

THE LAW TALKS

Law in the Digital Age: Protection of Consumer Rights



Edited by
Kong Phallack
Long Chanbormey

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Freedom, justice, and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). The KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-Atlantic community of values, the vision of a unified Europe, and an orientation towards the social market economy. His intellectual heritage continues to serve both as our aim as well as our obligation today. In our European and international cooperation efforts, we work for people to be able to live self-determined lives in freedom and dignity. We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world.

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Law in the Digital Age: Protection of Consumer Rights

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FOREWORD

Since the promulgation of the Cambodia's constitution, the country has made considerable strides in stimulating legal reforms to overcome the systematic weakness of its legal institutions. However, more work still needs to be done to safeguard the rule of law principle and to secure the effective and sustainable national justice system in the Kingdom, including the improvement of justice service delivery, strengthening the legal and policy framework, and ensuring comprehensive implementation and enforcement of the law in Cambodia.

The Konrad-Adenauer-Stiftung (KAS) is a German political foundation which has offices and projects, in over 100 countries worldwide. The main goals of our international commitment are fostering democracy and economic development as well as the respect for human rights. Promoting the rule of law is one of the top priorities in the work of KAS since we believe that sustainable development and security are not conceivable without stable democracies – and that stable democracies are not possible without the rule of law. KAS is committed to promoting rule of law structures and central institutions as well as the separation of powers and a strong independent judiciary through an open exchange between key players within the fields of rule of law, politics, and society.

The Konrad-Adenauer-Stiftung (KAS) Cambodia, in this context, has focused its rule of law-related activities on promoting pluralistic discussions around various legal topics. We aim to involve all relevant stakeholders, including both duty-bearers and rights holders, in constructive and peaceful debates concerning the ongoing status of the rule of law in Cambodia in a broader sense, using dialogue-based approaches such as conferences, training workshops, and publications. The Law Talk format is one of only a few regular forums for legal discussions between academia, civil society, students, and the government in the Kingdom.

Cambodia had only recently adopted its Consumer Protection Law in late 2019, making it one of the youngest consumer protection regimes compared to other countries in the region and the world. The national report on ASEAN Consumer Empowerment Index (ACEI) in Cambodia, released in September 2020, suggests that consumer protection knowledge and understanding are very limited among Cambodians. This is critical because even the strongest constitutions and laws can have little impact unless there is widespread awareness of the applicable law and its respective rights and obligations for the actors within the justice system and the population as a whole. Against this background and in order to contribute to Cambodia's limited legal literature particularly in this specific field of consumer protection law, researchers and experts were invited to submit and present their research papers at the 19th Law Talk: "Law in the digital age: Protection of consumer rights". This publication is, therefore, a compilation of various academic perspectives from different young Cambodian researchers and experts in identifying the Status Quo of consumer protection law and policy, the challenges of implementing these, and formulating policy recommendations for a better consumer protection regime in Cambodia.

We sincerely hope that this Law Talk publication will be of great use to students, researchers, policymakers, and the interested public to gain a better understanding and to contribute to promoting a better consumer protection system in Cambodia.

KAS Cambodia extends its sincere gratitude toward all the authors for their contributions and those who made this publication possible. We would like to extend our appreciation to the editor, Professor Kong Phallack, for his continuous academic devotion to this project and we also like to acknowledge the editorial contribution of Ms. Sita Zimpel—Programme Director for Consumer Protection in ASEAN (PROTECT), GIZ.

Finally, our special appreciation is directed to all the participants and guest speakers from the Ministry of Commerce, academic institutions, NGOs, local and international law firms for their active and constructive involvement in commenting and giving feedback during the initial presentation of the papers by our authors at the 19th Law Talk held on November 12-13, 2020.

Phnom Penh, June 2021
Isabel Weininger, Representative to Cambodia
Chanbormey Long, Programme Manager
Konrad-Adenauer-Stiftung e.V

ABOUT THE LAW TALK

Law Talk is an academic forum that aims to support legal discussion and analysis of various specialized legal themes. Participants are invited from different walks of life but common legal backgrounds, such as academicians, scholars, researchers, students, and sometimes politicians, public officers, NGO workers, embassies, and international organizations to meet and discuss particular legal matters.

The Law Talk enables the group to discuss legal topics freely in the form of papers presentation, open legal debates on a certain law, identifying knowledge gaps, and suggesting recommendations for further revision of the law. As a result, it is anticipated that those involved in the discussion return home with some lessons learned and spread the knowledge further, and most importantly, bring the recommendations for further discussion at their respective institutions. There have been various legal topics brought and discussed in each Law Talk during the past years, including the topics of Constitutional Law, Labour Law, Human Rights, Environmental Law, Criminal Law, Law on Political Parties, and so forth.

Partners we previously worked with were public institutions including the Senate, the National Assembly, Constitutional Council of Cambodia, and relevant ministries in Cambodia. We believe that the presence and attendance of such institutions are essential for our program to have an inclusive and dynamic legal discussion and debate. They play an important role when it comes to the legal reform process in Cambodia.

The theme of the 19th Law Talk is “The Protection of Consumer Rights” which is among the increasingly relevant issues discussed locally and regionally, especially in the context of digitalization. A number of Cambodian experienced scholars and young researchers have been generous enough to contribute chapters on different sub-topics related to the above-mentioned theme. It was an opportunity to express their academic freedom and reach out to interested fellow legal practitioners. KAS Cambodia, as the organizer, wishes to continue the spirit and carry on the delivery and facilitation of the discussion on legal matters that concern Cambodia and the region.



BIOGRAPHY

OF THE EDITORS AND AUTHORS

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Prof. KONG Phallack holds an LL.M. from Nagoya University, Graduate School of Law (Japan), an LL.B. from the Royal University of Law and Economics (Cambodia), and a Doctor of Dental Surgery (DDS) from the Royal University of Health Science (Cambodia). He is an attorney at law and a member of the Bar Association of the Kingdom of Cambodia. He has served as an arbitrator of the Arbitration Council and has practiced mediation and arbitration for 18 years. He has 19 years in legal and policy drafting, reviewing, and analysis, and extensive teaching experience with Cambodian and foreign undergraduate and graduate students, student judges and prosecutors, notary publics, and bailiff students for 19 years in Cambodia, the USA, Sweden, Japan, South Korea, China, Singapore, Malaysia, Philippines, Indonesia, Myanmar, Laos, Taiwan, Thailand, and Vietnam. Professor Kong Phallack served as Dean of PUC's Faculty of Law and Public Affairs until 2020.

Recent projects and involvement include environmental law, consumer protection, social security law, public-private partnership law, social protection law, law on persons with disabilities, telecom and ICT laws and regulations, waste management, and others. He wrote and published articles and books, including Introduction to Cambodian Law (2012), Cambodian Constitutional Law (2016), Contemporary Environmental Law in Cambodia and Future Perspectives (2020), Perspectives on Cambodian Constitutional Law (2020), Contemporary Cambodian Employment and Labor Law (2021), and Law in the Digital Age: Protection of Consumer Rights (2021).

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Throughout her tenure at KAS Cambodia, she has organized a number of publications, conferences, and annual training programs for both legal practitioners and Cambodian youth in general, working closely with KAS's local, regional, and international partners. Legal training and conferences on Environmental Law, as well as training on Consumer Rights Protection in the Digital Age, were among the recent projects she coordinated, which were participated by a number of Cambodian legal practitioners, young lawyers, judges, legal academics, government officials, and other relevant stakeholders.

Authors:

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He co-leads the Dispute Resolution and Corporate Practice Groups and leads the Intellectual Property Practice Group (including Data Protection and Competition Law and Policy) at Bun & Associates. Sovath has an extensive legal background and strong experience in market entry and investment, business establishment, corporate governance and compliance, corporate restructuring, and mergers and acquisitions. He has particular expertise, extensive legal background, and strong experience in providing advice and support for the protection, commercialization, and enforcement of intellectual property rights to a wide range of right holders in various sectors. He has acted as a Short-Term Consultant to provide Technical Assistance to the Ministry of Commerce, Department of Intellectual Property, in a Trademark Data Validation Project.

Sovath acted as a National Legal Adviser for international organizations by assisting the Ministry of Commerce of Cambodia in drafting competition law and the law on food safety and the Ministry of Health of Cambodia in drafting food safety regulations and the law concerning public health and intellectual property. He has recently served as a legal consultant in various legislative drafting and reviewing projects funded by national and international organizations including a draft law on water supply (former Ministry of Industry and Handicraft), the draft law on management of petroleum and petroleum products and its implementing regulations (Ministry of Mines and Energy), the draft law on pharmaceutical products (Ministry of Health), draft regulations on animal health and productions (Ministry of Agriculture, Forestry and Fisheries).

He is admitted to the Bar Association of the Kingdom of Cambodia and is one of the first selected commercial arbitrators in Cambodia and has become a member of the National Commercial Arbitration Centre (NCAC) and a Fellow of the Singapore Institute of Arbitration (SIArb). Sovath is a qualified Trademark Agent in Cambodia, registered with the Ministry of Commerce of Cambodia. He is a member of the ASEAN Intellectual Property Association (ASEAN IPA) and the Asian Patent Attorneys Association (APAA).

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Dr. Meas Bora got both a Master's and Doctoral Degree in Law from Nagoya University Graduate School of Law, Japan, after graduation from the Faculty of Law and Economic Sciences in 1998, Phnom Penh. He obtained the United Nations International Law Fellowship Program to study international law at The Hague Academy of International Law, the Netherlands, in 2011. In 2015,

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He is the president of the Cambodian University for Specialties (CUS) since October 2018. He has given lectures on international law, human rights, international criminal justice to the universities and the Bar Association of the Kingdom of Cambodia. He wrote several articles in English on extradition, human rights, criminal procedure, the rights of the accused, and one book in Khmer on introduction to public international law. He was a legal team leader of the Office of the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Since 2015, he is a member of the Council of Jurists of the Council of Ministers, Royal Government of Cambodia and in 2018, was appointed as one of the members of the National Committee of Cambodia ASEAN Law Association (ALA).

He was admitted to the Bar Association of the Kingdom of Cambodia in 2012 and 2017 as a vice-chair of the international law and human rights commission thereof. Before this, he was a consultant for UNICEF in Cambodia on the edition of the draft report on the implementation by the Kingdom of Cambodia of the Convention on the Rights of the Child, and for the Cambodian National Council for Children on Analysis of Legal Framework for the Protection of Children in Cambodia.

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Introduction and overview of Consumer Protection in Cambodia

Kong Phallack & Long Chanbormey

Consumer protection refers to measures that aim to protect and promote the well-being and/or financial interests of consumers. Consumer protection measures, including consumer education, mobilization, and representation, work to ensure that consumers can make well-informed decisions about their choices and that producers and sellers will fulfill their promises about the products and services they offer.¹ Cambodia has the youngest consumer protection regime in the ASEAN region, with the Law on Consumer Protection only passed in November 2019. The main mandate for its implementation lies with the Consumer Protection and Fraud Repression Department (CCF) under the Ministry of Commerce. Relevant sub-decrees and implementing regulations (prakas) are currently being drafted, among others concerning the constitution and composition of an inter-ministerial Commission.²

Besides the 2019 Consumer Protection Law, there are number of laws and regulations related to consumer protection namely Law on measures to prevent the spread of COVID-19 and other deadly infectious diseases (2021), Law on E-Commerce (2019), Law on Construction (2019), Law on the Management of Health Professions (2016), Law on Accounting and Auditing (2016), Law on Telecommunications (2015), Law on Associations and Non-Governmental Organizations (2015), Law on Metrology (2009), Law on Insurance (2014), Civil Code (2007), Law on Standards (2007), Prakas on Utilization and Protection of Credit Information (2006), Law on Post (2002), Law on the Management of Quality and Safety of Products (2000), Law on the Management of Private Medical, Paramedical and Medical Aide (2000), Law on Electricity (2000), Law on Banking and Financial Institutions (1999), Law on the Management of Pharmaceuticals (1996), Law on the Bar (1995), and sub-regulations required by the said laws developed by respective competent ministries and institutions.

The Law Talks Publication “Law in the digital age: Protection of Consumers Right” consists of seven academic papers submitted by Cambodian young researchers and legal scholars who, with their respective articles, provide analytical viewpoints including some important elements of the legal framework for consumer protections. Each article embeds different food for thought, which builds a foundation not only for policymakers to consider in order to improve the loopholes in the existing laws and regulations but also for researchers and students to gain a deeper understanding of this emerging field within the Cambodian legal system and education. These papers are put together from chapter one to chapter seven and can be summarized as follow:

CHAPTER 1 CONSUMERS’ PERCEPTIONS OF CONSUMER RIGHTS IN CAMBODIA explains the perceptions about the actual implementation and challenges concerning consumer rights of Cambodian consumers who are entitled to exercising the rights. The study employed desk research, a questionnaire-based survey, and key informant interviews with consumers who mostly were in college.

CHAPTER 2 CAMBODIA’S CULTURE AND LAW ON PRIVACY AND DATA PROTECTION, AND THE FUTURE examine Cambodia’s culture and laws on privacy and data protection, and its implications for Cambodia’s future development. In its examination, this article will draw upon the United States (“US”) and the European Union’s (“EU”) approaches to data protection and privacy and their cultures, history, and politics. This article is not intended as a comprehensive analysis of Cambodia’s culture of privacy but as a starting point for a deeper examination.

1. ASEAN, Handbook on ASEAN Consumer Protection Laws and Regulations (2018), p.3

2. ASEAN, The Report of ASEAN Consumer Empowerment Index 2020, p.31

CHAPTER 3 PRIVACY AND DATA PROTECTION IN THE DIGITAL AGE: A HOLISTIC APPROACH TO PRIVACY AND DATA PROTECTION IN CAMBODIA reviews the existing legal approaches to data protection taken by these general laws and specific or sectoral laws and then categorizes those legal approaches into four approaches: the right to privacy, the right to personality, the right to professional secrecy, and the right to Data Security. This research paper attempts to make theoretical analysis and discussion on each legal approach and highlight doctrinal challenges when it is applied within the Cambodian legal framework, and suggest that the data protection should be protected under the right to personality in which the right to privacy is a subset of the right to personality, and any legislative approach to the data protection should be based on this principle to make it consistent throughout the whole legal hierarchy including the Constitution and the Civil Code. In the end, this research paper also explores potential ways to develop an integrated legal approach to personal data in Cambodia.

CHAPTER 4 ONLINE SALE: CIVIL AND CRIMINAL LIABILITY FOR ENFORCING THE CONSUMER PROTECTION explores both types of liabilities applicable to online sale offenses. To do this, legal basis and types of liability, as well as the interrelation thereof in relevant laws or regulations in Cambodia, will be discussed. The concept of misrepresentation and the defective product will be presented, too. Legal theories, jurisprudence, and laws of other jurisdictions will be used for reference.

CHAPTER 5 PRE-CONTRACTUAL INFORMATION DISCLOSURE: WHAT CAN CAMBODIA LEARN FROM THE EUROPEAN UNION? introduces the importance of information disclosure for consumers. Second, this research provides an analytical framework on pre-contractual information disclosure relevant to e-commerce in the EU and Cambodia. Since the EU serves as a benchmark for comparison, the potential challenges faced by the EU and the strategies in overcoming those challenges are examined. Finally, this paper recommends the transposition of the best applicable practices of the EU to Cambodia's regulatory framework. Since Cambodia is undergoing a shift toward digital marketplaces, the findings of this article seek to identify and promote effective measures to protect consumers' rights in e-commerce in Cambodia.

CHAPTER 6 THE ADOPTION OF THE RIGHT OF WITHDRAWAL AS A MECHANISM TO PROTECT CONSUMER IN ELECTRONIC COMMERCE: LESSONS LEARNED FROM THE EUROPEAN UNION LEGAL FRAMEWORK. This paper aims to address the gaps of Cambodian law by comparing it with the right of withdrawal framework in the European Union and recommends adopting the right of withdrawal as a mechanism to strengthen consumer protection in electronic commerce in Cambodia.

CHAPTER 7 TOWARDS CONSUMER ACTION AND ACTIVISM – LEGAL AND PRACTICAL CONSIDERATIONS FOR ESTABLISHING A CONSUMER ASSOCIATION IN CAMBODIA attempts to demonstrate legal and practical consideration and reflect the essence of the establishment of consumer associations in Cambodia by examining the international legal framework, experience from other countries, and the Cambodian legal framework related to the formation of consumer associations.

The seven papers are not purely academic papers and thus always require a more thorough and deep critical analysis on specific discussions and issues raised in each chapter by the authors for further improvement. The publication is second in the line of the Law Talk Series Publication aiming to contribute to legal resources in Cambodia.



“

Respondents negatively perceived the exercise, implementation, and protection of rights to safety, rights to information, rights to raise concern, and rights to claim compensation of consumer although those rights are clearly stated and protected in Cambodia laws.

”

CHAPTER 01

Consumers' Perceptions of Consumer Rights in Cambodia

Soun Ponleu

Disclaimer: The views, opinions, and analyses presented in this paper represent those of selected respondents, key informant interviewees, and the author. They do not necessarily reflect the position of any entity other than the respondents and the author – and, since we are critical-thinking human beings, these views are always subject to change, revision, and rethinking.

Abstract

Deceptive practices and irregularities in the market are common issues happening in all countries around the globe, which require the government to intervene to safeguard consumer interests by upholding consumer rights in various legal instruments.¹ Cambodia is not an exception, there are many laws and regulations as well as mechanisms recognizing consumer rights, such as the law on consumer protection, the law on management of quality and safety of products and services, and the law on electronic commerce. However, there are not yet any studies focusing on how consumers perceive the exercise of their consumer rights in the country. The primary purpose of this research is to examine the perceptions about the actual implementation and challenges concerning consumer rights of Cambodian consumers who are entitled to exercising

1. Handbook on ASEAN Consumer Protection Laws and Regulations, 2018, page 04, retrieved from <https://aseanconsumer.org/>

the rights. The study employed desk research, a questionnaire-based survey, and key informant interviews with consumers who mostly were in college.

I. Introduction

Cambodia has been thriving forward to become a modern market economy in the region in which consumer rights are well protected. Inspired by the United Nations Guidelines on Consumer Protection and commitments under the ASEAN Economic Community, a new consumer protection law framework emerged in Cambodia legislation in late 2019 which focuses on the protection and promotion of the rights and interests of consumers in the country.² With the emergence of the digital era, the landscape of market transactions has experienced a dramatic transformation, and consumers have been facing an expanding range of challenges. Therefore, another provision, electronic commerce law, was enacted by the Royal Government of Cambodia at the same time, among others, providing confidence to the consumer in using electronic communications.³ However, the actual implementation of legislation in promoting and protecting consumer rights is questionable. Since consumers are affected directly by the implementation of these laws, they are the only people who can provide accurate information on the effectiveness of consumer rights exercise and protection. In light of this evolving landscape, fundamental questions arise as to what extent Cambodian consumers are already aware of their consumer rights, how they perceive those rights, and their recommendations in promoting and protecting consumer rights.

Research Questions

1. What are consumer rights?
2. To what extent are Cambodian consumers aware of their consumer rights?
3. How do Cambodian consumers perceive the actual implementation of consumer rights?
4. What are Cambodian consumers' recommendations for future improvement?

Methodologies

Against the backdrop of the below laws and regulations with a bearing on consumer rights promotion and protection, a survey was undertaken with a focus on five areas of consumer rights including rights to safety, rights to access education and information, rights to be heard of concern, rights to choose, and rights to claim compensation. Besides that, the survey also started with respondents' personal information and identified consumers' awareness of consumer rights, consumer responsibility, legislation on consumer rights protection, and institutions and NGOs in charge of consumer rights protection. The actual implementation and challenges of consumer rights were discussed through descriptive analysis of each relevant perception statement of five basic consumer rights (i) rights to safety – 8 statements; (ii) rights to access to information and education – 7 statements; (iii) rights to choose – 4 statements; (iv) rights to be heard of concerns – 6 statements; and (v) rights to claim compensation – 7 statements, altogether 32 statements. All statements were carefully developed and further revised and modified by experts in a subsequent stage before drafting the final versions of the questionnaire. In each statement, a five-point Likert scale of the agreement was used, running from "strongly disagree" to "strongly agree" with a neutral category for scale midpoint (1=strongly disagree, 2=disagree, 3=neutral, 4=agree, 5=strongly agree).

2. Article 2 of Cambodia Law on Consumer Protection adopted on November 2019

3. Article 2 of Cambodia Law on E-Commerce adopted on November 2019

Descriptive analysis was based on the majority scale of respondents in each statement of each consumer rights section. As the perception-related statements were all positively phrased, the analysis logic maintains that the scale “strongly disagree” and its subsequent scale “disagree” will be classified into a group of respondents with “negative perception” on the given statements. In another way round, the scale “strongly agree” and its subsequent scale “agree” will be classified into a group of respondents with “positive perception” on the given statements. Whereas, the scale “neutral” will be classified into a group of respondents with “neither good nor bad perception”. However, the paper will try to analyze the outstanding perceptions, “positive perception” and “negative perception” and other noticeable perceptions on consumer rights. In addition to survey data analysis, the convenience sampling was used to select participants different academic backgrounds for a semi-structured interview to (1) ensure that participants share the same subjectivity of consumer rights concept to legislation on consumer rights in Cambodia (2) further examine the actual implementation and challenges of consumer rights exercise in Cambodia.

Limitation of the Study

The research design has certain limitations. Above all, the result of the questionnaire-based survey and key informant interviews are not representative of the whole Cambodian population. However, it seeks to provide some insights from the questionnaire-based survey with 75 respondents and key informant interviews with six individuals and open a pathway for future study. Due to the limited scope of the study, assessing differences between certain socio-demographic factors, such as occupation, and economic factors was not possible.

II. International Legal Framework on Consumer Rights

Unlike Universal Declaration on Human Rights, there is no international convention of Consumer Rights Protection that is legally binding on every country in the world. The United Nations Guideline on Consumer Protection plays a major role in shaping policies on the protection of consumer rights nationwide and sets out the main characteristics of effective consumer protection legislation, enforcement institution, and redress systems.⁴ The UNGCP was last updated in 2016, and it assisted the interested Member States in formulating and enforcing domestic and regional laws, rules, and regulations that would be suitable to their economic, social, and environmental circumstances. Following the UNGCP, eight basic rights of consumers have been recognized:

1. The rights to satisfaction of basic needs – To have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water, and sanitation.
2. The rights to safety – To be protected against products, production processes, and services that are hazardous to health or life.
3. The rights to be informed – To be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labeling.

4. United Nations Guidelines on Consumer Protection

4. The rights to choose – To be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.
5. The rights to be heard – To receive consumer interests represented in the making and execution of government policy, and the development of unsatisfactory services.
6. The rights to redress – To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods, or unsatisfactory services.
7. The rights to consumer education – To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.
8. The rights to a healthy environment – To live and work in an environment, which is non-threatening to the well-being of present and future generations.

Regionally, consumer rights promotion and protection have long been recognized as an integral part of the ASEAN economic and social integration process. The Handbook on ASEAN Consumer Protection Law and Regulations emphasized the importance of government to safeguard the interests of consumers by recognizing and upholding their rights in various legal instruments, including consumer protection laws. They also recognized the eight basic rights of the UNGCP as basic consumer rights in ASEAN that needed to be protected.⁵ Additionally, protecting consumer rights has strongly emphasized in the High-Level Principle on Consumer Protection in ASEAN.⁶ Those principles make it clear that consumer rights in every ASEAN Member States (AMS) shall be within one same standard to thrive and push an all-level ASEAN Economic Integration shortly.⁷ Given that consumer rights in Cambodia constitute a fairly new topic, it is compulsory to identify basic consumer rights in Cambodian legislation.

III. Cambodian Laws and Regulations related to Consumer Rights Protection

This section identifies consumer rights in the existing legal frameworks in Cambodia, in particular, the Law on Consumer Protection, Law on Electronic Commerce, Law on Management of Quality and Safety of Products, Law on Standard, and Law on Telecommunications.

1. Law on Consumer Protection

In Cambodia, the first legislative act that directly targeted consumer rights protection is Law on Consumer Protection, adopted in November 2019 by Royal Kram No. NS/RKM/1119/016. The Consumer Protection Law established rules to guarantee the rights and interests of consumers. The law referred consumer rights to:⁸

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5. Handbook on ASEAN Consumer Protection Law and Regulation, retrieved from www.aseanconsumer.org
 6. ASEAN High-Level Principle on Consumer Protection
 7. *ibid*
 8. Article 6 of Cambodia Law on Consumer Protection adopted on November 2019

- The rights to access information and education to distinguish the difference between goods and services and to prevent fraud and fraudulence by commercial advertisement;
- The rights to choose goods or services with competitive prices and quality;
- The rights to be heard on concerns and to examination and settlement by competent regulators and the Royal Government;
- The rights to claim compensation under this law or other laws

2. Law on Electronic Commerce

In addition to Law on Consumer Protection, the government of Cambodia adopted Electronic Commerce Law in November 2019 by Royal Kram No. NS/RKM/1119/017, to regulate domestic and cross-border e-commerce activities in Cambodia, establish legal certainty for the electronic transaction, and enact several important protections for consumers.⁹ This law tended to focus on all areas of consumer rights stated in the law on consumer protection.¹⁰

3. Law on Management of Quality and Safety of Products (LMQSP)

Law on Management of Quality and Safety of Products (LMQSP) provided an administrative framework for the Cambodia Government to inspect and prevent the production of hazardous products and the provision of hazardous services.¹¹ At the same time, consumer rights are among several issues in which the LMQSP covered. In addition to the rights to information which later in the top agenda of law on consumer protection, chapter two of LMQSP explicitly put importance on the rights to safe goods and services of consumers.¹²

4. Law on Standards of Cambodia

Law on Standards of Cambodia adopted in Royal Kram No. NS/RKM0706/013,¹³ is another important legislation, before 2019, adopted to improve the quality of products and services and to enhance consumer protection and public welfare. Unlike the prior mentioned law, it did not stress any particular consumer rights besides providing a framework for the establishment of the Institute of Standard of Cambodia.¹⁴

5. Law on Telecommunications

In the telecommunications sector, the Law on Telecommunications, promulgated by Royal Kram No. NS/RKM/1215017 dated December 17th, 2015,¹⁵ is considered the most comprehensive

9. Chapter 1 of Cambodia Law on Electronic Commerce adopted on November 2019

10. Chapter 6 of Law on Electronic Commerce adopted on November 2019

11. Law on Management of Quality and Safety of Products and Services adopted on 2000

12. Chapter 2, Law on Management of Quality and Safety of Products and Services adopted on 2000

13. Law on Standards of Cambodia, Royal Kram No. NS/RKM0706/013

14. Chapter 2, Law on Standards of Cambodia

15. Royal Decree No. NS/RKM/1215017 dated 17 December 2015 on Law on Telecommunications

legal instrument in Cambodia. It illustrates that consumers of telecommunications services shall have the following basic rights:¹⁶

- Rights to enjoy quality telecommunications services, and to receive information about telecommunications services;
- Rights to security and safety while using telecommunications services, including protection of private information;
- Rights to participate in any public consultation on preparation of policy or regulation in the sector;
- Rights to redress and obtain compensation on damages caused by telecommunication operators or services providers;
- Rights to establish consumer association

In general, consumer rights in Cambodia have different characteristics, covered both goods and services, and ranged from traditional transactions to modern electronic transactions. In addition to the above-mentioned rights of consumers exemplified in Cambodian legislations, there are two public institutions in charge of consumer rights promotion and protection that shall be discussed.

6. Cambodia Import-Export Inspection and Fraud Repression Department (CAMCONTROL)

Sub-decree No. 91 A'NKR.BK dated August 1st, 2007 on the Organization and Functioning of Ministry of Commerce established Cambodia Import-Export Inspection and Fraud Repression Department (CAMCONTROL).¹⁷ CAMCONTROL had been upgraded from a department to a directorate-general by Sub-Decree No. 59 A'NKR.BK dated May 29th, 2008.¹⁸ The Directorate-General is the main legal entity in charge of promoting and protecting consumer rights in Cambodia. However, consumer awareness of the role and responsibility of this public institution is questionable leaving room for the survey to fill.

7. National Committee of Consumer Protection

Sub-decree No. 135 A'NKR.BK dated 27th August 2020 on Organization and Functioning of National Committee of Consumer Protection is responsible for protecting consumer and consumer rights and working on consumer complaints.¹⁹ Since this newborn committee would play a role as a first and only national committee directly in charge of consumer complaints, the level of consumer awareness toward this entity is questionable leaving room for the survey to fill.

16. Chapter 11 of Law on Telecommunications

17. Sub-Decree No. 91 A'NKR.BK dated 1st August 2007 on the Organization and Functioning of Ministry of Commerce

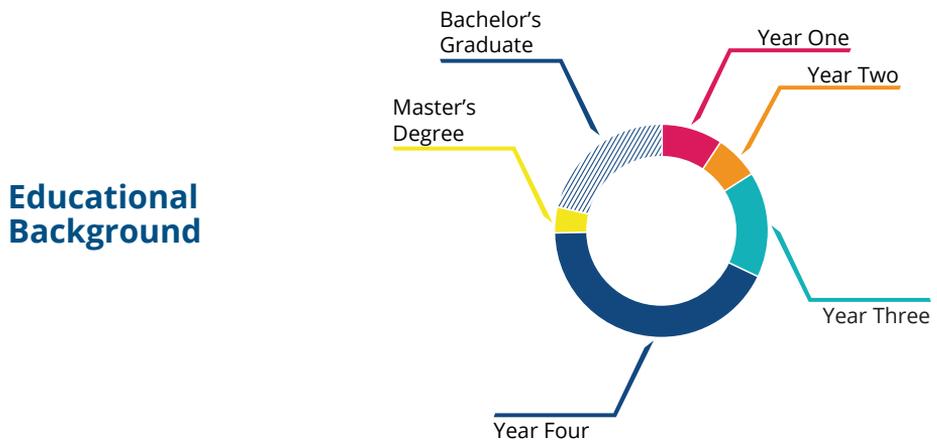
18. Sub-Decree No. 59 A'NKR.BK dated May 29, 2008 on the Upgrading of Cambodia Import-Export Inspection and Fraud Repression Department of the Ministry of Commerce

19. Sub-decree No. 135 A'NKR.BK dated 27th August 2020 on Organization and Functioning of National Consumer Protection Committee

IV. Consumers' Perceptions of Consumer Rights from the survey

1. Demographic Information

The survey started in September 2020 with a whole month-long period. There were 75 participants in this study sample, 74.5% of which were female. Most of the participants were doing a bachelor's degree, and the majority of participants were between 20 and 25 years old. 60% of participants mostly purchased imported goods and services, and 61.4% of them mostly purchased goods and services in the traditional shopping market. Since the study did not aim to measure the difference between perceptions of consumers based on the below demography, there was not any comparison between the demographic groups.



2. Consumers' Awareness About Their Rights

To have a sound understanding of how consumers perceived consumer rights practice in Cambodia, it is important to identify the level of awareness of respondents and their knowledge about consumer rights, consumer responsibility, regulation/legislation protecting consumer rights, and organization protecting consumer rights.

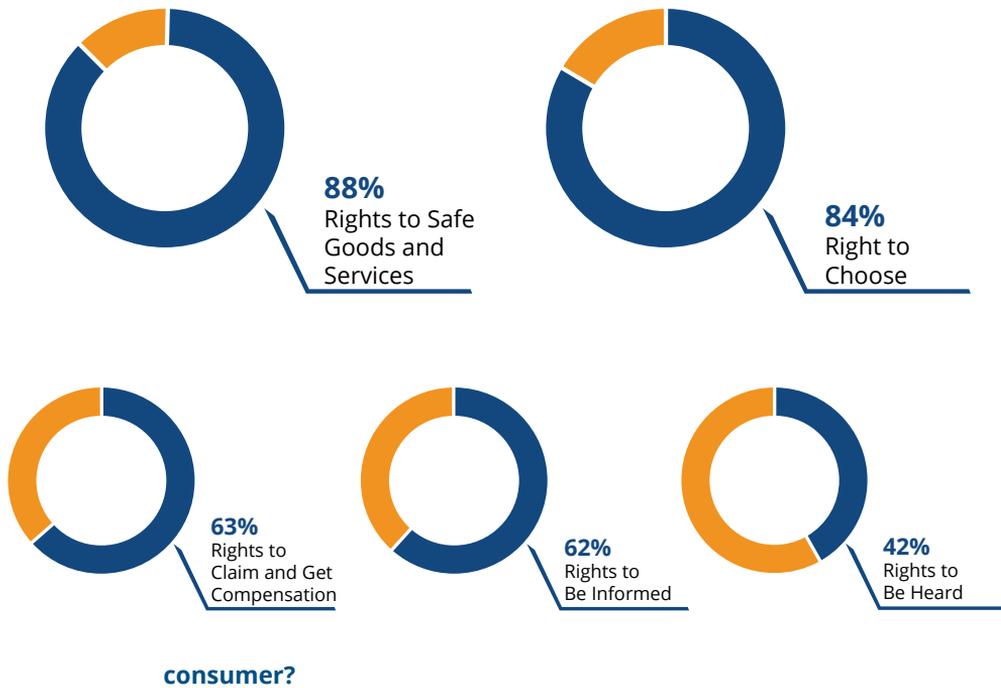
Question 1: Which of the following rights do you think you have as a consumer?

This first question aimed to identify how far consumers were aware of their basic consumer rights. It helped us have a better picture of which one is the most familiar consumer rights Cambodian consumers have acknowledged. The results showed that among the five basic consumer rights represented in the survey, 88% and 84% of respondents were aware of rights to safe goods and services and rights to choose, respectively. Whereas, six in ten respondents were aware of rights to claim and get compensation and rights to be informed. At the same time, only four in ten respondents were aware of the rights to be heard of concerns.²⁰

20. Figure 1: Which of the following rights do you think you have as a consumer?

Figure 01: Which of the following rights do you think you have as a consumer?

Question 2: Which of the following responsibilities do you think you have as a



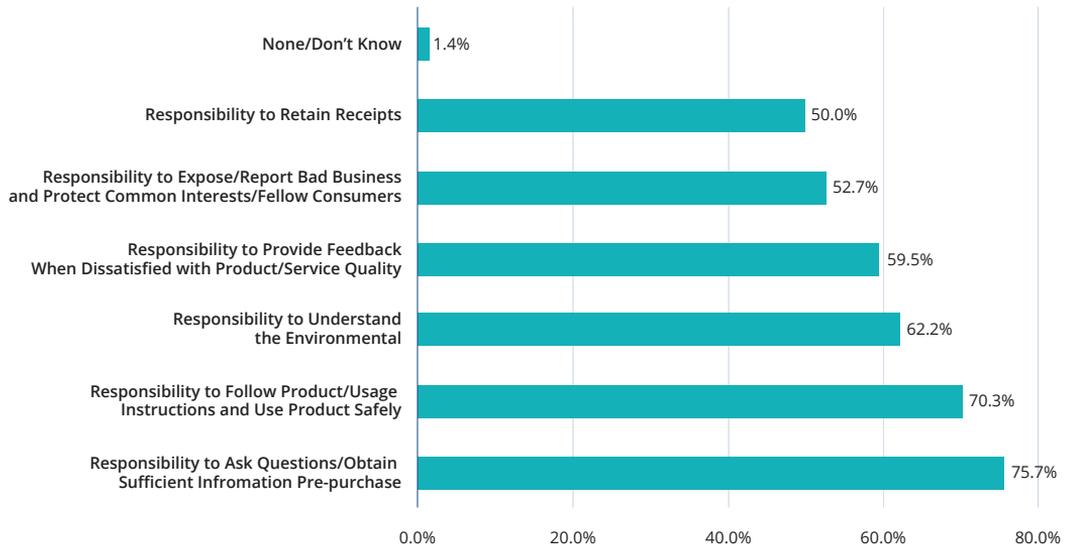
consumer?

The second question of this domain aimed to identify how far consumers were aware of their basic consumer responsibilities. It is an awakening to remind respondents that, in addition to consumer rights, they also have plenty of responsibilities, and their consumer responsibilities are as important as their consumer rights. The result showed that among basic consumer responsibilities illustrated in UNGCP,²¹ the responsibility to ask questions/obtain sufficient information pre-purchase was known by the majority of respondents (75.7%). It is followed by responsibility to follow product/usage instructions and to use the product safely (70.3%), responsibility to understand the environmental consequences of one's consumption and contribute to a healthy environment (62.2%), responsibility to provide feedback when dissatisfied with product/service quality (59.5%), responsibility to expose/report bad business and protect common interests/fellow consumers (52.7%), and responsibility to retain receipts (50%).²²

21. United Nations Guideline on Consumer Protection

22. Figure 2: Which of the following responsibilities do you think you have as a consumer?

Figure 02: Which of the Following Responsibilities do you think you have as a consumer?

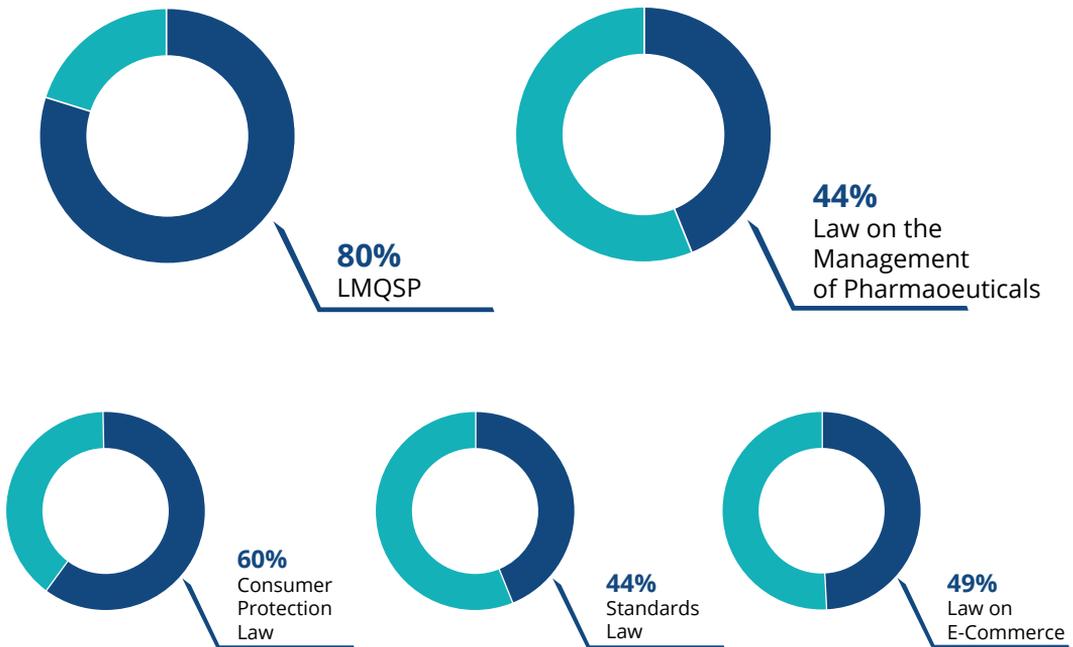


Question 3: Which of the following legislations/regulations protect Consumer Rights in one way or another?

The third question of this domain aimed to identify how far consumers were aware of existing legislation/regulations protecting consumer rights. The knowledge of legislation and regulation protecting consumer rights would help consumers to make an informed and responsible decision for their purchasing of goods and services. The result showed that eight in ten respondents knew that there was the Law on Management of Quality and Safety Product and Services protecting consumers in one way or another.²³ At the same time, six in ten respondents were aware that consumer rights would be protected by Law on Consumer Protection. Whereas, at least four in ten respondents thought they would be protected by law on the management of pharmaceuticals and standard law, while about five in ten respondents were aware of Law on Electronic Commerce in protecting consumer rights.

23. Figure 3: Which of the following legislations/regulations protect consumer rights in one way or another?

Figure 03: Which of the following legislation/regulations protect consumer in one way or another?

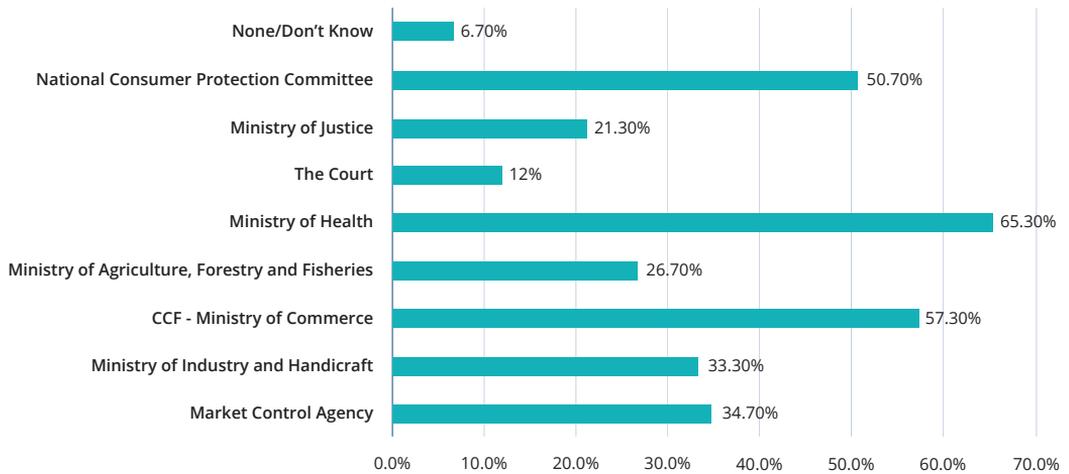


Question 4: which of the following institutions are primarily responsible for protecting consumer rights?

The fourth question of this domain aimed to identify how far consumers were aware of institutions responsible for protecting consumer rights. The result showed that 65.30% and 57.30% of respondents knew there were Ministry of Health and Consumer Protection Competition and Fraud Repression Directorate-General (CCF) of the Ministry of Commerce which is primarily responsible for protecting consumers, respectively.²⁴ At the same time, only 50.7% of respondents were aware that the National Committee on Consumer Protection would be responsible for protecting consumer rights. The unfamiliarity of the National Committee on Consumer Protect may align with the absence of this committee until the time writing this paper. A consumer's right to buy safe products is generally considered a public health issue; thus, it concerns many people around the world. That is why the majority of respondents in Cambodia believed it is primarily responsible for consumer rights.

24. Figure 4: Which of the following institutions are primarily responsible for protecting consumer rights?

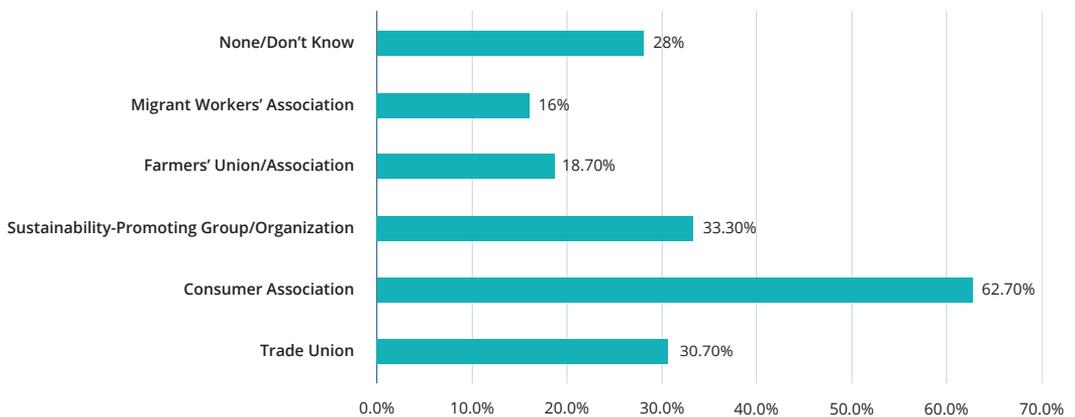
Figure 04: Which of the following institutions are primarily responsible for protecting consumers rights?



Question 5: which of the following organizations/groups protect consumers in one way or another?

The last question of this domain aimed to identify how far consumers were aware of organizations/groups protecting consumers. The results showed that 62.7% of respondents knew consumer association protects consumers in one way or another.²⁵ However, at the time of writing this paper, there was not an establishment of consumer association yet. It is interesting yet not surprising to see that approximately 30% of respondents thought sustainability promoting groups and trade unions would protect consumer rights given the fact that consumer association is a new topic in the country. It is also noticeable that almost three in ten respondents did not know whether any of the given organizations would protect consumer rights.

Figure 05: Which of the following organizations/groups protect consumers in one way or another?



25. Figure 4: Which of the following institutions are primarily responsible for protecting consumers rights?

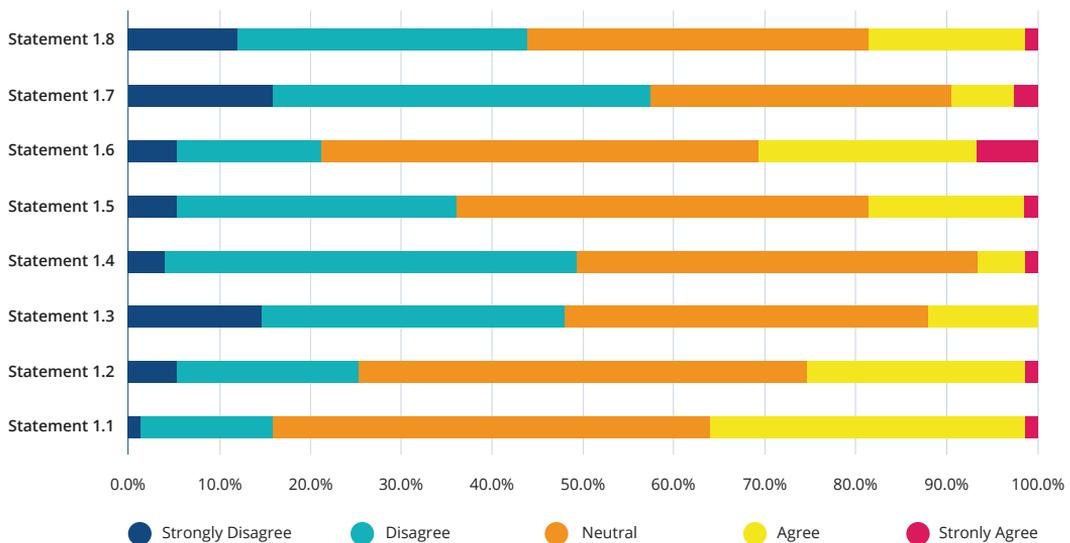
In general, participants in the survey are well-aware of consumer rights, consumer responsibility, legislation/regulations protected consumer rights, governmental institutions responsible for protecting consumer rights, and organizations protecting consumer rights. It aligned with the finding of the ASEAN Consumer Empowerment Index (ACEI) launched in 2020 which confirmed that the well-educated are more aware of consumer protection issues in Cambodia, especially concerning their basic consumer rights.²⁶

In addition to consumers’ awareness of consumer rights, how consumers perceived each right illustrated in Cambodian laws would manifest the current situation of consumer rights implementation and protection in the Cambodian context.

3. Consumers’ Perceptions of Rights to Safety

Among the eight statements in consumers’ perceptions of rights to safety, statement 1.7 on the marketers’ concern about products safety received the highest rate of disagreement from the majority of respondents (57.3%) representing negative perception.²⁷ It is followed by statement 1.4, statement 1.3, and statement 1.8 on safety standards, the government’s concern about product safety, and national standards formulated for safety and quality of goods, and services, respectively. Besides, the majority of respondents show neither good nor bad perception on the remaining statements, while there is no representation of majority respondents showing positive perception on any statement of rights to safety.

Figure 06: Consumers’ Perceptions of Rights to Safety



An interviewee who referred rights to safety to be protected against products, production processes, and services that are hazardous to health or life, stated that

26. National Report on ASEAN CONSUMER EMPOWERMENT INDEX (ACEI) In Cambodia, 2nd September 2020

27. Figure 6: Consumers’ Perceptions of rights to safety

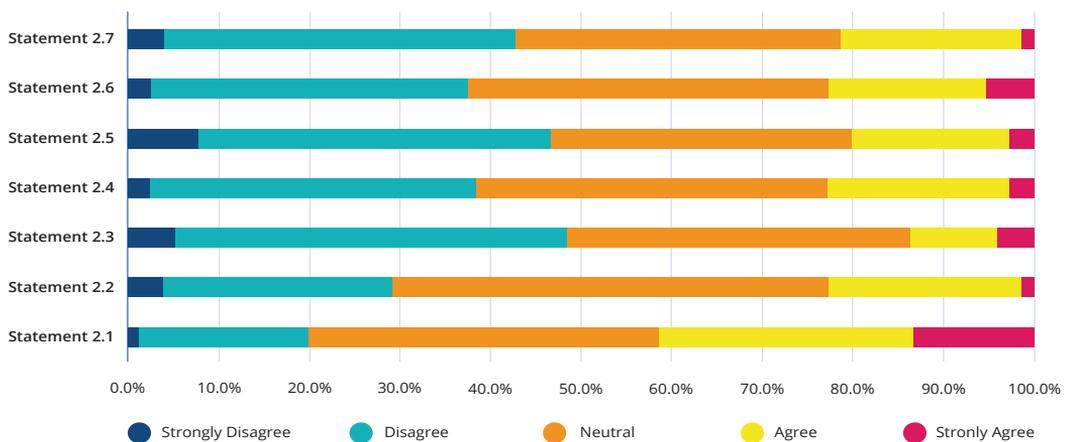
"I don't see enough commitment from either traders or the government to guarantee the rights to safety of consumers. The truth can be seen in today's society. I see a lot of sellers advertising their homemade and imported cosmetic products through online platforms, and I also see a lot of cases publicized on social media about the negative impact of those products on the health of consumers. I think there is, at least, a checklist on the quality of both imported and domestic products before entering the market, but why are such products hazardous to health being freely circulated in the market."²⁸

In regards to challenges that prevent consumers from realizing consumer rights to safety, he added that it centered on the competency and effectiveness of governance mechanisms. He believed that government did not prioritize consumer rights in their national strategic plan.²⁹

4. Consumers' Perceptions of Rights to Access Information and Education

Among the seven statements of consumers' perception of rights to access information and education, statement 2.3 on the convenience in detecting fraud and fraudulence by commercial advertisement in Cambodia received the highest rate of disagreement from the majority of respondents (48.6%) representing negative perception.³⁰ It is followed by statement 2.5 and statement 2.7 on marketers' performance informing consumers about all aspects of products and marketers' performance in providing all necessary information about products, respectively. Besides, the majority of respondents show neither good nor bad perception on the remaining statements, while there is no representation of majority respondents showing positive perception on any statement of consumer rights to access information and education.

Figure 07: Consumers' Perceptions of Rights to Information and Education



An interviewee who recognized the importance of rights to access information and education in distinguishing the difference between goods and services and to prevent fraud and fraudulence by commercial advertisement stated that

28. Respondent Number 1

29. ibid

30. Figure 7: Consumers' Perceptions of rights to access information and education

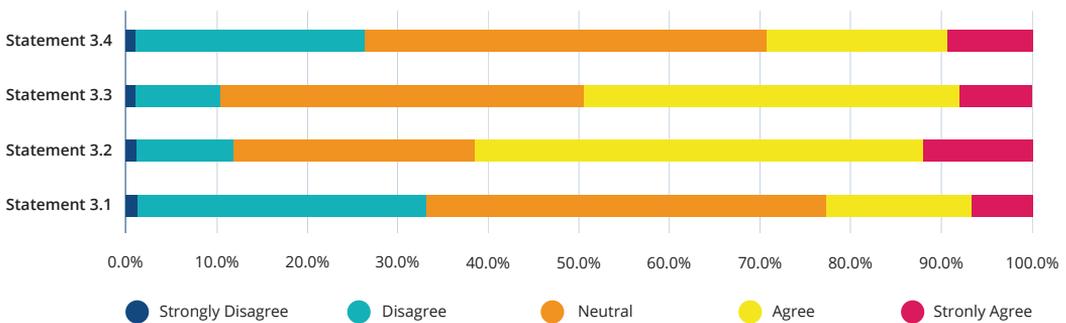
“I observe that ... most Cambodian people, especially those living in the rural area, still find it difficult to detect fraud and fraudulence by commercial advertisement or sellers. Detecting fraud and fraudulence is very challenging, most imported products are labeled in English, but the majority of old-aged people are illiterate.”³¹

Another interviewee who was in her junior year majoring in business administration showed concern about alcohol advertisement in Cambodia that

“.....there are so many alcohol companies in the country trying to compete for their market size through discount, promotion, or lucky winner. There are way too many on television, but I don't see any of them inform consumers about the bad impact of alcohol consumption on health.”³²

5. Consumers’ Perceptions of Rights to Choose Goods and Services

Figure 08: Consumers’ Perceptions of Rights to Choose Goods and Services



Among the four statements of consumers’ perception of rights to choose goods and services, statement 3.2 on availabilities of different versions of goods and services for different consumer budgets receive the highest rate of agreement from majority respondents (61.3%) representing positive perception.³³ It is followed by statement 3.3 on the availability of varieties of goods and services in different places. Besides, the majority of respondents show neither good nor bad perception on the remaining statements, while there is no representation of majority respondents showing negative perception on any statement of consumer rights to choose goods and services.

An interviewee who believes that rights to choose goods and services is being on the right track said,³⁴

31. Respondent Number 2

32. Respondent Number 3

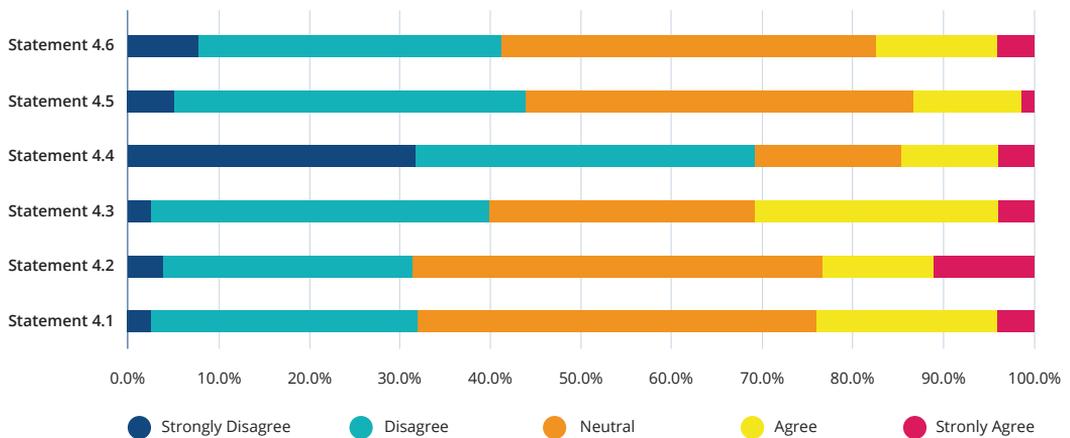
33. Figure 8: Consumers’ Perceptions of rights to choose goods and services

34. Respondent Number 4

“I think rights to choose goods and services is pretty good in the country. It is because Cambodia is a free market country, and globalization, free flow of trade, and digitalization help me as a consumer to get products and services at a competitive price that I am satisfied with....”

6. Consumers’ Perceptions of Rights to be Heard of Concerns

Figure 09: Consumers’ Perceptions of Rights to be Heard of Concern



Among the six statements of consumers’ perceptions of rights to be heard of concern, statement 4.4 on convenience in raising concerns to government authorities received the highest rate of disagreement from majority respondents (69.3%) representing the negative perception of consumers.³⁵ It is followed by statement 4.5, statement 4.6, and statement 4.3 on the proactive act of retailers/traders and service providers on taking consumers’ feedback, convenience in making complaints about any aspect of the business, and convenience in raising a concern directly about goods and services to retailers/traders or service providers. Besides, the majority of respondents show neither good nor bad perception on the remaining statements, while there is no representation of majority respondents showing positive perception on any statement of consumer rights to choose goods and services.

An interviewee who refers rights to be heard of concerns to consumer participation in the preparation of policy or regulation expressed her concern toward her limited opportunity in talking to government agencies that,³⁶

“In general, regarding raising concerns, I would prefer not to buy the products that make me feel unsafe rather than raising concern to the government agencies... It is not because I don’t want to tell them about the problem of the product, but I seriously have never found any public forums in which consumers are encouraged to raise a concern.”

35. Figure 9: Consumers’ Perceptions of rights to be heard of concerns

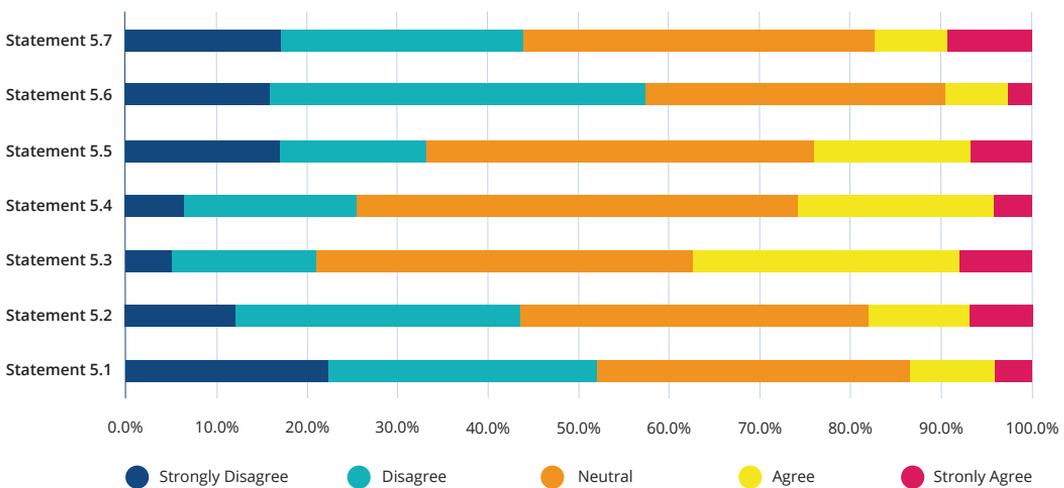
36. Respondent Number 5

Another interviewee told that,³⁷

“I see a lot of concern on particular goods and services expressed on social media, but how to raise concern officially to governmental authority is quite questionable. I am not sure about the procedure of raising concerns since I have never heard dissemination on the procedure from responsible entities”

7. Consumers’ Perception of Rights to Claim Compensation

Figure 10: Consumers’ Perceptions of Rights to Claim Compensation



Among the six statements of consumers’ perceptions of rights to claim compensation, statement 5.6 on convenience in claiming compensation received the highest rate of disagreement from majority respondents (61.4%) representing the negative perception of consumers.³⁸ It is followed by statement 5.1, statement 5.7, and statement 5.2 on the dissemination of government agency responsibility in taking complaint files for compensation, justice mechanism, and consumer tendency in claiming compensation when they have a legitimate cause. Besides, the majority of respondents show neither good nor bad perception on the remaining statements, while there is no representation of majority respondents showing positive perception on any statement of consumer rights to choose goods and services

An interviewee who refers consumer rights to claim compensation to receive a fair settlement of just claims said that,³⁹

37. Respondent Number 6

38. Figure 10: Consumers’ Perceptions of rights to claim compensation

39. Respondent Number 3

“I think the process of claim compensation in Cambodia is quite not favorable to consumers. The formal process would cost a lot of time and money from us as a consumer. I saw in the news that a woman is complaining about an imported milk powder product affecting her baby’s health. And, she has been through a lot of processes, including going to the court, filing a complaint form, hiring a lawyer, waiting for the court procedure, and other staff. The question is how many Cambodian people can do so. We do have rights to claim compensation, but little to none we exercise that rights”

In general, respondents negatively perceived the exercise, implementation, and protection of rights to safety, rights to information, rights to raise concern, and rights to claim compensation of consumers although those rights are clearly stated and protected in Cambodia law and regulation. Yet, they positively perceived the exercise and implementation, and protection of rights to choose because of the existing globalization and free flow of markets in the country.

V. Concluding analysis and Recommendation

Consumers were highly aware of rights to safe goods and services and the law on the management of quality and safety of products and services. But they negatively perceived the exercise and implementation of rights to safe goods and services, particularly regarding marketers’ attitude, safety standards, governments’ attitude, and national standards formulated for safety and quality of goods and services. The finding reasons for this negative perspective of consumers aligned with incompetency and ineffectiveness of government mechanisms and government control over business operation including business license, advertisement, and quality check.

On the other hand, consumers were highly aware of the rights to choose; moreover, they positively perceived that rights given the fact that Cambodia is a free-market economy where the free flow of trade provides consumers with plenty of choices at a competitive price for their consumption.

Consumers’ awareness of rights to redress, the law on consumer protection, and the roles and responsibilities of CCF and the National Committee on Consumer Protection are relatively high; however, they tended to express their negative perspectives toward the exercise and implementation of rights to redress. The root causes of consumers’ negative perceptions toward these rights centered around the justice system, inconveniency, and lack of dissemination about filing a complaint and claiming compensation.

The majority of consumers were relatively aware of the rights to be informed compared to rights to be heard of concerns. However, they negatively perceived the adoption of the rights to access information particularly in the area of difficulty in detecting fraud and fraudulence and business performance in providing information of products. Despite the requirement to indicate products, goods, and services in Khmer language,⁴⁰ respondents still claimed that most of the products in the markets are labeled in English language which led to a major limitation in detecting fraud and fraudulence.

40. Chapter 2, Law on the Management of Quality and Safety of Products and Services

Notably, six in ten respondents were aware that consumer associations would be responsible for consumer protection in one way or another, whereas only four in ten respondents were aware of rights to be heard of concerns. However, they negatively perceived the exercise of this right specifically in the area of raising concerns to the government authority and raising concerns and feedback to business operations, retailers, or services providers given the fact that there was no establishment of consumer association yet.

It can be inferred that consumer rights protection is way insufficient which leaves a multi-faced landscape for improvement in different areas ranging from effective regulation implementation and roles and responsibilities of governmental institutions and business operations in general. It could be because of the absence of governmental priority in the consumer protection plan. It is very recommended that both of them need to work hand in hand to promote consumer rights in the country. At the same time, civil society and nongovernmental institutions need to play an outstanding role as a check and balance agents in overseeing consumer rights promotion and protection in both traditional and electronic commerce. Civil society and NGOs shall urge, support, and join the establishment of consumer associations in different sectors to ensure that consumer rights to safety, rights to information, rights to choose, rights to be heard of concerns, and rights to redressed are guaranteed. The updated United Nations Guideline on Consumer Protection called for equity of treatment of electronic commerce with other forms of commerce in terms of consumer protection.⁴¹ With this spirit, all policies and regulations related to consumer rights protection shall as well expand to protect consumer rights in the digital economy.

41. Manual on Consumer Protection, United Nations Conference on Trade and Development, 2018

Appendix 1 – Study Sample

Table 1: Demographic Information of Participants

Demographic Info	Item	Freq	Percentage
Gender	Female	56	74.7%
	Male	19	25.3%
Academic Year	Year One	7	9.3%
	Year Two	5	6.7%
	Year Three	12	16%
	Year Four	32	42.7%
	Master's Degree	3	4%
	Bachelor's Graduate	16	21.3%
Age	Age < 20	11	14.7%
	20 ≤ Age ≤ 25	56	74.7%
	Age > 25	8	10.7%
Consumer Mostly Purchase	Domestic Goods and Services	30	40%
	Imported Goods and Services	45	60%
Consumer Mostly Purchase In	Online Shopping	29	38.6%
	Traditional Shopping	46	61.4%

Appendix 2 – Questionnaire-based surveys and Interview Questions

Questionnaire-based survey

Consumers' Perceptions of Rights to Safety

Statement 1.1: I feel “peace of mind” for my safety when I use the products I buy from the market.

Statement 1.2: I feel protected against the marketing of goods and services which are hazardous to health or life.

Statement 1.3: I feel that the government is concerned about product safety.

Statement 1.4: I feel that the goods in the market meet safety standards.

Statement 1.5: I feel comfortable about my health when I use the products I buy from the market.

Statement 1.6: I do not remember encountering any risks while using the goods purchased from the market.

Statement 1.7: I feel that all marketers are concerned about product safety.

Statement 1.8: I believe in national standards formulated for the safety and quality of goods and services.

Consumers' Perceptions of Rights to Access Information and Educations

Statement 2.1: Information about the products I buy includes benefits and warnings of abuse.

Statement 2.2: I do not find it difficult to access information in order to distinguish the difference between goods or services.

Statement 2.3: I do not find it difficult to detect fraud and fraudulence by commercial advertisements in Cambodia.

Statement 2.4: Information that I find on the cover of the product is reliable enough to match the reality of the content.

Statement 2.5: I feel that marketers do their best to inform us about all aspects of products.

Statement 2.6: There is no overstatement in the information listed on the goods that I buy.

Statement 2.7: I feel that the market provides us with all the necessary information about products.

Consumers' Perception of Rights to Choose Goods and Services

Statement 3.1: Goods and services diversity in the market is enough to meet all tastes.

Statement 3.2: There are different versions of goods and services available for different consumer budgets.

Statement 3.3: Wide varieties of goods and services are usually available in different markets to meet the needs of consumers in different places.

Statement 3.4: I never had to choose unsuitable goods or services due to a lack of alternatives.

Consumers' Perception of Rights to be Heard of Concerns

Statement 4.1: Businesses usually announce free contact numbers for consumers to encourage them to express their opinion.

Statement 4.2: As a consumer, I usually raise a concern about goods and services to a retailer/traders or government authority.

Statement 4.3: It is easy to raise a concern about goods or services directly to retailers/traders or service providers.

Statement 4.4: It is easy to raise a concern to government authority.

Statement 4.5: Retailers/Traders and service providers take consumer feedback seriously and usually act accordingly.

Statement 4.6: I do not find it difficult to make a complaint about any aspect of business.

Consumers' Perception of Rights to Claim Compensation

- Statement 5.1:** I know exactly where to go if I want to file a complaint about compensation.
- Statement 5.2:** I do claim compensation when I have a legitimate cause.
- Statement 5.3:** I prefer to take direct action with traders/retailers if I want to claim compensation.
- Statement 5.4:** The government has disseminated the rights to claim compensation.
- Statement 5.5:** I am aware of the rights to claim compensation.
- Statement 5.6:** I do not find it difficult to file to claim compensation.
- Statement 5.7:** I believe that the government agency will bring me justice if I claim compensation.

Interview Questions

Opening Questions:

- How old are you?
- What are your gender pronouns, if any?
- What is your academic background?

Research Questions: Consumers' Awareness

- Do you think consumer rights are important to you? What rights do you think you have as a consumer?
- In your own words, how do you describe what are consumer rights to safety, rights to information, rights to choose, rights to be heard of concerns, and rights to claim compensation?

Research Questions: How do Cambodian consumers perceive the actual implementation of consumer rights?

- What consumer rights do you think are protected or exploited? Why?
- Have you been fully exercising your consumer rights? If not, what constrains you from fully exercising your consumer rights?
- What are the challenges in exercising your consumer rights? What are your suggestions to solve those challenges?
- What traders/services providers should do to protect consumer rights?
- What are your suggestions or policy recommendations to the government in regard to consumer rights protection?



“

Cambodia's digital transformation reforms are driven by globalization – the need to adapt to changes in the world economy, catch up in legal and technological developments, and attract foreign direct investments.”

CHAPTER 02

Cambodia's Culture and Laws on Privacy and Data Protection, and the Future

Keo Sothie

Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Ministry of Post and Telecommunications.

Abstract

The ongoing digital transformation of Cambodia has led Cambodians to share with private parties more and more sensitive data and personal information such as their identities, purchases, locations, activities, and communications. As Cambodians are providing more personal information than ever before, Cambodians' cultural and social understanding of the concept of "privacy" will change. In addition, Cambodia as a developing country in Southeast Asia feels the need to undertake globalization and desires to keep up with digitalization trends. This article will examine Cambodia's culture and laws on privacy and data protection, and its implications for Cambodia's future development. In its examination, this article will draw upon the United States and the European Union's approaches to data protection and privacy and their cultures, history, and politics.

I. Introduction

In this new digital age, Cambodians have been conducting more of their daily activities online. The use of phone apps for activities such as communication, transportation, shopping, and banking is the new norm. However, this shift to a more online presence carries risks and issues. For example, when Cambodians use apps to socialize and communicate, they are essentially providing private companies with information about who they are, who they are talking to, their likes and dislikes, their beliefs, their personality, and their behavior.

When Cambodians order a Remorque or rickshaw taxi on an app, they are providing information to private companies about where they are and where they are going. A person that uses the app regularly to go to work will provide information about where they live, where they work, what kind of work they do, and with which people they interact. In addition, records about time and places can reveal what a person's activities or interests are, and even who this person meets.

It is imperative to require private parties to safeguard people's data and their right to privacy. On November 02, 2019, Cambodia promulgated the E-Commerce Law (the "Law") to regulate e-commerce, create legal clarity, and provide public confidence in the use of electronic communications. Tailored towards this goal, the Law requires private parties to protect the electronic data of consumers. However, it is at certain points vague and does not provide comprehensive protection. This may be attributable to Cambodia's privacy culture and Cambodia's ongoing process of socially constructing a new meaning of privacy. Cambodia's need to transform into a digital society and undertake globalization creates privacy and data protection challenges. The people at times confront these challenges in their daily lives, and in response, they form new understandings of how privacy is important to them. In examining Cambodia's culture and law on privacy and data protection, this piece comparatively draws upon the United States ("US") and European Union's ("EU") approaches. The piece concludes that owing to globalization and the need to digitalize, Cambodia should adopt a more comprehensive data protection framework that incorporates Cambodia's new socially constructed meaning of privacy.

Section II analyzes the roots of the legal concept of privacy, the cultures of the US and the EU, and their approaches to privacy and data protection, and then traces Cambodia's culture of privacy. Section III examines the E-Commerce Law and Cambodia's approach to privacy and data protection in connection with the discussions from Section II. Last, Section IV concludes, provides recommendations, and considers Cambodia's future on privacy and data protection in light of the discussions from Section III.

II. Culture and Law

Law is never created in a vacuum but consists of traces of history, politics, or philosophy.¹ Jacques Derrida describes that there exists an invisible dimension or a "fabric of traces" within texts.² These traces are signs and clues of the culture that underlies them.³ The traces "reveal that law does not exist in isolation from other discourses but is affected by them as regards its

1. Pierre Legrand, *Siting foreign law: How Derrida Can Help*, 21 *DUKE J. COMP. & INT'L L.* 595, 607 (2011).

2. JACQUES DERRIDA, *PARAGES* 118 (Galilée 2d ed. 2003) (1979).

3. Legrand, *supra* note 1 at 606.

very constitution: it is constructed, made, fabricated, assembled, actively constituted of them.”⁴ Law is influenced by culture, history, politics, and philosophy.

In order to understand the E-Commerce Law and the future direction of Cambodia's privacy culture and laws, it is necessary to bring forth the traces that underlie not only the E-Commerce Law but also traces of privacy as a legal concept. Sub-section 1 will examine the traces of privacy as a “legal right,” and US and European culture on privacy and data protection; Sub-section 2 will trace Cambodia's culture on privacy.

1. Traces of the United States and European Privacy Culture

Universally, cultures have some sort of concept of privacy in the regulation and methods of access to information.⁵ However, the concept of privacy as a “legal right” is a relatively new phenomenon that has roots in Western culture from the late nineteenth century.⁶ Despite its Western roots, the US and EU's culture, history, and politics have shaped their approaches to privacy and data protection differently. Today, the US approach to privacy and data protection is sectoral.⁷ The US does not have a comprehensive and encompassing federal law that regulates personal data.⁸ Instead, in order to guarantee privacy protection, the US relies on a combination of narrow federal and state legislations, administrative regulations, industry-specific self-regulation guidelines, and case law.⁹ These privacy laws are sector-specific, which includes “healthcare, education, communications, financial services, or in the case of online data collection, . . . children.”¹⁰ The US sectoral approach is in contrast with the EU approach. The EU depends on one comprehensive and encompassing law to regulate personal data – the General Data Protection Regulation (“GDPR”).¹¹

The US sectoral approach and the EU's comprehensive framework approach may be traced to its culture. James Q. Whitman explains that the two different cultures of privacy of the US and the EU, which are home to different intuitive sensibilities, have produced two significantly different laws of privacy based on liberty versus dignity.¹² “Why is it that French people won't talk about their salaries, but will take off their bikini tops? Why is it that Americans comply with court discovery orders that open essentially all of their documents for inspection, but refuse to carry identity cards? Why is it that Europeans tolerate state meddling in their choice of baby names? Why is it that Americans submit to extensive credit reporting without rebelling?”¹³

4. Id. at 609.

5. Irwin Altman, Privacy regulation: Culturally universal or culturally specific?, 3 J. SOC. ISSUES 33, 66-84 (1977).

6. Simon Chesterman, After Privacy: The Rise of Facebook, the Fall of Wikileaks, and Singapore's “Personal Data Protection Act 2012”, SINGAPORE J. LEGAL STUD. 391, 392 (2012). See also Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890); Dorothy J. Glancy, The Invention of the Right to Privacy, 21 ARIZ. L. REV. 1, 1 (1979) (“The right to privacy is, as a legal concept, a fairly recent invention. It dates back to a law review article published in December of 1890 by two young Boston lawyers, Samuel Warren and Louis Brandeis.”).

7. Shawn Marie Boyne, Data Protection in the United States, 66 AM. J. COMP. L. 299 (2018).

8. Id.

9. Id.

10. N. Terry, Existential Challenges for Health Care Data Protection in the United States, 3 ETHICS, MED. & PUB. HEALTH 19, 21 (2017).

11. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

12. James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 Yale L. J. 1154, 1160 (2004).

13. Id.

The US notion of privacy is oriented towards the values of liberty against the state.¹⁴ European privacy protections are a form of protection of the right to respect and personal dignity.¹⁵ That is not to say that Americans do not think about dignity when they speak of privacy or Europeans with liberty – the contrast is not absolute, yet there exist relative differences.¹⁶ Americans tend to place a heavier emphasis on the value of liberty in their notion of privacy while the Europeans are oriented more towards the value of dignity.

Whitman elaborates that America’s privacy core is the same one since the eighteenth century: the right to freedom from intrusions by the state, especially in one’s own home.¹⁷ The Fourth Amendment provides Americans’ persons, houses, papers, and effects the right to be protected against unreasonable searches and seizures from the state. It is the right that “inheres in us as free and sovereign political actors, masters in our own houses, which the state is ordinarily forbidden to invade.”¹⁸

On the other hand, European privacy rights are rights to one’s image, name, and reputation. Germans call it the right to informational self-determination, which is the right to control the sorts of information disclosed about oneself. “They are all rights to control your public image – rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure – to be spared embarrassment or humiliation.”¹⁹

European societies today are the result of a slow revolt against status privilege.²⁰ Over time, the norms of respect that were once only afforded to aristocrats and wealthy people have been extended to everyone – there was a “leveling up,” in which everyone has control over their own dignity.²¹ For example, Whitman writes that Europeans appear in public parks, beaches, and riversides naked or topless, which Americans find baffling.²² The mindset behind this is that Europeans want to have the choice to present their image however they want, even if it means appearing nude. The decision to appear nude belongs to their control of their own image, which is a control of their dignity.²³ Europeans have even claimed control over nude photographs that were taken in public because there exists the notion of private-public nudity under continental privacy laws.²⁴ Under German Law, the control of pictures of the naked body belongs “exclusively to the individual.”²⁵ Germans would even say that it is a matter of politeness that nude people have a right not to be stared at. Even in a public park, they have not surrendered their privacy, because their privacy rights entail a control of their image and dignity.²⁶

14. Id. at 1161.

15. Id.

16. Id. at 1163.

17. Id. at 1161; See also JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 5 (2000).

18. Id.

19. Id.

20. Id. at 1166

21. Id.

22. Id. at 1200.

23. Id. at 1201.

24. Id.

25. §§ 22-23 KUNSTURHEBERGESETZ (amended 2001).

26. Whitman, *supra* note 12, at 1201.

Whitman's traces of European and US cultures of privacy reveal why the EU has moved towards a comprehensive framework approach to data protection, while the US takes a sectoral approach. It is the Europeans' emphasis on protecting the individual's right to control their own information and dignity that has led to the adoption of the GDPR. European lawyers have believed that it is a serious potential violation of the privacy rights of the consumer if private companies can for instance purchase data on consumer behavior. Therefore, for the Europeans, comprehensive regulation is imperative.²⁷

The US, on the other hand, is reluctant to regulate and tolerates industry self-regulation.²⁸ American values of liberty against the state orient them towards opposing regulation and interference from the state. The right to privacy is the right to be let alone.²⁹ For this reason, when Americans do regulate data, they tend to favor market-based solutions "over the strict comprehensive regulatory regime adopted . . . in Europe."³⁰ The US thus takes a sectoral approach, only adopting laws that are narrow and absolutely necessary for specific sectors.

2. Cambodian Privacy Culture

Even though the US and the EU data protection schemes are significantly different, they nevertheless both share a culture of privacy that is a major drive for the creation of privacy as a "legal" concept. In non-Western cultures, the legal right to privacy is a foreign concept that has been transplanted or imported into their societies either through colonization or globalization.

There is no word in the Cambodian (Khmer) language that captures the Western concept of privacy.³¹ In a qualitative study conducted by Cornell University and independent researchers about the perceptions and practice of privacy and Facebook, the researchers had to translate and explain the concept of privacy using adjacent concepts with Khmer terms for "personal or confidential information, the concept of secrecy, and the idea of the right to own your own information."³² When bilingual participants were asked about the differences between the Western concept of privacy and Khmer ideas about privacy, the researchers would often hear the stereotype: "there is no privacy in Cambodia."³³ A 34-year-old Cambodian humorously explained:

I think there is a habit of expecting things to be public. Cambodia is very community-based. I grew up in a rural area where, seriously, what time you go to school, what time you come back, what you do throughout the day, when you go to sleep, is known by the whole community. We live outdoors. We don't spend a lot of time inside. In a traditional Cambodian house, everything is visible to everybody.³⁴

27. Id. at 1192.

28. Id. at 1192-1193. See also David Scheer, Europe's New High-Tech Role: Playing Privacy Cop to the World, WALL ST. J., Oct. 10, 2003.

29. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

30. Pamela Samuelson, Privacy as Intellectual Property?, 52 STAN. L. REV. 1125, 1127-1128 (2000).

31. Margaret Jack, Pang Sovannaroeth, and Nicola Dell, "Privacy is not a concept, but a way of dealing with life" Localization of Transnational Technology Platforms and Liminal Privacy Practices in Cambodia, 3 CSCW 1, 2 (2019).

32. Id.

33. Id. at 7.

34. Id.

Nevertheless, there is certain information which Cambodians do keep private. A 21-year-old female participant mentioned that she would like to keep to herself “any secrets about love.”³⁵ A 35-year-old elaborated:

*In general, the people of Cambodia, particularly the young, define privacy just as something that affects their dignity. So that is why I can say they do have privacy, but they do not have an understanding of the term privacy.*³⁶

The lack of the concept of privacy can be traced to ancient times. The most foundational form of social organization for Cambodia, that exists even today, is the family.³⁷ The bonds among family members are strong, close, and involve lifelong rights and obligations.³⁸ Respect and deference are owed to older members of the family, whose decisions are binding upon younger family members.³⁹ Parents are involved in the most intimate decisions of their children’s lives including the arrangement and approval of marriages.⁴⁰

Moreover, agriculture has played an important role in Cambodian society. Before Cambodia’s recent growth, 80 percent of the population was employed in the agricultural sector.⁴¹ As a result, culture and life are more communal. Dr. Bit writes:

*Traditional Cambodians are basically cooperative and take pleasure in the company of others in work and socialization. Sharing material wealth within the family, a tradition of cooperative labor in agricultural pursuits, religious beliefs, living among kinfolk, and the absence of negative models who encourage competition all serve to reinforce cooperative attitudes and behavior.*⁴²

As an extension of the family, the King is considered to be a parental figure.⁴³ During ancient times, the monarch, in theory, held absolute and supreme authority “in ownership of all lands, in the earthly incarnation of religious divinity and therefore religious activities, in internal and external political matters, in the power to extract taxes and corvée labor, and in judicial and legal administration.”⁴⁴ Dr. Chandler writes that rural people generally believed the King to have power over the weather, to “dispense true justice,” and to be “the only political source of hope among peasants.”⁴⁵

35. *Id.* at 8.

36. *Id.*

37. SEANGLIM BIT, THE WARRIOR HERITAGE 45 (1991).

38. *Id.*

39. *Id.*

40. *Id.* at 47.

41. *Id.* at 51.

42. SEANGLIM BIT, STUDY OF THE EFFECTS OF REWARD STRUCTURES (1981).

43. BIT, *supra* note 37, at 70.

44. *Id.* at 41.

45. DAVID CHANDLER, A HISTORY OF CAMBODIA 48 (2d. ed. 1993).

Traces of this culture in which the parent and the ruler both are involved in intimate aspects of a person's life, albeit now weaker than ancient times, remains today. Dialectically, Cambodia's communal culture may have driven its people to share more amongst each other as a counter and protective force against the traditional power imbalance between its people and its rulers. A 42-year-old male stated:

Privacy somehow is very Western developed... Here, in rural Cambodia, lack of privacy is for your protection. When things are very public you are much more protected in society. So very few things happen in private.⁴⁶

Cambodia never underwent a revolution like the US calling for liberty from authoritarian governance to stay out of private lives, nor did it ever undergo a revolution like the French to "level up" the dignity and status of all civilians under the ideals of *liberté, égalité, and fraternité*. Instead, the events that had a major impact on Cambodian society were French colonialism and the Khmer Rouge regime. Towards the end of French colonial rule, Western constitutionalism and the rule of law were imported into Cambodia for the first time under the 1947 Constitution.

Under the 1947 Constitution, the concept of privacy as a legal right emerged. Article 11 stated that nobody shall enter into the residence of another unless permitted by law.⁴⁷ Article 12 stated that mail exchanges shall not be opened by anyone unless permitted by law, or in the case of an emergency where it is necessary for the benefit of the people of the country.⁴⁸ There was no word that was equivalent to "privacy" but it is evident that these articles described certain privacy rights. However, the recognition of privacy as a legal concept came to a halt under the Khmer Rouge where personal rights were essentially non-existent – the Khmer Rouge forcibly married men and women who had never known each other, children were ordered to spy on their parents, and Khmer Rouge soldiers patrolled and secretly listened to family conversations in their homes.

The 1991 Paris Peace Agreements ended the Cambodian civil war that emerged after the fall of the Khmer Rouge and formed peacekeeping operation United Nations Transitional Authority in Cambodia ("UNTAC"). UNTAC helped introduce the 1993 Constitution, which was built on the 1947 Constitution and is the Constitution that governs Cambodia today. Legal privacy concepts were further developed. Article 31 explicitly refers to the Universal Declaration of Human Rights, which recognizes the legal right to privacy: "The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights and treaties and conventions related to human rights, women's rights and children's rights."⁴⁹ Article 40 states that "The protection of the rights to the inviolability of residence and to the confidentiality of correspondences by mail, telegram, telex, facsimile, and telephone shall be guaranteed. The search of residences, properties, and body search shall be done in accordance with the legal stipulations."⁵⁰

46. Jack, *supra* note 31, at 8.

47. CAMBODIA CONST. art. 11 (1947).

48. *Id.* at art. 12.

49. CAMBODIA CONST. art. 31 (1993). See also The Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 12 (Dec. 10, 1948) (Article 12 of the Universal Declaration of Human Rights states, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.").

50. *Id.* at art. 40.

While the legal concept of privacy is relatively more developed now, its concept has yet to be defined and there is still no word that captures the meaning of “privacy.” This lack of a concept of privacy is not unique to Cambodia. For example, even though there is a boundary between family and outsiders in Chinese culture, there is no word for “privacy” in the traditional Chinese language.⁵¹ Shin-Yi Ping explains, “At best, we can say that by emphasizing the family/kinship intimacy, some sort of ambiguous ‘privacy rights’ can be found in terms of maintaining family space free from outside interference, which significantly differed from the definition and coverage of ‘privacy rights’ in Western societies.”⁵²

The lack of a developed concept of privacy is because Cambodia as a society and culture has not defined what privacy means for itself. Cambodia’s own definition of privacy will emerge in due time as it transitions to having a much more online presence. By doing so, they will be “dynamically developing culturally-specific understandings and practices of online privacy.”⁵³ Nevertheless, Cambodia’s legal reforms are taking the charge in developing a legal concept before a cultural or social definition is constructed. These legal reforms are thus not driven by culture but by economic imperatives.

Cambodia’s transition to a more digital economy is simply due to economic considerations. Contrary to the US and EU, Cambodia’s reforms are not driven by cultures of privacy for liberty or dignity. They are driven by globalization – the need to adapt to changes in the world economy, catch up in legal and technological developments, and attract foreign direct investments. Cambodia is not alone in this “pragmatic approach” either. Singapore and other Asian countries implement privacy reforms because of the “economic imperative of globalization and the need to adopt standards that will afford trust in national institutions and seamless integration into global networks.”⁵⁴

III. Cambodia’s E-Commerce Law and Approach to Privacy and Data Protection

Cambodia’s economic imperatives are reflected in the E-Commerce Law’s purpose, meaning, and how it came to be adopted. The E-Commerce Law was drafted by the Ministry of Commerce with assistance from the Asian Development Bank.⁵⁵ When the Council of Ministers approved the Law, it stated that the Law will be an important step for the government to turn Cambodia into a “digital economy” in upcoming years.⁵⁶ When the National Assembly passed the Law, it released a statement explaining that the Law will actively contribute to the development of the digital economy in Cambodia and embrace the Fourth Industrial Revolution.⁵⁷ Government officials

51. Shin-Yi Ping, *Privacy and the Construction of Legal Meaning in Taiwan*, 37 INT’L LAW. 1037, 1039-1040 (2003).

52. *Id.* at 1040.

53. Jack, *supra* note 31, at 3.

54. Chesterman, *supra* note 6, at 400. See also *The Straits Times* (20 April 1987) (Simon Chesterman includes a quote by Lee Kuan Yew that highlights how globalization is a major force in driving reforms: “I am often accused of interfering in the private lives of citizens... Had I not done that, we wouldn’t be here today. And I say without the slightest remorse: that we wouldn’t be here, we would not have made economic progress, if we had not intervened on very personal matters—who your neighbour is, how you live, the noise you make, how you spit, or what language you use.”).

55. Hin Pisei, *NA approves e-commerce draft law*, PHNOM PENH POST (Oct. 08, 2019).

56. Chea Vannak, *Council of Ministers approves key commerce draft laws*, KHMER TIMES (July 15, 2019).

57. Hin Pisei, *NA approves e-commerce draft law*, PHNOM PENH POST (Oct. 08, 2019).

emphasized the need for Cambodia to transition into a digital economy because of globalization: “Development of the Digital Government is a sine qua non for Cambodia, both in the present and future, to prepare it to engage the Digital Economy, the fourth industrial revolution and globalization through the use of digital technology.”⁵⁸

While the legal right to privacy is important, economic imperatives are the driving force behind this reform. The Law itself explicitly states that its purpose is 1) to regulate digital commerce in the Kingdom of Cambodia and with the international community; 2) to create legal clarity in the practice of civil and commerce through digital means; and 3) to provide public confidence in the use of electronic communications.⁵⁹

The section of the Law that provides data protection is enshrined in Article 32, which states:

1. A private party that possesses electronic data and information must take all measures in order to guarantee that the data and information are protected safely under all reasonable circumstances so as to avoid the loss, entering, use, modification, leak, or revelation of those data and information, except when permission has been granted by the owner or an authorized person under the law.
2. Private parties shall not intrude into electronic networks to use, download, copy, extract, leak, delete, or modify data that is under the possession of other parties, with bad faith, or without permission.⁶⁰

Article 32 does not have the comprehensiveness or clarity of the GDPR. It mentions that the party must take all measures under all reasonable circumstances, but does not elaborate what “all measures” encompass or what a “reasonable circumstance” is. Would a small company have to take expensive security measures, which a larger company can much more easily afford? Does “reasonable circumstance” include an examination into the kind of business practice the company engages in, the sensitivity of the data, or the size of the business? Does the type of industry play a role? Furthermore, there is no mention about when or how private parties must disclose their data collection practices, how long data is to be retained, or how data breaches are to be reported. Article 32 is the product of a sense of urgency arising from the need to reform economically. Thus, Article 32 may serve as a starting point to a more comprehensive regulation of data protection.

On the other hand, Cambodia has already taken a sectoral approach to privacy, adopting laws only when needed like the US. Yet, unlike the US, its sectoral approach is not driven by a culture of laissez-faire, but again by needs to economically reform. The Law on Banking and Financial Institutions, adopted in 1999, essentially states that persons within the sector must comply with confidentiality and professional secrecy obligations.⁶¹ The Law on Telecommunications, adopted in 2015, provides telecommunications subscribers with the rights to protection of private information, security, and safety in using telecommunications services, except as otherwise

58. May Kunmakara, Official calls for faster roll-out of ‘Digital Government Policy’, PHNOM PENH POST (July 29, 2020).

59. E-Commerce Law, Kingdom of Cambodia, NS/RKM/1119/017, art. 1 (Nov. 2, 2019).

60. *Id.* at art. 32.

61. Law on Banking and Financial Institutions, NS/RKM/1199/13, art. 47 (Nov. 18, 1999)

determined by other specific laws.⁶² In the health sector, the Law on the Management of Private Medical, Paramedical and Medical Aid Profession, adopted in 2000, provides the government with the power to adopt codes of ethics by sub-decree for sub-sectors within the health sector.⁶³ As a result, confidential obligations have been imposed in a variety of sub-decrees.⁶⁴ Cambodia is not alone in this regard either, as other Asian countries initially followed the sectoral approach as well, until a more comprehensive data protection framework was needed.⁶⁵ Cambodia's future in privacy and data protection may follow a similar trajectory.

IV. Concluding Analysis and Recommendations for the Future

Privacy exists in every culture. However, privacy in the Western sense has been a foreign concept in Cambodia. Its legal concept was imported by the French and is currently being developed because of globalization and economic imperatives. The government will continue to take a pragmatic approach and implement reforms to address future technological and privacy challenges. Reforms and laws in Cambodia have been adopted on a need-basis. In parallel, even though Cambodians have not fully developed their own socially constructed meaning of privacy, they are in the process as the government is urgently transitioning to a digital economy and Cambodians themselves are conducting more of their daily activities online. Cambodian privacy culture is at a dynamic stage, "in which norms about information are shifting onto an online environment and we see examples where social norms for regulating information are not yet established."⁶⁶

Article 32 of the E-Commerce Law is the first step towards providing protection for Cambodians' right to privacy and their data. However, the Law at some points is vague and not comprehensive. The GDPR specifies what types of measures must be taken under what kind of circumstances to protect people's data. It also imposes other obligations specifying how long the data should be kept, and when and how it should be destroyed. These are among the numerous measures that Cambodia must consider when it adopts a more comprehensive data protection framework.

As Cambodians conduct more of their daily activities online, serious privacy violations may start to occur. In fact, some instances have already emerged such as when an online seller publicly posts a buyer's personal information on Facebook in order to shame the buyer in paying the remaining balance. If more serious technological privacy breaches occur, Cambodia's current data protection rules may not be adequate in addressing those problems. A more clear and comprehensive data protection framework is required.

This paper recommends the adoption of such a framework. A sectoral approach would not be sufficient as it is implemented on a need-basis. The nature of such an approach lags behind social changes and challenges. What is important is that Cambodia preempts future data protection issues. The European comprehensive data protection approach may be better at handling issues that may occur in the future.

62. Law on Telecommunications, NS/RKM/1215/017, art. 65 (Dec. 17, 2015). An English version of this law found Sithi.org translates Article 65 as including the "rights to privacy" but a direct translation of the original Khmer version of the law is the "rights to protection of private information," http://www.sithi.org/admin/upload/law/20150127_TelecommunicationDraftLaw_En%20edited-2.pdf.

63. Law on the Management of Private Medical, Paramedical and Medical Aid Profession, NS/RKM/1100/10, art. 10 (Nov. 3, 2000).

64. See Sub-Decree on the Code of Medical Ethics, 61 ANK/BK (Aug. 28, 2003); Sub-Decree on the Code of Ethics for Midwives, 24 ANK/BK (Jan. 18, 2003); Sub-Decree on Code of Ethics for Nurses, 59 ANK/BK (Feb. 11, 2014); Sub-decree on the Code of Ethics for Pharmacists, 33 ANK/BK (Jan. 20, 2014); Sub-Decree on Dentists' Code of Ethics, 156 ANK/BK (Sept. 16, 2009).

65. Chesterman, *supra* note 6, at 397-398.

66. Jack, *supra* note 31, at 13.

However, it is important to note that Cambodia should not adopt the full comprehensiveness and all the measures of the GDPR into its own law. Cambodia's comprehensive data protection framework must be mindful of Cambodia's own culture of privacy and must address what, in terms of privacy, is important to the Cambodian people, within Cambodia's new socially constructed meaning of privacy in the digital age. Certain obligations that can be implemented by European companies may not fit in Cambodia's context due to factors such as wealth and level of development. Furthermore, what is important to Cambodians in terms of privacy may not be as important to Europeans, and vice versa.

For this reason, in parallel to the adoption of such a framework, Cambodia should also undertake campaigns to engage with both private entities and the Cambodian people about privacy and the importance of data protection. Such campaigns will allow the government to grasp pragmatically what type of data protection obligations may be imposed, as well as what the people value and believe is important to them in terms of privacy. The adoption of a law would be meaningless if the implementation is confusing, difficult, or impossible. And its effectiveness would be hindered if it does not protect or address what the people consider to be important to them. Cambodia should adopt a clear and comprehensive framework for data protection that also reflects Cambodian values, customs, and culture of privacy in this new digital age.



“

In the transition period, until Cambodia could have a full set of data protection law, Cambodia may introduce the general principles for data protection through the implementing regulations of the Law on E-Commerce, the Law on Consumer Protection as well as other sectoral laws and regulations in order to encourage voluntary enforcement among private parties. ”

CHAPTER 03

Privacy and Data Protection in the Digital Age: A Holistic Approach to Privacy and Data Protection in Cambodia

Phin Sovath

Abstract

Cambodia currently has no specific law governing privacy and data protection. In the absence of this specific law, various concerns have been raised in relation to data protection in this digital age. It has been generally interpreted and understood that privacy or personal data should be protected under general principles and provisions set forth under Constitution, Civil Code and Criminal Code as well as under some provisions stipulated under specific laws such as the law on consumer protection, law on e-commerce, law on telecommunications. In addition, there are also laws in some regulated sectors such as banking and financial sector, health sector, insurance sector, and legal sector where professional secrecy is strictly regulated. This research paper reviews the existing legal approaches to data protection taken by these general laws and specific or sectoral laws and then categorize those legal approaches into four approaches: right to privacy, right to personality, right to professional secrecy, and right to Data Security. This research paper attempts to make theoretical analysis and discussion on each legal approach and highlight doctrinal challenges when it is applied within the Cambodian legal framework, and

suggest that the data protection should be protected under the right to personality in which the right to privacy is a subset of the right to personality, and any legislative approach to the data protection should be based on this principle to make it consistent throughout the whole legal hierarchy including the Constitution and the Civil Code. At the end, this research paper also explores potential ways to develop an integrated legal approach to personal data in Cambodia.

I. Introduction

In this digital age, most transactions are carried every day through various online or electronic platforms, and in each transaction, an identity of a person who is involved in such transactions is recognized or validated either directly or indirectly through information or data submitted by such person before or during the execution of the transactions. This information and data may include proxies such as passwords, user IDs, bank account information, credit card information or email address; personal information such as name, age, nationality, date of birth, permanent address or phone number; and biometric data such as fingerprint or facial recognition data. In addition, along with these transactions, this information and data may be collected and aggregated with other data to determine search habits, purchase history, or location of a person who in many cases does not know clearly to what extent such information and data are collected or how they are collected, stored, used or aggregated. These facts lead to at least two potential threats to our identity and privacy.¹ The first threat is identity theft or identity fraud and the second threat is the misapplication, mishandling, or misprocessing of this information and data.²

Cambodia currently has no specific law governing privacy and data protection. In the absence of this specific law, various concerns have been raised in relation to data protection in this digital age.³ Data is as critical to facilitating an online transaction as making a payment.⁴ Sensitive information such as delivery address and payment details is provided by consumers, but the extent to which wider data is gathered by vendors or suppliers is often unclear.⁵ Search habits, purchase history, location, and internet service provider address are collected in ways that can be difficult for consumers to understand or prevent, and when this is aggregated with other data, companies and third parties can develop an in-depth picture of people's preferences and likely purchasing intentions.⁶

In Cambodia, there are many subscribers of the internet and mobiles which has been increased from year to year.⁷ At the same time, with new technology and innovation, including fintech in Cambodia, everyday transactions such as online sales and payments through many different platforms have also increased.⁸ With newly adopted law on e-commerce either supporting or

1. See ANDREW MURRAY, INFORMATION TECHNOLOGY LAW: THE LAW AND SOCIETY 541 (Oxford University Press, 3rd ed. 2016).

2. *Id.*

3. See Ngoun Somaly, Policy vs. Privacy and Data Protection Implications: A Case of Cambodia, p. 90, in Digital Insight December (Konrad-Adenauer-Stiftung 2018), available online at <https://www.kas.de/c/document_library/get_file?uuid=49d4d004-3b68-bad3-1d5b-78e7961adfa4&groupId=264850> (last visit on 9 Nov. 2020).

4. See Handbook on Consumer Protection, p. 110, UNCTAD/WEB/DITC/CLP/2016/1 (UNCTAD 2016).

5. *Id.*

6. *Id.*

7. See Statistics published by Telecommunication Regulator of Cambodia (TRC), available online at <<https://www.trc.gov.kh/internet-subscribers/>> and <<https://www.trc.gov.kh/mobile-phone-subscribers/>> (last visit 9 Nov. 2020).

8. See SUON Prasith, PROMOTING e-Commerce for More Inclusive Development in Cambodia, presented at the Regional Consultation on

obstructing, online business transactions or processing of personal data, accidents will be likely increased in the near future. The number of transactions and processing is expected to increase as well due to the introduction by the government of paperless policy for trade, industrial development policy, and the coming digital economy policy.

In the absence of this specific law, it has been generally interpreted and understood that privacy or personal data should be protected under general principles and provisions set forth under Constitution, Civil Code and Criminal Code as well as under some provisions stipulated under specific laws such as law on consumer protection, law on e-commerce, law on telecommunications. In addition, there are also laws in some regulated sectors such as banking and financial sector and health sector where professional secrecy is strictly regulated. This research paper will first in Section II review the existing legal approaches to data protection taken by these general laws and specific or sectoral laws and then categorize those legal approaches into four approaches: right to privacy, right to personality, right to professional secrecy, and right to Data Security. In Section III, this research paper will attempt to make a theoretical analysis and discussion on each legal approach and highlight doctrinal challenges when it is applied within the Cambodian legal framework. In Section IV, the research paper will identify both synergies and tensions between and among these legal approaches and explore potential ways to develop an integrated legal approach to personal data in Cambodia.

II. Overview of Legal Framework Governing Data Protection in Cambodia

A. Legal Approach to Data Protection under the Constitution and General Laws

Since Cambodia has no specific law on data protection, there is a general view that personal data is impliedly protected under the right to privacy set forth under Article 40 of the Constitution,⁹ which states that: “The rights to privacy of residence, and the confidentiality of correspondence by mail, telegram, fax, telex, and telephone, shall be guaranteed.” Likewise, there is also a general view that personal data is impliedly protected under the right to personality set forth under Articles 10, 11, 12, and 13 of the Civil Code.¹⁰ According to Article 10 of the Civil Code, the right to personality refers to “the rights to life, personal safety, health, freedom, identity, dignity, privacy, and other personal benefits or interests.” By including the term “privacy” in Article 10 of the Civil Code, it is easy to conclude that similar to the Constitution, the Civil Code also recognizes the right to privacy and therefore, the personal data should be protected under the right to privacy which is a subset of the right to personality.

There are also references to relevant provisions under the Criminal Code as a basis to enforce some rights against the violations of the individuals such as recording private conversations

eCommerce for Sustainable Development in Asia and the Pacific, 30 OCTOBER 2017, available online at <<https://www.unescap.org/sites/default/files/3.%20Cambodia%20update%202017%2010%2030th%2C%20Inclusive%20eCommerce%20Sustainable%20Development%20in%20Cambodia.pdf>> (last visit on 9 Nov. 2020).

9. See Jay Cohen et al., Cambodia - Data Protection Overview, available online at <https://www.dataguidance.com/notes/cambodia-data-protection-overview> (last visit on 9 Nov. 2020); Darwin Hem et al., Doing Business in Cambodia: an Overview, available online at <<https://uk.practicallaw.thomsonreuters.com/>> (last visit on 9 Nov. 2020); Y Samphy, Law and regulations governing personal data protection and privacy in Cambodia, available online at <<https://www.nitesastra.com/personal-data-protection-and-privacy-law-in-cambodia/>> (last visit on 9 Nov. 2020); and Daniel Noonan, Data Privacy, available online at <<https://cambodiacounsel.com/data-privacy/>> (last visit on 9 Nov. 2020).

10. Id.

and images (Articles 301 and 302); breaches of professional secrecy (Article 314); secrecy of correspondences and telephone conversations (Article 318); and IT crimes (Article 427).¹¹ For the purpose of this research paper, however, these relevant provisions of the Criminal Code will not be examined and left for other future research projects. The main focus of this research paper is the private or civil rights of a person which are protected under the Constitution, the Civil Code, and other sectoral and specific laws and regulations.

In sum, based on the above views, the data protection is impliedly provided under the right to privacy set forth under Article 40 of the Constitution and the right to personality set forth under Article 10 of the Civil Code.

B. Legal Approach to Data Protection under Sectoral Laws

In addition to the Constitution and the Civil Code, there are some sectoral laws which impose professional secrecy obligations and to some extent, they are related to data protection. This section will review all of the relevant laws and regulations.

Law on Banking and Financial Institutions

Article 47 of a Law on Banking and Financial Institutions (“Banking Law”) prohibits employees, or any other persons participating in any capacity in the administration, direction, management, internal control, or external audit of the covered entity, from providing [sharing] “any confidential information” pertaining to statements, fact, acts, figures or the content of accounting or administrative documents which that person becomes aware through his/her functions, to “any person.” Under Article 47 of the Banking Law, there is an obligation to keep confidential any information pertaining to statements, facts, acts, figures, or the content of accounting or administrative documents of a customer. It is understood from this article that there is a professional secrecy obligation and prior consent from the owner of the confidential information is necessary for the collection, use, protection, and processing of the owner’s information. In addition, as banking is a regulated sector, it is understood from the current practice that approval from the National Bank of Cambodia is also required for any operations relating to the confidential information of the customers although such approval is not mentioned in the law or regulation.

Law on Negotiable Instruments

In addition to the Banking Law, there is also a Law on Negotiable Instruments which imposes professional secrecy to the banks. Under Article 221.1 of the Law on Negotiable Instruments, the banks (in broad terms including any institutions or entity authorized by law to take deposits or participate in payment transactions on the account of customers) is bound by secrecy and shall not disclose [share] any information regarding the accounts to anyone, except where disclosure is made with the express consent of the consumer or is imposed by applicable laws. Though this provision covers only the information relating to accounts, such provision may also apply to personal data as account information normally contains information relating to an identifiable living individual. In addition, this provision is intended to protect consumer’s information.

11. See Jay Cohen et al., id.

Law on Health and Implementing Regulation

In the health sector, there are three main laws and regulations stipulating the protection of medical records and information and their confidentiality which are (i) Health Profession Law, (ii) Codes of Ethics, and (iii) HIV-Related Law. In addition, the Ministry of Health also issued Operational Guidelines which provide further explanation on what patients' rights are and how to protect patients' information and keep them confidential. The following will explain each of these three laws and regulations in further detail.

The Health Profession Law dated 19 November 2016 does not directly mention the protection of privacy or personal information of patients but this Law requires all health professionals including, among other, physicians, dentists, midwives, nurses, pharmacists, laboratory specialists, physical therapists, dental specialists, radiologists, and other health professionals to hold a license to practice a relevant health profession and to comply with the code of ethics and professional standard. Currently, a number of codes of ethics were adopted and applied to physicians, dentists, midwives, nurses, and pharmacists in Cambodia. In each of those codes of ethics, there is a commonly found provision imposing an obligation of professional secrecy to physicians, dentists, midwives, nurses, and pharmacists. In this relation, for example, Article 70 of the Physicians' Code of Ethics states that physicians shall keep confidentiality of medical records and information of the patient under his or her medical care or treatment regardless of either the content or benefits of those documents. When physicians need to use his or her experience or documents of scientific text for the purpose of publication or education, they shall have to protect the patient's identity or otherwise shall seek the patient's consent. In addition, based on the Operational Guidelines, patients have the right to confidentiality of all information on their health status, medical condition, diagnosis, prognosis and treatment, and all other information of a personal kind, even after the death of the patients. In order to secure the confidentiality of patients, the Operational Guidelines require that health facilities (such as hospitals, health centers, health posts, and clinics, etc.) should keep all patients' files, registrar, and database in a safe place and have a clear assignment procedure for staff allowed to have access to the patients' file, registrar and/or database.

Moreover, based on the Operational Guidelines, the patients' files or documents can only be retrieved by relevant designated medical personnel and only for the purpose of medical indication. In addition, confidential health information can only be shared with other health care organizations, physicians, nurses, lab, and other paramedical technicians who are involved in the health care delivery of the client.

In addition to Health Profession Law, Physicians' Code of Ethics, and the Operational Guidelines, HIV-Related Law also requires the protection of patients' confidentiality as well as applicable penalty. Based on Article 33 of HIV-Related Law, the confidentiality of all persons who have HIV/AIDS shall be maintained. This article also requires that all professionals, data encoders, custodians of medical records related to HIV/AIDS shall be instructed to pay attention to the maintenance of confidentiality in handling medical information, especially the identity and personal status of a person with HIV/AIDS.

In sum, the professional secrecy obligation is imposed under the Health Profession Law, Physicians' Code of Ethics, the Operational Guidelines, and the HIV-Related Law.

Law on Insurance

In the insurance sector, there is a Law on Insurance imposing the professional secrecy obligation.¹² Article 106 of the Law on Insurance prohibits any person conducting insurance business from disclosing confidentiality of the insurance profession as determined by an insurance institution, whose benefit has been damaged by such disclosure. The confidentiality of the insurance profession is not defined under the current Law on Insurance, but it is left to be determined by an insurance institution including insurer, insurance agent, insurance broker, and insurance loss adjuster.

Law on the Bar and Lawyer's Code of Ethics

A Law on the Bar Association of the Kingdom of Cambodia imposes professional secrecy under Article 58 by stating that lawyers shall maintain absolute confidentiality and may not abuse the confidentiality of the profession and may not be forced to abuse the confidentiality of their professions, even before the court. Under Article 58, the following shall be considered as confidential: consultation, advice, and non-official documents prepared by the lawyer for his or her client, and correspondence sent between the lawyer and his or her client.

In addition, under Article 7 of the Lawyer's Code of Ethics, the lawyer is bound by professional confidentiality. Confidentiality may not be waived by anyone, not even the client. This absolute duty to maintain the secrets of a client is, when reflected upon, an extraordinary thing.¹³ No family member or friend of a client may persuade the lawyer to disclose secrets, no matter how important the need may seem.¹⁴ Article 19 of the Lawyers' Code of Ethics reconfirms that the lawyer shall not disclose the secrecy of its clients unless there is a notification to and approval by the clients or when it is permitted or required by law.¹⁵ Article 43 of the Lawyers' Code of Ethics reinforces this protection by making it clear that correspondence between lawyers may not, in any case, be confiscated or presented to the court, or be used to violate confidentiality.¹⁶

Labour Law

Under the Cambodian Labor Law, there is a duty of loyalty. The worker's loyalty and confidentiality towards the enterprise continue to be in effect during the execution and suspension of the employment contract.¹⁷ On the other hand, there is a duty of confidentiality in respect to medical data required under Article 239 of the Labour Law providing that "health record of employee which is collected by medical personnel shall be kept confidentially." However, there is no employment-specific privacy law in Cambodia and the term "loyalty" or "confidentiality" are not specifically defined.¹⁸

12. Law on Insurance, dated 4 August 2014, repealing the Law on Insurance dated 25 July 2000.

13. See Nicholas Rine and Ly U. Meng, Professional Responsibility, 45 (Community Legal Education Center 2000), available online at < <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1019&context=books> > (last visit on 9 Nov. 2020).

14. Id.

15. Article 19 of Lawyers' Code of Ethics, 2012.

16. Article 43 of Lawyers' Code of Ethics, 2012.

17. See Article 72 of the Labor Law; and See Kong Pallack, Cambodian Labor and Employment Law 287, 297, in Introduction to Cambodian Laws (Jörg Menzel et al., ed. 2011).

18. See Kong Phallack, Id., p.295.

Law on Telecommunications

In the telecommunication section, the Law on Telecommunications (“Telecom Law”), dated 17 December 2015, provides a key principle of the consumer right to privacy, which is found under Article 65(b) that the subscribers shall have “the rights to privacy, security, and safety of using the telecommunications service, excepted otherwise determined by other specific law.” However, there is no definition of the terms “the right to privacy” under the Telecom Law. Therefore, it is not clear if it is meant to cover data protection.

C. Legal Approach to Data Protection under Specific Law

Law on E-Commerce

Cambodia has recently introduced a Law on E-Commerce (“E-Commerce Law”), dated 2 November 2019. According to Article 3, the E-Commerce Law is applicable to any activity, document, or transaction of commercial or civil nature that is carried out through electronic system. With respect to data privacy and protection, Article 32 of this E-Commerce Law provides that any person storing electronic record of “private information” (“personal information”)¹⁹ shall use all means to ensure that the information is reasonably and safely protected in any circumstance to avoid loss, access, use, modification, leak or disclose of such information without the authorization of the data holder. In addition to Article 32, there is a provision under Article 22 prohibiting any use of the identity, record, electronic signature, electronic address, password, or other person’s identification dishonestly or without permission for commercial or non-commercial transactions in the electronic system. In this sense, the Author proposes to call this notion a “Right to Data Security” for theoretical analysis and discussion in Section III.

Law on Consumer Protection

Cambodia recently adopted a Law on Consumer Protection, dated 2 November 2019 to ensure the protection of consumers and to contribute to the promotion of fair competition.²⁰ The objectives of the law are to protect the rights and interests of consumers, to ensure fair competition, and to ensure confidence in consumer and trader engagement.²¹ While there is a whole chapter dedicated to information for consumers, there is no provision concerning the information of consumers such as name, age, nationality, or other personal information. This leads to three questions. The first is how and to what extent consumer data can be protected in light of the Law on Consumer Protection. The second is whether or not and to what extent the right of consumers protected under the Law on Consumer Protected can be interpreted to cover the protection of consumer data. The third and last question is whether we can refer and apply the relevant provisions of the general laws, sectoral and specific laws explained above to the protection of consumer data. We will explore and discuss various possible responses to these questions in Section III below.

19. There is an issue with the translation as to whether “private information” or “personal information” should be used to correspond with the Khmer term.

20. Article 1 of the Law on Consumer Protection, dated 2 November 2019.

21. Article 2 of the Law on Consumer Protection.

D. Categorization of Legal Approaches to Data Protection in Cambodia

Based on the reviewing of the existing legal framework concerning data protection in Cambodia, we can categories them into four legal approaches: the right to privacy, the right to personality, the right to professional secrecy, and the right to Data Security. The following table classifies these legal approaches according to their general, sectoral, or specific laws.

	Right To Privacy	Right To Personality	Right To Professional Secrecy	Right To Data Security
General Laws				
Constitution	✘			
Civil Code	✘	✘		
Sectoral Laws				
Law on Banking and Financial Institutions			✘	
Negotiable Instrument Law			✘	
Law on Insurance			✘	
Health Law and Its Implementation Regulations			✘	
Law on Bar and Lawyers' Code of Ethics			✘	
Labor Law			✘	
Law on Telecommunications	✘			
Specific Laws				
Law on E-Commerce				✘
Law on Consumer Protection	?	?	?	?

As shown in the table above, the right to privacy is found in the Constitution, the Civil Code, and the Law on Telecommunications; the right to personality is found in the Civil Code; the right to professional secrecy is found in many sectoral laws and regulations; and the right to data security is found in the most recent Law on E-Commerce. In sum, to assess whether or not Cambodia has

laws or regulations concerning data protection, we have to examine these four legal approaches as holistic approaches to data protection in Cambodia. However, when we attempt to apply any of these legal approaches, there are certain doctrinal challenges which need to be addressed to find out how these four legal approaches can be applied consistently without tensions to protect personal data in this digital age. The following Section III will provide theoretical analysis and discussion on each of these approaches. The findings of these theoretical analyses and discussion will be used to identify the synergies and tensions under Section IV with the ultimate purpose of exploring potential ways to address data protection in the digital age in Cambodia.

III. Theoretical Analysis and Discussion on Legal Approaches to Data Protection under General Laws

A. The right to privacy under the Constitution

As Cambodia does not have a specific law or regulation addressing data protection, there is a general view that personal data is subject to protection under the general principle of privacy set forth under the Constitution.²² The most reference cited to support this view is Article 40 of the Constitution stating that:

“...The rights to privacy of residence, and to the confidentiality of correspondence by mail, telegram, fax, telex, and telephone, shall be guaranteed.

Any search of a house, personal property, or a person shall be in accordance with the law.”

Under this Article, the Constitution does not expressly protect the right to information,²³ but it recognizes the right to privacy of his or her residence as well as the secrecy of his or her communication. Although there are certain references to the privacy principle, Cambodia lacks legal institutions that enforce privacy rights.²⁴

Besides this Article 40, there is no case law or guideline explaining further this privacy principle. By reviewing the wording of this Article, it is almost similar to Article 36 of the 1989 Constitution of Cambodia, which is read as follows:

“...The rights to privacy of residence, and to the confidentiality of correspondence by mail, telegram and telephone, shall be guaranteed by the State.

Any search of a house, personal property, or a person shall be in accordance with the law.”

22. See Supra Note 7.

23. See Graham Greenleaf, Asian Data Privacy Laws: Trade & Human Rights Perspectives 394 (Exford University Press 2014).

24. See Graham Greenleaf, The Right to Privacy in Asian Constitutions 12, in The Oxford Handbook of Constitutional Law in Asia, Forthcoming, available online at <SSRN: <https://ssrn.com/abstract=3548497>> (last visit on 9 Nov. 2020).

By comparing these two articles, the only difference is the addition of the additional means of correspondence with the phrase “by mail, telegram, fax, telex and telephone” and the deletion of the phrase “by the State.” The rest of the two articles are the same. Therefore, the two articles are substantially similar with only minor adjustments. According to Stephen P. Mark, the approach of drafting the same rights and duties failed to take advantage of the extensive drafting suggestions from NGOs and various advisers or to give due consideration to the requirements of the Paris Agreements or international treaties to which Cambodia is a party.²⁵ Due to this reason, it is even difficult to understand the rationale behind the drafting of this provision, in particular where there is no reference or document explaining the 1989 Constitution. And when applying to data protection, it is doubtful if the right to privacy set forth under Article 40 is meant or intended by the drafters to extend to the data protection as claimed by some practitioners.²⁶

By reviewing the texts of the Cambodian Constitutions in various political regimes, the privacy principle or the right to privacy has been incorporated in all those texts, except the Constitution of the Democratic Kampuchea.²⁷ The wordings of the relevant articles of those Cambodian Constitutions are substantially similar with the following two commonalities: privacy of residence and confidentiality of correspondence. By literally comparing the wordings of Article 40 of the Constitution with Article 12 of the Universal Declaration of Human Rights (“UDHR”), they are not the same and it seems the wordings under Article 12 of the UDHR are broader than the wordings under Article 40 of the Constitution which covers only the privacy of residence and the confidentiality of correspondence. Such difference raises the question of whether or not Article 40 of the Constitution is intended to cover the data protection as always claimed to be protected under Article 12 of the UDHR. In this regard, two contradictory views may be raised to address this difference.

In the first view, the right to privacy under the UDHR should not be equally applied in the same way of Article 40 of the Constitution in respect of data protection for the following reasons. First, by comparing the wording of the two articles, they are not the same although they are similar. The term “privacy” under Article 12 of the UDHR seems to be broader than the phrase “privacy of residence” of Article 40 of the Constitution. Second, while the right to privacy under Article 40 of the Constitution is guaranteed by the Constitution, the UDHR strongly emphasizes that the privacy of an individual shall not be subject to any arbitrary or unlawful interference. Third, as mentioned above, through the drafting history of the Constitution, Article 40 of the Constitution was substantially similar to Article 36 of the 1989 Constitution and the drafters did not make any due consideration to any conventions or treaties to which Cambodia is a party.

In the second view, the Constitution may be interpreted to follow the right to privacy under the UDHR and the International Covenant on Civil and Political Rights (ICCPR) by reading Article 40 of the Constitution in combination with Articles 31 (recognition and respect for human rights under UDHR and other covenants and conventions), 32 (the right to life, freedom and personal security of a citizen) and 38 (the right to life, honor, and dignity of a citizen). In accordance with Article 31 of the Constitution, Cambodia has recognized the Universal Declaration of Human Rights as well as other covenants and conventions on human rights including the International Covenant on Civil

25. Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 *Columbia Human Rights Law Review* 45, 85 (1994).

26. See *Supra* Note 7.

27. See Raoul M. Jennar, *The Cambodian Constitutions (1953-1993)* 81-88 (White Lotus 1995).

and Political Rights (ICCPR). Such recognition is also confirmed by the Cambodian Constitutional Council in its decision dated 10 July 2007. Under this decision, the Cambodian Constitutional Council confirms that the term “Law” includes the national law and “the international laws already recognized” by Cambodia.²⁸ It means that any covenants or conventions related to human rights, including the UDHR and ICCPR which have already been recognized by Cambodia, shall be treated the same as the national law. In this regard, references to relevant provisions of the UDHR and ICCPR should be used to interpret and argue whether or not the privacy principle under Article 40 and the general recognition of the UDHR, covenants conventions under Article 31 are intended to cover the data protection.

Under Article 12 of the UDHR, it was proclaimed that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Article 17 of the International Covenant on Civil and Political Rights (ICCPR) also repeated that:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor or reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

In 1988, the UN Human Rights Committee, the treaty body charged with monitoring implementation of the International Covenant on Civil and Political Rights (ICCPR) (Article 17), recognized the need for data protection laws to safeguard the fundamental right to privacy recognized by Article 17 of the ICCPR:

“The gathering and holding of personal information on computers, data banks, and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. ... every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files ... have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination”²⁹

In 2011, the then-UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression emphasizes that “the protection of personal data represents a special form of respect for the right to privacy” and that:

28. See the Decision of the CCC N° 092 /003/2007, dated 10 July 2007; and See Teilee Kuong, Constitutional Provisions on Treaties, 1 Cambodian Yearbook on Comparative Law Studies 1, 5-9 (2010) (arguing that “interpreter will need to conclude that by means of simple transformation, all international (human rights) treaties becomes part of the domestic law and will thus be ‘abide by’”).

29. UN Doc. HRI/GEN/1/Rev.9, General Comment No. 16: Article 17, para 10.

“The necessity of adopting clear laws to protect personal data is further increased in the current information age, where large volumes of data are collected and stored by intermediaries, and there is a worrying trend of States obliging or pressuring these private actors to hand over information of their users.”³⁰

In 2016 and 2017, the United Nation also adopted resolutions on the right to privacy in the digital age by explicitly stating that “the increasing capabilities of business enterprises to collect, process and use personal data can pose a risk to the enjoyment of the right to privacy in the digital age.”³¹ In sum, through the adoption of the UDHR and ICCPR and other subsequent explanations and resolutions, it is pretty clear that the right to privacy covers the data protection within the United Nation international legal framework.

Therefore, if the Constitution is interpreted to follow the right to privacy under the UDHR and the ICCPR, it will be stronger to argue that the right to privacy under Article 40 of the Constitution, in combination with Articles 31, 32, and 38, should extend to the data protection. Accordingly, an interpretation or guideline to be made or issued by an authoritative institution, in particular by the Cambodian Constitution Council, is required to shed light on this unsettled issue.

B. Rights to Personality under the Civil Code

In addition to the right to privacy under Article 40 of the Constitution, there are claims that the data protection was fallen under the right to personality under the Cambodian Civil Code. The Civil Code does not provide a straightforward definition of “personal data” but defines the concept of “personality rights” or “rights to personality.” Based on Article 10 of the Civil Code, “personality rights” or “right to personality” include “the rights to life, personal safety, health, freedom, identity, dignity, privacy, and other personal benefits or interests.” In respect of data protection, there are two main questions raised in light of this Article 10 of the Civil Code. The first question is whether the data protection falls under the general right to personality or the specific right to personality. The second question is, if the data protection falls under the specific right to personality, which right (right to identity, the right to privacy, or the right to other personal benefits or interests) will be the most suitable to the data protection.

In order to address the first question, let us first look at different systems of right to personality from a comparative viewpoint and determine which system will fit the right to personality under the Civil Code. According to Johann Neethling, personality rights recognize a person as a physical and spiritual-moral being and guarantee his enjoyment of his sense of existence.³² Personality rights are protected in various countries to a greater or lesser degree.³³ However, the ways of the protection are different and can be classified into the following four groups.³⁴ In the first group, there are those systems, in which German law is the best example, that recognize a general right to personality as a basis for comprehensive personality protection.³⁵ In the second group, there

30. UN Doc. A/HRC/17/27, para 58 (May 16, 2011).

31. See Handbook on European Data Protection Law 21-22 (European Union Agency for Fundamental Rights and Council of Europe, 2018); See UN, General Assembly, Revised draft resolution on the right to privacy in the digital age, A/C.3/71/L.39/ Rev.1, New York, 16 November 2016; UN, Human Rights Council, The right to privacy in the digital age, A/HRC/34/L.7/Rev.1, 22 March 2017.

32. See Johann Neethling, Personality Rights 530, in Elgar Encyclopedia of Comparative Law (Jan M. Smits, ed., Edward Elgar 2006).

33. See Johann Neethling, Personality Rights: a comparative overview, XXXVIII CILSA 2005, 210.

34. Id., p. 211-217.

35. Id.

are those systems, in which French law is the best example, that have and see no need for the recognition of a general right to personality because their law possesses a different foundation for comprehensive personality protection.³⁶ In the third group, there are those systems, in which Dutch law and Austrian law are the best examples, that also recognize a general right to personality although they have another basis for comprehensive personality protection.³⁷

In the fourth group, there are systems that lie between the French and Austrian models.³⁸ In this group, Switzerland was the first country in which the modern theory of personality rights was implemented, providing comprehensive statutory protection against any interference with legal subjectivity or the wrongful infringement of the personality.³⁹ In the fifth and last group, there are systems that the doctrine and recognition of personality rights are virtually non-existent (like the English system) and that the idea of personality rights gained acceptance (like the USA system).⁴⁰

By reviewing Article 10 of the Civil Code as well as the explanatory notes of the Civil Code, Cambodia seems to recognize both the general right to personality and the specific right to personality for the following reasons. First, the Civil Code recognizes personality rights by generally defining the terms as “the rights to life, personal safety, health, freedom, identity, dignity, privacy, and other personal benefits or interests.”⁴¹ Second, by using the phrase “and other personal benefits and interests” the drafters of the Civil Code recognizes the difficulty to strictly define the personality rights in abstract terms and to have an exhausting list of all of the personality rights and instead use the catchall phrase to include all other lawful personality rights which shall be equally recognized the same as the listed rights to life, personal safety, health, freedom, identity, dignity, and privacy.⁴² Third, the Civil Code also provides various remedies against any act of violating personality rights. Those remedies include the right to prohibition,⁴³ the right to demand elimination of the effects of an infringing act⁴⁴, and the right to damages.⁴⁵ In respect of the right to damages, the exercise of this right must be made in accordance with the provisions on tortious acts of the Civil Code. Based on this third reason, the Cambodian system of personality rights seems to fit with the Swiss legal system where comprehensive statutory protection was provided against any interference with legal subjectivity or the wrongful infringement of the personality.⁴⁶ This conclusion is also supported by the Explanatory Notes of the Civil Code which refer to Articles 28 and 28a of the Swiss Civil Code for explaining Articles 10, 11, 12, and 13 of the Civil Code.

36. Id.

37. Id.

38. Id.

39. Id.

40. Id.

41. See Professor Yamamoto Yutaka, Overview of the Draft Civil Code of the Kingdom of Cambodia: Book on Persons and Book on Obligations, Part II(3), presented at the National Seminar on the Drafting of Civil Code and Code of Civil Procedure of Cambodia, ICD News (International Cooperation Department, Research and Training Institute, Ministry of Justice, Japan 2003) (claiming that “Chapter 2 make it clear that the personal right of human being are protected by law, and set forth that, under certain requirements, an injunction claim can be made against the violation of personal rights.”)

42. See the Explanatory Notes of the Civil Code, p. 7-8; and Yamamoto Yutaka, id.

43. Article 11.

44. Article 12.

45. Article 13.

46. See Explanatory Notes of the Civil Code, p. 7-9.

In order to address the second question, it is worthy to note that there is no authoritative interpretation or guideline in Cambodia as to whether the data protection falls into the right to identity, right to privacy, the right to “other personal benefits and interests,” or the general right to personality. Since the Civil Code does not define the terms “identity,” “privacy” or “other personal benefits and interests,” whether or not data protection falling into any specific right is a matter of interpretation. In the following paragraphs, the author will try to bring about the general concepts of each of the rights and then discuss whether data protection can be fallen into any of these rights.

Right to Identity

In principle, identity as an interest of personality can be defined as a person's uniqueness or individuality which identifies or individualizes him or her as a particular person and thus distinguish him or her from others.⁴⁷ Identity is manifested in various indicia such as his name, physical image (or likeness), voice, life history, creditworthiness, handwriting, and character.⁴⁸ Through any of these indicia, a person can be recognized.⁴⁹ A person's identity is infringed if any of these indicia are used in ways which cannot be reconciled with his true identity.⁵⁰ In other words, there is an infringement if a person's identity has been falsified, or a wrong image of a person's personality has been communicated.⁵¹

In relation to data protection, there are some situations where the right to privacy is not sufficient to protect the identity of a person, and the right to identity should be incorporated to fill gaps of the right to privacy. An example of those situations is a group profiling of the non-distributive type where it represents a group and reveals attributes that may or may not be applicable to the individuals in such group.⁵² In this sense, there are situations where profiling technology may not convey a necessary true condition, presenting instead the possibility of misrepresenting the profiled individual; and thereby they should be covered by the right to identity. Thus, data protection can be interpreted by analogy to fall in the right to identity set forth under Article 10 of the Civil Code.

Right to Privacy

Privacy is a personal condition of life characterized by seclusion from, and therefore the absence of acquaintance by, the public.⁵³ A person himself or herself determines or controls the scope of his privacy.⁵⁴ A person's privacy can be infringed in two ways. First, it can be infringed by intrusion into the private sphere such as entering into a private residence, observing a person in a closed quarter, reading private documents, eavesdropping on private conversations, shadowing a person, taking blood tests, and the police interrogation of a person.⁵⁵ Second, it can be infringed

47. See Johann Neethling, *Supra* Note 28, p. 234-236.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. See Norberto Andrade, *Data Protection, Privacy and Identity: Distinguishing Concepts and Articulating Rights*, 6th International Summer School (ISS), Aug 2010, p. 11-12, available online at <<https://hal.inria.fr/hal-01559453/document>> (last visit on 9 Nov. 2020).

53. See Johann Neethling, *Supra* Note 28, p. 233-234.

54. *Id.*

55. *Id.*

by disclosure or publication of private facts in breach of a confidential relationship (for example, between doctor-patient, legal advisor-client, or bank-client) or the publication of private facts by the mass media.⁵⁶

In relation to data protection, the right to privacy plays an important role to entail the protection of a person (data subject) with regard to the processing of his or her personal data by another person or the state.⁵⁷ In the United States of America, the right to privacy has been used as the main basis for the development of the current data protection system.⁵⁸ As explained in Section III (A), the right to privacy has been also a basis for data protection under the UN international legal framework. Thus, data protection can be interpreted to fall in the right to privacy set forth under Article 10 of the Civil Code.

In addition, the right to privacy is also protected as part of the consumer rights under the Law on Telecommunications, but there is no definition of the right to privacy in the same law. Therefore, there is a question of whether or not the three versions of the right to privacy under the Constitution, the Civil Code, and the Law on Telecommunication should have the same meaning. This paper suggests that regardless of the contents of the right to privacy, the three versions in relation to data protection should be interpreted to have the same meaning for the following three reasons.

First, the right to privacy is the general principle which should be applied whenever there is any infringement either by intrusion into the private sphere or by disclosure or publication of private facts in breach of a confidential relationship. Second, the right to privacy is protected under the Constitution, which is the supreme law of the land, and under the Civil Code, which is the general law covering civil matters. There is no point to interpret it differently in a specific law where there is no definition in itself. Third and last, the three versions should have the same meaning to ensure consistency, certainty, and predictability when applying it to data protection. Otherwise, there will be a conflicting view as to what extent the right to privacy should be defined differently from the general principle defined under the Constitution and the Civil Code.

Right to other personal benefits or interests

In addition to the rights to life, personal safety, health, freedom, identity, dignity, and privacy, a person has a wide variety of other spiritual feelings or inherent perceptions on matters such as love, faith (religion), sentiment, and chastity.⁵⁹ While the Civil Code is silent as to these rights to love, faith, sentiment, and chastity, they may be interpreted to be included in the catchall phrase “other personal benefits or interests.” According to one drafter of the Civil Code as well as the Explanatory Notes of the Civil Code, such rights that are comparable with the listed rights should be included as other specific rights to personality. Therefore, there is a need to apply the “comparable” test whenever we want to interpret and recognize any new specific right to personality.

56. Id.

57. Id.

58. See Xiaolan Yu and Yun Zhao, Dualism in data protection: Balancing the right to personal data and the data property right, 35 computer law & security review 1, 4 (2019).

59. See Johann Neethling, *Supra* Note 28, p. 236.

In relation to data protection, there is a need to interpret whether or not the right to data protection is comparable to the listed rights to life, personal safety, health, freedom, identity, dignity, and privacy. If it is comparable, the right to data protection should be included in the list of a specific right to personality. If it is not comparable, it should not be included. In the absence of case law or guidelines explaining the meaning and application of the “comparable” test, there is no conclusive answer to this interpretation. However, in China in its recent reform of the Civil Code, data protection has been recognized as a specific right to data protection and will become effective from this coming January 2021. Due to time constraint and space limit, this Paper does not discuss in further details the Chinese data protection under its Civil Code but conclude that there is a possibility to include the data protection as a specific right to personality under Article 10 of the Civil Code.

C. Right to Professional Secrecy

As explained in Section II, some sectoral laws are imposing a duty to keep confidential some data collected from the relationship between bankers-customers, doctors-patients, lawyers-clients, insurance institution-insured. Professional secrecy can be understood as a special ethical duty that incurs a legal obligation inherent in certain professions and functions, which are based on faith and trust.⁶⁰ Professional secrecy is not a fundamental right but is protected as a form of the right to respect for private life.⁶¹

Under the relevant sectoral laws and regulations reviewed under this paper, professional secrecy has been regulated very strictly, and currently, any processing of such data will be able to carry out only when there is consent or authorization of the clients, customers, or patients and in some cases, an approval from the supervisory authority is also required. The sectoral law approach here, however, has limitations as they do not cover comprehensive aspects of data protection such as data processing, localization, or transfer. While there are some countries like the United States of America adopting the sectoral approaches to data protection, the sectoral law approach in Cambodia has not reached the same level as most of them are mainly regulating the professional secrecy and some even do not touch at all on how and when data can be processed or transferred. To balance the interests protected under a data protection law and the interests protected under these sectoral laws and regulations, there is a need to adopt rules to safeguard the professional or other equivalent secrecy obligations and reconcile the right to data protection with the obligation of professional secrecy.⁶²

D. Right to Data Security

As explained in Section II (D), Article 32 of this E-Commerce Law provides that any person storing electronic record of “private information” (“personal information”)⁶³ shall use all means to ensure that the information is reasonably and safely protected in any circumstance to avoid loss, access, use, modification, leak or disclose of such information without the authorization of the data holder. In addition to Article 32, Article 22 prohibiting any use of the identity, record, electronic

60. See Handbook on European Data Protection Law, Supra Note 26, p. 69.

61. Id.

62. Id.

63. There is an issue with the translation as to whether “private information” or “personal information” should be used to correspond with the Khmer term. For the purpose of this paper, we will use the terms “personal information.”

signature, electronic address, password, or other person's identification dishonestly or without permission for commercial or non-commercial transactions in the electronic system.

The E-Commerce Law provides a new notion of data protection in Cambodia for the following reasons. First, it provides the general concept on the duty of the person who stores the personal information to use all reasonable measures to safely protect all of the personal information. In this sense, the E-Commerce Law has adopted a key principle of the modern data protection law; that is, the principle of security safeguard. Second, although this article failed to detail any restriction on such transfer outside of Cambodia or requirement of localization of data, the said article provides a clear message that the personal information shall be protected to avoid loss, access, use, modification, leak, or disclosure of such information. In case of infringement, the data owner will be entitled to take legal action against the person who stores his or her personal information. Third, authorization of the data holder is required for any access, use, modification, or disclosure of such personal information.

Although the E-Commerce Law has introduced the notion of data protection in Cambodia, such introduction is very limited to the principle of data security safeguard and fails to include many other key principles such as the principles of openness, accessibility, access and correction, collection limitation, purpose specification, use limitation, and data integrity. In addition, many key terms were not defined in the E-Commerce Law including "personal information," "a person who stores" or "reasonable measures." Such failure to lead to different interpretation and application when there is an accident brought to the competent courts. Furthermore, the E-Commerce Law fails to regulate many other aspects in detail of the data protection law such as the scope of the protection, the obligation of controllers and processors, the rights of data subjects as well as oversight and enforcement. Therefore, future options will be whether the current regime should be reformed to including all the missing elements and principles or the current regime should be complemented by the other legal approaches such as the right to privacy, the right to personality, or the right to professional secrecy. These options will be discussed in the following Section IV below.

While the Law on E-Commerce has relevant provisions on data security, the Law on Consumer Protection is silent on data protection. However, one of the main objectives of the Law on Consumer Protection is to protect the rights and interests of consumers; therefore, if the right to data protection could be considered as a right of consumers, there would be a question as to what extent the Law on Consumer Protection can be applied to protect consumer data. One possible way is to have an implementing regulation as provided for under Article 22.- Other Unfair Practices:

"Other unfair practices shall be defined by the Prakas of a competent regulator according to the scope of the roles and duties of that regulator, with the approval of the National Consumer Protection Committee to protect the legitimate rights and interests of the consumers."

In relation to this Article 22, it is possible to have a Prakas regulating consumer data protection by defining any violation of consumer data protection as an act of unfair practices. Nevertheless, any future regulation on consumer data protection should take into account the right to data security protection as provided for by the Law on E-Commerce.

IV. Synergies and Tensions between and among General Laws and Specific Laws and Potential Ways to Develop an Integrated Legal Approach to Data Protection in Cambodia

As explained and discussed in Section II and Section III, there are four legal approaches corresponding to four theories which exist in the current legal system of Cambodia concerning data protection. Among these four legal approaches, this Section will first examine the tensions between the right to privacy and the right to personality in relation to data protection, and then examine how the right to professional secrecy should be ruled and reconciled to make the whole system consistent and strongly protect the personal data.

From the analysis and discussion under Section II, the data protection can be provided based on either the right to privacy found under Article 40 of the Constitution or the right to personality found under Article 10 of the Civil Code. However, the right to privacy under Article 40 of the Constitution has a limitation as it mainly focuses on the privacy of residence and the secrecy of correspondence. Therefore, it is necessary to read Article 40 of the Constitution in combination with other provisions under Article 31 (recognition and respect for human rights under UDHR and other covenants and conventions), 32 (the right to life, freedom, and personal security of a citizen) and 38 (the right to life, honor, and dignity of a citizen).

On the other hand, the right to privacy is just one specific right to personality stipulated under Article 10 of the Civil Code and when it comes to data protection, other specific rights to identity or other personal benefits or interests may also be used as its bases for the data protection as explained in Section II (B). In addition, the term “right to privacy” is not defined under the Civil Code; therefore, there is a question of whether the terms should be interpreted to be consistent within the limitation of the right to privacy alone under Article 40 of the Constitution or to be consistent with the right to privacy under Article 40 in combination with the provisions under other relevant articles 31, 32 and 38. There are two options to address this issue.

For the first option, in relation to the data protection, this paper put forward the proposal that the option of applying the right to personality under Article 10 of the Civil Code with the legal support from the right to privacy under Articles 31, 32, 38 and 40 of the Constitution will serve as the stronger bases for the data protection in Cambodia. In this sense, it is possible to treat the right to personality under Article 10 of the Civil Code as human rights as many human rights which are constitutionally enshrined as fundamental rights relate to the right to personality such as the right to life, the right to honor and reputation, right to dignity, right to health, right to freedom and the right to personal safety.⁶⁴ By doing so, the right to personality will receive constitutional protection in addition to the protections provided under the Civil Code and consequently, the protection of the relevant personality rights is also naturally enhanced.⁶⁵ In addition, this approach will make the data protection consistent throughout the whole legal hierarchy including the Constitution and the Civil Code.

For the second option, while the data protection should find its support through the interpretation of the right to privacy under Article 40 of the Constitution or the right to personality under Article 10 of the Civil Code, there is another option where the personal data or the data protection can

64. See Johann Neethling, *Supra* Note 28, p. 241-242.

65. *Id.*, 242.

become an independent and specific right to the personality. This option has been found in the recently amended Civil Code of China where the right to protection of personal information is next to the right to privacy⁶⁶ and the Charter of Fundamental Rights of the European Union where the right to personal data was stipulated separately and next to the right to privacy.⁶⁷

By choosing this second option, one scholar suggested three models to link between the right to privacy and the right to data protection.⁶⁸ In the first model, the right to data protection and the right to privacy are complementary to each other. In the second model, data protection is the facet of the right to privacy. In the third model, data protection is a right that serves a number of purposes, including but not limited to privacy purposes. In light of the existing legal framework of Cambodia, there is no legal or doctrinal challenges where the three models cannot be applied if Cambodia chooses to have a separate and specific right to data protection. However, the right to Data Security under the law on e-commerce should be reviewed and assessed as a learning experience or as to reconcile with the details of the second option.

The interaction between professional secrecy and data protection is often ambivalent.⁶⁹ On the one hand, data protection rules and safeguards established in legislation help ensure professional secrecy.⁷⁰ On the other hand, obligations of professional secrecy imposed on controllers and processors in respect of certain personal data may limit the rights of the data subjects, notably the right to receive information.⁷¹ Therefore, it is necessary to establish specific rules to safeguard the professional or other equivalent secrecy obligations and reconcile the right to data protection with the obligation of professional secrecy.⁷² In light of the existing legal framework concerning professional secrecy in Cambodia, there are some rules designated to justify the access to the information or data by the supervisory authorities, by courts, or by law, but there is no rules or reconciliation by and between the data controllers and processors and the data subject. Therefore, there is a need to include rules and reconciliation by and between the data controllers and processors and the data subject in either one of the two options proposed above.

In conclusion, there are two options Cambodia should consider for data protection. In the first option, the data protection should be provided based on the rights to personality recognized under Article 10 of the Civil Code, which should also be recognized as human rights recognized in Articles 31, 32, 38, and 40 of the Constitution. In the second option, the data protection should be provided as an independent and specific right to personality and link with the right to privacy as a complementary tool, a facet of the right to privacy as well as serving the privacy purpose. Finally, whether Cambodia chooses either option one or option two, there is a need to include rules and reconciliation by and between the data controllers and processors and the data subject.

66. Article 110 and 111 of the Chinese Civil Code.

67. Article 7 and Article 8 of the Charter of Fundamental Rights of European Union.

68. See Orla Lynskey, *The Foundations of EU Data Protection Law 91-106* (Oxford University Press 2015).

69. See Handbook on European Data Protection Law, *Supra* Note 26, 71.

70. *Id.*

71. *Id.*

72. *Id.*

V. Conclusion

The notion and concept of data protection are quite new in Cambodia. When data protection has to be discussed and analyzed from the concepts and theories of right to privacy and right to personality, there are still many practical and doctrinal challenges due to the fact of having no case law, guidelines, and few scholarly articles or papers addressing these issues in Cambodia. Therefore, this research paper might be among the first scholarly works that attempts to bring about the existing frameworks and their practical and theoretical gaps of the right to privacy and the right to personality as well as the right to professional secrecy within the context of data protection and to provide possible ways to solve these gaps. The author hopes that the analyses made in this paper is critical, informative, and useful for other future works either from the comparative law or international law approach to help Cambodia find the best solution for data protection in this digital age. Since Cambodia adopted a Civil Code where the general rights to personality and the specific rights to personality are protected, this research paper recommends comparative law studies on the data protection laws with other countries such as Switzerland, China, the European Union, and the United States of America to complement the current work. While the discussion and proposal in this research paper will help establish theoretical foundations for data protection in Cambodia, such theoretical foundations cannot fully and comprehensively address the protection of specific personal data. A full set of data protection law should be introduced in the future in order to regulate key matters such as scope of the protection, definitions of key terms, data protection principles, obligation of controllers and processors, the rights of data subjects, and oversight and enforcement. Each of these key matters will require additional and comprehensive researches and studies from foreign and international experience and best practices to propose optimal policies and best approaches for Cambodia in light of its existing laws and policies. These optimal policies and best approaches will be then used as bases to develop a draft law on data protection in Cambodia.

In the transition period, until Cambodia could have a full set of data protection law, Cambodia may introduce general principles for data protection through implementing regulations of the Law on E-Commerce, the Law on Consumer Protection as well as other sectoral laws and regulations in order to encourage voluntary enforcement among private parties. Such general principles may be learnt from various guidelines such as the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Organization for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data, the Guidelines for the Regulation of Computerized Personal Data Files, the Asia-Pacific Economic Cooperation Privacy Framework, and the ASEAN Framework on Personal Data Protection. When there is widespread public awareness and sufficient technical, financial, and institutional capacity and resources, Cambodia may consider moving from these guidelines into a comprehensive law on data protection. Finally, the author hopes that this research paper will be useful and contribute to the efforts to move from the current system of data protection to the full set of data protection laws to be developed and introduced in Cambodia.

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As with other laws, there are remaining loopholes. The instructions by the Supreme Court or the Ministry of Justice on the standard and burden of proof, in this case, might help partially in the implementation of this law while waiting for new regulations.

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CHAPTER 04

Online Sale: Civil and Criminal Liability for Enforcing the Consumer Protection

Dr. Meas Bora

Abstract

Online sales have become increasingly widespread and have caused trust issues among sellers and buyers, especially concerning the quality of products. Relevant laws are needed to ensure the liability of sellers whereby they help to strengthen the protection of consumer rights. To this end, a balanced and reasonable legal construction that does not violate the separation of powers should be adopted so that there are enough applicable rules and norms to apply when legal issues arise. This paper explores and discusses the types of liabilities applicable to online sale offenses. To do this, the legal basis, as well as the interrelation thereof in relevant laws or regulations in Cambodia, will be discussed. The concept of misrepresentation and defective products will be presented while legal theories, jurisprudence, and laws of other jurisdictions will be used for reference.

I. Introduction

In the era of digital communication, online sale, including marketing/advertisement, is rapidly increasing, causing great challenges in quality of product and trust in advertisement wordings. This phenomenon indirectly affects the rights and benefits of consumers through buying the wrong or defective products. As a result, consumers might waste time and spend money in the wrong way, adding to the poverty situation for the poor. This has happened.

Many laws and regulations, including the newly adopted law on the protection of the consumer (LPC), and law on e-commerce (LoEC) address partly the above-mentioned issues by requiring that the sellers provide the correct information on the nature, types, and quality of their products. Those laws also impose criminal liability for facts characterized as offense and/or civil fault leading to tort liability. To what extent this provision was wholly applied to online sales is unclear. This is the purpose of this short paper which is to explore both types of liabilities applicable to online sale offenses. To do this, legal basis and types of liability, as well as the interrelation thereof in relevant laws or regulations of Cambodia, will be discussed. The concept of misrepresentation and defective products will be presented. Legal theories, jurisprudence, and laws of other jurisdictions will be used for reference.

This could be the first study that deals with the liability of individual online sellers—not legal entities—and other liable persons in the form of qualitative research with the expectation that it will help contribute to more effective suppression and prevention of online sale offenses.

II. Product Liability in General

Product is defined broadly covering tangible things with exception of the intangible object such as ICT, or e-documents.¹ A product may not be of the intended quality or may have a defect that is not of the expected quality. For example, a hammer with a small handle is a defect. A defect might happen through all processes of production, either in the design stage, production, circulation into the marketplace, or in the presentation stage.² The last one causes the public to believe wrongly on quality or quantity.³ A defect is simply defined as a lack of safety as expected it has. A product shall be deemed defective if it does not provide the safety which, taking all circumstances into account, may be reasonably expected, in particular with respect to 1. the presentation of the product...⁴

Forms of liability for wrongdoers are various; however, it is remarkable that most of the States in Europe impose strict liability for a defective product. The producer will be liable without the need of proving *mens rea*.⁵ It is enough for a producer to be liable if the product causes damage to the consumer in a certain and direct manner.⁶ Liability is either individually or jointly. Amongst

1. A product is any movable thing, even though incorporated into an immovable, including the products of the soil, of stock-farming, and of hunting and fishing. Electricity is deemed a product, Piotr Machnilowski ed., *European Product Liability, An Analysis of the State of the Art in the Era of New Technologies (EU Product Liability)* 2016, pp. 117, 214 and 224.

2. *Id.*, p. 126.

3. *Id.*, p. 247

4. *Id.*, p.123.

5. *Id.*, p. 253.

6. *Id.*, pp. 224 and 260.

this, a seller is, as well, liable for defective product although it is needed to fulfill some conditions. *If the producer cannot be identified, the seller, the lessor, with the exception of a lending lessor or a lessor similar to a lending lessor, or any other professional supplier is liable for the defect in the safety of the product in the same conditions as a producer, unless he names his supplier or the producer within three months from the date he received notice of the demand from the victim.*⁷

The burden of proof is on a claimant to prove that a product is a defect, and caused damage to him or her (causation).⁸ For excuse or defense, the burden of proof will shift to the defendant to prove that it is the own fault of the consumer, such as improper usage of the product by ignoring the warning on usage.⁹ Defenses include development risk¹⁰, mandatory regulations¹¹, a defect by other co-producer.¹²

Liability leads to reparation, including compensation, which is various according to each law of jurisdictions. They might be monetary compensation¹³ or non-monetary one, such as damage due to distress resulted from the defective product.¹⁴ Amount to compensation might be deduced from the victim because of his or her contributory fault.¹⁵

A claimant shall claim within a set period otherwise he or she will not be entitled to claim. Some jurisdictions set three years from the day claimant becomes or reasonably should have become aware of the damage.¹⁶

III. Legal Framework on Liability

a. Criminal Liability

Criminal code provides criminal liability for acts with *mens rea*¹⁷ or by negligence.¹⁸ Liability is individual.¹⁹ A legal person is held criminally if a clear provision of laws is mentioned in advance.²⁰ In the latter, individual liability does not absolve the criminal liability of the legal person.²¹

7. Id., p. 220.

8. Id., pp. 143 and 228.

9. Coulter Boesch, Defenses in A Product Liability Lawsuit at <https://www.alllaw.com/articles/nolo/personal-injury/defenses-product-liability-lawsuit.html> (accessed on 1 December 2020).

10. EU Product Liability, supra note 1, pp. 139, 226 and 262.

11. Id., pp. 226 and 264.

12. Id., p. 140.

13. Code of Criminal Procedure of Cambodia (CCP), 2007, Article 14.

14. Id., Article 14.

15. Civil Code of Cambodia (CC) 2007, Article 764.

16. Personal actions or movable rights of action prescribe in five years from the day the holder of right knew or should have known the facts enabling him to exercise his right (France), U Product Liability, supra note 1, pp. 229 and 268.

17. Criminal Code of Cambodia (CCC), 2009, Article 4.

18. Id.,

19. Id., Article 24.

20. Id., Article 6.

21. Id., Article 42.

Statute of limitation is a short of detail in criminal code or code of criminal procedure of Cambodia. The statute of limitation is divided into sentence imposition and prosecution.²² The latter set forth short or longer periods depending on the types of offenses. If it is a crime, the time for prosecution is 15 years.²³ However, crimes under international law—a war crime, genocide, and crime against humanity—do not have a statute of limitation.²⁴ The period commences from the date of the crime commission and stops running when any act of investigation is generally conducted, for example, charging.²⁵ Thereafter, time starts running over again. Article 7 lists the expiration of the statute of limitation as one of the grounds for extinguishing a criminal charge.²⁶

It is rare in relation to both criminal and civil liability that laws provide clear standards and a burden of proof for every stage of the court proceeding. Existing case laws do not mention. Criminal procedural code sets out the standard of proof for notification of charge by investigating judge²⁷, but not one for accused of raising criminal defense, such as alibi. It is generally understood that the prosecutor has the burden of proof to convince that the accused is guilty²⁸; however, it is not clear when and in what context that the accused has the burden of proof.

It is in need of asserting that not all acts cause criminal liability. Act of self-defense, if not exceeding, exempted perpetrator from both civil and criminal liability.²⁹ However, the defense of insanity only relieves the insane person from criminal liability while the civil liability is still operative for those, such as parents, who are civilly liable persons.³⁰

Sanction consists of principal and additional criminal liabilities. The first has imprisonment term and/or fine³¹, while the latter consists of many types of liabilities which must be clearly provided in advance by the laws.³² The only fine is the principal sentence for a legal person³³, and additional penalties are applicable to both physical and legal persons.³⁴

Some provisions provide provisional fines designed for a petty offense.³⁵ It is the amount of money that shall be paid to competent authorities. Some laws set a limit on the number of days during which the fine must be delivered.³⁶ Paying a fine leads to the end of criminal litigation.³⁷ In

22. CCP, supra note 13, Article 10.

23. Id.

24. Id., Article 9.

25. Id., Article 11.

26. Id., Article 7.

27. Id., Article 126.

28. MEAS Bora, Burden and Standard of Proof in Compilation of Academic Articles, 2020, p. 37.

29. Id., p. 38.

30. CCC, supra note 17, Article 31.

31. Id., Article 43 and 93.

32. CCC, supra note 17, Article 54.

33. Id., Article 167.

34. Id., Articles 53 and 168.

35. CCC, supra note 17, Article 167.

36. Law on Land Traffic 2007, Article 87.

37. Id.

case of a failure, the amount of fine will be doubled³⁸, and in the end, criminal litigation shall be initiated.³⁹ This fine is applied to both physical and legal persons for which the latter is required to pay higher.⁴⁰

When deciding sentences, aggravating and mitigating circumstances are taken into account.⁴¹ A victim as a civil party might claim compensation for the lost property⁴², mental or physical suffering, or restitution.⁴³ So far, there is no guideline on how to calculate compensation for the damage.

b. Civil liability

In the field of civil liability, the Civil Code (CC) and other relevant laws provide as such for contractual obligation breach⁴⁴, enrichment without cause⁴⁵, and tort liability.⁴⁶ These types of liability might overlap with each other.

The claim for compensation might be made for any act affecting the interest or rights of individuals.⁴⁷ Liability is individual or jointly dependent on each case where there are several tort actors.⁴⁸ The actions leading to liability might be intentional or unintentional in the sense that the wrongdoer is foreseeable of risk and taking that risk is a normal act in the situation of a similarly experienced person, with a duty to prevent but negligent or reckless contrary to that duty.⁴⁹

The Civil Code provides all types of civil liability. What is relevant here is the product liability.⁵⁰ It is not clear if it covers liability because of a defect or not. In the commentary, a defect is simply the lacking of expected safety as the product needs to have.⁵¹ There will be a liability if a defect caused unreasonable damage.⁵² Other provisions require a seller to give an object without defect to the buyer. The defect can be considered broadly as being not conformity to size and quality as set in the contract or different from the sample shown to the buyer.⁵³

Seller shall exchange defective object, even after the risk was revealed, with the new one, and be responsible for repairing the defect or reducing the value of such object. In case the buyer

38. Law on Control of Tobacco Product 2020, Article 38.

39. LPC, Article 40.

40. LoEC, Articles 64 and 65.

41. CCC, supra note 17, Chapter II on Aggravating and Mitigating Circumstances.

42. CCP, supra note 13, Article 14.

43. CC, supra note 15, Article 14(restitution).

44. Id., Article 383.

45. Id. Article 736.

46. Id., Chapter 16.

47. Id., Article 743.

48. Id., Article 754.

49. Id., Article 742.

50. Id., Article 751.

51. Ministry of Justice, Note on Each Article of Civil Code, Book Five, 2010, p. 189.

52. CC, supra note 15, Article 751.

53. Id., Article 539.

knows or did not know due to his grave fault about the defect of the object, the seller will not be liable for the defect.⁵⁴

For civil litigation, the plaintiff has the burden of proof to get compensation if it is a wrong act and has caused damage to him or her.⁵⁵ Article 742 impliedly applied the test of “the same experienced person” to set fault.⁵⁶

The issue of the statute of limitation for civil litigation is more complicated and applicable to different types of acts and civil liability. For example, article 162 provides a statutory limitation during which the title of immovable property might be claimed within 20 years after peaceful possession.⁵⁷ For breaching contractual obligation, five years period is for claiming compensation after damage happens.⁵⁸ Claim for compensation for damage caused by the tortious act shall be made three years after the victim knew or 10 years after the tort act was committed.⁵⁹

Similar to criminal liable defense, civil wrongdoers might raise excuses such as consent of the victim, self-defense, necessity, and socially accepted act.⁶⁰ The civil code further stipulates conditions leading to an exemption of liability, such as minor age (under 14 years), mental problem, or other grounds for not being liable.⁶¹

Victims of civil wrongness might get several types of compensation for physical abuse, including medical treatment fees⁶², death⁶³, damage to the object⁶⁴, reputation rehabilitation⁶⁵, mental harm.⁶⁶ For compensation calculation, the following factors will be considered: victim contribution⁶⁷, revenue gained by the victim⁶⁸, the extent of property damage⁶⁹, level of intent, impact on victims, and the response of tort doer after commission.⁷⁰

54. Id., Article 560.

55. Id., Article 743.

56. Id., Article 742.

57. Article 162 on Prescriptive Acquisition of ownership over immovable; Article 163 on retroactive effect of prescriptive acquisition; Article 164 on invocation of prescriptive acquisition; Article 165 on renunciation of benefit of prescriptive acquisition; Article 166 on persons affected by renunciation of benefit of prescriptive acquisition; Article 167 on grounds for interruption of prescriptive acquisition; Article 168 on persons affected by interruption of prescriptive acquisition; Article 169 on loss of possession with intention of ownership; Article 170 on judicial claim not effect of statute of limitation suspension if claim is denied or withdrawn; Article 172 on running of prescriptive acquisition period following interruption; Article 173 on suspension upon demand; Article 174 on suspension of period for prescriptive acquisition against minor or adult in guardianship; Article 177.. of CC, supra note 15.

58. Id., Article 406.

59. Id., Article 765.

60. Id., Article 756.

61. Id., Article 745; Force majeure or management without defect as defense for dangerous item (Article 752 of CC).

62. Id., Article 761

63. Id., Article 760

64. Id., Article 759

65. Id., Article 757

66. Id., Articles 762 and 744.

67. Id., Article 764

68. Id., Article 763

69. Id., Article 758.

70. Id., Article 758.

Liability can be individual or joint.⁷¹ At least from one judgment, the Supreme Court asserted that the victim shall share civil liability due to his fault.⁷² After payment of the whole compensation, a paid civilly liable person might claim from other tortious actors. Similarly, in the case of public servant liability, state or public organs might claim for the amount of compensation back from a responsible public servant.⁷³

c. Liability and Relevance

When some acts were committed, they might affect the only individual and/or social interest. First, if the acts are civilly wrong causing harm to an individual, the wrongdoer might be civilly liable in the form of tort or contractual breach liability. Second, they might be characterized as a criminal offense triggering criminal liability.

The victim can file a complaint to court as a civil party along with a criminal complaint by a prosecutor with a view to getting compensation⁷⁴ or she or he can file a separate civil claim to civil court. However, a judgment of the civil court shall be in waiting for criminal judgment⁷⁵ since, if the accused is not guilty of a criminal offense, no civil liability is incurred.

Litigation to uphold both types of liability is dependent of each other. The Criminal code mentioned the extinction of criminal liability and whereby it also leads to the end of civil claim.⁷⁶ For example, in an act of destroying property in legal self-defense, the offender will not be civilly liable. It is in the sense that the victim act to cause self-defense cannot claim for compensation of damaged property.

There is also an interrelation between the statute of limitation in criminal litigation and the one in the civil proceeding. Ending a criminal statute of limitation, civil litigation might not be filed before the criminal court.⁷⁷

IV. Liability of Online Seller for Their Consumers

a. Law and Regulations on Protection of Online Consumer

There are many laws related to consumer protection although some of them only express such a purpose.⁷⁸ Three laws are more relevant to consumer protection: law on management of quality and safety of products, goods, and service (LMQS), LoEC, LPC, and the 2007 Civil Code.

71. Id., Article 754.

72. Considered that the facts that lower courts decided imposing on only accused without considering of fault of victims...acts violated article 10 and 30 on land traffic...Therefore, victims shall share liability for prejudice caused by traffic accident..., see Supreme Court, Judgement No. 29 dated on 23 September 1998.

73. CC, supra note 15, Article 749.

74. CCC, supra note 17, Article 22.

75. Id., Article 22.

76. CCP, supra note 13, Article 26.

77. Id., Article 26.

78. Law on Standards of Cambodia 2007, Article 2; Law on Mark, Trade Name and Unfair Competition Acts (Law on Mark), 2001, Article 20.

First of all, this section needs to indicate the meaning of some terminologies. The term “product” was not defined. It will become goods when it is subject to a transaction⁷⁹ by an individual—physical or legal person—through a sale in person or online in a random or permanent manner, by a registered company or not, or whether the transaction is main or accessory.⁸⁰ LMQS used the terms “producer, service provider, trader, and businessmen”⁸¹, however, no definitions were provided.

LMQS covers several types of things, including food.⁸² A trader, like a producer, shall ensure the truth of the product ingredients⁸³, a clear demonstration in the Khmer language on how to use, date of the production and expiration, and that the product is not contrary to provisions of the laws⁸⁴, and not causing public confused on quality and quantity.⁸⁵ In this connection, it was prohibited to advertise in any form in forging, evading correct information about the product, confusing the quality or safety of the product. Offering a person of such an advertisement is considered as an act of instigation and she or he who does so shall provide such required information to the promoter.⁸⁶

LPC demands description in an advertisement of size, production process, function, durability, and purpose of the product.⁸⁷ Furthermore, it prohibits unfair acts in a transaction⁸⁸ which is, for example, confusing consumers about the price or the quality of goods,⁸⁹ selling goods with incorrect descriptions. Since it is important, the whole text on unfair acts deserves to be quoted here:

“Unfair act refers to any act of a person in the business which may be misleading or deceptive, whether intentionally or not, to the consumers. - Act or representation such as advertising, sales promotion, and other representations; - Misleading of consumers regarding the cost, price, or quality of the goods or services. A person in business cannot rely on hard-to-read small print and labels and misleading claims for self-defense to avoid liability; - Failure to present to consumers promises, expectations, and relevant information; - Taking advantage of the consumers if the supplier is aware that the consumers are not in a position to protect his or her interests or are incapable of understanding the goods or services, such as the characteristics, type, language, effect of the transaction or

79. Law on Standards of Cambodia, 2007, Article 3.

80. LPC, supra note 39, Article. 4.

81. Law on Management of Quality and Safety of Product, Goods and Service (LMQS), 2000, Article 3.

82. Id., Article 18.

83. Id., Article 4.

84. Id., Article 5.

85. Id., Article 21; similarly: causing confusion by any means related to goods is regarded as unfair competition, see Law on Mark, Trade Name and Unfair Competition Acts, 2001, Article 23; court can order reparation, Article 28 on Law on Mark; sale of goods with fake mark will be sanctioned based on Article 64 and 65, Article 66 of Law on Mark; no sale of product without standard symbol, Article 36 of the Law on Standards of Cambodia; sale of product with fake standard symbol for confusing public to believe that his or product have permission or pursuant to Cambodian standard shall be imprisonment from 1 to 3 months with fine of 2 to 6 million riels or either, Article 55 of Law on Standards of Cambodia, supra note 78.

86. LMQS, supra note 81, Article 21.

87. LPC, supra note 39, Article 4.

88. Id., Articles 9 and 10.

89. Id., Article 4.

any problem related to the transaction, or - Other acts determined by the Prakas of the Ministry of Commerce".⁹⁰

In addition to the requirement of correct information, trader or businessmen shall disclose the minimum information to consumers pursuant to a model of the content of the standards of the information for consumers as set forth in *prakas* of the regulator⁹¹ and shall execute those pieces of information.⁹² Likewise, LoEC requires the minimum piece of the information posted for online commerce, and sufficient information for transaction/consumer decisions. However, it is not as details as it is in LPC.⁹³

Breaching of LPC might be resorted to negotiation, exception of criminal offense or repetition of breaching, between offender and National Committee on Protection of Consumer.⁹⁴ LMQS provides further by requiring the recollection of troubled products.⁹⁵

For penalty, the fine is between five to 10 million and/or imprisonment of one month to one year for the wrongful advertisement of a product.⁹⁶ In case of repetition, the amount and period of both penalties are doubled regardless of further consequent criminal liability. If it affects the safety or health of consumers⁹⁷, the accused is, as well, civilly liable.⁹⁸ Relevant products shall be confiscated to state property by the order of the courts.⁹⁹

The sanction provided in LPC includes a warning, provisional fine, fine, and imprisonment.¹⁰⁰ An unfair act is subject to warning.¹⁰¹ If it affects the health of consumers, imprisonment of six months to two years with a fine between one to four million riels are imposed.¹⁰² If it causes death or disability, a maximum of five years in prison and a ten million riels fine are demanded.¹⁰³ Furthermore, the law also imposes a penalty for unfair practices.¹⁰⁴ The sale of goods with incorrect description deserves a fine and imprisonment term shorter or longer to the extent of the effect on the health and safety of consumers.¹⁰⁵ Finally, being not conformed to the model

90. Id., Article 21.

91. Id., Article 23.

92. Id., Article 24.

93. LoEC, supra note 40, Article 29.

94. LPC, supra note 39, Article 33.

95. LMQS, supra note 81, Article 23.

96. Id., Article 63.

97. Id., Article 64.

98. Id., Article 65.

99. Id., Article 65.

100. LPC, supra note 39, Article 40.

101. Id., Article 41.

102. Id., Article 42.

103. Id., Article 43.

104. Chapter V of the LPC is on this issue: covering unfair sale (Article 13), promise of prize (Article 14), bait advertisement (Article 15), unfair solicitation sales (Article 16), demanding without intention of providing goods (Article 17), misleading representation (Article 18), coercion by force related to goods supply (Article 19), pyramid sale scheme (Article 20), sale of goods bearing false trade description (Article 21) and other unfair practices (Article 22).

105. LPC, supra note 39, Articles 55-57.

information for consumers shall be fined a maximum of 10 million riels.¹⁰⁶ Breaching provision on a minimum piece of information posted in online commerce will receive a warning and if such an act still continues, the permission letter for business transaction might be confiscated.¹⁰⁷ Of relevance, the law on CPL provides no excuse of a letter font or small size of the poster to be exempted from liability of unfair practice.¹⁰⁸

The criminal Code criminalizes some acts that are relevant to consumer protection in the field of food. For example, Article 225 is on toxic substances deemed to be intentional acts of violence: *'the administration of toxic substances to another person shall be deemed to be intentional acts of violence'*¹⁰⁹; article 226 is on giving toxic food, article 227 on putting in water toxic substance and article 228 on the lower severe act of violence (act does not result in any injury).

LPC protects consumers¹¹⁰ who were defined as receivers of goods for use in families. They have several rights, including the right to claim compensation based on this law and others.¹¹¹

b. Facts and Liability

1. Fact

Online sales can be made along with advertisement or promotion; thus, a seller is once considered as an advertiser. Goods to be sold might be defective, lack quality, or with fake marks. It might be not defective or lack quality; however, the seller does not provide clear and enough information on goods as required by laws. The exact quality or effectiveness might not be the same as advertised or described.

As a result, consumers get the wrong goods they do not expect due to misrepresentation during advertising. Even if they might get the expected goods (with quality), the product can still be a defect due to the lack of safety as expected. Although they are the wrong products, they have caused loss to consumers (losing money). This might be a rare case. Finally, when they are used, due to the defect or the lack of quality, they cause damage to property, health and can even lead to death.

In the case of cosmetic products, it might cause itches to the face of the consumers, leading to a health problem or even death due to the reaction.

^{106.} Id., Article 48.

^{107.} LoEC, supra note 40, Article 57.

^{108.} LPC, supra note 39, Articles 4 and 9; immediacy person is not responsible if he or she did not know that sent information causing criminal or civil liability (Art 24 of LoEC); he or she will not be liable as well if acted in good faith pursuant to order of Ministry of Telecommunication (art. 25 of LoEC); payment service provider is not liable in case of force majeure or own fault of client (art. 47 and 48 of LoEC); manager as well legal persons shall be liable for breaching of this law except he or she did not know or consented to such an offense (Article 68 of Law on Mark).

^{109.} Giving any person a drink, injection intoxicated substance into other body by any means and intentionally caused damage to health considered as an intentional violence. This violence deserves to 1 to 3 years and fine of 2 million to 6 million riels, Article 217, CCC, supra note 17.

^{110.} LPC, supra note 39, Article 2.

^{111.} Id., Article 4.

2. Liability

There are laws as highlighted above; however, there is not a single law detailing consumer protection in terms of liability such as the element of relevant crimes, standard, and burden of proof, defense, and statute of limitation. Scope of the relevant laws covers, of course, consumer protection, but glossaries that might reflect the scope of liability of the seller were not defined clearly. Thus, there remain doubts, for example, whether the term “person” used in the laws covering online sellers and whether an online sale falls within the definition of the term “business transaction” in the LPC. This leads to the use of legal construction methods to solve the problem. In this connection, as a rule, LPC with detailed provisions and, given that it was newly adopted, shall be treated as *lex specialis*, and other laws provisions will be resorted to as well to fill the gaps.

LPC used the term “individual” which includes both physical and legal person. Thus, the online seller is covered. Acts of trading by online sellers are to gain benefits regardless of how regular they are. This falls within the ambit of LPC. To summary, the LPC provides personal and material scope applicable to online sellers.

2.1. Criminal Liability

All trading acts, including misrepresentation, might amount to an offense leading to criminal liability and sanction depending on the level of damage. For example, selling whitening cosmetics products which, when applied to the face, causes itches.

This is considered as an unfair act according to article 41 or 42 of LPC which provides a penalty for unfair acts related to goods mentioned in Article 10 of the same law. It is an act of deceiving the public about the quality of goods. Article 10 does not provide *mens rea* or any effect on the consumer; therefore, the fact that the good lacks quality is enough for the seller to be liable.

If Article 41 is not applicable, the act might be considered as violence to the body in article 225 of the Criminal Code of Cambodia. To make the face white, a cosmetic product might contain a chemical substance beyond the medically accepted amount of toxic substance which might spread to other parts of the body through the face and cause damage when applied. However, the act of causing the damage has to be intentional, and only knowing is not enough.

Prosecutor has the burden of proof to prove that there really are itches on the face of the product user and that it was caused by using the bought product. Moreover, either *mens rea* (intent or negligence) shall be proved beyond reasonable doubt by the prosecution in order to make the online seller guilty.

The seller, in this case, might raise types of defenses including not following usage instructions properly or consent to risk. It might happen in the case that consumers use the product more often than recommended by the instruction to have a quick whitening effect or consumers choose to buy and use the product despite knowing that it might cause itches. Both defenses are not mentioned as the types of justification or excuse in the Criminal Code of Cambodia. The lack of law prescription means that there shall not be any prevention from raising such justifications and the justification should, in fact, be considered as a mitigating circumstance. It will be the burden of consumers to raise either or both defenses at the level of balance of probability.

For the compensation in the case that the consumer has to spend three days being hospitalized to cure illness, as indicated above, the consumer might file a civil complaint along with criminal litigation of prosecutor or file a separate civil claim to civil code. As mentioned above, the penalty will be imprisonment with or without suspension and a fine as set in law. Either way is to get compensation. More details will be discussed in the following section.

2.2. Tort Liability

The act of trading might cause damage but does not reach the level of criminal liability. Therefore, LPC provides the level of liability and sanction which is a written warning as the lowest one. LPC leaves room for civil liability. While LPC is *lex specialis* in terms of substance, other issues and procedures shall be based on CC, especially in relation to tort liability.

To trigger such a liability, it is a burden for victims to prove that there is an act with intent or by negligence and causes damage for which the claimant should get compensation. The consumer who, in this case, is a victim shall file a claim within 3 years after knowing that the act caused damage or 10 years after a tort commission.

There is no guideline on a calculation of the amount of compensation provided to the victim. However, besides generally accepted compensation for physical damage or medical treatment fee, there are other factors for calculation. One of which is the contributory fault of the victim consumer.

Of many factors, CC allows joint liability and contributory fault of the consumer. Therefore, if the consumer is at fault as well, the amount of the compensation to the victim might be deducted from the victim. Subject to further study, this might allow a share of compensation from influencer due to misrepresentation or informative exaggeration in the process of marketing to make sale happens.

After compensation is granted, the victim might still get a return of money for the wrong product delivered by the seller. It is clear for a buy-sale contract. However, there is no found obstacle for applying this to a tort act given that tort liability is one of the civil liability branches. It is an interest of law and justice and such an expansion of legal construction does not offend the principle of separation of powers.

Furthermore, although there are no provisions on a cooling-off rule or details of how that kind of rule is applied, such rule can be possible and relevant since the civil affair is an individual issue and based on individual autonomy. Therefore, it might depend on an agreement after negotiation on the refund for the wrong product that the consumer obtained.

The Civil Code provides consent or assumption of risk by victim consumer as a possible excuse for not being liable by a seller. It is also applicable and can be raised by a civilly liable seller. In addition to arguments on confirming refunding to online sale without contract mentioned at the top of this page, tort defenses here are provided as generally for all types of tort liabilities except provided clearly in each type of liability clause. What remains to be settled by future judgments of courts is whether defenses of „consent of victim or assumption of risk“ are complete or partial defense.

V. Conclusion

The review of relevant laws, including the Criminal Code, the Criminal Procedure, Civil Code, and the Law on Protection of Consumer, on the liability of online sellers and other legal aspects, revealed that online sellers might be both liable for tort act or criminal offense. The reparation for tort act is broad, and not precise. The reparation for a criminal act, including restitution, which is stipulated, might be used to order the online sellers to pay back buyers of the defective product.

There remains uncertainty about the burden and standard of proof applied in the consideration of liability. The discussion in this paper referred to laws and practices of some jurisdictions to help resolve when legal issues arise.

The gap or uncertain issue found as mentioned above is not of substance, which requires new laws or regulations. To sum up, as having done in the past, the Supreme Court or the Ministry of Justice should provide instruction on the burden and standard of proof so that the court can take them into account for reasoning, in addition to referring to the practices of foreign jurisdictions.



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Information is significant only when such information is useful in safeguarding consumers' interests.

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CHAPTER 05

Pre-contractual Information Disclosure: What can Cambodia Learn from the European Union?

Chhoun Morokoth

Disclaimer: This study was completed before the Ministry of Commerce adopted the Prakas on Consumer Information Standard on August 31, 2021. Therefore, the analysis and discussion in this work are based on the facts available at the time.

Abstract

The European Union (EU) has one of the world's most robust regulations on consumer protection in electronic commerce (e-commerce). This article aims to analyze how Cambodia can learn from the EU model in developing its pre-contractual information standard for consumer protection in e-commerce. First, this paper introduces the importance of information disclosure for consumers. Second, this research provides an analytical framework on pre-contractual information disclosure relevant to e-commerce in the EU and Cambodia. Since the EU serves as a benchmark for comparison, the potential challenges faced by the EU and the strategies in

overcoming those challenges are examined. Finally, this paper recommends the transposition of the best applicable practices of the EU to Cambodia's regulatory framework. Since Cambodia is undergoing a shift toward digital marketplaces, the findings of this article seek to identify and promote effective measures to protect consumers' rights in e-commerce in Cambodia.

I. Introduction

The growth of electronic commerce (e-commerce) has triggered a lot of countries to review and revise their legislations in order to keep up with the market development and afford sufficient protection to consumers. While e-commerce offers many benefits including a convenient and flexible shopping environment, it also places consumers in a vulnerable position, especially if consumers are not well informed. In making an informed purchase, consumers need clear, sufficient, and accurate information. In a brick-and-mortar environment, consumers are able to communicate with the traders and examine the products physically before making any purchase. However, in the e-commerce context, consumers heavily rely on the information that businesses disclose to them. This instance poses a challenge for consumers by creating obstacles, notably limiting consumers' ability to carefully examine the products or the identity of traders. In another scenario, if the information is disclosed to consumers in a language that they cannot understand, such information is not helpful. Hence, disclosing sufficient information conforming to consumers' abilities and needs are key factors in protecting consumers.

Information disclosure and transparency rules are crucial considerations to improve consumer protection, both in an offline and online setting. Consumer laws are adopted to counter the imbalance in the bargaining positions between consumers and traders.¹ Economists believe that information asymmetry may lead to market failure.² In theory, information disclosure at the pre-contractual stage has its benefits as it minimizes market interference and promotes private autonomy. The rule on information disclosure does not interfere much with the market, contrary to other rules on business obligations, such as acknowledging mandatory consumer rights or remedies.³ For example, it is less burdensome for businesses to provide information about the products or services that they are offering in the market than to afford consumers the withdrawal rights or other substantive rights. Concerning the promotion of private autonomy, information disclosure allows consumers to act effectively on their own which in turn results in the promotion of self-determination.⁴ For these reasons, equipping consumers with information before they are bound by a contract is believed to be very beneficial.

This research aims to promote a better understanding of pre-contractual information disclosure by learning from the EU. The EU is chosen as a benchmark due to its hallmark provisions concerning pre-contractual information duties for businesses in both offline and online settings. At the same time, this research seeks to improve the knowledge and awareness of stakeholders in Cambodia, including consumers, about what to be careful about when engaging in e-commerce transactions. In the following parts, this paper will examine and compare the legal framework governing pre-contractual information disclosure in Cambodia and the EU. Building on the

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1. Weatherill Stephen, Justifying Limits to Party Autonomy in the Internal Market, in *Party Autonomy and the Role of Information in the Internal Market: An Overview*, 180 (Grundmann Stefan et al. eds., 2001).
 2. George A. Akerlof, The Market for Lemons: Qualitative Uncertainty and the Market Mechanism, *Quarterly Journal of Economics*, 488, 488-500 (1970).
 3. Busch Christoph, The Future of Pre-Contractual Information Duties: From Behavioral Insights to Big Data, in *Research Handbook on EU Consumer and Contract Law*, 222 (Twigg-Flesner Christian, ed., 2016).
 4. Hans-W Micklitz, et al. eds., *Cases, Materials and Text on Consumer Law*, 215 (2010).

assessment, this research will highlight the challenges faced by the EU and the methodologies that the EU has adopted in improving its rules on pre-contractual information disclosure. Finally, this research will offer some recommendations for Cambodia.

II. Analysis framework on pre-contractual information disclosure

This section provides an overview of the legal framework relevant to pre-contractual information disclosure in e-commerce in Cambodia and the EU. This research is not a place for the discussion of sector-specific laws as it only seeks to analyze the general consumer protection laws.

The basis of consumer protection in Cambodia is embedded in the Constitution of the Kingdom of Cambodia which imposes a ban and penalty on persons who import, manufacture, and sell drugs, counterfeits, or expired goods that harm the health or lives of consumers.⁵ Building on this framework, the Cambodian government has enacted other general and sectorial laws aiming to safeguard consumers' interests. In late 2019, Cambodia adopted the Law on Consumer Protection and the Law on Electronic Commerce in Cambodia. Due to the recent enactment of these laws, many of their provisions are still untested and subject to further clarifications by the competent regulator. Moreover, some implementing regulations are still being drafted.

Unlike Cambodia, consumer protection has long been rooted in the European legal framework. According to the Treaty on the Functioning of the European Union, the EU is obliged to enhance consumers' health, safety, and economic interests, and promote their right to information and education, and to organize themselves to protect their interests.⁶ The EU has many general and sectoral legal frameworks governing consumer protection which are frequently being adapted and reviewed in order to keep up with the development of the marketplace and technology.

The discussion of this section begins with the EU's legal framework so as to compare whether the existing Cambodian legal framework is sufficient, and if not, this research will pinpoint the insufficiencies.

1. Framework on pre-contractual information disclosure of the European Union

The EU has one of the world's most robust rules on consumer protection. Information duties serve as the standard staple of consumer protection in the EU.⁷ In the EU, pre-contractual information disclosure for e-commerce is regulated under the Consumer Rights Directive (CRD) and the Electronic Commerce Directive. The CRD mandates different information requirements for different types of contracts. Under the CRD, the electronic contract falls under the definition of a distance contract. Accordingly, a distance contract refers to any contract which is entered into between the trader and the consumer under the organized distance sales or service-provision scheme without the simultaneous physical presence of both parties with the exclusive use of the distance communication methods until or at the time of contract conclusion.⁸ The CRD provides formal and substantive information requirements.

5. Article 64, The Constitution of the Kingdom of Cambodia (1993).

6. Article 169, The Treaty on the Functioning of the European Union (2012).

7. Omri Ben-Shahar & Bar-Gill, *Regulatory Technique in Consumer Protection: A Critique of European Consumer Contract Law*, 50 *Common Mkt. L. Rev.* 109, 110 (2013).

8. Article 2(7), Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

Concerning formal requirements, businesses have to provide or make the information available to consumers in a manner that is appropriate to the methods of communication, provided that such information has to be in plain and intelligible language.⁹ If the information is given on a durable medium, such information has to be legible.¹⁰ Durable medium refers to any instrument which allows consumers or traders to store and access the information for future reference at a period sufficient for the purpose of the information and which enables unchanged reproduction of the stored information.¹¹ Simply put, online businesses have to provide information that consumers can use and refer back to.

As to the substantive requirement, in a clear and compressible manner, businesses have to provide consumers very extensive information before a consumer is bound by the contract.¹² The information required by the CRD ranges from simple to complicated information, which amounts to 20 items in total. The information mandated includes details about the goods or services, the trader, price information, consumer rights and guarantees, payment and delivery details, contract details, interoperability of digital content, and consumer redress.¹³

On the other hand, the Electronic Commerce Directive provides two key provisions concerning electronic contracts: the provision on general information and the provision on information for contracts concluded by electronic means. As to the general information, the trader must provide easily, directly, and permanently accessible information to consumers and the competent authorities.¹⁴ Such information must include at least the information and contact details of the trader, and if applicable information regarding the trade register, supervisory authority, value-added tax, and regulated professions.¹⁵ Moreover, if the trader discloses the price, such information must be clear and unambiguous, particularly if the price includes any taxes or delivery fees.¹⁶

As a contract is concluded electronically, the trader has to provide the information on the technical steps for contract execution, the possibility of having access to the contract, the technical means to correct any error, and the language of the contract.¹⁷ The trader has to provide this information in a clear, comprehensible, and unambiguous manner before consumers place the order.¹⁸ Where applicable, the trader has to disclose if he or she complies with any voluntary code of conduct and where consumers can have access to the code.¹⁹ Furthermore, the trader has to make the contract terms and general conditions available for consumers to store and reproduce.²⁰

9. Id.

10. Id.

11. Id. Article 2(10).

12. Id. Article 6(1).

13. Id.

14. Article 5(1), Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Electronic Commerce Directive).

15. Id.

16. Id. Article 5(2).

17. Id. Article 10(1).

18. Id. Article 10(2).

19. Id. Article 10(3).

20. Id.

2. Framework on pre-contractual information disclosure in Cambodia

Every consumer transaction builds on the law of contract. Cambodia does not have a specific law on consumer contracts. The current contract law is under the Cambodian Civil Code (Civil Code). Under the Civil Code, a seller must provide a clear explanation to a buyer regarding the buyer's obligations and the legal circumstances surrounding the sales.²¹ In addition to this obligation, online businesses have to comply with the Law on Consumer Protection and the Law on Electronic Commerce concerning information disclosure when engaging in e-commerce in Cambodia.

The Law on Consumer Protection affords consumers the right to information and imposes the obligation to provide information on persons who conduct business, supply, promise to supply, or advertise the supply of goods or services.²² The law requires that the competent regulator establishes the Ministerial Regulation on Information Standard. To date, such ministerial regulation is not yet in place. However, Article 27 of the Law on Consumer Protection provides a sample of information standards which the competent regulator can refer to when formulating the ministerial regulation. In short, the information standard can include details of the goods or services, the methods to obtain such information and how it is advertised, or the minimum information required for e-commerce.²³ Moreover, written information must include Khmer language.²⁴ While this sample can be a promising guide, it does not specify the timeframe as to when the information must be disclosed to consumers.

On the other hand, the Law on Electronic Commerce provides minimum information that businesses have to provide to consumers. In an accurate, clear, and intelligible manner, the minimum information includes (1) the name of the business, its registered business address, and electronic contact or telephone number, (2) a quick, easy, and effective communication form for consumers and sellers, (3) terms, conditions, and fees of the goods or services, including payment methods and detailed information concerning withdrawal or cancellation of the order, termination, return and exchange of goods, and refund, and (4) the actual goods or services offered.²⁵ This information must be sufficient for consumers to make a commercial transaction and to store it as a record.²⁶ The information under this article can be interpreted as pre-contractual information or other information which is disclosed at the subsequent stage. By interpreting literally, the information is considered as pre-contractual information because at the pre-contractual stage, consumers need sufficient information before they decide to make any purchase. The information under Article 29 can be categorized as having a mandatory nature, which means that businesses have to disclose the prescribed information to consumers in an e-commerce context. In short, online businesses have to refer to these laws when formulating information disclosure for consumers.

A summary of the legislative framework in the EU and Cambodia is as follows:

21. Article 529, The Civil Code of the Kingdom of Cambodia (2007).

22. Articles 4(6), 23, & 24, Royal Kram No. NS/RKM/1119/016 of 2 November 2019 promulgating the Law on Consumer Protection.

23. Id. Article 27(1).

24. Id. Article 27(2).

25. Article 29(1), Royal Kram No. NS/RKM/1119/017 of 2 November 2019 promulgating the Law on Electronic Commerce.

26. Id. Article 29(2).

European Union	Cambodia
Consumer Rights Directive	Law on Consumer Protection
<p><i>Formal requirements</i></p> <ul style="list-style-type: none"> ● The information is made available in an appropriate form. ● The information on a durable medium must be legible. <p><i>Substantive requirements</i></p> <ul style="list-style-type: none"> ● The information is disclosed in a clear and comprehensible manner. ● There are 20 items of information. 	<p><i>Ministerial Regulation on Information Standard (not yet established)</i></p> <ul style="list-style-type: none"> ● The trader has to disclose details of the goods or services, methods to obtain such information, how the information is advertised, or the minimum information required for e-commerce. ● Written information must be in Khmer language.
Electronic Commerce Directives	Law on Electronic Commerce
<p><i>General information</i></p> <ul style="list-style-type: none"> ● The information must be easily, directly, and permanently accessible to consumers. ● There is a list of minimum information for traders to comply with. ● If traders disclose the price, the information must be clear and unambiguous. <p><i>Information for the contract concluded electronically</i></p> <ul style="list-style-type: none"> ● Traders have to provide information on the technical steps to conclude the contract, the possibility of having access to the contract, technical means to correct any error, and the language of the contract. ● Such information must be clear, comprehensible, and unambiguous before consumers place the order. ● If a trader is bound by any code of conduct, he/she has to disclose such information. ● Contract terms and conditions must be made available for consumers to store and reproduce. 	<p><i>Minimum information includes</i></p> <ul style="list-style-type: none"> ● the name of the business, its registered business address, and electronic contact or telephone number, ● a quick, easy, and effective communication form for consumers and sellers, ● terms, conditions, and fees of the goods or services, including payment methods and detailed information concerning withdrawal or cancellation of the order, termination, return and exchange of goods, and refund, and (4) the actual goods or services offered. <p><i>This information must be sufficient for consumers to make a commercial transaction and to store it as a record.</i></p>

III. Potential challenges faced by the European Union

Despite the comprehensive and straightforward framework for pre-contractual information disclosure, many scholars and researchers have consistently highlighted the potential problems of the EU framework. From the analysis, the EU adopts a mandatory technique that requires businesses to disclose the prescribed information to consumers. For instance, online businesses have to comply with the CRD and the Electronic Commerce Directive when operating e-commerce in the EU. This technique resonates with the traditional belief that the more information consumers have, the better they can act.

Contrary to this stance, behavioral researches suggest that that human cannot deal with too much information.²⁷ In other words, people function on two different systems when making any decision. System 1 works automatically, quickly, and unconsciously, whereas System 2 is rather reflective and deliberative, and operates slowly.²⁸ Daily, most people function on System 1 due to cognitive and psychological biases.²⁹ Moreover, consumers have different levels of literacy and numeracy resulting in bounded attention and bounded rationality.³⁰ If consumers can neither use nor understand the information disclosed to them, such information is useless. For example, consumers tend to agree to terms and conditions without carefully examining their contents. As a result, this practice evidences the need to reduce the amount and complexity of information.

The fact that consumers do not read the information carefully is not surprising and there are different reasons for it. They either cannot find the information, underestimate the value of information, or are overloaded with information.³¹ When the number of information is excessive, some important information may be hidden in the lengthy text. Moreover, the information may be beyond the understanding or interest of consumers.³² Even if consumers read the information, they may not understand or misinterpret the information due to the complexity of the language and the limitation of their cognitive abilities.³³ As to cognitive limitation, the research found that an average person can only receive, process, and remember about six to seven pieces of information at a time.³⁴ Moreover, even if consumers can find and read the information, they might find the information not helpful and act due to their cognitive biases.³⁵ Additionally, consumers may not act as expected or originally intended by the legislature when drafting the law.³⁶ This problem occurs because the mandated information is not necessarily within consumers' interests.³⁷

In the EU, the European Commission (EC) has evaluated the CRD. The result demonstrates that the current regime concerning pre-contractual information disclosure can be problematic. There are some overlapping requirements and inconsistencies between the CRD and the Electronic Commerce Directive. As the provisions of the CRD are an addition to those of the Electronic Commerce Directive, one can imagine the amount of information disclosed before consumers. With many pieces of information, consumers can be overloaded and confused making them unable to process the information.³⁸

In short, at its inception, the rules on information disclosure aim to level consumers' positions with those of the traders. However, if consumers cannot make use of such information, they are

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27. George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 *PSYCHOL. REV.* 81, 95 (1956); Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information* 32 *J. L. & SOC'Y* 349, 360 (2005).
 28. See Daniel Kahneman, *Thinking, Fast and Slow*, (2011).
 29. Busch Christoph, *The Future of Pre-Contractual Information Duties: From Behavioral Insights to Big Data*, in *Research Handbook on EU Consumer and Contract Law*, 226-227 (Twigg-Flesner Christian, ed., 2016).
 30. Omri Ben-Shahar, & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure*, 79-93 (2014).
 31. *Id.* at 40; Natali Helberger, *Form Matters: Informing Consumers Effectively*, *IViR* 9 (2013).
 32. Bar-Gill and Ben-Sharhar, *supra* note 7 at 110.
 33. Helberger, *supra* note 31 at 14.
 34. Miller, *supra* note 27 at 90.
 35. Davide Arcidiacono, *Consumer Rationality in a Multidisciplinary Perspective*, 40 *J. Socio. Econ.*, 516, 516-522 (2011).
 36. Helberger, *supra* note 31 at 13-14.
 37. Alecia M. McDonald & Tom Lowenthal, *Nano-Notice: Privacy Disclosure at a Mobile Scale*, 3 *Journal of Information Policy*, 331, 349 (2013).
 38. European Commission, *Evaluation of the Consumer Rights Directive*, SWD (2017) 169 final, 47.

not sufficiently protected and potentially exposed to the risk of being misled or harmed. Over the years, there are a growing number of researchers suggesting other alternative methods to the mandatory information disclosure technique. These alternatives will be discussed in the following section.

IV. The European Union's strategies in overcoming the challenges

Upon criticizing the mandatory disclosure of pre-contractual information, scholars have suggested some alternatives. Effective consumer information depends on a few factors such as how consumers collect, process, and use the information. According to behavioral researchers, the alternatives to mandatory disclosure are to simplify and standardize the form of information.³⁹ Simplification can be done through the reduction of information and the improvement of the presentation of information.⁴⁰

The interests of consumers and legislatures may differ. As previously mentioned, there are some instances where the legislature falsely believes that certain information is of consumers' interest. To counter this problem, the use of behavioral experiments to observe consumers' needs and interests should be conducted. Behavioral insights are relevant to consumer laws for two reasons. First, consumer law focuses on the behavior of consumers making cognitive psychology directly relevant to the law.⁴¹ Second, consumer law is paternalistic because it seeks to prevent consumers from making bad decisions and offer remedies when they do.⁴² In line with this stance, the EC has dedicated profound efforts in incorporating insights from behavioral research in protecting consumers which can be seen through various studies on consumer behavior.⁴³

Additionally, scholars have suggested simplifying the information which can be done by reducing the information and/or improving the way the information is presented. However, in the CRD evaluation, the EC does not support the reduction of information.⁴⁴ The EC argued that the criticism is not sufficient since the stakeholders cannot put forward what information should be reduced.⁴⁵ Rather the EC supports that the presentation of information can better assist consumers.⁴⁶ As a result, a sub-group was established to continuing working on enhancing the presentation of pre-contractual information.⁴⁷ According to the European Economic and Social Committee, information can be simplified by focusing on the quality but not the quantity of the information.⁴⁸ For instance, detailed information can be disclosed by referencing via digital links.

39. George Loewenstein, et al. Disclosure: Psychology Changes Everything, 6 *Annu. Rev. Econ.* 391, 405-410 (2014).

40. *Id.*

41. Eva Maria Tscherner, Can behavioral research advance mandatory law, information duties, standard terms and withdrawal rights? *ALJ* 144, 145.

42. Anne-Lise Sibony & Geneviève Helleringer, EU Consumer Protection and Behavioral Sciences: Revolution or Reform? in *Nudge and the Law: A European Perspective*, 211 (Alberto Alemanno & Anne-Lise Sibony eds. 2015).

43. See the research results at https://ec.europa.eu/info/policies/consumers/consumer-protection/evidence-based-consumer-policy/behavioural-research_en.

44. European Commission, *supra* note 38 at 38.

45. *Id.* at 38.

46. *Id.*

47. *Id.* at 67.

48. Bernardo Hernandez Bataller & Alberto Mazzola, *Information Report* (2017), ¶15.2(i).

Presenting the information in a standardized manner helps appealing information to consumers.⁴⁹ Using a standardized form, icons, or logos are among the methods to improve the presentation of information.⁵⁰ While this idea sounds convincing, stakeholders suggested that the use of model form, icons, or logos should be promoted but not mandated because such requirement if clearly specified under the law may not be able to keep up with the development of technology and may be difficult to implement.⁵¹ Moreover, the result indicates that using icons has little impact on consumers' ability to process information.⁵²

In its report on the Fitness Check of EU consumer and marketing law, the EC recognized the problem of information overload and the importance of behavioral insights in providing relevant information to consumers.⁵³ The timing of disclosure is also important in protecting consumers since consumers may not place equal importance on every piece of information. For example, consumers may not be interested in knowing the address of the trader before they make a purchase. Such information may be more relevant after consumers purchased in the event that they want to return the products. This issue implies the need to focus on providing the information at the right time when consumers find them most relevant to their purchasing decision. In the telecom sector, the EU has rightly recognized the importance of providing information in a timely manner and in the right context. In this case, the operators have to send the information regarding roaming charges by text message every time the roaming options are used.⁵⁴

V. Conclusion and lessons learned for Cambodia

The traditional belief that consumers can act better with correct and adequate information is not entirely wrong. However, the length and complexity of information that builds up over time may cause potential problems for consumers when they cannot understand or adequately make use of the information. Cambodia and the EU have put tremendous efforts into ensuring that consumers are protected when they engage in commercial transactions regardless of whether they shop in a brick-and-mortar store or online. This research subscribes to the view that consumers' behaviors and marketplaces are constantly developing; hence, there is a need to keep the laws up to date.

1. Use of behavioral insights

To better protect consumers, the legislature should consider the genuine needs of consumers and how they act and transact in the marketplaces. In the EU, insights from behavioral studies insights are used to assist policymakers in understanding how consumers process and use information. Since 2008, the EC has been applying behavioral insights to consumer policy. For example, the 2014 Recommendation on Online Gambling Services suggests that member states provide ongoing support for players by way of information alerts about winnings and losses

49. Omri Ben-Shahar, The Myth of the 'Opportunity to Read' in Contract Law, John M. Olin Program in Law and Economics Working Paper No. 415, 1, 13 (2008).

50. Civic Consulting, Study for the Fitness Check of EU Consumer and Marketing Law: Final Report Part II, 226 (May 2017).

51. Id.

52. European Commission, *supra* note 38 at 55.

53. Civic Consulting, Study for the Fitness Check of EU Consumer and Marketing Law: Final Report Part I, 169 (May 2017).

54. Article 14(1), Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union.

while playing and to take time out from gambling.⁵⁵ Specifically for e-commerce, the OECD Recommendation of the Council on Consumer Protection in E-commerce aims to combat drip pricing and hidden cost on top of suggesting the use of behavioral insights when formulating e-commerce policy.⁵⁶

Cambodia should adopt the same method so as to learn the behavior of consumers in the marketplaces when formulating any consumer policy, particularly the forthcoming Ministerial Regulation on Information Standards, among others. A correct understanding of consumers' needs would be beneficial for the legislatures to put in place regulations that are effective in safeguarding consumers' interests. The study on behavioral insights can be conducted in, but not limited to, the form of experiments or surveys. By allowing consumers to express their voices and concerns, the legislatures would find it easier in tackling the existing consumer's problems and prevent future threats. Regardless of the advantages, there might also be some notable challenges including limited resources and times. This research suggests that if conducting surveys or experiments is beyond the current capability of the competent regulator, the first step for Cambodia would be the use of the existing findings from behavioral insights in other countries as previously discussed.

2. Simplified information

The simplification of information can be done through the reduction in the length and complexity of information and the improvement of the presentation of information, among others. At present, the EU has not shown its position in reducing the number of information but is focused on improving the presentation of information. The Recommendations for a better presentation of information to consumers which aims specifically at online transactions provides some suggestions concerning how to better disclose information to consumers. On top of providing all mandatory information pursuant to the general or sectorial consumer laws, traders should provide the information at the different stages of purchase in a clear and comprehensible manner.⁵⁷ The design of information should enable consumers to easily find the information despite the different devices used such as a desktop or mobile phone.⁵⁸ Moreover, traders can also use a layered approach which means that each layer of information contains more details than the previous one.⁵⁹ Other techniques such as the use of legible font size and color, the method in highlighting important terms, the use of symbols or tables can also enable consumers to comprehend the information better.⁶⁰

This research suggests that the Cambodian legislature can work on reducing the number of information as well as simultaneously improving its presentation, without compromising on the essentials. Improving the disclosure of information can be done by following the methods described in the previous paragraph. While the reduction of information does not mean the

55. European Commission, Study on online gambling and adequate measures for protection of consumers gambling services, March 2014; European Commission, Online gambling: Commission recommends principles to ensure effective protection of consumers, July 2014.

56. Organization for Economic Co-operation and Development, Recommendation of the Council on Consumer Protection in E-commerce, March 2016.

57. Recommendations for a better presentation of information to consumers (July 2019), 4.

58. Id.

59. Id.

60. Id. at 5.

elimination of important information, rather the technique focuses on providing concise information that is relevant to consumers' decision to purchase. Together with the result or study from behavioral insights, Cambodian competent regulators can establish the binding regulations or soft instruments where it is difficult to create the binding regulations. For example, information related to how consumers can report a problem or file a complaint can be incorporated in a simple heading like "Reporting a problem," while information concerning the traders can be entitled as "About the trader."⁶¹ If the information has a significant impact on consumers' decisions, such information can be repeatedly shown to consumers.⁶² For example, the information about extra delivery costs or any tax payment should be made clear to consumers and not hidden among other text.

This paper concludes that information is important for consumer decision-making. However, there are cases where less can be more for consumers. The information works only when it is relevant to consumers' interests and enables consumers to understand and use such information appropriately and to their advantage. While information disclosure as a tool carries good intention, there is a need to recognize its limitations and appreciates the realistic behaviors of consumers in the marketplaces. This research acknowledges the importance and growth of e-commerce which will have to underpin any effort by the legislature to assess and address future requirements on information disclosure. Due to the limitation of knowledge and time, this research can only focus on broader aspects of the general laws; further research could look into the sectoral laws as well as the implementing regulations which will come into force in the future. That notwithstanding, it is hoped this study will promote a better understanding of the rules governing consumer protection in e-commerce in Cambodia.

61. Helberger, *supra* note 31 at 24.

62. Ofcom, *A Review of consumer Information Remedies*, March 2013, 47.

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*The right
to change
your mind?
The right of
withdrawal.*

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CHAPTER 06

The Adoption of the Right of Withdrawal as a Mechanism to Protect Consumer in Electronic Commerce: Lessons Learned from the European Union Legal Framework

Sous Monirida

Abstract

After purchasing a product or service, some consumers may experience buyer's remorse as they neither want nor satisfy what they just purchased. With respect to this, consumers are even more hesitant to engage in online transactions since they are not aware of who the sellers are and what they are buying. Recognizing the ambiguity consumers face in online transactions and the impulsive trait of electronic commerce, many countries adopted various measures to safeguard consumers' rights including the right of withdrawal. The right of withdrawal allows consumers to revoke their contracts within a certain period after purchasing without being penalized. The right of withdrawal attempts to enhance consumer bargaining power in connection to irrational behavior and asymmetric information. The concept of the right of withdrawal, however, does not exist in Cambodia. Therefore, this paper aims to address the gaps of Cambodian law by comparing it with the right of withdrawal framework in the European Union and recommends

adopting the right of withdrawal as a mechanism to strengthen consumer protection in electronic commerce in Cambodia.

I. Introduction

Imagine you order a dress from a website. After delivery, you find the dress's length does not fit your preference. You wish to return them, but the seller says purchased products cannot be returned. When consumers cannot return products and get a refund, it could significantly affect consumers' rights. This situation occurs frequently in online transactions in Cambodia. As the majority of online businesses offer products to consumers "from a distance" without practically seeing sellers or objects of the transaction, e-consumers cannot inspect the products as if they would do in physical shops. When purchasing, consumers rely heavily on images, descriptions, or peer reviews which could produce information asymmetry. In addition, e-commerce has an impulsive nature, and consumers are led by their emotions rather than rational decisions when purchasing goods in a hot mental state.¹

To tackle this issue, different countries have adopted the right of withdrawal², known as the cooling-off rule, which permits consumers to cancel their contract within a certain period without justification after receiving the goods or services. The cooling-off rule, as its name suggests, allows consumers to cool down to reevaluate their purchase.³ The rationale of this rule is to reassure that consumers are not in a disadvantaged position when opting for electronic commerce (e-commerce).⁴ Nonetheless, the cooling-off is also arguably contradicted the principle of *Pacta Sunt Servanda*⁵ and freedom of contract.⁶

In Cambodia, however, there are no provisions equivalent to the concept of the right of withdrawal for online consumer contracts although the laws are in place. Buyers generally can legally revoke the sale contract unless there is a defective declaration of intent, non-conformity of goods, faulty products, or unscrupulous practices by sellers. Nevertheless, consumers, who buy products through non-negotiable terms on a website, may have difficulty proving their purchase falling under any of these conditions.

In the absence of the right of withdrawal, online consumers are exposed to additional risks not to mention they conclude the contract without seeing the traders and inspecting products. In response to the growing numbers of online consumers and the loophole of the laws, the study advocates for the right of withdrawal as a catalyst to enhance consumer protection in e-commerce in Cambodia. The introduction of the right of withdrawal should be carefully considered to avoid potential drawbacks on businesses and consumers. The finding of this research also aims to assist the policymakers in dealing with problems arising out of e-commerce concerning consumer protection in their agenda.

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1. Colin Camerer et al., "Regulation For Conservatives: Behavioral Economics And The Case For Asymmetric Paternalism," University of Pennsylvania Law Review 151, (2003): 1238.
 2. The right of withdrawal and cooling-off rule will be used interchangeably throughout the paper.
 3. Colin Camerer et al., "Regulation For Conservatives," 1239.
 4. Racheller Andrew, "Electric commerce: lessons Learned from the European Legal Model," Intellectual Property Law Bulletin 9, (2005): 92.
 5. *Pacta Sunt Servanda* means agreement must be kept.
 6. Loos Marco, "Right of Withdrawal," in *Modernizing and Harmonizing Consumer Contract Law*, ed. Geraint Howells and Reiner Schulze, (Sellier European Publishers, 2009), 241.

II. Overview of the Legal Frameworks and the Practices in E-Commerce in Cambodia

The three main legal frameworks governing consumer contracts in Cambodia are the Civil Code of Cambodia (CCC), the Law on Consumer Protection, and the Law on E-commerce. This section explains how these laws do not provide adequate protection to e-consumers as the required conditions are hard to prove, and consumers mostly do not want to pursue civil litigation for a small amount.

Under CCC, the party can terminate the contract when a defective declaration of intent exists. Declaration of intent is a defect when the declaration of intent is made as to the result of (1) mistake, (2) other party's fraud, duress, or misrepresentation, or (3) other party's act to exploit the situation to obtain excessive profits.⁷ However, e-consumers may have difficulty proving the requirements. For example, parties can terminate the contract if the party makes a mistake on the substantial terms of the contract and the other party could have been aware of such a mistake.⁸ As consumers and traders are physically distant during contract conclusion, they can miscommunicate on essential terms. As a result, they cannot apply the mistake to terminate the contract.

Apart from the defective declaration of intent, sellers are obligated to deliver a non-defective object to buyers. The objects are considered as defective if (1) the objects do not conform to the quantity, quality, and description required by the contract (2) objects differ from that the quantity, quality, and or description (3) objects do not fit the particular purpose expressly or impliedly made known to the buyer when the contract was executed (4) objects do not fit to the purpose for which object of the same description would ordinarily be used (5) objects are not contained or packaged in the manner usual for such object or in a manner adequate to preserve and protect the object.⁹ After acquiring the products, consumers may find it hard to prove the product is originally defective, especially electronic products. Additionally, if buyers are not aware of such defects as a result of negligence, sellers do not bear any liability.¹⁰ CCC also provided a rule that a seller will take responsibility where a subject matter of a contract is destroyed, lost, or damaged without the fault of the seller.¹¹ Take the above scenario as an example, consumers cannot revoke the contract merely because the dress's length does not fit his/her preference as it does not constitute destruction, loss, or defective products required by the law.

The Law on Consumer Protection and the Law on E-commerce, on the other hand, are the recently enacted laws to specifically address consumer rights and the substantial growth of the digital economy in Cambodia. The practicality of the laws is still under observation given the ambiguous terms, limited capacity of regulators, and long-arm jurisdiction. The Law on Consumers Protection guarantees consumers protection and regulates unfair trading activities and practices such as misleading, deceptive advertisement, unfair solicited sales, and pyramid schemes; However, the right of withdrawal is nowhere to be seen in the law.¹² The Law on

7. Cambodian Civil Code, Art. 345.

8. CCC, Art. 346.

9. Ibid, Art. 539 (2).

10. Ibid, Art. 540.

11. Ibid, Article 419

12. Law on Consumer Protection, Chapter 4 and chapter 5.

E-commerce, on the other side, devotes the whole chapter six to consumer protection which imposes an obligation to online traders to disclose necessary information that allows consumers to purchase the goods or services. The traders are further required to protect consumer's data and are prohibited from sending unsolicited communication without clear information.¹³ As such, consumers are required to prove such unfair practices conducted by traders and the breach of obligation of traders to legally cancel the contract.

In the absence of a legally recognized right of withdrawal, market practices are varied. Some businesses prohibit the consumer's right of withdrawal by putting a notice on their webpage that "the purchased products cannot be canceled." Having said that, some foreign-based companies voluntarily provide the cooling-off period to Cambodian consumers such as Decathlon, Pedro, Charles&Keith, and Zando. Decathlon allows e-consumers to cancel the purchased product through a form that is placed under the Exchange and Refund policy section, instead of the Term and Condition section.¹⁴ On the contrary, Cambodia-based businesses provide cooling-off in the term and condition which is long and complicated, and such right is subject to ambiguous and unreasonable condition. For instance, the I-Quick company allows consumers to return the products only if there is defective. If several conditions are not met, the company will fix them under warranty, but they will not change a new one for consumers.¹⁵ These terms are put as a marketing technique to attract consumers while it is supposed to be the trader's obligation. Currently, the Covid-19 pandemic has dramatically shifted Cambodian traders and consumers from brick-and-mortar to online shops and generate a new sale technique so-called "Live sale." For Live Sale, buyers watch the sellers showing the product with its mere description and then drop their phone number and location if they want to make a purchase. The products are sold based on the principle of first come first serve, causing competitiveness among consumers which induces them to buy without rational thinking.

III. The framework of the cooling-off rule in the European Union

The right of withdrawal is enshrined in the Consumer Right Directive ("CRD") that was established to harmonize inconsistency of legislation on consumer rights among member states on the doorstep selling and distance selling directive.¹⁶ The withdrawal right was firstly applied for doorstep selling contracts and gradually expanded to cover contracts involving timeshare, distant selling, life insurance, distance marketing of financial services, and consumer credit.¹⁷ The justification policy of the withdrawal right is to protect consumers against psychological pressure and informational deficits consumers receive when concluding the contract.¹⁸

The element of the cooling-off rule

The study examines the application of the right of withdrawal in e-commerce focusing on the condition and exemption, the length of the cooling-off period, the return, and the refund arrangement.

13. Law on E-commerce, Chapter 6.

14. "Exchange and Refund," Decathlon, Accessed August 15, 2020, <https://www.decathlon.com.kh/page/exchange.html>

15. "លក្ខខណ្ឌស្តីពីការទិញទំនិញរបស់ក្រុមហ៊ុន អាចគ្រឹកតាមអនឡាញ," I-Quick, Accessed August 15, 2020, <https://www.i-quick.com/km/terms-and-conditions/>

16. CRD, Recital 20, "In the EU, the online contract is a part of the distant selling contract which is now under the CRD."

17. Jonathon Watson, "Cooling-off period," in Research handbook on EU consumer and Contract Law, ed. Christian Twigg-Flesner, (Edward Elgar, USA: 2016), 242-243.

18. Ibid, At 244.

1. The length of the cooling-off period

Initially, the cooling-off period in the Distant Selling Directive is 7 working days. However, the 7 days was condemned for being too short for complicated contracts while the proposed two weeks period was criticized as being too long which can lead consumers to make opportunistic use of their rights.¹⁹ To achieve the uniform period of all contracts, CRD opts for 14 calendar days cooling-off period.²⁰ Furthermore, the change of length from 7 working days to 14 calendar days is to ensure legal certainty in member states due to different national holidays and varying lengths depending on contract types.²¹

The cooling-off period starts differently depending on the characteristic of goods or services. It starts after the conclusion of the contract for the service contract, and after consumers acquire physical possession of the goods for sale contract.²² Nevertheless, the starting time of the cooling-off period becomes a question when consumers buy a fridge (good) with installation service (service).²³

2. Pre-contractual information obligation

To allow consumers to benefit from the cooling-off, the traders have to provide consumers the pre-contractual information such as the description of goods or services, identity and contact of traders, total price, a contract detail, and the cooling-off period.²⁴ The failure to inform consumers of the withdrawal right results in the prolongation of the cooling-off period to 12 months.²⁵ Hence, the cooling-off period starts to run only after traders inform consumers of their withdrawal right.

3. Exercise of the right of withdrawal

Consumers have to inform traders of their decision to withdraw within the cooling-off period through the standard withdrawal form or any other unequivocal statement.²⁶ The use of a standard withdrawal form is to harmonize the withdrawal process and ensure legal certainty among member states. Nevertheless, the consumers are free from using other means such as letters or phone calls other than the standard withdrawal form as long as it is durable since consumers need to prove their withdrawal from the contract.²⁷ The notice of withdrawal takes effect when it is sent by consumers before the cooling-off period is expired.²⁸ Furthermore, consumers can also submit a withdrawal form electronically or any other unequivocal statement on the trader's

19. Marco Loos, "Review of the European Consumer Acquis," Centre for the Study of European Contract law No. 2008/03, (2008): 10.

20. Ibid, Art. 9(1).

21. CRD. Recital 40.

22. Ibid, Art. 9(2).

23. Marco, *supra* note 5, at 252

24. CRD, Art. 8.

25. Ibid, Art. 10.

26. Ibid, Art. 11 (1).

27. CDR. Recital 44.

28. Ibid. Art. 11(2).

website.²⁹ In such a case, traders should communicate to consumers to acknowledge the receipt of such withdrawal without unnecessary delay.³⁰

4. The obligation of traders and consumers following the exercising of the withdrawal right

Traders should reimburse all payments received from the consumers, including, if applicable, the cost of delivery without undue delay or no later than 14 days after they are informed of the consumer's decision to withdraw from the contract. The reimbursement should be carried out using the same payment method the consumers used for the initial transaction unless the consumers have expressly agreed otherwise.³¹ Traders may withhold the reimbursement until they have obtained the goods or until consumers have supplied evidence of having sent the goods whichever is the earliest.³²

Consumers must send back the goods to traders or a person authorized by the traders without undue delay and no later than 14 days from the day of their notifications to the traders of their decisions to withdraw.³³ Consumers should bear the direct cost of returning the goods unless the traders have agreed to bear them, or the traders fail to inform the consumers of the obligation to return goods.³⁴ When consumers exercise the right of withdrawal, any ancillary contracts³⁵ should be automatically terminated.³⁶ There are two conflicting opinions regarding this matter. One considers that requiring consumers to pay the returning cost would discourage consumers to return the goods while others argue that consumers should bear the cost of returning to avoid abusing the withdrawal right, and consumers also pay transportation costs when returning the goods purchasing in the brick-and-mortar shop.³⁷

In addition, consumers are also liable for any diminished value of the goods resulting from the handling of the goods that are other than what is necessary to establish their nature, characteristics, and functioning.³⁸ During the cooling-off period, consumers should only test and inspect the products with due care as they are allowed to do in the physical shop.³⁹ If they continue to use after testing and inspecting the goods to an extent more than necessary to establish the nature, characteristics, and functioning of the goods, they may be liable for the diminished value of the purchased good when they want to return it.⁴⁰

29. Ibid, Art. 11(3).

30. Ibid, Art. 11 (3).

31. CDR, Art. 13(1).

32. Ibid, Art. 13(3).

33. Ibid. Art. 14(10).

34. Ibid. Art. 14 (1).

35. Ancillary contract is defined in para. 15 of Art. 2 of CRD as "a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between the third party and the trader."

36. CRD, Art. 15.

37. Marco, supra note 5, at 269.

38. CRD, Art. 14(2).

39. Ibid. Recital 47.

40. Marco, supra note 5, at 272.

The method used to calculate the diminished value of returned products raised a concern.⁴¹ Most traders in the EU lack the standard to conduct an assessment of returned goods and therefore give a refund in full amount to avoid negative reviews from consumers.⁴² Moreover, traders selling technological products might suffer additional losses for cutting-edge electrical products whose values depend on how brand new the item is. If the consumers have used the products for 14 days with a delivery period of another 14 days, the value of the product can be considerably diminished.⁴³ Nevertheless, the court in the Messner case held that the obligation of consumers to pay the diminished value of goods is assessed depending on whether the utilization of goods is contravened the principle of civil law such as good faith or unjust enrichment.⁴⁴

5. Exemption of the right of withdrawal

The right of withdrawal is not applicable as follows:

- a) service contracts after the services have been fully performed only if the performance begins with the consumers' prior expressed consents and acknowledgment that they will lose their rights of withdrawal once the contracts have been fully performed
- b) goods or services for which the price depends on fluctuations in the financial market which cannot be controlled by the traders and which may occur within the withdrawal period;
- c) goods made to the consumer's specification;
- d) goods which are liable to deteriorate or expire rapidly;
- e) sealed goods that are not suitable for return due to health protection or hygiene reasons;
- f) goods which are, after delivery, according to their nature, inseparably mixed with other items;
- g) alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;
- h) contracts where the consumers have specifically requested a visit from the trader for the purpose of carrying out urgent repair or maintenance;

41. European Commission, "Study on the Application of the Consumer Right Directive 2011/93/EU," European Commission, (Luxembourg: Publication Office of the European Union), 2017, 115.

42. Risk & Policy Analysts, Center for Strategy & Evaluation Services and EPRD, *supra* note 38, 115.

43. *Ibid.* 115-116.

44. Case C-489/07 (Messner) ECLI:EU:C:2009:502, Court of Justice of the European Union, 3 September 2009, para. 29.

- i) sealed audio or sealed video recordings or sealed computer software that was unsealed after delivery. This exception prohibits consumers from buying good to copy and then returning it through the cooling-off period;⁴⁵
- j) newspaper, periodical, or magazine with the exception of subscription contracts for the supply of such publications; The exception is due to the risk of diminished value is high after they are read;⁴⁶
- k) the contract concluded at a public auction; The exception does not apply to online auction since the term public auction refers to auction with the physical presence of people;⁴⁷
- l) the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering, or services related to leisure activities if the contract provides for a specific date or period of performance; This exception requires traders to keep such space for consumers (e.g. hotel booking) if consumers cancel, traders might face difficulty to find a replacement;⁴⁸
- m) digital contents which are not supplied on a tangible medium if the performance has begun and, if the contract places the consumers under an obligation to pay, where:
 - 1. the consumers have provided prior expressed consents to begin the performance during the cooling-off period
 - 2. The consumers have provided acknowledgment that he thereby loses his right of withdrawal, and
 - 3. The traders have provided confirmation of the consumer's prior express consent and acknowledgment contract on durable medium;⁴⁹

The exception applies to the download of music, movies, or apps that can be easily copied once they have been downloaded.⁵⁰

IV. Analysis and Recommendation

This section will analyze and propose the suitable scope and application of the right of withdrawal into the Cambodian legal system.

45. Soop-Tzi Tang, "The statutory Right of withdrawal in E-commerce: the comparative study of European Law and Swiss law," (Master Thesis, University of Neuchatel, 2015), 17.

46. Tang, supra note 42, at 17.

47. Ibid. 17-18.

48. CRD, Recital 49.

49. Ibid, Art. 16; Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directive 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the council as regards the better enforcement and modernization of Union Consumer Protection rules PE/83/2019/REV/1 (2019).

50. Tang, supra note 42, at 18.

1. Justification to adopt the right of withdrawal

The adoption of the withdrawal right allows the government to combat unfair trade practices, particularly against vulnerable consumers, and boost consumer confidence in e-commerce. Although there is a claim that the cooling-off period might cause economic disadvantages, uncertainty for business, and the consumer's abuse of the right to undermine the contract,⁵¹ consumers, however, may not abuse the right because consumers tend to consider goods as their property after they possess it for a certain period of time⁵² and the withdrawal right is not afforded to consumers in all types of transactions or all subject-matter of the sale contract. In addition, the right of withdrawal does not erode the contractual principle of *Pacta Sunt Servanda*, instead, it is an additional remedy afforded to consumers that cannot meet the conditions to cancel a contract under governing laws. Therefore, the paper recommends including the right of withdrawal as part of other essential rights afforded to consumers in the Law.

2. The element of the right of withdrawal

Under the provision of the right of withdrawal, there are five elements including the length of the cooling-off period, the pre-contractual information, the exercise of the withdrawal right, the obligation of consumers and traders following the withdrawal of consumers, and the exception of the right of withdrawal. The structure of the cooling-off period seeks to provide fair and reasonable scope for consumers and traders.

a. The length of the cooling-off period

The appropriate cooling-off period should allow consumers to calm down, reflect on their purchase and examine the product after they are away from the heat of the moment.⁵³ The study recommends applying a seven working days cooling-off period because it is an appropriate duration for consumers to reconsider their decision and exercise their rights as soon as possible. A prolonged cooling-off period causes harm to consumers as well as traders. The longer the consumers keep the products, the riskier consumers face. Consumers might be liable for the diminished value of products after keeping too long whereas the trader expects the returned products to be in good condition. Equally, traders suffer a loss due to the depreciation of value in goods and affect the operation of the business. Furthermore, the cooling-off period should start after consumers obtain the products for goods and after the contract is concluded for services.

b. The pre-contractual information requirement

Traders should provide consumers information that enables them to make informed decisions before purchasing, for consumers can fully exercise the right of withdrawal. Since most of the pre-contractual information required by the E-commerce law is less than that in the CDR, the study proposes to include the information including the cooling-off period, the procedure to exercise the right of withdrawal, the obligation of consumers to bear the cost of returning, and

51. ASEAN, "Consumer Protection Digests and Case Studies: A Policy Guide," Volume I, Jakarta: ASEAN Secretariat, November 2014, 54-55.

52. Caroline Cohen, "The Contract Law Principle of *Pacta Sunt Servanda* and Behavioral Economics Literature in Relation to Justifications for the European Consumer's Right with Withdrawal Under Directive 2011/83/EC," 2 *Exeter Student Law Review* 2m no.13 (2016):25.

53. Consumer Council, "A report to advocate Mandatory Cooling-off Period in Hong Kong," 2018, 70.

the circumstance where consumers lose their right of withdrawal. If the traders fail to provide consumers such information concerning the right of withdrawal, the cooling-off period is prolonged to 3 months until consumers receive the information.

c. The exercise of the right of withdrawal

Consumers can express their intention to withdraw through any means on a durable medium before the withdrawal period elapses. Traders are also recommended to provide a withdrawal form on their websites where consumers can file and submit their decision. In this case, the traders are required to acknowledge the receipt of the consumers' indicated intention without undue delay. Hence, the notice becomes effective when it is sent. To facilitate consumers and traders, the legislators can provide a model of withdrawal form as a guide by taking a sample from Decathlon's website or companies in other countries; however, such form is optional for consumers. Requiring for the notice of the provided withdrawal form might have an adverse effect on the consumers who may be ignorant of the importance of the form which then results in invoking the right of withdrawal.⁵⁴ The form of notice should not matter as the purpose of the notice is merely to inform the traders of the clear intention of withdrawal.⁵⁵ Therefore, consumers can use other means to deliver their expressed intent to withdraw from the contract so long as the form is given on a durable medium.

d. The obligation of consumers and traders following the exercise of the right of withdrawal

After having requested to withdraw from the contract, consumers are required to return the goods through any methods within 14 working days upon the request of withdrawal unless the traders offer to pick up the goods, or traders do not inform about the consumer's obligation to return the goods. Consumers also bear the burden of returning goods to prevent abuse of the cooling-off period and unnecessary complications by requiring traders to be responsible for it since the goods are in the consumer's possession. In addition, consumers are also liable for any diminished value of the goods occurring from the handling of goods to the extent to what is necessary to establish the nature, characteristic, function of goods. Handling goods should mean inspecting and testing the goods with reasonable care as they would be allowed in the physical shop.⁵⁶ If the consumers continue to use them after inspecting and testing which causes damage that is contrary to its nature, characteristic, or function of goods, consumers are responsible to pay the diminished value of goods.⁵⁷ Moreover, upon exercising the right of withdrawal, an ancillary contract is also terminated.

Traders are obligated to reimburse the consumers all the costs consumers have paid including the original delivery cost, except the special delivery at the consumer's request, within 14 working days after receipt of the notice of withdrawal. Considering traders can face the risk if they make a refund without certainty whether consumers return the goods in a good condition or within an appropriate time⁵⁸ the trader may reimburse unless the returned goods are delivered. The traders are required to refund by employing the same payment method as the consumers used for the initial transaction unless consumers agree otherwise.

54. Marco, *supra* note 5, at 265

55. *Id.*

56. Marco, *supra* note 5, 272.

57. *Ibid.*

58. Joasia Luzak, "Online consumer contract," Centre for the Study of European Contract Law, no. 2014-8, (2014): 10.

e. The exception of the right of withdrawal

To maintain the balance between consumers and the trader's interest, the right of withdrawal is restricted to apply to the contract and the subject matters governed by the Consumer Protection Law and E-commerce Law. Hence, the cooling-off should not apply to personalized goods (e.g. tailor-made suits) or perishable goods (e.g. foods). Additionally, the digital content product is also excluded due to the difficulty to examine whether the software has been used or whether consumers have deleted the software after exercising the cooling-off period. For the contract concerning performance on a specific date, traders generally utilize their resources to prepare for such date if consumers cancel at the last minute, traders might suffer loss because they cannot find replaced consumers and waste the resource spend on preparation. As a result, the study proposes to exempt the following goods and services from the right of withdrawal:

- 1) customized goods;
- 2) goods whose value fluctuates depending on the market;
- 3) goods that are deteriorated or expire rapidly;
- 4) goods, by nature, inseparably mixed with other items after delivery;
- 5) goods contain sealed for health protection or hygiene reasons once unsealed;
- 6) delivered Newspapers, magazines, or periodicals;
- 7) sealed audio, video and software, or other digital content products which are not supplied on a tangible medium;
- 8) supply of accommodation, transport of goods, vehicle rental services, catering, and services related to leisure activities if the contract provides for a specific date of performance;
- 9) digital content products which are not supplied on a tangible medium;
- 10) supply of services that have been fully performed.

V. Conclusion

The right of withdrawal, which allows consumers to revoke the contract without giving any reasons, will be a powerful tool to boost consumer confidence in online transaction. Having been examining the EU legal framework, the paper suggests Cambodia adopting the right of withdrawal as a remedy for consumers to overcome the deficits of information or pressure sale technique. Concerning the right of withdrawal framework, consumers should be able to cancel their purchase within 7 working days in writing or a statement equivalent thereof. For consumers to fully exercise the withdrawal right, the traders are required to provide consumers necessary information including the cooling-off period before the conclusion of the contract. After consumers exercise the withdrawal right, they should return the goods and bear the cost of returning within 14 working days whereas traders should make a refund without undue delay

within 14 working days. Nevertheless, the application of withdrawal rights is limited to certain goods and services. The establishment of the right of withdrawal represents an important pillar to magnify consumers' rights in Cambodia and enables Cambodia to catch up with other countries, including ASEAN member states, in protecting e-consumers. However, the effectiveness of the right of withdrawal rests on many aspects including awareness of consumers and sellers, legal enforcements, and the capacity of authority provided that consumer protection in e-commerce is an emerging trend.

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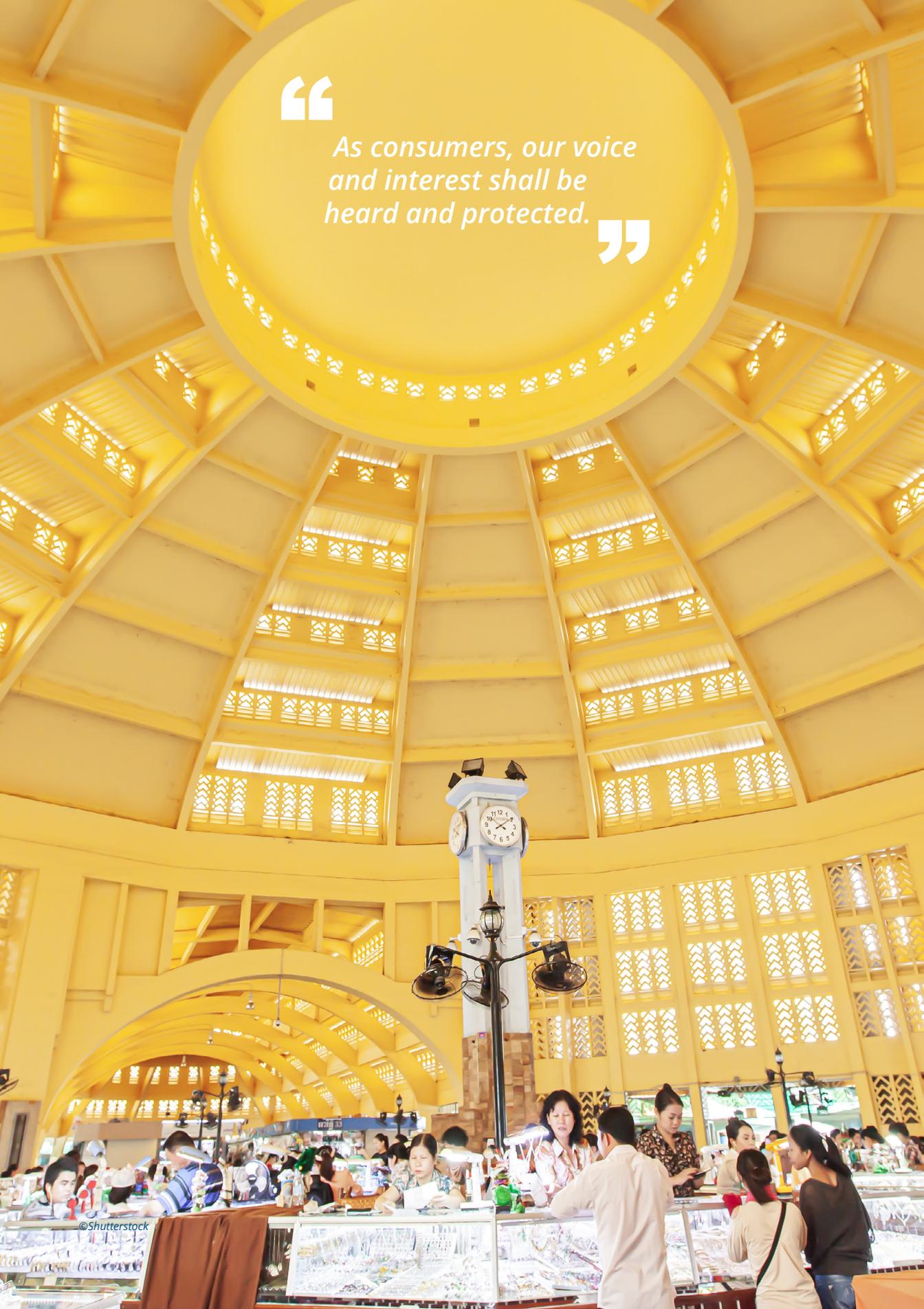
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*As consumers, our voice
and interest shall be
heard and protected.*

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CHAPTER 07

Towards Consumer Action and Activism – Legal and Practical Considerations for Establishing a Consumer Association in Cambodia

Chea Lida & Kong Phallack

Abstract

This paper attempts to demonstrate legal and practical consideration and reflect the essence of the establishment of consumer associations in Cambodia by examining the international legal framework, experience from other countries, and the Cambodian legal framework related to the formation of consumer associations.

I. Introduction

According to the Handbook on ASEAN Consumer Protection Laws and Regulations, a ‘consumer’ might be generally understood as a purchaser of goods and services for the personal satisfaction of themselves or other members of their households, as distinct from use to generate further income.¹ However, under Cambodian law, a “consumer” refers to a person who receives goods or services which are used ordinarily for personal, domestic, or household purposes, and not for further supply, for use in production, or commercial activities.² In any modern market economy, consumers often experience an imbalance of bargaining power as compared to producers and sellers of products and services. For example, offering low-quality products at lower prices while misleading the consumers to believe that the products offered are of good quality. As a result, consumer interests are affected. Not only do consumers not receive a fair value for their money, their health and safety could also be adversely affected by unsafe or defective products and services.³ Therefore, there is a need to protect consumers by laying down laws and regulations, establishing the National Consumer Protection Committee or Agency, and consumer associations, as well as consumer dispute resolutions. This paper examines the international legal framework, experience from other countries, and the Cambodian legal framework related to the formation of consumer associations. This paper is divided into five parts: Part 1 explains the roles and functions of consumer associations. Part 2 describes international legal frameworks and experiences from other countries related to consumer associations. Part 3 examines the Cambodian legal framework related to consumer associations. Part 4 proposes the establishment of sectoral consumer associations in Cambodia, followed by the conclusion.

II. Roles and Functions of Consumer Associations

1. Definitions and key concepts

UNCTAD defines consumer associations as “non-governmental or civil society organizations representing citizens’ or group of citizens’ interests in terms of protecting their rights to goods and services under an ethical trading environment”.⁴ The definition of consumer associations also corresponds to that of the ASAPCP.⁵

The main characteristics of the consumer associations are that they are commonly non-profit-making and independent from government’s or businesses’ influence, and their sources of funds or financial supports can be entirely or partly funded by the government or acquired from other agencies.⁶ The consumer associations are sometimes known as consumer organizations or consumer groups; these are called in accordance with the countries’ preferences. Apart from this, they are normally a form of civil society whose fundamental roles and mandates are to support or assist governments and businesses in nurturing transparency and accountability related to

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1. Handbook On ASEAN Consumer Protection Laws and Regulations, p.5
 2. Law On Consumer Protection, 2019, Article 4(5)
 3. Handbook On ASEAN Consumer Protection Laws and Regulations, p.5
 4. UNCTAD MENA Programme, Consumer Associations, p.13. Link: <https://unctadmena.org/wp-content/uploads/2018/12/Report-on-Consumer-Organizations.pdf>
 5. Handbook on ASEAN Consumer Protections Laws and Regulation, p.6.
 6. UNCTAD MENA Programme, Consumer Associations, p.13. Link: <https://unctadmena.org/wp-content/uploads/2018/12/Report-on-Consumer-Organizations.pdf>

the provision of consumer's products and services.⁷ In furtherance, the consumer associations are the voice of consumers; they represent and protect the consumers' interest by ameliorating the balance of power between consumers and businesses.⁸ Reflecting on the definition, their roles, and mandates, it can be seen that the consumer associations are prominent actors in protecting consumer rights.

2. The essence of consumer associations for an effective consumer protection regime

Historically, consumer protection associations injected profound impacts in both domestic and international arenas for the adoption of the rules and regulations related to consumer protection. The evidence of their influence could be illustrated via the adoption of UNGCP in 1985 which the guidelines came into existence due to a lengthy campaign by many consumer organizations from many different countries with Consumers International.⁹ The guidelines per se also stipulated the necessity of forming consumer organizations and the opportunity of such organizations to present their views in decision-making processes that affect them.¹⁰ Domestically, the Consumer Association of Singapore (CASE) is an instance of the influence of the consumer association. In 1979, CASE first urged the government to consider fair-trading legislation in Parliament.¹¹ After years of study of fair-trading legislation for Singapore, The Consumer Protection (Fair Trading) Act was passed and came into effect in 2004.

In general, an effective consumer protection regime requires the existence of consumer associations since the associations are the key actors when it comes to facilitating the government and businesses to sustain a greater level of transparency and accountability when offering services and products.¹² Well-established and legitimate consumer associations are mandated to represent the voice of consumers in the governance process via maintaining the balance of power between the consumers and businesses.¹³ Additionally, the consumer associations are the voice of consumers and also educators and information providers.¹⁴ As a result, through the associations, consumers could learn and understand the products and services more or even could make their voice heard if any problems arise from the products or services they used.

In furtherance, consumer associations are essential during this digital age. It is seen that online businesses and technologies bring great benefits to consumers. On the contrary, consumer considerations and protection are sporadically explored during the technological development process due to the consequence of rapid growth of innovation which influences the policymakers

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7. HUONG HA and SUE L. T. MCGREGOR. Role of Consumer Associations in the Governance of E-commerce Consumer Protection; *Journal of Internet Commerce*, 12:1, 2013.; UNCTAD MENA Programme, Consumer Associations, p.14. Link: <https://unctadmena.org/wp-content/uploads/2018/12/Report-on-Consumer-Organizations.pdf>
 8. Ibid.
 9. UNCTAD, 'United Nations Guidelines on Consumer Protection' Link: <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-on-consumer-protection>
 10. United Nations Guidelines for Consumer Protection (2016), Rule. 5(h).
 11. Consumer Association of Singapore, Link: https://www.case.org.sg/consumer_guides_cpfta.aspx
 12. UNCTAD MENA Programme, Consumer Associations, p.14. Link: <https://unctadmena.org/wp-content/uploads/2018/12/Report-on-Consumer-Organizations.pdf>
 13. Ibid.; HUONG HA and SUE L. T. MCGREGOR. Role of Consumer Associations in the Governance of E-commerce Consumer Protection; *Journal of Internet Commerce*, 12:1, 2013.
 14. UNCTAD MENA Programme, Consumer Associations, p.14. Link: <https://unctadmena.org/wp-content/uploads/2018/12/Report-on-Consumer-Organizations.pdf>

to pursue the 'catch up' approach when they enact or amend their policies to suit new innovation. Simply put, when the policymakers pass laws or regulations concerning technological innovation; they appear to be reactive rather than proactive, and the consumer organizations play very crucial roles in terms of fulfilling this gap.¹⁵ This is owing to the fact that consumer associations pursue the self-regulatory approach which functions in the opposite direction from the policymakers who follow the catch-up approach. In the self-regulatory approach, the consumer protection associations pursue the protection of consumers beyond the laws stipulated. The best example of this is a practice of the CI which is making reviews and ratings to be reliable and verifiable; this practice helps the consumers to be sure or to ascertain that the products sold online are safe, clarify who is responsible in new peer-to-peer markets, and better spotting and prevention of online scams.¹⁶

3. Specific tasks and services performed by consumer associations

Effective consumer associations are mainly mandated to perform several tasks including but not limited to representing consumers' interests, supporting consumer protection enforcement, educating or providing information to consumers, offering legal counsel, and assisting consumers in dispute resolution.¹⁷

- **Representing consumers' interest:** under this mandate, the associations are tasked to act on behalf of the consumers during the decision-making processes by voicing the consumer concerns, preferences, and priorities.¹⁸
- **Supporting consumer protection enforcement:** under this mandate, the consumer associations assist the public sectors in enforcing consumer protection legislation. For instance, the associations alert or inform the government agencies about the breach of consumer protection regulations.¹⁹
- **Educating or providing information to consumers:** under this mandate, the consumer associations are tasked to offer independent information which consists of testing or surveying results on the products and services so that the consumers are able to make informed purchasing choices. The examples of this mandate cover activities such as public outreach via workshops and talks; social media campaigns; publications of newsletters on consumer issues, media or press conferences; surveys; testing and test reports, etc.²⁰
- **Offering legal counsel and assisting consumers in dispute resolution:** Under this mandate, the associations offer legal consultation to the consumers in case they wish to bring claims against companies or businesses.²¹ Moreover, they may also

15. Consumers International, 'How can consumers international create positive change for consumers in the digital world?' Link: <http://www.consumersinternational.org/media/155007/global-digital-partners.pdf>

16. Consumers International, Link: <https://www.consumersinternational.org/what-we-do/digital/>

17. UNCTAD, MENA Programme, Report on Consumers Associations (2020), p.4-8.

18. Ibid. p.5.

19. Ibid. p.7.

20. Ibid.

21. Ibid.

represent the consumers in the courts either via individual or collective claims. Some consumer associations extend their mandate to offering alternative dispute resolutions,²² for instance, this role can be seen in CASE's practice.

III. International and regional legal framework related to consumer protection associations

The first international legal framework regarding consumer protection associations could be found in the UNGCP adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution E/1999/INF/2/Add.2 of 26 July 1999, and lately revised by the General Assembly in resolution 70/186 of 22 December 2015. The resolution per se gave rise to the establishment of UNGCP in which it is stipulated that the formation of the consumer associations is one of the legitimate needs which the guidelines intended to meet.²³ Then in 2017, United Nations Conference on Trade and Development also enacted the Manual on Consumer Protection in order to give detailed guidelines to the respective stakeholders with regard to the protection of the consumers. The manual also reaffirms the importance and roles of consumer associations in consumer protection. Beyond this, regionally, ASEAN Strategic Action Plan on Consumer Protection (ASAPCP) 2016-2025 was also created in order to protect the consumers' rights.

Contemporarily, in ASEAN, the existence of consumer associations can be seen in some states. Therefore, this paragraph will illustrate some consumer association models in ASEAN states. In Indonesia, one of its consumer associations is called Yayasan Lembaga Konsumen Indonesia (YLKI); albeit, with its informative website and platform, there is no online complaint mechanism.²⁴ The same goes to the consumer association in Malaysia which is the Federation of Malaysian Consumers Associations (FOMCA); it also possesses its own website that is informative, however, the complaint mechanism is not available there.²⁵ In Myanmar, its consumer association is Myanmar Consumers' Union. The association has its own website yet the availability of information is limited.²⁶ In the Philippines, the consumer association, known as Coalition for Consumer Protection and Welfare also comes with its own website which provides a lot of information governing consumer rights. However, the complaint mechanism is not available on the website.²⁷ The consumer association in Thailand, the Foundation for Consumers (FFC), possesses an informative website. Beyond this, it also offers an online complaint mechanism.²⁸ Lastly, consumer association in Singapore which is called the Consumer Association of Singapore (CASE) shall be considered the most influential and effective one in ASEAN; its website is equipped with detailed information governing consumer protection where the consumers can just look through and get thorough understandings about the consumer protection policies.²⁹ Noticeably, only those of Singapore, Thailand, and Indonesia appear to be very active in protecting and promoting the consumers' rights. More importantly, their models are very suitable in this digital era.

22. Ibid.

23. United Nations Guidelines for Consumer Protection (2016), Rule. 5(h).

24. Yayasan Lembaga Konsumen Indonesia (YLKI) Link: <http://ylki.or.id>

25. Federation of Malaysian Consumers Associations (FOMCA) Link: <http://www.fomca.org.my/v1/>

26. Myanmar Consumers' Union Link: <http://www.myanmarconsumersunion.org/en/home/>

27. Coalition for Consumer Protection and Welfare Link: <http://www.ccpw.org/articles.htm>

28. Foundation for Consumers, Link: <https://www.consumerthai.org>

29. Consumer Association of Singapore, Link: <https://www.case.org.sg>

Amongst the consumer associations in ASEAN, CASE performs a wider range of mandates comparing to those of the rest. Significantly, CASE's mandates fulfill all the elements of the tasks generally performed by an effective consumer association stipulated in UNGCP; as aforementioned these include: representing consumers' interest, supporting consumer protection enforcement, educating or providing information to consumers, offering legal counsel, and assisting consumers in dispute resolution. Moreover, CASE has a precise organizational structure such as Advisory Councils, Central Committee, Committees, and Case Department.³⁰ It also has stable sources of funding as the funding is based on the endowment fund, the sources of its fund are from sponsorship, grants, and investment income.³¹ It is a non-profit, non-governmental organization that is established to protect the consumers' interest via offering them information, education, and promoting an environment of fair and ethical trade practice.³² Beyond this, CASE's website allows consumers to lodge complaints via the online platform. CASE's consumer association model also shares similar features as the Consumer Council of Fiji³³ and the Consumer Council of Hong Kong.³⁴

Likewise, a consumer association of England known as "Which?" can also lend us good practices since it has a long-standing practice and experience with consumer protection. The mandates of "Which?" cover all the tasks commonly performed by the credential consumers' associations. In addition to those common tasks, "Which?" compares providers; this service facilitates the consumers to make informed purchasing decisions.³⁵ Plus, the legal services which they offer cover a wide range of services but are not limited to consumer protection; those include employment, landlord, and tenancy, traveling, wills and probate, etc.³⁶ Governing the sources of funds, "Which?" receives them entirely from their commercial activities; noticeably, they do not obtain any donations, public funds, or fundraising.³⁷ In furtherance, "Which?" possesses a vibrant organizational structure that comprises committees and sub-group to oversee the operation of the whole organization; those include group audit and risk committee, remuneration committee, investment committee, nomination committee, member governance committee, and council policy and campaigns sub-group.³⁸

IV. The Cambodian legal framework related to consumer associations

1. Laws and Regulations Related to Consumer Associations

According to the Cambodian Constitution "Khmer citizens shall have the right to create associations and political parties. This right shall be determined by law."³⁹ This implies that the Constitution gives freedom to Cambodian citizens to form associations of their choice as long as

30. Ibid.

31. Ibid.

32. Ibid.

33. Consumer Council of Fiji, Link: <http://www.consumersfiji.org>

34. Consumer Council of Hong Kong, Link: https://www.consumer.org.hk/ws_en

35. Which?, About Which? Link: <https://www.which.co.uk/about-which/our-products-and-services>

36. Which? Legal advice, Link: https://legalservice.which.co.uk/?utm_source=Which&utm_medium=Referral&utm_campaign=Products&utm_content=Advice_

37. Governance at Which?, Link: <https://www.which.co.uk/about-which/company-info/governance-overview>

38. Ibid.

39. The Constitution of Cambodia (1993), Art. 42.

the associations are established and abide by the law. The term “consumer association” exists in the Law on Standards (2007), and according to the Law on Standards, a consumer association is a member of the National Standards Council.⁴⁰ In furtherance, under Chapter 2 of the Civil Code of Cambodia, the procedures for establishing the associations can be found there.⁴¹ Additionally, the Law on Associations and Non-Governmental Organizations (2015) provides the rules, formalities, and procedures on the establishment of associations⁴² and in 2019, the Law on Consumer Protection was promulgated which stipulated provisions on consumer protection such as the establishment of sectoral consumer associations, and the roles and duties of consumer associations.⁴³

Besides the above-mentioned laws, there are a number of other laws related to consumer protection, such as the Law on measures to prevent the spread of COVID-19 and other deadly infectious diseases (2021), Law on E-Commerce (2019), Law on Construction (2019), Law on the Management of Health Professions (2016), Law on Accounting and Auditing (2016), Law on Telecommunications (2015), Law on Metrology (2009), Law on Insurance (2014), Law on Standards (2007), Prakas on Utilization and Protection of Credit Information (2006), Law on Post (2002), Law on the Management of Quality and Safety of Products (2000), Law on the Management of Private Medical, Paramedical and Medical Aide (2000), Law on Electricity (2000), Law on Banking and Financial Institutions (1999), Law on the Management of Pharmaceuticals (1996), Law on the Bar (1995), and sub-regulations required by the said laws developed by respective competent ministries and institutions.

2. Setting Up Sectoral Consumer Associations in Cambodia

This section describes the sectoral consumer associations in Cambodia. Sectoral Consumer Associations refer to non-governmental civil societies that are formed by individuals to represent consumers to protect the rights and interests of their members without profit or distribution. Sectoral Consumer Associations perform activities independently from the Royal Government, consumers, and businesses.⁴⁴ According to the Law on Associations and Non-Governmental Associations (2015), to set up a consumer association, there shall be at least three (3) founding members, whose age is at least eighteen (18) years old.⁴⁵

Sectoral Consumer Associations can be formed in services, or products and goods. The following are examples of sectoral consumer associations:

a. Sectoral Consumer Associations in Services

- If a person wants to establish a consumer association in the telecommunications sector, they first need to request permission from the Ministry of Post and Telecommunications. After that, they can finally request permission from the Ministry of Interior

40. Law On Standards, (2007), Art. 11

41. The Civil Code of Cambodia (2011), Chapter 2.

42. Law On Associations and NGOs(2015) Ch. 2 (Art. 5 to 11), Ch. 4 (Art. 18, 19), Ch, 5 (Art. 20 to 25)

43. Law on Consumer Protection (2019) Ch. 3 Art. 6, 7, 8

44. Law on Consumer Protection Ch. 3 Art. 6, and Draft Guidelines Regarding the Establishment Of Sectoral Consumer Associations, Page 2

45. Ibid, Art. 5

- If a person wants to create a consumer association in the banking and microfinance sector, they first need to request permission from the National Bank of Cambodia. After that, they can finally request permission from the Ministry of Interior
- If a person wants to create a consumer association in the health sector, they first need to request permission from the Ministry of Health. After that, they can finally request permission from the Ministry of Interior
- If a person wants to create a consumer association in the transport sector, they first need to request permission from the Ministry of Public Works and Transport. After that, they can finally request permission from the Ministry of Interior
- If a person wants to create a consumer association in the hotel and restaurant sector, they first need to request permission from the Ministry of Tourism. After that, they can finally request permission from the Ministry of Interior
- If a person wants to create a consumer association in the education sector, they first need to request permission from the Ministry of Education, Youth, and Sports. After that, they can finally request permission from the Ministry of Interior
- If a person wants to create a consumer association in the construction sector, they first need to request permission from the Ministry of Land Management, Urban Planning, and Construction. After that, they can finally request permission from the Ministry of Interior

Other service sectors also need to request permission from the competent ministries or institutions of the respective sectors that were not mentioned in the examples above.

b. Sectoral Consumer Associations in Products and Goods:

- If a person wants to create a consumer association in the Medicine, Traditional Medicine, Nutrition, Cosmetics, or Medical Equipment products sector, they first need to request permission from the Ministry of Health. After that, they can finally request permission from the Ministry of Interior
- If a person wants to create a consumer association in the Electricity or Electronic products sector, they first need to request permission from the Ministry of Commerce. After that, they can finally request permission from the Ministry of Interior

Other products and goods sectors also need to request permission from the competent ministries or institutions of the respective sectors that were not mentioned in the examples above.

3. Registration and Statutes of Sectoral Consumer Associations

Before operations, the sectoral consumer associations are required to obtain permission from the relevant ministries or institutions, the founder must apply for the registration of the consumer association at the Ministry of Interior with supporting documents as follows:⁴⁶

- 2 (two) Forms of Application of Registration
- 1 (one) copy of the address and head office of the consumer association from the Commune Chief or Sangkat Chief
- 2 (two) Copies of Biographies of each founder with a recent photograph, sized 4*6
- 2 (two) copies of the statutes, signed by the president of the consumer association

The statutes shall be composed of the following:

- a)** Purpose and goal;
- b)** Name written in full and abbreviation that does not copy the full name or abbreviation of any registered association or non-governmental organization;
- c)** A logo that does not copy that of any national or state institution, any registered association or non-governmental organization, or the Red Cross or Red Crescent or international institution;
- d)** Rules for selecting, terminating, dismissing, transferring, and removing the position of the president or executive director;
- e)** Rules for changing the organization's name and logo, and for amending its statutes;
- f)** Sources of resources and properties;
- g)** Rules for managing resources and properties;
- h)** Rules for dissolving and disposing resources and properties upon dissolution of the organization. The establishment of sectoral consumer associations requires at least three (3) founding members who are natural persons and shall be over the age of 18 years old.

After the formation and registration of the association at the Ministry of Interior and gaining permission from the relevant and competent regulators, that consumer association shall deposit the registration documents and permits that were received to the National Consumer Protection Committee, which has a General Department of Consumer Protection, Competition, and Fraud Repression (CCF) as a secretariat. Sample forms for permission to form a sectoral consumer association, association registration form, Letter stating the address of the central office of the association issued by the commune or Sangkat chief, Profiles of founding members, and application form for deposit of documents can be found in the Annex of this chapter.

4. Roles and Obligations of Sectoral Consumer Associations

According to the Law on Consumer Protection and the Guidelines Regarding the Establishment of Sectoral Consumer Associations, the Sectoral consumer associations have the following roles and obligations:

- Provide independent advice to consumers and resolve issues related to consumers

46. Ibid, Art. 6

- Act as a representative before of the National Consumer Protection Committee or in court on behalf of any consumer or group of consumers whose rights and interests have been violated
- Represent the views and interests of consumers in the face of the public and the press
- Receive advice from any competent regulator on the provisions on the information standards to be provided to the consumers that have been issued by that competent regulator
- Establish consumer protection task forces in each sector
- Perform other tasks that were assigned by the National Consumer Protection Committee

5. Rights, Interests, and Obligations of Sectoral Consumer Associations

According to the Guidelines Regarding the Establishment of Sectoral Consumer Associations, the Sectoral Consumer Associations have the following rights, interests, and obligations:

- Sectoral Consumer associations will become a legal entity from the date of registration by the Ministry of Interior
- Unregistered sectoral consumer associations are prohibited from operating in the Kingdom of Cambodia
- Sectoral consumer associations that have been registered shall be subject to the common law of the tax regime in force and receive incentives and favors in accordance with the applicable law and provisions
- Sectoral consumer associations shall provide monthly, quarterly, semi-annual, and annual activity reports to the National Consumer Protection Committee on a regular basis

6. Resources and Assets of Sectoral Consumer Associations

According to the Guidelines Regarding the Establishment of Sectoral Consumer Associations, the Sectoral consumer associations may have the following sources of resources and assets:

- Contributions of members
- Personal resources and assets of the association
- Gifts of natural persons or legal entities
- Revenue from other legal sources

7. Cooperation

According to the Guidelines Regarding the Establishment of Sectoral Consumer Associations, the sectoral consumer associations have the right to enter into the following contracts:

- Cooperation with partners in the implementation of action plans which are in line with the law in force
- Recruitment of staff/employees or workers to work
- Cooperation with relevant associations at national, regional, and international levels

V. Conclusions and Recommendations

Upon the review of both national, regional, international legal frameworks, practices of various countries governing consumer associations, it is clear that the consumer associations are the important actors once it comes to protecting consumers' rights. Therefore, consumers in Cambodia shall work together to establish sectoral consumer associations to protect consumer rights and interests as explained in Section 3 above. The experience from countries in the region, as explained in Section 2 should be considered, while establishing sectoral consumer associations. Without consumer protection associations, there will be an imbalance of bargaining power between consumers, and producers and sellers of products and services. As a result, consumers' rights are not fully protected. In this regard, the support from National Consumer Protection Committee and the respective ministries and government agencies are important to kick off the first consumer association in Cambodia. Despite providing support, the consumer association should perform activities independently from the government as explained in the United Nations Guidelines for Consumer Protection.⁴⁷

47. United Nations Guidelines for Consumer Protection (2016), Rule.1(e)

Glossary

ASEAN:	Association of Southeast Asian Nations
ASAPCP:	ASEAN Strategic Action Plan on Consumer Protection
AusAid:	Australian Aid
CI:	Consumers International
CASE:	Consumer Association of Singapore
FFC:	Foundation for Consumers
FOMCA:	Federation of Malaysian Consumers Associations
GIZ:	Deutsche Gesellschaft für Internationale Zusammenarbeit
MENA:	The Middle East and North Africa Region
MOC:	Ministry of Commerce
NCPC:	National Consumer Protection Committee
NGO:	Non-governmental Organization
SIDA:	Swedish International Development Cooperation Agency
UNCTAD:	United Nations Conference on Trade and Development
UNGCP:	United Nations Guidelines for Consumer Protection
WTO:	World Trade Organization
YLKI:	Yayasan Lembaga Konsumen Indonesia

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- UK Government Digital Service, Link: <https://www.gov.uk/government/organisations/government-digital-service>
- UNCTAD, 'The History of United Nations Guidelines on Consumer Protection' Link: <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-on-consumer-protection>
- Which? Legal advice, Link: https://legalservice.which.co.uk/?utm_source=Which&utm_medium=Referral&utm_campaign=Products&utm_content=Advice_
- Yayasan Lembaga Konsumen Indonesia (YLKI) Link: <http://ylki.or.id>

Annex

Sample Forms for Establishment and Registration of Sectoral Consumer Associations

**Kingdom of Cambodia
Nation, Religions, King**

Application For Permission To Form A Sectoral Consumer Association

My name is: Latin Characters:.....Sex: Male Female
 Date of Birth: Day:..... Month:..... Year:..... Nationality:.....Race:.....
 Place of Birth: Village:..... Commune/Sangkat:.....
 Municipality/District/Khan..... City/Province:.....
 Current Address: House number:.....Street:.....Group:.....
 Village:.....Commune/Sangkat:.....
 Municipality/District/Khan..... City/Province:.....
 Current Occupation:.....
 Telephone: Email:

Respectfully to

His/Her Excellency

Subject: Application For Permission To Form Sectoral Consumer Association

Reference: Royal Kram No. NS/RKM.1119/016 dated November 2nd, 2019, promulgating the Law On Consumer Protection

As indicated in the Subject and Reference above, I respectfully inform **His Excellency, the Minister:** in order to protect the rights and interests of consumers in the sector. We ask for permission from **His Excellency, the Minister** to form and establish a sectoral consumer associationwith the head office located at House No. St. Commune/Sangkat Municipality/District/Khan City/Province..... With the goal.....

Once the association receives permission from the Ministry of Interior, I promise to abide by the Law On Associations And Non-Governmental Organizations, the legal documents in force, and act in accordance with | the statutes as deposited in the Ministry of Interior.

As indicated above, please, **Your Excellency**, be informed and implement accordingly.

Please accept, **Excellency**, the assurances of my highest consideration.

Day Month Year Buddhist Era 256...
Date Month Year 20.....

Please Find The Attached Documents:

Original Copy Of The Statutes	(2 copies)
Structure	(2 copies)
Biographies of each of the founding members	(2 copies)
Other administrative letters	(If there are any)

Chairman

**Kingdom of Cambodia
Nation, Religions, King**

Association/Organization

.....
No.

Registration Form

My name is: Latin Characters:.....Sex: Male Female
Date of Birth:Day:.....Month:..... Year:..... Nationality:.....Race:.....
Place of Birth: Village:..... Commune/Sangkat:.....
Municipality/District/Khan..... City/Province:.....
Current Address: House number:.....Street:.....Group:.....
Village:.....Commune/Sangkat:.....
Municipality/District/Khan..... City/Province:.....
Current Occupation:.....
Telephone:.....Email:.....

Respectfully to

Samdech Kralahom Sar Kheng, Deputy Prime Minister of The Ministry of Interior

Subject: Request for Registration of Association / Organisation

Reference: Royal Kram No. NS/RKM.0815/010 dated August 12th, 2015, promulgating the Law on Associations and Non-Governmental Organizations

As indicated in the Subject and Reference above, I respectfully inform **Samdech**

Kralahom that Association / Organization was established with the head office located at House No. St. Commune/Sangkat Municipality/District/Khan City/Province.....

With the goal

Once the Association / Organization receives permission from the Ministry of Interior, I promise to abide by the Law On Associations And Non-Governmental Organizations, the legal documents in force, and act in accordance with the statutes as deposited in the Ministry of Interior.

As indicated above, please, **Samdech Kralahom Sar Kheng, Deputy Prime Minister of The Ministry of Interior**, be informed and allow registration of into the list at the Ministry of Interior.

Please accept, **Samdech Kralahom**, the assurances of my highest consideration.

Day Month Year Buddhist Era 256...
Date Month Year 20.....

Chairman

Please Find The Attached Documents:

- Original Copy Of The Statutes (2 copies)
- Structure (2 copies)
- Biographies of each of the founding members (2 copies)
- Other administrative letters (If there are any)

Kingdom of Cambodia
Nation, Religions, and King

Municipality District Khan
Commune Sangkat
No.

Certification Letter

We, Chief of Sangkat/Chief of Commune

Would like to confirm that Mr./Mrs. Age: residing at House
No. Group No. Street Village ... Commune/Sangkat

Municipality/District/Khan City/Province has established the
Association / Organisation that truly has a head

office located at House No. St. Commune/Sangkat

Municipality/District/Khan City/Province.....

We issue this certification letter for the Association/Organization to use in the case that the law
permits.

Day Month Year Buddhist Era 256...

Date Month Year 20.....

**Signature and Stamp of
Chief of Sangkat/Chief of Commune**

**Kingdom of Cambodia
Nation, Religions, King**

Association/Organization

No.

Registration Form

My name is: Latin Characters:.....Sex: Male Female
Date of Birth:Day:.....Month:..... Year:..... Nationality:.....Race:.....
Place of Birth: Village:..... Commune/Sangkat:.....
Municipality/District/Khan..... City/Province:.....
Current Address: House number:.....Street:.....Group:.....
Village:.....Commune/Sangkat:.....
Municipality/District/Khan..... City/Province:.....
Current Occupation:.....
Telephone:.....Email:.....

Respectfully to

Samdech Kralahom Sar Kheng, Deputy Prime Minister of The Ministry of Interior

Subject: Request for Registration of Association / Organisation

Reference: Royal Kram No. NS/RKM.0815/010 dated August 12th, 2015, promulgating the Law on Associations and Non-Governmental Organizations

As indicated in the Subject and Reference above, I respectfully inform **Samdech Kralahom** that Association / Organization was established with the head office located at House No. St. Commune/Sangkat Municipality/District/Khan City/Province.....

With the goal

Once the Association / Organization receives permission from the Ministry of Interior, I promise to abide by the Law On Associations And Non-Governmental Organizations, the legal documents in force, and act in accordance with the statutes as deposited in the Ministry of Interior.

As indicated above, please, **Samdech Kralahom Sar Kheng, Deputy Prime Minister of The Ministry of Interior**, be informed and allow registration of into the list at the Ministry of Interior.

Please accept, **Samdech Kralahom**, the assurances of my highest consideration.

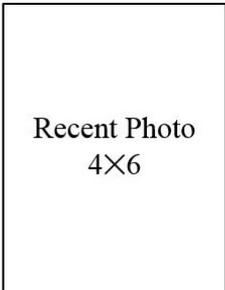
Day Month Year Buddhist Era 256...
Date Month Year 20.....

Chairman

Please Find The Attached Documents:

- Original Copy Of The Statutes (2 copies)
- Structure (2 copies)
- Biographies of each of the founding members (2 copies)
- Other administrative letters (If there are any)

Kingdom of Cambodia
Nation, Religions, King



Biography

1. Family Name and Given Name.....Latin Character.....
Sex: Male Female
2. Date of Birth: Month Year.....Nationality Race ...
3. Place of Birth: Village:..... Commune/Sangkat:.....
Municipality/District/Khan.....City/Province:.....
4. Current Address: House No. Group No. ...Street No. Village
Commune/Sangkat Municipality/District/Khan
City/Province
- Telephone: Email
5. General Qualifications and Training:
 - a. Level of Education:
 - b. Level of Professional Training.....
 - c. Knowledge of Foreign Languages:
6. Personal Activities (What, and Where?)
 - a. From 1979 to 1993:
 - b. From 1994 to the Present:
 - c. Positions in Associations/NGOs:
7. Family Situation
 - a. Husband or WifeAliveDeceased Age: Years...Position :
 - b. Place of Birth:
 - c. Children: (Name, Sex, Age, Role):
.....
.....
 - d. Father AliveDeceased Age: Years
Role: Place of Birth:
.....
 - e. Mother AliveDeceased Age: Years
Role: Place of Birth:
.....

I report in this biography is absolutely correct. If it is not true, I shall fully be responsible before law.

Day Month Year Buddhist Era 256...
Date Month Year 20.....

Please Find The Attached Documents:
Khmer ID Card (Certified True Copy)
Or Birth Certificate (Certified True Copy)

Signature and name

Kingdom of Cambodia
Nation, Religion, and King

**Secretariat Of The National Consumer
Protection Committee**

No

Application Form for Deposit of Documents

My name is: Latin Characters:.....Sex: Male Female
Date of Birth:Day:..... Month:Year:.....Nationality:..... Race:.....
Place of Birth: Village:..... Commune/Sangkat:.....
Municipality/District/Khan..... City/Province:.....
Current Address: House number:.....Street:.....Group:.....
Village:.....Commune/Sangkat:.....
Municipality/District/Khan..... City/Province:.....
Current Occupation:.....
Telephone:..... Email:

Respectfully to

**H.E Delegate of the Royal Government of Cambodia, Director-General In Charge Of General
Department Of The C.C.F and Secretary Of The National Consumer Protection Committee**

Subject: Request to Deposit Registration Documents and Permit To Establish Sectoral Consumer
Association

Reference: Royal Kram No. NS/RKM.1119/016 dated November 2nd, 2019, promulgating the Law
on Consumer Protection

As indicated in the Subject and Reference above, I respectfully inform **H.E Delegate and
Secretary Of The National Consumer Protection Committee** that I have already received
permission from the competent and relevant ministry or institution that manages each sector and
registered the association with its head office located at House No. St.
Commune/Sangkat Municipality/District/Khan
City/Province..... At the Ministry of Interior.

I promise to abide by the Law On Associations And Non-Governmental Organizations, the
legal documents in force, and act in accordance with the statutes as deposited in the Ministry of
Interior.

As indicated above, please, **His Excellency Delegate**, be informed and allow accordingly.
Please accept, **His Excellency Delegate**, the assurances of my highest consideration.

Day Month Year Buddhist Era 256...
Date Month Year 20.....

Chairman

Please Find The Attached Documents:

- Original permit to form a sectoral consumer association (2 copies)
- Original registration documents of the association (2 copies)
- Other administrative letters (If there are any)

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Konrad-Adenauer-Stiftung, Cambodia

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Facebook: www.facebook.com/kaskambodscha

Instagram: www.instagram.com/kas_cambodia

