

## ARTICLES

### THE ROLE OF INTERNATIONAL CONSUMER POLICY IN FOSTERING INNOVATION AND EMPOWERING CONSUMERS TO MAKE INFORMED CHOICES

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## I. INTRODUCTION

This study addresses the topic of consumer policy from an international law perspective; exploring the content and evolving meaning of the right to information in the age of fast-paced scientific and technological advancement, according to the United Nations Guidelines for Consumer Protection (“the Guidelines”), which were adopted in 1985 and last revised in 2015.<sup>1</sup>

The revision of the Guidelines in 2015, and its new text, have attributed enhanced responsibility for businesses and governments in building consumer knowledge and education, so that consumers are equipped to make informed choices. The “Principles for Good Business Practices”, now embedded in the Guidelines, highlight the responsibility of businesses to provide truthful, relevant, and non-misleading information concerning their products and services, while also avoiding deceptive or abusive practices. Since its latest revision, the Guidelines have established a role for businesses to upskill consumers’ awareness and knowledge of risks, through consumer education initiatives.

As regulation often lags behind the speed of product development, the Guidelines encourage businesses to educate consumers on product innovation and new technologies. Where regulatory gaps exist, businesses should be able to disseminate accurate and truthful information to avoid the risk of consumers being left in the dark, unable to make an informed decision on whether or not to consume a new product. The free flow of information, including relevant scientific information provided from producers to consumers, contributes to more innovation, enabling better and informed consumer choices.

This study is divided into three parts. Part I will address the meaning of the consumer right to information in the age of innovation, using the Guidelines as a framework. Part II will discuss how courts in different jurisdictions have addressed the issue of the provision of information to consumers, based on consumer rights and/or commercial speech theories. Part III will look at how the provision of scientific information to consumers can propel innovation and behavior change.

## II. THE MEANING OF THE CONSUMER RIGHT TO INFORMATION IN THE AGE OF INNOVATION

### *A. The Foundations of the Right to Information*

At its core, the right to information is a corollary of freedom of expression, which is embedded in the international human rights framework.<sup>2</sup> The Universal

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1. See, U.N. GUIDELINES ON CONSUMER PROTECTION (2016), [https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf) [<https://perma.cc/EZ42-PQM4>].

2. The international human rights framework is composed of the UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), adopted by the U.N. GEN. ASSEMBLY (UNGA) on 10 December 1948, the Int’l Covenant on Civ. and Pol. Rts., adopted by the UNGA on 16 December 1966, and the Int’l Covenant on Econ., Soc. and Cultural Rts. (ICESCR), adopted by the UNGA on 16 December 1966, which together form the “Int’l Bill of Hum. Rts.”; see also OFF. OF THE HIGH COMM’R FOR

Declaration of Human Rights (UDHR), in its Article 19, and the International Covenant on Civil and Political Rights (ICCPR), in its Article 19 (2), state that individuals have a right to freedom of expression, which includes the right to receive information. This principle has also been incorporated into regional human rights frameworks and enforced by regional human rights judicial mechanisms, including the European Court of Human Rights (ECtHR), the African Court of People and Human Rights, and the Inter-American Court of Human Rights.<sup>3</sup>

In this connection, Article 10 of the European Convention on Human Rights (ECHR) reiterates that the right to freedom of expression includes the right to receive and impart information and ideas. This concept is similarly expressed in Article 9 of the African Charter of Human and People's Rights, and Article 13 of the American Convention on Human Rights. Jurisprudence from the European Court of Human Rights supports this proposition, in applying the principle that Article 10 guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed.<sup>4</sup> Information that is of the public interest should be disclosed, to allow individuals to participate in public governance and debates of legitimate public concern.<sup>5</sup>

The African Commission on Human and People's Rights has declared that the right of the public to receive information is a core tenet of a democratic society,<sup>6</sup> providing regional reinforcement for similar statements made by the United Nations Human Rights Council and the General Assembly.<sup>7</sup> The African Court of Human Rights has determined that the right to freedom of expression, including the right to receive information, can only be infringed if the

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HUM. RTS., HUM. RTS. FRAMEWORK, <https://www.ohchr.org/EN/Issues/Migration/Pages/HumanRightsFramework.aspx> [<https://perma.cc/R2PG-7TU3>]. (last visited on Apr. 15, 2019).

3. The EUR. CONVENTION ON HUM. RTS. (ECHR) was opened for signature on 4 November 1950 and came into force on 3 September 1953. The Afri. Charter of Hum. and People's Rts. was adopted on 27 June 1981 and entered into force on 21 October 1986. The Am. Convention on Hum. Rts. was signed on 22 November 1969 and entered into force on 18 July 1978, <https://www.ohchr.org/EN/Issues/ESCR/Pages/RegionalHRTreaties.aspx> (last visited on Oct. 24, 2019) [<https://perma.cc/XV3C-PWZP>].

4. *The Sunday Times v. The United Kingdom*, Case No. 6538/74, 26 April 1979, Eur. Ct. H.R., ¶ 66.

5. *Magyr Helsinki Bizottsag v. Hungary*, Case No. 18030/11, 8 November 2016, Eur. Ct. of H.R. ¶ 161.

6. *Art. 19 v. Eritrea*, Afr. Comm. on Hum. and People's Rts. (SC) (May 30, 2007), <https://acjr.org.za/resource-centre/286-eritrea-article-19-v-eritrea-2007-ahr-lr-73-achpr-2007.pdf/@download/file/286-eritrea-article-19-v-eritrea-2007-ahr-lr-73-achpr-2007.pdf> [<https://perma.cc/45RM-TBHV>].

7. See United Nations, *Report of the Special Rapporteur on the Promotion and Protection of Freedom of Expression (SC)* (Sept. 6, 2016), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/373](http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373) [<https://perma.cc/B8VA-FVJ5>]. The Human Rights Council and the General Assembly have referred to freedom of expression as one of the essential foundations of a democratic society and one of the basic conditions for its progress and development.

restrictions put in place are proportionate and for a legitimate public concern.<sup>8</sup> The Inter-American Court of Human Rights has reiterated this concept.<sup>9</sup>

The international human rights framework is clear in delineating the right of individuals to receive accurate information to allow them to make informed decisions and to participate in public governance. Information accessibility also entails the right to seek, receive, and impart information and ideas concerning products. While within the human rights context, the scope of discussion typically relates to political speech—commercial speech is another form of communication which also receives varying levels of protection in various jurisdictions. While each jurisdiction has a different approach, this paper posits that consumers should be provided more, rather than less information, and businesses should be able to engage in truthful non-misleading communications as a means of informing the public. The more information the public receives, the better equipped they are to make informed decisions.

Information accessibility, and the ability to communicate to consumers, are key in the context of rapid technological innovation and advancement which facilitates the creation of new products. The right to receive, seek, and impart information takes on various dimensions, and understanding the foundational basis for these principles is key to coming up with effective consumer policies. The right to information also has roots in the principle of autonomy, which will be explored in further detail below.

### *B. Respect for Autonomy*

As an ethical principle, autonomy provides recognition for the fact that individuals, i.e. consumers, should have the ability to freely express their will and their choices. The term autonomy comes from the Greek phrase *autos* which means self, in combination with the word *nomos* which means rule, governance or law.<sup>10</sup> In ethics and political philosophy, autonomy is the state or condition of self-governance, or leading one's life according to reasons, values, or desires that are authentically one's own.<sup>11</sup>

Autonomy, or personal autonomy, is one of the ethical foundations to many moral and political rights and freedoms. Personal autonomy can be defined as the ability to conduct life in a manner of one's own choosing. Within the sphere of human rights, the concept of personal autonomy is closely linked to the right

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8. Lohé Issa Konaté v. The Republic of Burkina Faso, The Afr. Ct. of Hum. and People's Rts., App. No. 004/2013, 5 December 2014, ¶ 133. The case is in the context of criminalization for defamation.

9. Inter-Am. Ct. H.R., Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Inter-Am. Ct. H.R., App. No. 004/2013, 24 November 2010, ¶¶ 197-202.

10. Evanthia Sakellari, *Patient's autonomy and informed consent*, 13 ICUS NURS WEB J. (SC) 1 (Dec. 2002), [https://www.researchgate.net/publication/241752332\\_Patient's\\_autonomy\\_and\\_informed\\_consent](https://www.researchgate.net/publication/241752332_Patient's_autonomy_and_informed_consent) (last accessed on April 10, 2019).

11. James Taylor, *Autonomy, Ethics and Political Philosophy*, ENCYCLOPEDIA BRITANNICA (July 3, 2014), <https://www.britannica.com/topic/autonomy>, [https://perma.cc/WD5P-3WJ5].

to privacy<sup>12</sup> and the freedom to make choices. This term relates to:

(. . .) a person's ability to make his or her own rules in life and to make decisions independently. The idea that people must be free to shape their own lives is central to most accounts of autonomy. In general, autonomy means that a subject is the best expert on his/her interests. It is the reason why this subject should be able to make his/her own laws, particular rules of conduct or follow the values that are acceptable to him/her in practice. In general, any action or act can be described as autonomous only if the agent gives preference to this action, and this decision is independent and corresponds with his/her plan of action. In other words, we can talk about autonomy only when the freedom to choose and to make ethical decisions is guaranteed.<sup>13</sup>

In the field of bioethics, to respect an autonomous agent is to acknowledge that person's right to hold views, to make choices and to take actions based on personal values and beliefs.<sup>14</sup> This principle is the basis for the practice of "informed consent" in the physician/patient relationship regarding health care. Before any treatment can be given to a patient or procedure performed, patients must give informed consent. The process of informed consent is an opportunity for a doctor to provide information to their patients about the risks, benefits, and alternatives of a certain procedure, so that they can take an informed decision about the medical treatment they wish to follow.<sup>15</sup>

Respect for autonomy is also engrained in consumer laws and relates to the right of consumers to make informed choices according to their own needs and preferences. To ensure respect for consumers' autonomy, governments should provide a framework under which consumers can receive reliable, accurate and non-misleading information about the choices of products that are available to them. This is particularly true when products can have an impact on the health of consumers. This information is usually supplied and provided by businesses, in the form of commercial speech. The overlay between the principle of autonomy, the right to information, and commercial speech, is even more relevant in the context of new innovative or technological products on the market, which consumers may be unfamiliar with and need information concerning the form of

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12. UNITED NATIONS, *International Covenant on Civil and Political Rights*, art. 17 (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [<https://perma.cc/VK9Y-K7GN>]. ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.").

13. Jaunius Gumbis et al., *Do Human Rights Guarantee Autonomy?*, Cuadernos Constitucionales de la Cátedra Fadrigue Furió Ceriol (SC) (2011) 79-80, <http://www.corteidh.or.cr/tablas/r26750.pdf> [<https://perma.cc/PZ86-9M78>].

14. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 63 (5th ed., Oxford University Press 2001).

15. John Coggon & Jose Miola, *Autonomy, Liberty, and Medical Decision-Making*, THE CAMBRIDGE L. J. (2011) at 523-47.

usage, benefits and potential risks.

These two fundamental principles, the right to information and the concept of autonomy (or the right to make informed choices), are embedded in the modern notions of consumer rights and consumer protection. The next section will explore the political origins of consumer policy, and the right to be informed in relation to products, goods, and services.

### *C. The Political Origins of Consumer Rights*

Many scholars believe that the modern concept of consumer protection first appeared in a political declaration made by President Kennedy to the United States Congress in 1962, entitled the Special Message to the Congress on Protecting the Consumer Interest. In this speech, President Kennedy recognized the importance of consumers as a political and economic group and called upon Congress to take action to protect their interests. The historic speech recognized that technological progress posed both opportunities and difficulties for consumers. Consumers benefited from a much wider variety of consumer goods but were rarely provided with the information they needed to make informed choices. The following sections of the speech illustrate this point:

*[t]he march of technology* – affecting, for example, the foods we eat, the medicines we take, and the many appliances we use in our homes – has increased the difficulties of the consumer along with his opportunities; and *it has outmoded many of the old laws and regulations and made new legislation necessary*. The typical supermarket before World War II stocked about 1,500 separate food items – an impressive figure by any standard.

But today it carries over 6,000. Ninety percent of the prescriptions written today are for drugs that were unknown 20 years ago. *Many of the new products used every day in the home are highly complex*. The housewife [or house husband] is called upon to be an amateur electrician, mechanism, chemist, toxicologist, dietitian, and mathematician – *but she [or he] is rarely furnished the information she [or he] needs to perform these tasks proficiently*.

Nearly all of the programs offered by this Administration – e.g., the expansion of world trade, the improvement of medical care, the reduction of passenger taxes, the strengthening of mass transit, the development of conservation and recreation areas and low-cost power – are of direct or inherent importance to consumers. Additional legislative and administrative action is required, however, *if the federal Government is to meet its responsibility to consumers in the exercise of their rights*.<sup>16</sup>

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16. John F. Kennedy, *Special Message to the United States Congress on Protecting Consumer Interest*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (Mar. 15, 1962), <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028>

Stemming from this declaration, four policy areas have been identified, which shaped the basic rights of consumers: (i) the right to safety; (ii) *the right to be informed*; (iii) the right to choose; and (iv) the right to be heard. The right to be informed entails the right of consumers to be provided all the facts they need to make informed choices, as well as the right to be protected against fraudulent, deceitful, or misleading information, advertising, labeling, or other practices.

The right to information is essential to empowering consumer choice. A delicate balance must exist between the rights of consumers, and the shared responsibility of governments and businesses, to provide consumers with truthful information on products and services.

Over the years, political support has grown globally for enhancing the rights of consumers. The “right to be informed” has been tangibly furthered through the implementation of national laws and development of court jurisprudence which protect this right. The United Nations, through its Guidelines, established a global framework and strong political will to encourage the adoption of laws around the world which further the rights of consumers. These Guidelines, and relevant revisions which have taken place over the years to reflect the reality of the evolving rights of consumers due to technological innovation and advancement, will be explored in detail below.

#### *D. The United Nations Guidelines for Consumer Protection*

##### *1. Background*

Prior to the issuance of the Guidelines in 1985, member states already started to assess responsibilities for businesses in the context of consumer goods, through issuing the United Nations Set of Principles and Rules on Competition, also known as The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the “Set Principles”).<sup>17</sup> The Set Principles reflect a multilateral agreement on competition policy.<sup>18</sup>

On 9 April 1985 the General Assembly of the United Nations unanimously

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[<https://perma.cc/V24E-P3NW>] (*emphasis added*).

17. *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, THE U.N. SET OF PRINCIPLES & RULES ON COMPETITION (2000) <https://unctad.org/en/docs/tdrbpconf10r2.en.pdf> [<https://perma.cc/D2UH-KV23>]. Resolution 35/63 was adopted by the United Nations General Assembly at its thirty-fifth session on 5 December 1980, whereby the Set principles were pronounced. One of the stated objectives of the Set Principles is “to attain greater efficiency in international trade and development, (. . .), such as through: (. . .) (c) encouragement of innovation.”

18. *The United Nations Set of Principles of Competition*, U.N. CONF. ON TRADE & DEV., <https://unctad.org/en/Pages/DITC/CompetitionLaw/The-United-Nations-Set-of-Principles-on-Competition.aspx> [<https://perma.cc/4XR5-FHM3>]. (The Set Principles (i) provide a set of equitable rules for the control of anti-competitive practices; (ii) recognize the development dimension of competition law and policy; and (iii) provide a framework for international cooperation and exchange of best practices).

adopted the Guidelines, which were then again revised in 1999 and 2015.<sup>19</sup> The Guidelines are an internationally recognized set of minimum objectives for consumer protection. They are a form of policy advice for member states, with flexibility to be imposed into national laws in a manner which respects local circumstances and tradition.<sup>20</sup>

Given the international unanimous consensus with which the Guidelines were adopted, some scholars believe “they have a chance of developing into customary law and becoming binding laws in the future.”<sup>21</sup> The Guidelines were one of the first international documents explicitly recognizing the right of consumers to make informed decisions in accordance with their individual wishes and needs—placing a responsibility on member states to ensure these protections are ingrained in their local laws.

The adoption of the Guidelines has reinforced the increasing recognition in recent years that consumer policy can no longer be seen as being of purely local concern and must be seen in an international context.<sup>22</sup> In addition, given that there is recognition that “consumer rights are sufficiently important and have been unanimously accepted by UN member states as basic principles (. . .),” there is a presumed universal need to ensure a stable and high level of protection.<sup>23</sup> The Guidelines are said to have shaped consumer laws in over 100 countries, and thus can potentially be viewed as embodying universally recognized standards for consumer-related legislation.<sup>24</sup> This demonstrates direct acceptance of consumer rights at an international level, and sets a framework to encourage governments to promote consumer protection in the areas of consumer information, choice, and education.<sup>25</sup>

Over time, the Guidelines have been adapted to take into consideration innovations and advancements, like the internet and e-commerce, and were revised in 1999 and 2015. Product innovation creates a new set of dynamics and

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19. As a general rule, guidelines and declarations issued by international organizations assist countries in implementing their national laws. These soft law documents do not trigger binding obligations on member states. Nevertheless, guidelines provide useful information and guidance for member states to interpret and implement laws in their national jurisdictions.

20. Dan Wei, *Consumer Protection in the Global Context: The Present Status and Some New Trends*, CONSUMER LAW AND SOCIOECONOMIC DEVELOPMENT NATIONAL AND INTERNATIONAL DIMENSIONS, 10 (Claudia Lima Marques et al. eds., 2017).

21. *Handbook on Research of International Consumer Law: Consumer Protection and Human Rights*, 23 (2010), <https://search-proquest-com.proxy.ulib.uits.iu.edu/central/docview/761721226/D58E2056F5BE47A3PQ/1?accountid=7398> [<https://perma.cc/SK2J-VUVY>] [hereinafter *Handbook*].

22. David Harland, *The United Nations Guidelines for Consumer Protection*, J. OF CONSUMER POL'Y (SC) (1987), <https://doi.org/10.1007/BF00411533> [<https://perma.cc/NEV4-U9PU>].

23. *Handbook*, *supra* note 21, at 23.

24. CONSUMER LAW AND SOCIOECONOMIC DEVELOPMENT NATIONAL AND INTERNATIONAL DIMENSIONS, *supra* note 20.

25. *Id.*



responsibilities for businesses and governments. An analysis of the revisions to the Guidelines shows that businesses now have more of a role to play in upskilling the awareness of consumers through communication initiatives. The evolution of the Guidelines to highlight the increased onus placed on businesses, and the delicate balance that must be achieved between business and governments, will be assessed below.

## 2. *Revision of the Guidelines*

The Guidelines were last revised in 2015 to reinforce one of the underlying objectives of providing consumers with relevant information on products and services, so they can make better and more informed choices.<sup>26</sup> Over time, a textual review and analysis of the Guidelines from 1985, to 1999, and then 2015, shows that: (i) there is an emphasis on the empowerment of consumers to make decisions for themselves, echoing the principle of autonomy; (ii) businesses have an enhanced responsibility to educate consumers, and to provide truthful, relevant, non-misleading information concerning their products, which should in turn be allowed to reach consumers and be subject to government scrutiny and enforcement; and (iii) effective policies require a delicate balance between the roles of governments, businesses, and consumers themselves.

One of the most important changes made in the 2015 revision of the Guidelines is to section III(5)(e). Instead of access “of” consumers to adequate information, the Guidelines were changed to read access “by” consumers to adequate information enabling informed choices according to their individual wishes and needs.<sup>27</sup> These changes were interpreted as follows:

*What is the underlying philosophy of the Guidelines? They promote a ‘choice’ model of consumer protection tempered by information and education, along with certain protection. A key aspect of this Revision is the emphasis on knowledge. Information and knowledge complement a choice model, for without information and the ability to use that information there can be no informed choice, optimum or otherwise. In addition to promoting global flows of knowledge, there is an interesting change to the preposition in the General Principles concerning adequate information for informed choices. Instead of access ‘of’ consumers, this*

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26. *Handbook, supra* note 21; Gael Pearson, *The UNGCP Guidelines: Some Comments*, at pp. 40-41.

27. GUIDELINES, *supra* note 1, §III(5)(e). (“4. Member States should develop, strengthen or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Member State must set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, and bearing in mind the costs and benefits of proposed measures. 5. The legitimate needs which the guidelines are intended to meet are the following: [ . . . ] (e) Access by consumers to adequate information to enable them to make informed choices according to their individual wishes and needs.”).

now reads access 'by' consumers. 'By' connotes a more positive involvement of consumers with information.<sup>28</sup>

Notably, the 2015 revision of the Guidelines also places enhanced emphasis on the duty of businesses, through addition of the new "Principles for Good Business Practices" section. Older versions of the Guidelines had fewer references to direct business responsibilities. The previous versions primarily addressed governments, to ensure that member states put the proper frameworks in place to regulate the activities of businesses.

In the beginning, the 1985 version of the Guidelines included limited references to responsibilities for businesses.<sup>29</sup> The United Nations Economic and Social Council adopted revisions to the Guidelines in 1999, with the primary purpose of adding provisions on sustainable consumption. The 1999 revisions slightly enhanced the reference to responsibilities on businesses, introducing a new section II(7).<sup>30</sup> Fast forwarding to the digital era of technological advancement and the internet, the newly revised 2015 version of the Guidelines

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28. *Handbook*, *supra* note 21 (emphasis added).

29. UNITED NATIONS, *UNGA Resolution on Consumer Protection* (Apr. 16, 1985), <https://www.un.org/documents/ga/res/39/a39r248.htm> (last visited April 8, 2019) ("Section IIIA(10): Appropriate policies should ensure that goods produced by manufacturers are safe for either intended or normally foreseeable use. Those responsible for bringing goods to the market, in particular suppliers, exporters, importers, retailers and the linked (hereinafter referred to as 'distributors') should ensure that while in their care these goods are not rendered unsafe through improper handling or storage that while in their care they do not become hazardous through improper handling or storage. Consumers should be instructed in the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers by internationally understandable principles wherever possible. Section IIIB(20): Promotional marketing and sales practices should be guided by the principle of fair treatment of consumers and should meet legal requirements. This requires the provision of the information necessary to enable consumers to take informed and independent decisions, as well as measures to ensure that the information provided is accurate. Section IIIB(22): Governments should, within their own national context, encourage the formulation and implementation by business, in co-operation with consumer organizations, of codes of marketing and other business practices to ensure adequate consumer protection. Voluntary agreements may also be established jointly by business, consumer organizations and other interested parties. These codes should receive adequate publicity. Section IIIF(35): Business should, where appropriate, undertake or participate in factual and relevant consumer education and information programmes.").

30. *Department of Economic and Social Affairs*, UN GUIDELINES FOR CONSUMER PROTECTION (2003), [https://unctad.org/en/PublicationsLibrary/UN-DESA\\_GCP1999\\_en.pdf](https://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf) [<https://perma.cc/PN5X-SGC4>]. ("Section II(7) All enterprises should obey the relevant laws and regulations of the countries in which they do business. They should also conform to the appropriate provisions of international standards for consumer protection to which the competent authorities of the country in question have agreed (Hereinafter references to international standards in the guidelines should be viewed in the context of this paragraph.)").

incorporate a whole section entitled “Principles for Good Business Practices.” This section, in its entirety, provides as follows:

- (11) The principles that establish benchmarks for good business practices for conducting online and offline commercial activities with consumers are as follows:
- (a) Fair and equitable treatment. Businesses should deal fairly and honestly with consumers at all stages of their relationship, so that it is an integral part of the business culture. Businesses should avoid practices that harm consumers, particularly with respect to vulnerable and disadvantaged consumers:
  - (b) Commercial behaviour. Businesses should not subject consumers to illegal, unethical, discriminatory or deceptive practices, such as abusive marketing tactics, abusive debt collection or other improper behaviour that may pose unnecessary risks or harm consumers. Businesses and their authorized agents should have due regard for the interests of consumers and responsibility for upholding consumer protection as an objective.
  - (c) *Disclosure and transparency. Businesses should provide complete, accurate and not misleading information regarding the goods and services, terms, conditions, applicable fees and final costs to enable consumers to take informed decisions. Businesses should ensure easy access to this information, especially to the key terms and conditions, regardless of the means of technology used.*
  - (d) *Education and awareness-raising. Businesses should, as appropriate, develop programmes and mechanisms to assist consumers to develop the knowledge and skills necessary to understand risks, including financial risks, to take informed decisions and to access competent and professional advice and assistance, preferably from an independent third party.*
  - (e) Protection of privacy. Businesses should protect consumers’ privacy through a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of their personal data.
  - (f) Consumer complaints and disputes. Businesses should make available complaints- handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution without unnecessary cost or burden. Businesses should consider subscribing to domestic and international standards pertaining to internal complaints handling, alternative dispute resolution services and customer satisfaction codes.<sup>31</sup>

The shared responsibility between business and governments in relation to the

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31. GUIDELINES, *supra* note 1, at § IV (emphasis added).

dissemination of information and education programs is highlighted in the following sections:

42. Member States should develop or encourage the development of general consumer education and information programmes, including information on the environmental impacts of consumer choices and behaviour and the possible implications, including benefits and costs, of changes in consumption, bearing in mind the cultural traditions of the people concerned. The aim of such programmes should be to enable people to act as discriminating consumers, capable of making an informed choice of goods and services, and conscious of their rights and responsibilities. In developing such programmes, special attention should be given to the needs of vulnerable and disadvantaged consumers, in both rural and urban areas, including low-income consumers and those with low or non-existent literacy levels. Consumer groups, business and other relevant organizations of civil society should be involved in these educational efforts”.

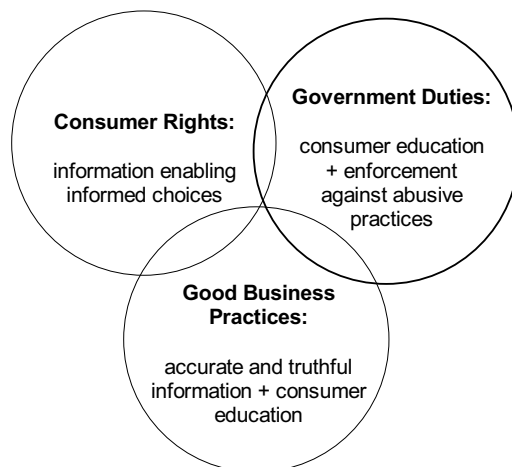
46. Businesses should, where appropriate, undertake or participate in factual and relevant consumer education and information programmes.<sup>32</sup>

These additions put an enhanced responsibility on businesses to have a proactive role in providing consumers with information to guide their decisions. The new critical provisions, section 11(c), section 11(d), and section 42, show that the responsibility for education and awareness-raising is split between both government and businesses—representing a paradigm shift in the role of businesses to upscale the knowledge of consumers. Section 11(d) now encourages businesses to develop the knowledge and skills necessary for consumers to understand risks associated with products.

The provisions outline a balance among the roles of all parties involved in consumer policy. On the government side, frameworks should enable consumers to access information which is provided in relation to the full range of products and services available for consumption. Governments are also expected to provide consumer education and adequate law enforcement to curb the potential for any abusive practices. Businesses, in turn, have a responsibility to communicate truthfully and accurately to ensure that they do not mislead consumers. Consumers should then exercise their rights autonomously, making informed decisions. This delicate balance among the different roles is illustrated in the visual representation below:

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32. *Id.* at §§ 42 and 46.



**Figure 1: Information and the roles of governments, businesses and consumers**

Under the current text of the Guidelines, approaches to consumer policy that allow providing more (not less) information to consumers, should be encouraged. Further support for this approach is found in Section 5 (k), which states that “the global free flow of information” is one of the guiding principles and objectives of the Guidelines. Section 28 also calls on Member States to “encourage all concerned to participate in the free flow of accurate information on all aspects of consumer products.”

This balanced policy approach proves to be more relevant in the case of newly emerging technologies and product innovations, which may not be explicitly covered by existing regulations. Ideally, regulation should indicate to manufacturers which information standard they must comply with. However, as regulation is always a few steps behind innovation, there is a legitimate case for manufactures to provide such information despite regulatory gaps.

### III. DIFFERENT POLICY APPROACHES TO THE PROVISION OF INFORMATION TO CONSUMERS

#### *A. Comparative Law Review*

In some jurisdictions, businesses have a fair amount of discretion in providing consumers with product related information. In the United States, for instance, the Supreme Court has granted constitutional protection to “commercial speech”, i.e. speech which communicates an economic interest and provides information to consumers.<sup>33</sup> Commercial speech protections can help facilitate the

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33. Oxana Gassy-Wright, *Commercial Speech in the United States and Europe*, Univ. of Ga.

dialogue between businesses and consumers, and allow for the free flow of information to guide decision-making.

In the United States commercial speech is a relevant tool available for businesses to keep consumers abreast of new products and services. As an example, a 2012 decision by the Second Circuit Court of Appeals recognized as commercial speech that merit protection the provision of truthful and non-misleading information about unapproved off-label use of prescription drugs.<sup>34</sup>

Although commercial speech can be considered a constitutional feature particular to the United States, other jurisdictions also protect commercial speech, or have framed the concept in different ways – in some instances as a *right* or *freedom* and in others as an *obligation* or *duty* – providing a certain degree of protection to the information.

The next section will analyze how courts have approached the provision of information to consumers by examining selected jurisprudence in the United States, Canada, Germany, the European Union, and Brazil. As stated above, the United States provides stronger safeguards for commercial speech. Canadian protections for commercial speech mirror the American approach but can be more restrictive. In Germany, the Constitutional Court grants protection to commercial speech and will not allow blanket bans on advertising or commercial information, especially if it involves truthful and non-misleading content. In Europe, the Court of Justice of the European Union (CJEU) recognizes a certain degree of protection for commercial speech, but in concrete cases this protection does not always fully materialize.<sup>35</sup> The CJEU is willing to accept restrictions on commercial speech justified on the basis of health, or other relevant public interests. While Brazilian Courts have not developed their own “commercial speech” doctrine, they have recognized a consumer right to receive adequate information, which is considered an autonomous right that needs to be fulfilled by businesses.

Of course, varied political, legal, and cultural traditions lead to varying degrees of protection for information provided by businesses. With all due respect for varied approaches, this paper contends that in order for businesses to fulfill the “Principles for Good Business Practices” and inherent responsibilities delineated in the newly revised Guidelines, the act of providing truthful non-misleading information to consumers in relation to new and innovative products should receive some level of protection, in order to spur product innovation and equip consumers with the requisite knowledge to guide their decisions.

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Sch. of L. LLM Theses & Essays (May 1, 2005), [https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1016&context=stu\\_llm](https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1016&context=stu_llm) [<https://perma.cc/2H7A-KCDN>]; see also *Securities and Exchange Commission v. Wall Street Publishing Institute Inc. dba Stock Market Magazine*, 851 F.2d 365 (U.S.C.A. DC Cir. 1988); *Central Hudson Gas & Electric Corp. v. Public Service Commission* (*hereinafter* *Central Hudson*), 447 U.S. 557 (1980).

34. *US v. Caronia*, 703 F.3d 149, 163, 168-69 (2d Cir. 2012).

35. *Gassy-Wright*, *supra* note 33, at 5.

### *1. Commercial Speech in the United States*

Free speech is viewed as one of the foundational tenets of a democratic society, and can be used as an instrument for the achievement of truth through knowledge.<sup>36</sup> Commercial speech can be defined as speech that is “concededly an advertisement and refers to a specific product and is motivated by commercial interest,” or speech that is used for advertising or profit.<sup>37</sup> The justifications for protecting commercial speech include that commercial speech helps to influence the free market economy, and the free market allows for the free flow of information and free choice (autonomy).

Until the mid-1970s, however, the Supreme Court did not consider that commercial speech was protected by the First Amendment. In a series of cases culminating in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc* (1976), the Supreme Court changed course and decided that the First Amendment’s protections extended to purely commercial speech. In *Virginia Pharmacy*, the Court struck down a Virginia regulation that prohibited pharmacists from advertising the price of prescription drugs.

In that case, the rationale for First Amendment protection of commercial speech was the interest both of the individual consumer and society generally in the free flow of commercial information, which was viewed as indispensable to informed economic choice.<sup>38</sup> Justice Blackmun, writing for the Court, argued that there was a listener’s right to receive advertising and also considered that an alternative approach could be to assume that the information is not in itself harmful – and that people will act in their own best interest if they are well informed. Justice Blackmun suggested that the best approach is open the channels of communication rather than to close them.

While commercial speech receives constitutional protection in the United States, review and survey of jurisprudence from the Supreme Court shows that there is an intermediate level of protection for the dissemination of truthful and

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36. *Id.* at 1.

37. *Id.* at 15.

38. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976); ERIC BARENDT, *FREEDOM OF SPEECH*, OXFORD UNIV. PRESS 400-1 (2d. ed. 2005). In the course of the decision the Court provided three reasons why commercial speech should be entitled to First amendment protections. (“The first focused on the interests of consumers in the free flow of commercial information: ‘[T]hat interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.’ Secondly, society has a strong interest in the unimpeded flow of commercial information, partly because that information may have a public interest component, but more generally because the flow is important in enabling consumers to make informed choices, which cumulatively are essential to the working of a free-enterprise economy. Thirdly, for the state to justify its ban on the publication of drug prices with the argument that otherwise consumers would be attracted to go to low-cost, low-quality pharmacist is unacceptable paternalism.”).

non-misleading information about products and services.<sup>39</sup> The Central Hudson case laid out a four part test to determine whether or not commercial speech should be protected.<sup>40</sup> This test, articulated below, has been used consistently to determine whether or not commercial speech will receive protection from the Court:

For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>41</sup>

The test lies first in determining whether or not the communication could be misleading. A check will also be done to ascertain if the government interest in controlling or limiting the commercial speech is substantial and if the regulation directly advances such interest. Finally, the Court will review whether the restriction imposed extends further than necessary. This approach provides more leeway to businesses to communicate. At the same time it ensures that misleading statements do not receive protection under the First Amendment.

The *44 Liquormart* (1999) case was critical in highlighting the rationale of the Court in providing protections for commercial speech.<sup>42</sup> In this case, liquor retailers challenged Rhode Island statutes prohibiting advertising of liquor prices. The Supreme Court held that a complete ban on such advertisements violated the First Amendment. The Supreme Court gave deference to the ability of businesses to provide truthful non-misleading information to the public.

The language of the Supreme Court in the *44 Liquormart* case again reiterates that there must be a delicate balance between businesses, governments, and individuals, in shaping effective policies. This balance, along with an emphasis on the principles of autonomy and the free flow of information, was expressed in the following passage:

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. *Linmark*, 431 U.S., at 96, 97 S.Ct., at 1620. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products (. . .).<sup>43</sup>

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39. Gassy-Wright, *supra* note 33 at 5.

40. *Central Hudson Gas & Electric v Public Service Commission*, 447 U.S. 557 (1980).

41. *Id.* at 566.

42. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

43. *Id.* at 503.



Also crucial is the impact commercial speech may have on broader societal changes. In *Bigelow v. Virginia*, the Supreme Court is said to have recognized, for the first time, the correlation between commercial speech and social development, in upholding the ability to make available to the public abortion services and daily rates.<sup>44</sup>

An interesting evolution of the commercial speech doctrine can also be evidenced in a 2012 decision by the Second Circuit Court of Appeals in *Caronia v. United States*. In this case the Court extended the First Amendment protection to the diffusion of truthful and non-misleading information on unapproved off-label use of prescription drugs. The court held that a salesperson who promoted unapproved off-label—yet scientifically justified—uses of a drug (in this case, the anti-narcolepsy drug Xyrem®) could not be held liable for violating the Food, Drug, and Cosmetics Act (FDCA).

According to the Second Circuit Court of Appeals ruling, the particular FDCA restrictions imposed on such speech violated the First Amendment.<sup>45</sup> In this ruling the Court noted that prohibiting the promotion of off label drug use, while simultaneously allowing off-label drug use, would interfere with the ability of patients to receive relevant information. The Court reasoned that “such barriers to information about off-label use could inhibit, to the public’s detriment, informed and intelligent treatment decisions.”<sup>46</sup> The Court gave deference to the free flow of information and revealed a policy approach which gave heightened protection to the value of truthful and non-misleading communication.

## 2. Commercial Speech in Canada

The Canadian Charter of Rights and Freedoms (the Charter) is the supreme law of Canada and the main source of constitutionally guaranteed rights and freedoms.<sup>47</sup> In *Ford v. Quebec (A.G.)* (1988), the Supreme Court of Canada stated

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44. *Bigelow v. Virginia*, 421 U.S. 809 (1975); NARAIN BATRA, THE FIRST FREEDOMS AND AMERICA’S CULTURE OF INNOVATION, THE CONSTITUTIONAL FOUNDATIONS OF THE ASPIRATIONAL SOCIETY 116-7 (2013).

45. *US v. Caronia*, 703 F.3d 149 (2012). (“[O]ff-label drug usage is not unlawful, and the FDA’s drug approval process generally contemplates that approved drugs will be used in off-label ways. In effect, even if pharmaceutical manufacturers are barred from off-label promotion, physicians can prescribe, and patients can use, drugs for off-label purposes. As off-label drug use itself is not prohibited, it does not follow that prohibiting the truthful promotion of off-label drug usage by a particular class of speakers would directly further the government’s goals of preserving the efficacy and integrity of the FDA’s drug approval process and reducing patient exposure to unsafe and ineffective drugs.”).

46. *Id.*

47. *Canadian Charter of Rights and Freedoms* (1982), <https://laws-lois.justice.gc.ca/eng/const/page-15.html>. (“Everyone has the following fundamental freedoms: (...) (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”).

that the freedoms guaranteed in the Charter “should be given a large and liberal interpretation” and that there is “no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter.”<sup>48</sup> The Supreme Court based its opinion on the welfare enhancing argument that individuals were able to make improved economic choices, as well as the proposition that the making of market choices was “an important aspect of individual self-fulfillment and personal autonomy”:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, *protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices*, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.<sup>49</sup>

In *Irwin Toy Ltd. v. Quebec (A. G.)* (1989), the majority decision begins with an analysis of what constitutes “expression” under section 2(b) of the Charter. In this case, the Supreme Court gave “expression” a very broad scope and decided that “if the activity conveys or attempts to convey meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.”<sup>50</sup> After deciding that expression is to be defined broadly, the majority restated and summarized the reasons for protecting freedom of expression as set out in *Ford v. Quebec*.<sup>51</sup>

These cases show that the Supreme Court of Canada proclaimed recognition for commercial speech protections, recognizing benefits to both speakers and listeners.<sup>52</sup> The Canadian approach, however, is different from the doctrine in the United States, as the Supreme Court of Canada usually assesses the value of the expression at issue as part of the justification process under the Charter. Based on this assessment, restrictions on commercial speech, due to their content, are more

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48. *La Chaussure Brown's Inc., Valerie Ford, McKenna Inc., Nettoyeur et Tailleur Masson Inc. and La Compagnie de Fromage Nationale Ltée A.G. v. Quebec (Attorney General)*, [1988] 2 S.C.R.712, para. 59 (Can.) (hereinafter *Ford v. Quebec*).

49. *Id.*

50. *Irwin Toy Limited v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (Can.)

51. *Id.* (“We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in *Ford* (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.”).

52. See Kent Roach & David Schneiderman, *Freedom of Expression in Canada*, 61 SUP. CT. L. REV. 429, 430 (2013); Richard Cullen & Kevin Tso, *Commercial Free Speech - A Critical Reconsideration*, 17 Australian J. Asian L., 2016, at 1, 7.

easily justified.<sup>53</sup>

### 3. Freedom of Speech in Germany

Germany is one jurisdiction within the European Union that also provides for strong protections for freedom of speech, including commercial statements, typically upholding the right of businesses to provide essential, non-misleading information to consumers.

For example, in the case *Nuklearmedizin im Briefkopf*, the German Constitutional Court recognized the interest of third parties in receiving truthful and non-misleading information as a factor to be considered in the balancing test required by constitutional law. This case involved advertising signs placed by a doctor. The German Constitutional Court annulled restrictions on the ability of a radiologist to make certain statements in his letterhead. In making its decision, the German Constitutional Court held that:

The legally protected interest [Rechtsgut] of public health and the resulting advertising ban to avoid the commercialization of the profession of doctors, which is undesirable from the point of view of health policy, do not justify the general prohibition of information on the specifics of the exercise of the profession, irrespective of its intent and purpose or its informative value for third parties (. . .) *Insofar as the references are fact-based and non-misleading, they are permitted* (. . .) This follows from Art. 12(1)GG.<sup>54</sup>

In another case, the German Constitutional Court (BVerfG) overruled the civil court decision prohibiting the dissemination of three publications by a physician who sold vitamin supplements.<sup>55</sup> The complainant published books and brochures and engaged in a public debate with the pharmaceutical industry stating that many diseases are caused by a lack of vitamins, which could easily be avoided through consumption of vitamin supplements.<sup>56</sup> In issuing its judgment and allowing the dissemination of the information, the Constitutional Court recognized the general importance of the consumers' interest in receiving information about publicly discussed health issues.<sup>57</sup>

In general, business communications will receive protection in Germany if

53. Cullen, *supra* note 52.

54. BVerfG, 1 BvR 166/89, Apr. 21, 1993, <https://research.wolterskluwer-online.de/document/04a5e9aa-931a-4d0d-8cba-3df853c02335?searchId=47777636> [<https://perma.cc/23L5-XMRG>], and subsequently BVerfG, 1 BvR 1147/01, Jan. 8, 2002, <https://research.wolterskluwer-online.de/document/8d09742b-074e-4175-a5bb-c7f2a9e9447b?searchId=47777593> [<https://perma.cc/4C2S-QTC7>] (emphasis added).

55. *Id.*

56. *Id.*

57. BVerfG, 1 BvR 2041/02, July 12, 2007, <https://research.wolterskluwer-online.de/document/cba39fb1-18e3-4bc4-af2b-ad8b502850c1?searchId=47777289> [<https://perma.cc/SRN2-RQR2>].

they aim to contribute to a debate of public interest, like health.<sup>58</sup> The German Federal Court for private and criminal law (“Bundesgerichtshof”) has also recognized the interests of the majority of consumers in the dissemination of truthful information, in showing that objectively correct information is worthy of a higher level of protection.<sup>59</sup>

In the medical context, recognition has been given for the ability of a charitable foundation whose purpose is to provide consumer information and advice on health issues, to provide information on doctors in its patient information services, specifying special treatment options, therapy facilities, and the specialist title.<sup>60</sup> In upholding its justifications, the Court noted that it is in the essential interest of patients to be informed about special treatment methods, and also that the “guiding model of the autonomous citizen and patient, would be also undermined by a corresponding ban on information (. . .).”<sup>61</sup>

#### *4. Commercial Speech in the European Union*

Jurisprudence at the level of the European Union shows recognition of some degree of protection to “commercial speech,” although both the ECtHR and CJEU give deference to member states in determining the restrictions deemed necessary to protect other relevant values, like public safety, health, or security, which may conflict with commercial speech.<sup>62</sup>

For state interference with commercial speech to be considered legitimate by the ECtHR, it has to: (i) be prescribed by law; (ii) pursue one or more of the legitimate aims set out in Article 10, paragraph 2, ECHR; and (iii) be necessary in a democratic society to achieve such aims.<sup>63</sup>

A review of jurisprudence of the ECtHR shows that the necessity test is less strict with regard to commercial statements than in the case of political speech. This means that member states enjoy a wider “margin of appreciation” to regulate commercial matters, which implies that they may interfere with commercial speech to a greater extent than would be allowed with regard to other kinds of

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58. *Id.*

59. BGH Feb. 15, 1996, I ZR 9/94, <https://research.wolterskluwer-online.de/document/a588c907-13a0-49d8-8741-e4eee0e0109e?searchId=47776599> [<https://perma.cc/F9ZW-T8LD>].

60. District Court Kiel, judgment of 10 November 1998- 16 O 19/98-Patienteninformationsdienst.

61. *Id.*

62. The European Convention on Human Rights, *supra* note 3, at art. 10, § 2. (“The exercise of these freedoms [freedom to hold opinions and to receive and impart information and ideas], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

63. *Casado Coca v. Spain*, 15450/89 Eur. Ct. H.R. ¶¶ 35-51 (1994).

expression. In other words, the ECtHR is usually more willing to accept the regulation of advertising than it is to accept the regulation of noncommercial speech.<sup>64</sup>

In *Casado Coca vs. Spain*, the ECtHR examined whether the Barcelona Bar Association violated Article 10 of the ECHR in sanctioning a lawyer for advertising his practice in the local newspapers, which was considered in breach of an advertising ban imposed by the Bar regulation.<sup>65</sup> The Court provided in depth reasoning for how Article 10 guarantees freedom of expression and also covers some forms of communications in a business context.<sup>66</sup>

The dicta in *Casado Coca v. Spain* implied recognition of the notion that restrictions on the provision of truthful information to consumers will be subject to close scrutiny by the ECtHR. According to the reasoning of the Court, attempts to ban or restrict purely factual business communications may be challenged, based on a potential violation to Article 10, as it impinges on freedom of expression and the free flow of information.<sup>67</sup> However, in the end the ECtHR found that a violation of Article 10 had not occurred and that local authorities were better placed to regulate the advertising of legal services.<sup>68</sup>

64. Bruce E. H. Johnson & Kyu Ho Youm, *Commercial Speech and Free Expression: The United States and Europe Compared*, 2 J. Int'l Media & Ent. 159, 180 (2009); (“The doctrine of “margin of appreciation” allows the governments of the Party States some discretion, subject to the [European Court of Human Rights] supervision, in balancing freedom” of speech “with conflicting interests such as reputation, privacy, and the right to a fair trial.”) *See, e.g.*, *Church of Scientology v. Suede* (Sweden), 7805/77 Eur. Ct. H.R. (1979). (“[T]he level of protection must be less than that accorded to the expression of ‘political’ ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned[.]”)

65. *Casado Coca v. Spain*, 15450/89 Eur. Ct. H.R. ¶¶ 35-51 (1994).

66. *Id.* at ¶¶ 35, 49, and 51. (“For the citizen, advertising is a means of discovering the characteristics of services and goods offered to him. Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinized by the Court, which must weigh the requirements of those particular features against the advertising in question; to this end, the Court must look at the impugned penalty in the light of the case as a whole.” [ . . .]”The Court would first point out that Article 10 guarantees freedom of expression to ‘everyone’. No distinction is made in it according to whether the type of aim pursued is profit-making or not. [ . . .]”In the Commission’s view, banning practically all advertising by members of the Bar appeared to be excessive and scarcely compatible with the right to freedom of expression, which includes the freedom to impart information and its corollary, the right to receive it. The applicant’s notice set out particulars that were wholly neutral (his name, occupation and business address and telephone number) and did not contain information that was untrue or offensive to fellow members of the Bar. He was therefore entitled to impart that information, just as his potential clients were entitled to receive it.”)

67. *Id.* at ¶¶ 35-51.

68. *Id.*

The ECtHR allows for a broader “margin of appreciation” or discretion when reviewing national policies that restrict commercial advertising.<sup>69</sup> In practice, this leads to an overall weaker level of protection of commercial speech.<sup>70</sup> This weaker scope of protection implies that the ability of businesses to communicate with consumers in the European Union can be more easily restricted.<sup>71</sup>

Alongside the ECtHR, the CJEU also has a significant body of jurisprudence addressing issues related to commercial speech. This study focuses on selected cases where consumer protection was included in the rationale of the decisions.

In *GB-INNO-BM v. Confederation du Commerce Luxembourgeois*, the CJEU addressed a question of commercial advertising and the free movement of goods.<sup>72</sup> The case involved the advertising of sales offers with reduced prices through leaflets, with information on the duration of the offer and the prices previously charged. This was prohibited by the Luxembourg legislation but permitted by the regulations in force in Belgium. The CJEU decided that the restrictions imposed by the Luxembourg legislation were unjustified and did not protect consumer interests.<sup>73</sup> The Court stated that community law establishes a link between consumer protection and providing information to consumers, which implies providing more, rather than less, information.<sup>74</sup> The Court stated that by providing information, the consumer is given a voice in decisions which involve him (or her).<sup>75</sup>

In *Neptune Distribution Snc v. Ministre de l'Economie et des Finances* (France), a request was made for a preliminary ruling concerning the prohibition to label and advertise natural mineral waters, suggesting characteristics which the

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69. Johnson & Youm, *supra* note 64, at 198.

70. Gassy-Wright, *supra* note 33.

71. Case 362/88, *GB-INNO-BM v. Confederation du Commerce Luxembourgeois*, 1990 E.C.R. I-667.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at ¶¶ 13-15, 18. (“The question thus arises whether national legislation which prevents the consumer from having access to certain information may be justified in the interest of consumer protection. . . . It should be observed first of all that Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information. . . . The existence of a link between protection and information for consumers is explained in the introduction to the second programme [of the European Economic Community for a consumer protection and information policy]. There it is stressed that measures taken or scheduled in accordance with the preliminary programme contribute towards improving the consumer’s situation by protecting his health, his safety and his economic interest, by providing him with appropriate information and education, and by giving him a voice in decisions which involve him. . . . It follows from the foregoing that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.”).

water did not possess.<sup>76</sup> In this case, the CJEU reaffirmed the need to provide accurate and transparent product information to consumers, which would be “closely related” to the protection of human health. Through using this reasoning, the Court found that the message at issue could mislead consumers, so the Court accepted the restrictions on speech that had been imposed by the French government.<sup>77</sup>

In another case, *MSD Sharp & Dohme GmbH v. Merckle GmbH*, involving the alleged advertisement of prescription drugs, the CJEU made a clear distinction between “information” content versus “advertising” content of commercial communications. The Court stated that “material which is purely informative, without promotional intent, is not covered by the provisions of [the] directive relating to advertising of medicinal products.”<sup>78</sup> The Court found that in order for a communication to be qualified as an advertisement, it must bear a promotional purpose; information which is purely informative does not amount to advertising.<sup>79</sup>

In the food context, the CJEU has considered disproportionate and unjustified in light of consumer protection arguments, a general prohibition of health claims,

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76. Case 157/14, *Neptune Distribution SNC v. Ministre de l'Économie et des Finances* (Minister for Economic Affairs and Finance), 2015, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0157> [<https://perma.cc/2MLG-QPDA>].

77. *Id.* at ¶¶ 65, 74 (“The need to ensure that the consumer has the most accurate and transparent information possible concerning the characteristics of goods is closely related to the protection of human health and is a question of general interest . . . which may justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business.”). (“Since the freedom of expression and information laid down in Article 11 of the Charter has, as is clear from Article 52(3) thereof and the Explanations Relating to the Charter as regards Article 11, the same meaning and scope as the freedom guaranteed by the ECHR, it must be held that that freedom covers the use by a business, on packaging, labels and in advertising for natural mineral waters, of claims and indications referring to the sodium or salt content of such waters.”).

78. Case 316/09, *MSD Sharp & Dohme GmbH v. Merckle GmbH*, 2011 E.C.R. I-03249 ¶ 32.

79. *See id.* at ¶ 48. (“Having regard to all of the foregoing, the answer to the question referred is that Article 88(1)(a) of Directive 2001/83 must be interpreted as meaning that it does not prohibit the dissemination on a website, by a pharmaceutical undertaking, of information relating to medicinal products available only on medical prescription, where that information is accessible on the website only to someone who seeks to obtain it and that dissemination consists solely in the faithful reproduction of the packaging of the medicinal product, in accordance with Article 62 of that directive, and in the literal and complete reproduction of the package leaflet or the summary of the product’s characteristics, which have been approved by the authorities with competence in relation to medicinal products. On the other hand, the dissemination, on such a website, of information relating to a medicinal product which has been selected or rewritten by the manufacturer, which can be explained only by an advertising purpose, is prohibited. It is for the referring court to determine whether and to what extent the activities at issue in the main proceedings constitute advertising within the meaning of that directive.”).

combined with a prior authorization system for the labelling and presentation of foodstuffs, imposed by food regulations in Austria. Such a requirement resulted in a failure to fulfill obligations on the approximation of the laws of member states relating to the labeling, presentation, and advertising of foodstuffs.<sup>80</sup> In this case, *Republic of Austria v. Commission*, the CJEU noted that the Austrian government did not produce any evidence that a system of ex post control of foodstuffs is ineffective.<sup>81</sup> The Court also clarified that, in case of doubt as to whether the message can mislead consumers or not, the national authorities should take “into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.”<sup>82</sup>

### 5. *Protection of Consumer Information in Brazil*

Brazil is another jurisdiction which favors the free flow of information enabling individuals to make better consumer choices. While not through the use of the doctrine of “commercial speech,” consumer information receives a high level of protection in Brazil.<sup>83</sup> The Courts clearly place an obligation on businesses to give more, rather than less, information to consumers in order to guide their decisions. Similar to other freedom of expression provisions around the world, Article 5 of the Brazilian Constitution provides as follows: “[M]anifestation of thought is free, but anonymity is forbidden;”<sup>84</sup> “expression of intellectual, artistic, scientific, and communication activity is free, independent

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80. Joined Cases C-421/00, C-426/00, and C-16/01, *Republic of Austria v. Commission*, 2003 E.C.R. I-1068 ¶¶ 37-38. (“While Article 2(1) of Directive 79/112 prohibits, first, all statements relating to the preventing, treating and curing of a human disease, even if they are not liable to mislead the purchaser, and, second, misleading statements relating to health, it is clear that the protection of public health, assuming that risks relating thereto are nevertheless conceivable in a particular situation, cannot justify a system as restrictive of the free movement of goods as that which results from a procedure of prior authorisation for all health-related information on the labeling of foodstuffs, including those which are manufactured lawfully in other Member States and are in free circulation. . . . Less restrictive measures exist for the prevention of such residual risks to health, such as, for example, an obligation on the manufacturer or distributor of the product in question, in the event of any uncertainty, to furnish evidence of the accuracy of the facts mentioned on the labelling (see, to that effect, *Commission v. Austria*, paragraph 49).”)

81. Joined Cases C-421/00, C-426/00, and C-16/01, *Republic of Austria v. Commission*, 2003 E.C.R. I-1068 ¶¶ 37-38.

82. *Id.* at ¶ 43.

83. With respect to the consumer right to information, see Código de Proteção e Defesa do Consumidor [C.D.C.], art. 6 §§ II, III (Braz.) (“The following are basic consumer rights . . . II - education and information about the adequate level of consumption for products and services, ensuring freedom of choice and equality in hiring processes; III - adequate and clear information about different products and services, with correct specification of quantity, characteristics, composition, quality, price and taxes, as well as the risks presented.”) (unofficial translation).

84. Constituição Federal [C.F.] [Constitution] art. 5(iv) (Braz.) (discussing Freedom of Thought).



of any censorship or license;<sup>85</sup> and “access to information is assured to everyone, protecting the confidentiality of sources when necessary for professional activity[.]”<sup>86</sup>

In 2007 the Superior Court of Justice handed down an important ruling determining the level of information that a business should provide to consumers in order to fulfill its obligation under the Consumer Protection Code.<sup>87</sup> The Superior Court of Justice case involved the labeling of a food product that contained gluten. Brazilian food regulations required standard labeling for products containing gluten (i.e. this product “contains gluten”). Although the producer had complied with the labeling requirements set by the food regulation, in a legal action filed by the Federal Public Prosecutor’s Office, the Superior Court of Justice understood that such requirements were insufficient to provide the consumer with the level of information they needed to protect their health, placing a higher burden on businesses.<sup>88</sup>

The Superior Court of Justice ruled that manufacturers should always strive to go beyond labeling requirements established under food law (special law) if this proves to be necessary to meet their general duty to inform under the Consumer Protection Code (consumer law.) The Superior Court of Justice highlighted that, under the consumer protection law, the right to information was an autonomous right that posed an autonomous obligation on businesses.<sup>89</sup> The decision went further stating that labeling requirements provided under food regulation set minimum standards, which did not replace the general information obligations set forth by the consumer protection law.<sup>90</sup>

Stating that the product “contains gluten,” as required by the existing food regulation, was not enough to keep consumers well informed. Businesses were

85. Constituição Federal [C.F.] [Constitution] art. 5(ix) (Braz.) (discussing Freedom of Expression).

86. Constituição Federal [C.F.] [Constitution] art. 5(xiv) (Braz.) (discussing Access to Information).

87. See T2, Ap. Civ. No. Resp 586316 MG 2003/0161208-5,; Relator: Ministro Herman Benjamin, 17.04.2007, <https://stj.jusbrasil.com.br/jurisprudencia/4092403/recurso-especial-resp-586316> [<https://perma.cc/UTJ6-YF8W>] (Braz.). (“The duty of information requires a positive and active behavior[.] . . . Positive and active behavior means that the consumer protection microsystem is not compatible with half-information, semi-information, proto-information or partial information, regardless of the term being chosen. Information is either given in full, or is not information in the legal (and practical) sense attributed to it by the CDC. . . . If the requirements of the special legislation that governs a specific product or service are not sufficient to properly inform the consumer, it is up to the manufacturer – the most knowledgeable about the products and services on sale – to offer complementary information . . . Only the well informed consumer may in fact fully enjoy the economic benefits of the product or service it has been provided, as well as to adequately protect itself from risks arising thereof. . . . Strictly speaking, the obligation to inform, nowadays has a true autonomous nature . . .” (unofficial translation).

88. *Id.*

89. *Id.*

90. *Id.*

required to add an additional message that “gluten is harmful for people with celiac disease,” even though this message was not prescribed by the existing food regulation.<sup>91</sup> The Court acknowledged that “if the requirements of the special legislation that governs a specific product or service are not sufficient to properly inform the consumer, it is up to the manufacturer – the most knowledgeable about the products and services on sale – to offer complementary information.”<sup>92</sup> This ruling demonstrates that businesses are encouraged to complement labeling information prescribed by special regulations, if necessary to fulfill the consumer’s right to information.

#### IV. PROPELLING INNOVATION THROUGH INFORMATION

##### *A. Providing Scientific Information to Consumers*

Communication of scientific information presents unique opportunities in the context of consumer policy. One of the first studies analyzing the effects of disseminating scientific information to consumers in relation to consumer behavior and product development/innovation was produced in 1990.<sup>93</sup> The objective of the study was to assess advantages and risks of allowing producers to provide consumers with scientific information that could help them make better dietary choices, as well as the effects this policy approach could have in terms of fostering product innovation.<sup>94</sup> The study also identified policy approaches that could help deter consumer deception, while not inhibiting the dissemination of truthful science-based claims.<sup>95</sup> It provided a number of examples where this approach proved to be advantageous for consumers, highlighting that “[t]he gain to consumers from incorporating evolving scientific discoveries into basic decisions about food and product choices can be enormous.”<sup>96</sup>

One case study confirming the proposition that providing scientific information to consumers could have a positive impact on consumption behavior and product development involved the ready-to-eat cereal market in the United States.<sup>97</sup> Prior to 1984, health claims were not allowed on the labeling of food in the United States.<sup>98</sup> However, upon a change in the food legislation, the Kellogg

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91. *Id.*

92. *Id.*

93. Pauline M. Ippolito & Alan D. Mathios, *The Regulation of Science-Based Claims in Advertising*, 13 J. CONSUMER POL’Y 413 (1990).

94. *Id.*

95. *Id.*

96. *Id.* at 413.

97. Before the Department of Health and Human Services Food and Drug Administration: In the Matter of Request for Comment on First Amendment Issues, Docket No. 02N-0209 at 24 (2002), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf) [<https://perma.cc/T4ZJ-AGPD>].

98. *Id.*

Company started to claim that All Bran cereal was high in fiber and that diets high in fiber could benefit consumers by reducing health risks.<sup>99</sup> Other cereal companies then responded with similar claims for their own high fiber cereals, while producers not using high fiber cereals in their portfolio were nudged to reformulate their products to match consumer expectation and competitors' offers.<sup>100</sup>

By the year 1987 consumers substantially increased their consumption of high-fiber cereals, with the greatest increase occurring in the groups that previously consumed the least amount of fiber cereal.<sup>101</sup> The profile of the cereal market then correspondingly changed. Market shares for high fiber cereals increased and more cereals with high fiber content were circulating on the market and being purchased.<sup>102</sup> This study also noted that when information is provided by producers, it can be more effective and far-reaching than non-producer information disseminated by state educational campaigns, which may typically benefit segments of society with higher education.<sup>103</sup> Another finding was that producers have higher incentives to innovate and introduce better products to the market if they can highlight certain aspects of their products, while consumers can use the information provided to make better choices.<sup>104</sup>

Another case study showing that the provision of scientific information to the consumer through food labeling can positively impact product development and innovation is related to industry "trans fatty acid" (TFA). Consumption of TFA increases the risk of coronary heart disease, and possibly also the risk of sudden cardiac death and diabetes according to public health studies.<sup>105</sup> In 2002, Canada passed regulations requiring mandatory TFA food labeling, which came into force on most packaged foods by 2005.<sup>106</sup> A study published by the European Journal of Clinical Nutrition assessed both grocery and restaurant foods likely to contain TFA in Canada in 2005–2007, the period following mandatory labeling of TFA content.<sup>107</sup> The conclusions were that food manufacturers and restaurants took the opportunity to reformulate their products, to reduce TFA content, increasing content of unsaturated fats, which could provide health benefits to

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99. *Id.*

100. *Id.*

101. *Id.*

102. Ippolito & Mathios, *supra* note 93, at 417.

103. Before the Department of Health and Human Services Food and Drug Administration: In the Matter of Request for Comment on First Amendment Issues, Docket No. 02N-0209 at 24 (2002), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf) [<https://perma.cc/T4ZJ-AGPD>].

104. *Id.*

105. WMN Ratnayake et al., *Nationwide Produce Reformulations to Reduce Trans Fatty Acids in Canada: When Trans Fat Goes out, what Goes in?*, 63 EUR. J. CLINICAL NUTRITION 808 (2009).

106. *Id.*

107. *Id.*

consumers.<sup>108</sup>

As evidenced by the cereal and TFA case studies, improvements to health can be achieved through the introduction of new and innovative consumer goods on the market, or by reformulation of existing products. In both cases, a change in the regulatory frameworks, which allowed consumers to receive more information about products, also encouraged producers to improve their respective product offerings. In the cereal case, researchers were also able to detect a change in consumption patterns related to high fiber cereals.<sup>109</sup> For those behavior and market changes to happen, it was key that consumers received the essential information they needed on new products, via labeling, education campaigns, or other means. In these cases, regulatory policies which encourage the provision of information, can have the effect of “[t]apping [into] the resources of the private sector to promote products based on scientific relationships[.]”<sup>110</sup> This type of fact-based dissemination of information can inform decision-making and product innovation in parallel.

Scientific innovation may create what can be categorized as “imperfect information”.<sup>111</sup> Unlike the case of asymmetric information, where producers know relevant information about the product that consumers do not, in cases of imperfect or missing information, relevant product information does not exist or

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108. *Id.* at 809-11 (“Among the major grocery and restaurant food products in Canada that might contain TFA in 2005–2007, nearly half (42%) contained [greater than or equal to] 5% TFA on initial assessment. Many were subsequently discontinued or reformulated to reduce TFA; in those assessed more than once, nearly three-quarters had undergone reformulation, with average reduction to [less than or equal to] 2% TFA. Following reformulation, only one product had unchanged content of *cis* unsaturated fats; all others had increased *cis* unsaturated fats, most with absolute increase [greater than or equal to] 10% of fatty acids and half with absolute increase [greater than or equal to] 20%. The total fat content was generally unchanged. . . . [T]his first large-scale contemporary assessment of TFA contents and reformulations suggests that, at least in industrialized nations with food labeling, rather than replacing TFA with SFA or increasing total fat content, food manufacturers/restaurants are generally taking advantage of costs and efforts of reformulation as an opportunity to not only reduce TFA but also increase the content of *cis* unsaturated fats. Such reformulation may provide additional health benefits beyond those due to lower TFA content. Most of the assessed food manufacturers and restaurants have global reach, and these findings should encourage food and restaurant industries in other regions that it is possible to reformulate foods to both eliminate industrial TFA and improve overall fatty acid composition.”).

109. Before the Department of Health and Human Services Food and Drug Administration: In the Matter of Request for Comment on First Amendment Issues, Docket No. 02N-0209 at 24 (2002), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf) [<https://perma.cc/T4ZJ-AGPD>].

110. Ippolito & Mathios, *supra* note 93, at 440.

111. *Mandatory Labeling*, U.S. DEP'T AGRIC., ECON. RES. SERV., [https://www.ers.usda.gov/webdocs/publications/41203/18890\\_aer793d.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/41203/18890_aer793d.pdf?v=0) (last visited Oct. 17, 2019) [<https://perma.cc/SG86-WDZA>].

is contradictory.<sup>112</sup> This situation could arise when the long term health effects of a product are unknown, or when scientific opinions differ about the health consequences of consumption.<sup>113</sup> Even in those cases, the government can take a policy stance to provide consumers with the fullest information possible. This situation was described in more detail by the United States Department of Agriculture as follows:

Another type of information problem that may occur in food markets is that of imperfect information. Unlike the case of asymmetric information, where producers know relevant information about the product that consumers do not, in cases of imperfect or missing information, relevant market information does not exist or is contradictory. This situation could arise when the long-term health effects of a food or food attributes are unknown, or when scientific opinions differ about the health consequences of consumption. In these cases, the government might require full disclosure of even preliminary or contradictory information to provide consumers with the fullest information possible. Hadden (1986, p. 263) argues ‘It is a perversion of the intent of information provision to wait until full knowledge is available before labeling products.’ Indeed, if such information is valuable to consumers, it could improve market efficiency as in the case of asymmetric information.<sup>114</sup>

If a policy standard is adopted which requires absolute certainty before any claims or communications on products are allowed, consumers will lose the potential benefits of receiving the information earlier.<sup>115</sup> Keeping consumers in the dark about scientific developments will lead consumers to use outdated information on which to base their decisions.<sup>116</sup>

In the context of tobacco, this raises questions about what level of information should be provided to consumers on innovative and emerging nicotine containing products, such as e-cigarettes and heated tobacco, which may potentially be less harmful alternatives to conventional cigarettes. Recognizing that alternative nicotine containing products may have the potential to reduce public health harms associated with smoking, some governments have adopted regulatory frameworks that allows information to be provided to adult legal aged

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112. *Id.*

113. *Id.*

114. *Id.*

115. See Ippolito & Mathios, *supra* note 93, at p. 432-33.

116. *Id.* at 438-39.

smokers about those alternatives.<sup>117</sup>

The fact that these products are subject to stringent regulations, including mandatory disclosure regimes, should not keep adult legal aged consumers from being properly informed and updated on scientific advancement and innovation that concerns new products.

*B. Education Campaigns: A New Way of Communicating with Consumers*

Making consumers aware of the latest scientific evidence will help inform their decisions. To ensure that the information on new and innovative products gets to consumers, governments and businesses should use appropriate means of communication, including education campaigns.

Section 11(c), section 11(d), and section 42 of the Guidelines indicate that the responsibility for consumer education and awareness-raising is split between both government and businesses.<sup>118</sup> Section 11(d) now calls on businesses to develop the knowledge and skills necessary for consumers to understand risks associated with products.<sup>119</sup> Interestingly, businesses are now engaging in more education campaigns with consumers, especially for new technological products that consumers may not be familiar with.

In this connection, revisions to the Vienna Convention on Road Traffic have paved the way for automated vehicles.<sup>120</sup> In 2017 Waymo (formerly part of Google) was the first company to create “the world’s first public education campaign for self-driving cars,” which sought to increase knowledge regarding self-driving technology.<sup>121</sup> The campaign partnered with “Mothers Against Drunk Driving,” attempting to raise awareness on the possibilities to reduce drunk driving crashes through the use of autonomous vehicles.<sup>122</sup> The campaign entitled “Let’s Talk Self-Driving” was geared towards educating the public about this new technology.<sup>123</sup>

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117. See, e.g., *Towards a Smoke-Free Generation: A Tobacco Control Plan for England*, U.K. Dep’t Health (July 2017) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630217/Towards\\_a\\_Smoke\\_free\\_Generation\\_-\\_A\\_Tobacco\\_Control\\_Plan\\_for\\_England\\_2017-2022\\_\\_2\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630217/Towards_a_Smoke_free_Generation_-_A_Tobacco_Control_Plan_for_England_2017-2022__2_.pdf) [<https://perma.cc/6DBT-CC4D>]; see also *Vaping and Smokeless Tobacco*, N.Z. Ministry Health, (Oct. 2017) <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco> (last visited Oct. 23, 2019) [<https://perma.cc/NPR2-UK4Z>].

118. GUIDELINES, *supra* note 1.

119. GUIDELINES, *supra* note 1.

120. See *UNECE paves the way for automated driving by updating UN international convention*, UNECE (Mar. 23, 2016), <https://www.unece.org/?id=42459> [<https://perma.cc/N4U4-A3YJ>].

121. See Mallory Locklear, *Waymo ad campaign aims to get the public behind self-driving cars*, ENGADGET (Oct. 9, 2017), <https://www.engadget.com/2017/10/09/waymo-ad-campaign-get-public-behind-self-driving-cars/?guccounter=1> [<https://perma.cc/U7LV-3LUC>].

122. *Id.*

123. *Id.*

Other companies such as Intel and Uber were also slated to release statements and advertisements concerning the new technology. Driverless cars may have the ability to reduce accidents significantly.<sup>124</sup> When commercialized, consumers need to be aware of the potential risks and benefits, and also how to use them. A parallel can be drawn to recent education campaigns which are informing consumers about better options than smoking, such as quitting or switching to less harmful alternatives.<sup>125</sup> Communication efforts and education campaigns discussing new technologies are aligned with the spirit and letter of the Guidelines.

#### V. CONCLUSION

The theoretical foundations for freedom of expression, respect for autonomy, and consumer protection support the notion that individuals should be provided with truthful non-misleading information, in order to guide their autonomous decisions. The newly revised version of the Guidelines places an enhanced responsibility on businesses to provide information to consumers.

Reviewing the jurisprudence pertaining to commercial speech and consumer protection in selected jurisdictions around the world shows that, while approaches are different and there is a spectrum of communication restrictions and freedoms, overall there is recognition of the benefit of providing essential information to consumers. This benefit must be considered and weighed against potential risks underlying the product and broader public concerns. The delicate balance between businesses and governments, envisioned in the Guidelines, can be achieved through allowing communication and simultaneously encouraging substantiation of claims and effective enforcement measures to quell deceptive practice.

In order to fulfill responsibilities under the “Principles for Good Business Practices” section of the Guidelines, while in parallel propel product innovation forward, businesses should be able to communicate science-based information to consumers. As science and technology continues to evolve, approaches which open the gateways of communication to consumers will encourage product innovation, development, and advancements, which may ultimately have a positive impact on society.

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124. *UNECE paves the way for automated driving by updating UN international convention*, *supra* note 119.

125. *See, e.g.*, Unsmoke Your World, <https://www.pmi.com/unsmoke> (last visited Aug. 16, 2019) [<https://perma.cc/PZ52-2W9F>].