who predispose or write adhesive or general contract clauses.¹ Freedom of contract and private autonomy cannot be exerted unilaterally by one party but need to be adjusted to consumer protection inspection processes to assess their contents.

The consumer protection system in Peru has not been indifferent to this new scenario and has theoretically enforced penalties and sanctions on some type of coercive business practices. There is, for example, the case of a bank that offered ‘points’ to their credit cards users; those points could be redeemed for products and services under a catalogue. The benefit was free and awarded automatically upon request from the customer. After two years, the bank indirectly informed that the administration of these points had a cost, assuming consumer silence as an acceptance of those

1. Adhesion contracts and general contract clauses are very much demanded at the Consumer Protection Commission in Peru, due to its difficult comprehension because its technical nature and sector’s specific regulation, particularly in insurance, utilities and financial services.

costs. After 30 days, all credit cards users were charged 12 soles per month for this service. The Bank in their disclaimers to the Commission noted that credit card agreement clauses allowed the Bank to modify the conditions of the deal, and that it was sufficient to inform the consumer with a prior notice of 30 days to make changes. Fortunately, the CPC sanctioned this practice indicating that changes authorised in the contract had only to be referred to direct credit card conditions, i.e., amount of credit line, interest rates and maturity, among others.

Parking lots is another good case to mention. Despite charging for the service, they intended informing clients by posting notices inside the parking lot, as to be exempted of responsibility from total or partial theft of a vehicle. The CPC did not accept this type of abusive practice and sanctioned them.

There are however, other sectors and cases in which general contract clauses are not questioned or supervised. The law on consumer protection in financial services authorised the Bank Superintendent in 2005 to identify abusive clauses and issue general rules that prohibit their arbitrary use without prior review and approval by the authority. Up to the end of 2011 however, not a single clause has ever been questioned or supervised indicating lack of interest and leniency in its implementation.

Junk Goods, Technical Regulations and Standards

Goods and services could be classified into three major categories: (1) those that threaten the security, integrity and health of individuals, (2) those that are useless or affect the commercial good faith or dignity of the consumer, without them being dangerous or harmful, and (3) the most important category where good and services differ in quality to suit the different needs and tastes of consumers.

In the first category, the state must quickly act to prevent damage to consumers. Truck-buses (buses with truck bodywork structures), which proved technically dangerous on the roads should be detained and not be allowed to transit. Adulterated and dangerous drugs should be confiscated; and toys and stationery

with lead and chromium should be withdrawn from the market. The same happens with houses that collapse, tires that explode, etc. Ministries are responsible for proposing obligatory standards and norms to safeguard the life and health of the consumers.

Junk goods or goods that affect the commercial good faith or dignity of the consumer usually break the institutional trust in the market but are very difficult to protect especially in countries whose consumer authorities favour the 'diligent' or 'reasonable' consumer approach. Consumer authorities that practice the 'vulnerable' approach are better armed to sanction this type of behaviour.

In the third category, the state generally leaves the market to operate alone but promotes a good handling of information and a voluntary system of conformity evaluation about the quality of goods and services in the market.² Consumers and producers are free to select goods and services, standards of which are classified under a voluntary system of certification and accreditation of quality.

During the period 1992-2001, most of the state authorities in Peru to a large extent abdicated from assuring standards on any of these three categories of practices based upon the dogmatic idea that free markets determine the quality of different goods and services produced. Under this point of view, producers and consumers were entirely free to choose what to produce or buy without the need of any regulation or standard. There was therefore nothing wrong for example with companies producing useless cardboard shoes or sporadic ill-fated outlets. If transportation services threaten passenger's life, they will notice it and in the long run they will not take that kind of services. Problems are solved themselves in the market. The preponderant view was that it is far better for consumers to have access to low quality and price goods, irrespective of its dangerousness, dignity, useless and health effects.

The practice has been different in the period 2002-2006. The consumer authority promoted product and service quality differentiation to facilitate free access to various socioeconomic strata, but at the same time strictly enforced consumer guardianship

2. Hanak *et al.* (2000).

when it came to products violating the security, integrity or dignity of consumers. Authorities aggressively promoted the implementation of a private and voluntary system of conformity evaluation. This approach has remained after 2006 also, but is slightly enforced until today.

Serious problems however, remained about technical infrastructure. Peru is not only one of the Latin American countries with the lowest number of voluntary and obligatory norms and standards, but its technical and institutional infrastructure are outdated and obsolete. The certification and accreditation system is weak and tracability is difficult to prove. For example, when the CPC ordered the verification of lead in toys, various samples were collected and sent to the health authority laboratory. Findings suggested at first, high concentrations of lead, chromium and cadmium and an *ex-officio* procedure was exerted against the manufacturer. The case was sanctioned at the first instance but revoked on the appeal at the Tribunal, due to the lack of certainty about the instruments used at the laboratory. This example shows the lack of trustable minimum technical infrastructure to make the system work.

Intellectual Property and Consumer Protection

There is no balance between intellectual property (IP) and consumer rights in Peru today. IP law punishes companies that infringe any patent, trademark, copyright and related rights. Lately however, not only producers but also consumers are being blamed as main violators of these rights.³ This, to a large extent is inverting responsibility towards the consumer instead of the real infringer who is the company who violates IP rights. Consumers are being sent to prison for buying goods that—they even do not know—are violating IP rights. IP laws are handled too rigidly and do not solve the problems of the ‘alleged’ pirate behaviour. Acts of confusion and/or deception should fall on business and not on consumers.

3. DL 1075, DL 1076, DL 822, DL 1092, and Law 29316, all of them extend IP rights to implement the FTA Peru-US.

Abusing Consumers through Anticompetitive Practices

The 1992 competition law initially asserted the possibility of punishing exploitative practices: those related to abuse of dominance to exploit consumers; the new 2008 law has eliminated them from their prohibited conducts. An emblematic case refers to pension funds, which not only played with prices but also charged abusive commissions to manage those funds. Another example is the quintuplicating of inter-regional transportation fares on holidays under the tacit approval of the competition authorities and the fury of passengers who destroyed bus terminal windows and facilities.

Weights and Measures

One of the most serious problems facing consumers is the veracity of weights and measures in the markets. There is no good system of inspection and verification of weights and measures. According to the Peruvian Consumer Association, ASPEC, 50 per cent of all grocer's scales weight between 12.5 and 300 grams less of what they ought to, accounting for more than 268 million soles of losses to consumers per year. The proposal to promote private certifications to verify weight and measures was not approved because market dogmatic believers think more regulation is not needed to correct malpractices.

Informality and Small Enterprises: The Difficulty of the Procedures

In principle, it should be noted that informality is not defined by the size of the company or its legal form nor is synonymous of illegality. Informality is a socioeconomic phenomenon, not a legal one. In this respect consumer protection jurisdiction holds when a consumer complains about an informal enterprise and the Commission is obliged to act according to their abilities.

However in procedural terms, the situation is different; a provider without residence cannot be notified, therefore the authority cannot start the administrative procedure. Similarly if notification procedures are overcome, the Commission's final orders and sanctions are very difficult to be executed. Informal business moves from place to place without advising the authority, and if

located, they usually have no means to face the dictated sanction or corrective measure. Coactive units of course report the case to credit bureaus that prevent the infringer from re-entering the financial system but this at the end does not solve the consumer problem.

Most of these irregularities occur both, in small businesses engaged in services, carpentry, furniture, installation and sale of parquet flooring, as in larger businesses such as real estate, where agents work with elegant personal cards, next-generation cellular phones and luxurious offices that they moved every two months like their own corporate names.

Informality also makes preventive inspections difficult to perform. For example, an operation against adulterated vinegars in an open market was frustrated because the samples taken on a day did not belong to anyone the next day—the authority finding another business in the same place. Or, immobilisation orders to allow good's investigation are not observed allowing goods to be transferred to other places without authority's consent. As is apparent, when the good or service purchased is in the informal sector, the victim is usually the consumer who is not served on his claims, not because the Commission has no competence to act but because of procedural and observance deficiencies.

Institutional and Administrative Issues

One of the major deficiencies of the consumer protection regime in Peru is its institutional design and territorial reach. There is not a single institution in charge of elaborating and coordinating a national consumer protection policy and plan for the country. INDECOPI and its two administrative bodies (the CPC and the Tribunal) are empowered only to resolve consumer conflicts and eventually take *ex officio* action against companies infringing major consumer protection laws. Independent agencies exist in each ministry to supervise producers to offer safe and efficient goods, but they are usually very weak and have no interrelation or coordination between themselves.

Territory wise, INDECOPI has 1 main office in Lima and 13 offices in a handful of provinces. Hundreds out of thousands of

consumers across the country do not have access to protection and advocacy services.

The CPC's operative and management systems lack speed, efficiency and simplicity for the solutions of the procedures. CPC cannot keep up with the demand to resolve cases within reasonable periods. There are no impact indicators or manuals of best practices to guide consumers, suppliers and the government itself. Quality of service is poor, data bases scarce and the reporting and monitoring information system obsolete.

The CPC does not entertain collective interest cases. Throughout its existence, only one 'class action' has been approved, but INDECOPI Board has postponed action indefinitely.

Institutional mechanisms have not been developed to allow the private sector to participate through 'public hearings' and 'inter-institutional spaces', and promote coherence and consistency on global consumer protection policy. CPC has not implemented programmes to promote social corporate responsibility and an active participation of the academic sector.

References

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