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# Analysing the Notion of 'Consumer' in China's Consumer Protection Law

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## Abstract

*The notion of 'consumer' in Article 2 of the People's Republic of China (PRC)'s Consumer Protection Law has been subject to criticism as it is vague, can be difficult to apply to real-life situations, and is also at odds with the notion of a 'consumer' found in other jurisdictions around the world. This article will discuss the Chinese legislative definition of a 'consumer' from a comparative perspective before considering how this notion has been applied by the courts, by analysing several guiding cases issued by China's Supreme People's Court and judgments in which reasons given in the guiding cases have been subsequently applied. The article will then consider the delicate balance that the courts in China are attempting to strike between encouraging consumer claimants to pursue fraudulent traders and yet discouraging consumers from exploiting the punitive damages provisions of the Consumer Protection Law. Thus, this detailed analysis of the legal notion of a 'consumer' in China offers a unique and powerful insight into the wider role of consumers within the Chinese legal system.*

## Introduction

The key national-level consumer protection law in China (Law of the People's Republic of China on the Protection of Consumers' Rights and Interests [Consumer Protection Law]) was first promulgated in 1993 and was substantially amended in 2013.<sup>1</sup> However, the definition of 'consumer' found in

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<sup>1</sup> *Zhonghua renmin gongheguo xiaofei zhe quanyi baohu fa* (Law of the People's Republic of China on the Protection of Consumer Rights and Interests), promulgated on 31 October 1993, amended on 27 August 2009 and on 25 October 2013, effective as of 15 March 2014 (Consumer Protection Law) <<http://npc.people.com.cn/n/2013/1028/c14576-23353525.html>> accessed 14 June 2017.

Article 2 remained unaltered: '[W]hen a consumer purchases or uses goods or receives services for the needs of daily consumption, their rights and interests are protected by this Law.' Article 62 also provides that the Consumer Protection Law should apply to peasants who purchase means of production directly for agricultural use.<sup>2</sup> The definition of 'consumer' found in Article 2 has been subject to criticism as it is vague and can be difficult to apply to real-life situations.

As will be discussed in the next section, this definition is also at odds with the notion of a 'consumer' found in the consumer protection laws of many other countries that frequently follow the models set by the United States of America (USA) and the European Union (EU). The definition of a 'consumer' found in Article 2 of the Consumer Protection Law is also highly significant because of the availability of statutory punitive damages under Article 55 of the 2013 Consumer Protection Law<sup>3</sup> for those individuals who do qualify as 'consumers' and are supplied with goods or services by a business operator engaged in fraudulent activities—for example, an operator engaged in selling fake or counterfeit products. Consequently, cases in which the consumer claimant is seeking to claim such statutory punitive damages will be a central focus of this article.

The issue of clearly defining who can make a claim under specific consumer protection measures is not a problem that China alone faces. Although more than 50 years have passed since the accepted emergence of modern consumer protection law,<sup>4</sup> the notion of a 'consumer' as a legal and philosophical construct has never been clearly and coherently defined. For example, the 1985 United Nations Guidelines on Consumer Protection (UN Guidelines)<sup>5</sup> outline various basic consumer rights and have frequently been used as an exemplar for the drafting of consumer laws in many countries around the world.<sup>6</sup> The UN Guidelines contain a broad definition of a 'consumer' on whom these rights should be bestowed under Guideline 3: 'For the purpose of these guidelines, the term "consumer" generally refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes, while recognising that Member States may adopt differing definitions to address specific domestic needs.' Thus, within this general guidance, it is left to each specific legislature to define the notion of a 'consumer' that will apply in their specific jurisdiction.

<sup>2</sup> Previously art 54 in the original 1993 PRC Consumer Protection Law. The 2013 amendments did not change the wording of this provision although the article number was shifted from art 54 to art 62.

<sup>3</sup> Previously Consumer Protection Law (n 1) art 49.

<sup>4</sup> Commonly dated to the Special Message of President Kennedy to the United States Congress in 1962 on protecting the consumer interest, see John F Kennedy, 'Special Message to Congress on Protecting the Consumer Interest' <<http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx>> accessed 14 June 2017.

<sup>5</sup> United Nations, 'United Nations Guidelines for Consumer Protection' <<http://unctad.org/en/PublicationsLibrary/ditccplmisc2016d1.en.pdf>> accessed 14 May 2018 (UN Guidelines).

<sup>6</sup> David Harland, 'The United Nations Guidelines for Consumer Protection' (1987) 10 *J Consumer Policy* 3.

Clearly, the legal protection offered to a 'consumer' goes beyond that offered to contractual parties under the usual laws of contract. Further, the legal notion of a 'consumer' is such a critical concept because only those who fall within the definition have the legal standing to bring a claim under specific consumer protection laws if they are left with defective, fake, or dangerous goods or services. However, the issue of how to define a 'consumer' has been described as both complex and sensitive since defining the scope of protection may reveal the entire rationale underpinning the wider consumer protection law.<sup>7</sup> Thus, examining the notion of a 'consumer' in one specific jurisdiction not only exposes the policy responses that are typically designed by the State for the local context and at a national level<sup>8</sup> but also uncovers the ideological perspective behind those consumer-related laws and regulations.<sup>9</sup> The definition of 'consumer' to be found within the law of the People's Republic of China (PRC) is consequently of particular interest for several reasons. First, much of the existing literature on the philosophical foundations of the concept of a 'consumer' draws on developed market economies in their analysis.<sup>10</sup> As a socialist economy in transition, China does not follow the same neo-classical economic principles as developed market economies,<sup>11</sup> so it can consequently offer a fresh perspective on the debate underlying consumer protection.

China has experienced remarkable and sustained rates of economic growth since the 'reform and opening-up' (*gaige kaifeng*) period began in the late 1970s, despite remaining firmly under the grip of an authoritarian government.<sup>12</sup> Indeed, China often succeeds in defying conventional economic theories—for example, in sustaining spectacular economic growth during the 1980s in the absence of formal protection for property rights.<sup>13</sup> Consequently, China can offer a unique and powerful insight into the foundations of consumer protection law and how it can change and adapt to an emerging economy. This article will, therefore, focus on the central notion of who is a

<sup>7</sup> Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, 'Consumer Law in Its International Dimension' in Geraint Howells and others (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 3.

<sup>8</sup> *Ibid* 1.

<sup>9</sup> Robert G Vaughn, 'Chilean Consumer Protection Standards and the United Nations Guidelines on Consumer Protection: A Comparative Study Revealing Regional Conflicts' (1996) 22 *North Carolina J Intl L & Commercial Regulation* 2, 71.

<sup>10</sup> For example, from a European perspective, see Ewoud Hondius, 'The Notion of Consumer: European Union versus Member States' (2006) 28 *Sydney L Rev* 89; Michelle Everson, 'Legal Constructions of the Consumer' in Frank Trentmann (ed), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World* (Berg 2005) 99.

<sup>11</sup> Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2007) 86.

<sup>12</sup> Franklin Allen, Jun Qian and Meijun Qian, 'Law, Finance and Economic Growth in China' (2005) 77 *J Financial Economics* 57.

<sup>13</sup> For more details on the link between property rights and economic development in reform-era China, see Louis Putterman, 'The Role of Ownership and Property Rights in China's Economic Transition' (1995) 144 *China Quarterly* 1047; Jean C Oi and Andrew G Walder (eds), *Property Rights and Economic Reform in China* (Stanford University Press 1999).

'consumer' under the Consumer Protection Law and what this tells us about the wider role of consumers in China.

The article will proceed as follows: the first section will outline the notion of the 'consumer' under the Consumer Protection Law in more detail before considering the Chinese definition from a comparative perspective. This comparative analysis will focus on the definitions of 'consumer' to be found in the EU and the USA as they exemplify the main approaches taken to defining a consumer around the world. The second section will outline how this Chinese notion of a 'consumer' has been applied by the courts by examining relevant court judgments, including relevant guiding cases issued by China's Supreme People's Court. The third section will discuss the delicate balance that the courts in China are attempting to strike between encouraging individual consumers to bring actions against fraudulent and shoddy traders and yet discouraging consumers from exploiting the punitive damages provisions of the Consumer Protection Law. The final part of the article will conclude by discussing what this analysis of the notion of a 'consumer' within the Consumer Protection Law can tell us about the wider role of the consumer within the Chinese legal system, within the rapidly modernizing economy, and within wider Chinese society.

## The definition of a 'consumer' in the Consumer Protection Law

From the establishment of the PRC in 1949 until the start of China's 'reform and opening-up' (*gaige kaifeng*) period in 1978, the formal notion of the 'consumer' was completely alien to the Chinese legal and regulatory system. As a centrally planned economy controlled by the Chinese Communist Party, the concept of individual consumer interests as fundamentally opposed to those of capitalist producers was entirely redundant.<sup>14</sup> Instead of being governed by market forces, the socialist economy was directed by the State at this time and relied on collective production and distribution. In addition, State priorities in the early years of the PRC were firmly productivist, focusing manufacturing efforts 'on the making of things that make more things'<sup>15</sup> such as steel or chemicals rather than finished consumer goods for sale in the marketplace. Urban citizens received products through their work units in accordance with the centrally directed command economy, and rural citizens lived in poverty with no disposable income to even consider purchasing goods or services beyond

<sup>14</sup> For broader discussion of the redundancy of the notion of the 'consumer' within a socialist economy, see Rafał Mańko, 'Resistance towards the Unfair Terms Directive in Poland: The Interaction between the Consumer Acquis and a Post-Socialist Legal Culture' in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (CUP 2012) 412.

<sup>15</sup> Karl Gerth, *As China Goes, So Goes the World: How Chinese Consumers Are Transforming Everything* (Farrar, Straus and Giroux 2010) 6.

essential survival.<sup>16</sup> Consequently, there was no legal need for formal protection of individual consumers' rights and interests at this time.

From late 1978 onwards, China officially entered the modern reform period with the introduction of an economic policy known as 'reform and opening-up' (*gaige kaifeng*).<sup>17</sup> The opening up of the Chinese economy necessitated the introduction of a consumer economy as individuals could exercise free choice in selecting goods and services for the first time.<sup>18</sup> However, the initial legal reforms of the 1980s focused on introducing the basic building blocks of a functioning legal system,<sup>19</sup> such as amending the PRC Constitution in 1982, passing a provisional Civil Procedure Law in 1982 and the General Principles of Civil Law in 1986, as well as implementing the 1979 Joint Venture Law specifically to support initial economic development and reform. These initial legal reforms of the 1980s focused on establishing a basic level of a functioning legal system in order to encourage potential foreign investors into China.

Thus, China's first comprehensive Consumer Protection Law was not passed until October 1993 and entered into force on 1 January 1994, as part of a subsequent wave of laws aimed at facilitating and strengthening the construction and operation of a socialist market economy.<sup>20</sup> This revitalized focus on law-making to support further liberalization of the developing market economy followed then-President Deng Xiaoping's tour of Southern China in 1992, which 'signalled a renewed attempt by the regime to stimulate economic growth while retaining strict control over social and political activities that might challenge the regime's authority.'<sup>21</sup> The Consumer Protection Law, therefore, was passed as part of a surge of law-making expressly aimed at liberalizing the economy and affirming the open-door reform policy; as part of this upsurge, 85 laws were approved within a single five-year period (1993–98).<sup>22</sup>

Together with the PRC's Product Quality Law,<sup>23</sup> passed in the same year, the 1993 Consumer Protection Law established a basic level of protection for consumers against counterfeit, defective, or dangerous goods or services for the first time and was necessary in order to support the drive towards deeper

<sup>16</sup> Michael B Griffiths, *Consumer and Individuals in China: Standing Out, Fitting In* (Routledge 2013) 1.

<sup>17</sup> For an overview of the reforms introduced from 1978 onwards, see Elizabeth J Perry and Christine Wong (eds), *The Political Economy of Reform in Post-Mao China* (Harvard University Press 1985).

<sup>18</sup> Gerth (n 15) 7.

<sup>19</sup> For further details on Chinese legal reforms in the reform and opening-up era, see Stanley B Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press 1999) particularly ch 7.

<sup>20</sup> Pitman B Potter, 'Liberation and Control: Deng Xiaoping's *Nanxun* Legacy and the Chinese Legal System' in John Wong and Yongnian Zheng (eds), *The Nanxun Legacy and China's Development in the Post-Mao Era* (Singapore University Press 2001) 249.

<sup>21</sup> *Ibid* 249.

<sup>22</sup> Mary Ip and Mary Marshall, 'Evolution of Chinese Consumer Protection: Through the Lens of Product Quality Laws' (2014) 26 *Bond L Rev* 2, 6.

<sup>23</sup> For the full text of the Law of the People's Republic of China on Product Quality, 1993 (amended in 2000), see <<http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content.1383813.htm>> accessed 14 June 2017

economic reforms in the 1990s. During the 1980s, ownership of durable consumer goods rose dramatically, particularly amongst urban residents,<sup>24</sup> with the ownership of washing machines per one hundred Chinese urban residents, for example, increasing from 6.0 in 1981 to 48.3 in 1985 and to 78.4 by 1990.<sup>25</sup> The basic legal protections offered by the Consumer Protection Law were, thus, necessary prerequisites to support this continued growth of consumer spending throughout the 1990s, which has even been described as 'a consumer revolution'.<sup>26</sup>

Overall, the Consumer Protection Law contained eight chapters and a total of 55 articles, which, according to Article 1, were aimed 'to protect the legitimate rights and interests of consumers, maintain social and economic order, and promote the healthy development of the socialist market economy'. These expansive aims were realized mainly through Chapter 2, which laid out a number of basic consumer rights that were expressly informed by the 1985 UN Guidelines on Consumer Protection.<sup>27</sup> The wide aims found in Article 1 also highlight the main rationale behind the passing of the Consumer Protection Law, which was primarily the further development of individual consumers within the broader construction of a socialist market economy. As in other transition economies,<sup>28</sup> consumers had initially been exhilarated by the freedom to select from a choice of goods and services but then became disenchanted after experiencing many problems with poor quality goods and services. The primary aim of promulgating the consumer legislation at this time was to further support and develop consumer confidence in the goods and services that they were purchasing and to ensure appropriate remedies were available if goods and services supplied were not as expected.

The Consumer Protection Law was subsequently amended in October 2013, 20 years after its initial promulgation, with the amended law entering into force on March 2014. In the two decades that had passed since the substantive consumer protection legislation had first been implemented, China had undergone significant social, economic, and legal reforms, and the Consumer Protection Law was consequently in need of extensive updating. Technological changes also contributed to the amendments, with online

<sup>24</sup> Tao Sun and Guohua Wu, 'Consumption Patterns of Chinese Urban and Rural Consumers' (2004) 21(4) *J Consumer Marketing* 245. For more information on the gap between urban and rural income more generally, see Terry Sicular and others, 'The Urban-Rural Income Gap and Inequality in China' (2007) 53(1) *Rev Income & Wealth* 93.

<sup>25</sup> Ning Wang, *Rise of the Consumer in Modern China* (Paths International 2015) 248.

<sup>26</sup> Linda Chao and Ramon H Myers, 'China's Consumer Revolution: The 1990s and Beyond' (1998) 7 *J Contemporary China* 18, 355.

<sup>27</sup> Kristie Thomas, 'Revolution or Evolution? The Development of Consumer Protection Law in Contemporary China,' (2017) 3 *Journal of Business Law* 181, 187.

<sup>28</sup> For example, Estonia, discussed in Heiki Pisuke, 'The Influence of Social Reforms and the Information Society on Consumers in a Transition Economy' in Thomas Wilhelmsson, Salla Tuominen and Heli Tuomola (eds), *Consumer Law in the Information Society* (Kluwer Law International 2000) 34; Czechoslovakia, discussed in Blanka Tomančáková, 'Consumer Law Regulation in the Czech Republic in the Context of EU Law: Theory and Practice' in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (CUP 2012) 397.

transactions and data privacy concerns<sup>29</sup> becoming areas of increased focus through ensuring better regulation of e-commerce.<sup>30</sup> Other modifications included raising the damages available for dishonest or fraudulent business practices, strengthening the role of the China Consumer Association, and reversing the burden of proof for certain categories of durable goods, such as televisions or air-conditioning units.<sup>31</sup>

Official pronouncements made when the amendments to the Consumer Protection Law were debated in 2013 outline the reasons for the amendments, including: to strengthen the protection of consumer rights; to tackle new and emerging problems in the consumer sector; to enhance consumer confidence; to reduce and prevent consumer disputes; and to guide sustainable consumption.<sup>32</sup> The goals of enhancing consumer confidence and guiding sustainable consumption are explicitly linked to the wider State economic policy of increasing domestic consumption as a proportion of gross domestic product (GDP) from only approximately 30 per cent to at least 40 per cent over the next few years.<sup>33</sup> The aim is for this shift to create more sustainable domestic economic growth for the future as the burgeoning middle class in China continues to expand and exercise increased spending power.<sup>34</sup> The motivation behind the 2013 amendments of the Consumer Protection Law, thus, is not only driven by a need to adapt to an increasingly sophisticated and technologically driven retail market but also to increase consumer confidence in order to boost domestic demand and, thus, help to rebalance the export-oriented economy in China.

The Chinese notion of a 'consumer' is defined in Article 2 of the Consumer Protection Law as 'when a consumer purchases or uses goods or receives services for the needs of daily consumption, their rights and interests are protected by this Law'. However, as this article merely states that consumers purchasing goods or services for daily consumption are covered by this law,

<sup>29</sup> Graham Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP 2014) 205.

<sup>30</sup> E-commerce is now regulated specifically by the Law of the People's Republic of China on E-Commerce, promulgated 31 August 2018 <[http://www.npc.gov.cn/npc/xinwen/2018-08/31/content\\_2060172.htm](http://www.npc.gov.cn/npc/xinwen/2018-08/31/content_2060172.htm)> accessed 5 September 2018.

<sup>31</sup> For further details on the changes made by the 2013 amendments to the Consumer Protection Law, see Thomas (n 27) 189–93.

<sup>32</sup> Yu Chen, 'Woguo shouci quanmian xiugai xiaofei zhe quanyi baohu fa' (China's First Comprehensive Revision of the Consumer Protection Law) *Legal Daily* (24 April 2013) <[http://www.npc.gov.cn/npc/xinwen/lfgz/2013-04/24/content\\_1792943.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/2013-04/24/content_1792943.htm)> accessed 14 June 2017.

<sup>33</sup> Still a relatively low proportion compared to developed countries such as the USA where domestic consumption accounted for 69% of the gross domestic product in 2012. Benjamin Robertson, 'China Urged to Increase Domestic Consumption to Rebalance Economy' *South China Morning Post* (20 January 2014) <<http://www.scmp.com/business/economy/article/1409982/china-urged-increase-domestic-consumption-rebalance-economy>> accessed 14 June 2017.

<sup>34</sup> Dominic Barton, 'The Rise of the Middle Class in China and Its Impact on the Chinese and World Economies' <<http://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+07.pdf>> accessed 15 August 2018.

rather than clarifying which persons fall under this category, it could be seen (at best) as somewhat of a circular definition rather than a coherent and practical designation of who should qualify for protection. In other words, Article 2 'defines' consumers as consumers; the word 'person' is not present. This definition of 'consumer' also remained unchanged following the 2013 amendments. Consequently, this Chinese notion of a consumer is vague and difficult to apply to real-life practice.

In particular, as the article does not mention 'persons', it is consequently unclear whether legal persons such as small businesses or work units may be categorized as consumers or whether the designation is restricted to natural persons only. Indeed, some local and provincial level regulations on consumer protection explicitly include 'units' as well as individuals within the definition of a consumer. For example, Article 2 of the Measures on the Implementation of the Consumer Protection Law in Guangdong Province (1999) provides that 'consumers' include individuals and units that purchase or use goods and services for the purposes of daily consumption.<sup>35</sup> However, because many other provincial and local level consumer-related regulations simply duplicated the definition to be found in Article 2 of the Consumer Protection Law, the question of whether legal persons such as work units could ever qualify as consumers under Chinese law remains unclear.

Such a clarification is a common feature of definitions in other jurisdictions. Thus, although, for example, the definition found in the UN Guidelines focuses on natural persons only,<sup>36</sup> some jurisdictions do specifically allow for the inclusion of certain types of legal persons under the umbrella of consumer protection legislation. For instance, the definition of 'consumer' in the South Korean Consumer Protection Law has been expanded in order to include small-scale agricultural enterprises or fisheries that might objectively appear to be commercial enterprises, yet are deemed worthy of protection by the Consumer Protection Law.<sup>37</sup> Other developing countries such as Vietnam, India, and the Philippines also explicitly include small-scale producers within their definition of 'consumer'.<sup>38</sup> Similarly, Article 62 of the PRC Consumer Protection Law states that '[t]his Law shall apply, by reference, to farmers' purchase and use of means of production directly for agricultural production'. Consequently, China's inclusion of agricultural workers in the notion of a 'consumer' within the Consumer Protection Law mirrors the approach taken by several other developing countries to include certain categories of small or micro-businesses as 'consumers'.

<sup>35</sup> 'Measures on Implementation of the Consumer Protection Law in Guangdong Province' (1999) <<http://www.law-lib.com/law/law.view.asp?id=34665>> accessed 14 June 2017, and further discussed in Zhixiong Liao, 'The Recent Amendment to China's Consumer Law: An Imperfect Improvement and Proposal for Future Changes' (2014) 5 Beijing L Rev 3.

<sup>36</sup> UN Guidelines (n 5).

<sup>37</sup> Sothi Rachagan, 'Development and Consumer Law' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 55.

<sup>38</sup> United Nations Conference on Trade and Development (UNCTAD), *Manual on Consumer Protection* (2016) 6 <<http://unctad.org/en/PublicationsLibrary/webditclp2016d1.pdf>> accessed 14 June 2017.

Another problematic feature of the Chinese definition of a consumer in Article 2 of the Consumer Protection Law is the concept of 'daily consumption needs' (*shenghuo xiaofei xuyao goumai*), which is unclear and somewhat distinct from the notion of 'consumer' as defined in other legal systems. Further, the term 'everyday or daily consumption needs' is not further defined within either the legislation itself or within any subsequent implementing regulations. This lack of clarity leads to a great deal of uncertainty as to the precise meaning of a 'consumer' within Chinese law.

For instance, does this restriction focus exclusively on 'everyday' purchases that would potentially exclude more exceptional or luxury purchases such as automobiles or property, which are clearly not transactions that would literally be completed on a daily basis? Can purchasing services such as education, finance, or medical treatment be classed as being for 'daily consumption needs'?<sup>39</sup> Can a person who is knowingly purchasing (often large quantities of) fake goods with the sole purpose of claiming the punitive damages available under the Consumer Protection Law really be said to be making the purchase for their daily consumption needs? The wording of Article 2 'when a consumer purchases or uses goods or receives services for the needs of daily consumption' suggests that it is the nature of the transaction that is key rather than the nature of the goods or services themselves. In other words, the wording of Article 2 implies that the crucial question at the heart of who is a 'consumer' is that the putative consumer should be acting for personal or household purposes rather than for commercial purposes. However, the focus in Article 2 on testing for 'daily consumption needs' in defining a 'consumer', without further guidance on the precise meaning of this term, results in a lack of certainty about the scope of the notion of 'consumer' in practice.

Further, placing the Chinese consumer protection rules under a comparative lens reveals differing approaches to the rationale for protection. How can or should the notion of a 'consumer' be defined? The notion of a consumer differs from jurisdiction to jurisdiction. Some definitions consider the purpose of the contracting party—for example, whether they are acting for professional reasons within the course of a business, trade, or profession—whereas other definitions focus on the nature of the goods or services supplied under the contract and whether these goods or services are typically of an everyday, 'consumerable' nature.<sup>40</sup> In terms of comparative analysis of the notion of a 'consumer', the definitions that have evolved within EU law and within US law are significant as they represent key divergent approaches to the question of who should be subject

<sup>39</sup> For a more detailed consideration of protection available for financial consumers in China, see Raymond Siu Yeung Chan and Angus Young, 'Lack of Regulatory Safeguards for Financial Consumers in China: Deficiencies in the Chinese Consumer Law' (2016) 31(7) *J Intl Banking L & Regulation* 369.

<sup>40</sup> Hugh Beale and others, *Cases, Materials and Text on Contract Law* (2nd edn, Hart Publishing 2010) 142.

to the law's protection as a 'consumer'. Furthermore, many countries around the world have followed one of these two approaches when developing their own notion of a 'consumer' within domestic consumer protection law.<sup>41</sup>

In the field of European law,<sup>42</sup> most of the multiple European directives commonly considered as relating to consumer protection rely on a definition of a consumer based on the nature of the transaction.<sup>43</sup> Thus, a common European notion of a 'consumer' has emerged based upon a natural person acting outside of their trade or profession.<sup>44</sup> Although some minor variations exist between the definitions in the specific directives, most of the relevant European legislation relating to consumer protection relies on a definition of a 'consumer' based on the nature of the transaction as falling outside of professional purposes. Consequently, in a European context, a frequent focus of the case law revolves around the issue of so-called 'mixed transactions', in which an individual purchases goods or services for purposes that are partly personal and partly related to their profession or employment.<sup>45</sup> It is unclear how the issue of 'mixed transactions' would be dealt with under the Chinese definition of a 'consumer', as the daily consumption needs test under Article 2 of the Consumer Protection Law does not offer clarity on the situation where the goods or services purchased may be partly for daily consumption needs and partly for business needs.

The European notion of a 'consumer' could also be described as a negative definition; a 'consumer' is defined by the nature of the transaction not being related to that person's business, trade, or profession. The Chinese notion of a 'consumer' as laid out in Article 2 of the Consumer Protection Law is quite different from the European notion as it is not a negative definition; rather, it seeks to positively define a 'consumer' through limiting coverage to daily consumption needs. Accordingly, it is apparent that the Chinese notion of a 'consumer' does not follow the EU consumer *acquis*; not only is a 'consumer' defined positively within the Consumer Protection Law but mention of the potential business or trade purposes of the transaction is also missing from the Chinese definition under Article 2.

<sup>41</sup> It is beyond the scope of this article to consider the definition of a 'consumer' to be found in every jurisdiction around the world; instead, the key definitions from the EU and the USA will be used to make some comparative observations.

<sup>42</sup> For discussion of the history of European consumer law generally, see Hans-W Micklitz and Stephen Weatherill, 'Consumer Policy in the European Community: Before and after Maastricht' (1993) 16(3) J Consumer Policy 285.

<sup>43</sup> Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart Publishing 2007) 70.

<sup>44</sup> Bastian Schüller, 'The Definition of Consumers in EU Consumer Law' in James Devenney and Mel Kenny (eds) *European Consumer Protection: Theory and Practice* (CUP 2012) 123.

<sup>45</sup> See eg Case C-464/01, *Johann Gruber v Bay Wa AG* [2005] ECR I-439.

In the USA, on the other hand, a “consumer” is defined relatively expansively in many laws<sup>46</sup>—for example, under the Uniform Commercial Code (UCC), a ‘consumer’ is an individual who enters into a transaction primarily for personal, family, or household purposes.<sup>47</sup> Consequently, individuals acting for business purposes are excluded from protection as ‘consumers’. Nevertheless, an individual will be considered as a ‘consumer’ if the transaction was entered into for both personal and business purposes as long as the primary purpose of the transaction was for personal purposes. The Chinese notion of a ‘consumer’ as articulated in Article 2 of the Consumer Protection Law certainly seems to be closer to the US notion, with a similar focus on the nature of the transaction and whether the transaction was carried out for personal purposes. However, it is unclear to what extent the US concept of ‘personal, family or household purposes’ can be equated to the Chinese wording of ‘for the needs of daily consumption’. The US definition also includes use of the word ‘primarily’ to qualify the purposes of the transaction, whereas such a qualifier is absent from the Chinese definition. Therefore, it may arguably be harder to qualify as a ‘consumer’ under the Consumer Protection Law as a person must be acting solely ‘for the needs of daily consumption’ whereas under US law, acting primarily for personal, household, or family purposes is enough.

Considering the Chinese notion of a ‘consumer’ in comparative perspective, it is clear that significant differences exist between the definition to be found in Article 2 of the Consumer Protection Law and the approaches taken by other major jurisdictions around the world. Many jurisdictions around the world appear to have implemented a notion of ‘consumer’ based on one of these two key approaches. However, China is somewhat of an outlier in terms of defining the notion of a ‘consumer’; the definition to be found in Article 2 of the Consumer Protection Law appears to rely primarily on the purposes of the transaction as being for daily consumption needs but is not at all clear-cut.

In addition, the definition of the transaction as being for ‘daily consumption needs’ is distinctive and potentially increases uncertainty in the application of the Chinese definition. By veering away from the more established formulations to be found elsewhere in national level consumer laws, such as the USA, where transactions of a personal or household nature are typically the focus, the Chinese definition introduces an increased level of unpredictability into the application of the Consumer Protection Law. The application of the Consumer Protection Law in published case law will now be considered to see how this uncertainty concerning the boundaries of the notion of the Chinese ‘consumer’ have been handled in practice.

<sup>46</sup> See Jacques Delisle and Elizabeth Trujillo, ‘Consumer Protection in Transnational Contexts’ (2010) 58 *American J Comparative L* 135, which provides a good overview of US consumer protection law generally.

<sup>47</sup> Uniform Commercial Code § 1-201(11); 15 United States Code § 2301(1) (Magnuson-Moss Warranty Act).

## China's notion of a 'consumer' in judicial practice

### *The notion of a 'consumer' in China's guiding cases*

Although China, as a civil law system, does not formally follow the precedent laid down in previous cases,<sup>48</sup> nevertheless it is illuminating to consider how the vague and imprecise notion of a 'consumer' found in Article 2 of the Consumer Protection Law has been applied in cases that have appeared before the courts, in order to gain a deeper understanding of the concept of a 'consumer' in Chinese legal practice and the role that 'consumer' claimants play within the wider consumer protection system. In fact, the key notion of who may qualify to claim as a 'consumer' has been recently considered in two guiding cases issued by China's Supreme People's Court (SPC).

The guiding cases system, established in November 2010, is a relatively new device in China through which the SPC is attempting to improve the quality and consistency of judicial decision-making in lower-level courts by selecting and publishing a number of guiding cases (*zhidaoxing anli*) that must then be considered by lower courts in subsequent cases.<sup>49</sup> Thus, the selection of judgments as guiding cases can offer some insight into the SPC's view on the 'correct' outcome of these leading cases. The key question of who can claim as a 'consumer' under the Consumer Protection Law is magnified by the availability of statutory punitive damages for those who do qualify as consumers and are supplied with goods or services by a business operator engaged in fraudulent activities—for example, selling fake or counterfeit products. Article 55 of the Consumer Protection Law states that business operators engaged in fraudulent activities in supplying goods or services shall, on the demand of the consumers, increase the compensation for the consumers' losses; the increased amount of the compensation shall be three times the costs that the consumers paid for the goods purchased or services received, or 500 RMB if the amount of compensation is less than 500 RMB,<sup>50</sup> unless the law provides otherwise. It is noticeable that much of the available case law involves claims for punitive damages under this provision. The availability of punitive damages is another aspect in which the Chinese notion of a 'consumer' may be closer to that in the USA as punitive damages are more widely available in the USA, with awards in the USA significantly higher than other countries too.<sup>51</sup>

<sup>48</sup> For further discussion of the tension between the issuing of Guiding Cases to guide lower level courts and the lack of binding precedents within China as a civil law system, see Mark Jia, 'Chinese Common Law? Guiding Cases and Judicial Reform' (2013) 129(8) *Harvard L Rev* 2213.

<sup>49</sup> 'Zuigao renmin fayuan guanyu anli zhidao gongzuo de guiding' (Provisions of the Supreme People's Court Concerning Work on Guiding Cases), 26 November 2010. Discussed further in Bjorn Ahl, 'Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court' (2014) 217 *China Q* 121.

<sup>50</sup> 500 RMB is approximately US \$75.

<sup>51</sup> John Y Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42(2) *Columbia J Transnational L* 391.

The first of the two guiding cases offering guidance on the notion of the ‘consumer’—Guiding Case no. 17—directly involved the judicial application of Article 2 of the Consumer Protection Law defining who can be classified as a ‘consumer’ for the purposes of claiming under the law.<sup>52</sup> This case involved the purchase of an automobile from the defendant Heli Huatong Company by an individual plaintiff, Zhang Li. A few months after Zhang Li had completed the purchase of the automobile, it emerged that the car had undergone some repairs to its bodywork prior to the contract being agreed between the plaintiff and the defendant. Heli Huatong Company claimed that they had fulfilled their duty of disclosure by informing Zhang Li of the previous repairs and discounting the price accordingly. Nevertheless, the court found that as the defendant seller of the automobile (Heli Huatong Company) could not prove that they had disclosed the previous repairs to the individual plaintiff, the non-disclosure amounted to sales fraud. The court further held that Zhang Li, the plaintiff, was entitled to claim as a consumer under Article 2 of the Consumer Protection Law as the defendant was unable to prove that the car was purchased for business purposes or for other consumption purposes unrelated to the needs of daily life. The court appeared to place the burden of proof on the defendant to prove that the plaintiff should not be treated as a ‘consumer’ under Article 2.

Accordingly, the plaintiff was thus entitled to not only rescind the contract but also to claim punitive damages under Article 49 of the 1993 Consumer Protection Law. Zhang Li was thus awarded double the total vehicle purchase price as compensation.<sup>53</sup> Interestingly, although the purchase of an automobile may be thought of very much as an exceptional, luxury purchase, it is clear from the court’s judgment in Guiding Case no. 17 that such purchases should, nevertheless, be considered as ‘for the needs of daily consumption’ under Article 2. Indeed, this inclusion of automobile purchases within the scope of ‘consumer’ transactions accords with the rates of car ownership in modern China.<sup>54</sup> As a car is now a normal asset for many (particularly urban) citizens in China, it is appropriate that the Consumer Protection Law recognizes the purchase of an automobile as within the daily consumption needs test under Article 2. Consequently, such purchasers are explicitly considered to be ‘consumers’ under Article 2 of the Consumer Protection Law. Additionally, the selection of this case as a guiding case by the SPC emphasizes their view that this is the correct application of the law to such ‘luxury,’ one-off purchases. This judgment also seems to support the notion that the Chinese daily consumption needs test is similar in scope to the US test of whether the transaction is primarily for personal, family, or household purposes. Buying an automobile for personal use is, thus, clearly interpreted as being for the

<sup>52</sup> Guiding Case no 17 (2013), ‘ZHANG Li v Beijing Heli Huatong Automobile Service Co, Ltd, A Sale and Purchase Contract Dispute’ <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-17/>> accessed 14 June 2017.

<sup>53</sup> This case was concluded before the introduction of the amended Consumer Protection Law (n 1).

<sup>54</sup> Xinhua, ‘China’s Car Ownership Reaches 172 Million’ *China Daily* (26 January 2016).

needs of daily consumption even though such a transaction may not happen every day.

The second guiding case in which the key question of who can claim as a 'consumer' under Article 2 of the Consumer Protection Law was considered is Guiding Case no. 23.<sup>55</sup> The facts of this specific guiding case as selected by the SPC were that the plaintiff, Sun Yinshan, visited the Jiangning branch of the Nanjing Auchan Hypermarket in May 2012. Sun Yinshan bought 15 packs of sausages, 14 of which were already past their expiration date. Thus, after paying for the sausages at the checkout, Sun Yinshan immediately went to the customer service desk to claim his statutory compensation. The legal basis for his claim was Article 96 of the Food Safety Law, which provides that the seller should pay ten times the purchase price of any food which does not conform to food safety standards.<sup>56</sup> However, in order to be eligible to claim this compensation under Article 96 of the Food Safety Law, Sun had to first qualify as a 'consumer'. The defendant supermarket argued that he did not fall within the definition of a 'consumer' from Article 2 of the Consumer Protection Law because he was clearly purchasing the goods solely in order to claim compensation rather than 'for the needs of daily consumption'.

However, the Jiangning District People's Court of Nanjing Municipality, Jiangsu Province found in favour of Sun and awarded him the full compensation demanded of ten times the purchase price of the goods. The court's judgment focused on whether the defendant could prove that Sun had purchased the goods for any commercial purposes, such as resale or production. As the defendant supermarket failed to provide any evidence that Sun bought the sausages for any business purposes, the court held Sun to be a 'consumer' under Article 2 of the Consumer Protection Law and, thus, entitled to the statutory compensation. In other words, the court again placed the burden of proof on the defendant seller to prove that the buyer was not a 'consumer' under the statutory definition, in order to deny the buyer's compensation claim.

Cases from lower courts are selected as guiding cases by the SPC when they are 'of authoritative, normative, exemplary, and uniformly applicable nature'.<sup>57</sup> Thus, from the selection of these two guiding cases, the SPC appeared to be signalling that Article 2 of the Consumer Protection Law should consistently be treated as akin to a rebuttable presumption. In other words, all plaintiffs should be treated as 'consumers' unless the defendant can present evidence that their purchase was for business purposes or that the purpose of the transaction in question fell outside of daily consumption needs. By defining a consumer negatively in judicial practice as an individual buyer whose purchase a

<sup>55</sup> Guiding Case no 23 (2014), '*SUN Yinshan v Nanjing Auchan Hypermarket Co, Ltd Jiangning Store, A Sale and Purchase Contract Dispute*,' <<https://cgc.law.stanford.edu/guiding-cases/guiding-case-23/>> accessed 14 June 2017.

<sup>56</sup> Law of the People's Republic of China on Food Safety, 1 June 2009.

<sup>57</sup> Feng Guo, 'The Compilation and Application of China's Guiding Cases' Stanford Law Schools China Guiding Cases Project, Commentary no 18 (27 January 2017) <<https://cgc.law.stanford.edu/commentaries/18-guo-feng/>> accessed 14 January 2018.

seller is unable to prove is for business purposes such as manufacture or resale, the boundaries of who may be classified as a 'consumer' would be widened considerably. This permissive judicial approach to the notion of a 'consumer' in Chinese law as exhibited in this particular guiding case also appeared to signal approval of the role of such so-called professional consumers or consumer activists in tackling the numerous fake and defective goods available in the marketplace. These individuals knowingly purchase fake or counterfeit goods with the sole intention of claiming the punitive damages available under the Consumer Protection Law and have presented a persistent challenge to the law in China as to whether they should legitimately be considered as 'consumers'.

The mechanism employed by such 'professional consumers' of purchasing counterfeit goods and immediately returning them in order to claim the statutory punitive damages was pioneered in the 1990s by an infamous activist called Wang Hai. He became well known for purchasing large quantities of fake goods, verifying their status as counterfeit, then forcing the seller to compensate him under Article 49 of the Consumer Protection Law. For example, in 1995, one of Wang's first highly publicized transactions involved purchasing 10 pairs of fake Sony-brand headphones. He successfully claimed twice the cost of the goods in compensation under the provisions of the 1993 Consumer Protection Law once he had verified that they were not genuine Sony products.

However, it is doubtful whether he should legally have been permitted to claim as a 'consumer'. Under the provisions of Article 2 of the Consumer Protection Law, Wang Hai did not appear to be purchasing and using goods or receiving services for the purposes of everyday or daily consumption. Not only was his subjective purpose solely the claiming of compensation rather than purchasing and using the goods for daily consumption but furthermore, it is debatable whether a purchase of ten pairs of headphones could ever objectively be classified as for everyday or 'daily consumption purposes' if the term were to be strictly interpreted. Nevertheless, Wang Hai continued to repeatedly confront suppliers of fake goods by claiming under the statutory compensation mechanism and built up quite a media following as well as a significant personal fortune. The question of whether activists who knowingly purchase fake goods are entitled to claim punitive compensation as 'consumers' was thus reconsidered with the release of Guiding Case no. 23. Like Wang Hai nearly twenty years earlier, the judgment in Guiding Case no. 23 suggests that activists like Sun Yinshan appear to be tolerated by the courts and are even somewhat encouraged, in order to curtail widespread counterfeit goods and services.

### *The notion of a 'consumer' in subsequent judgments*

According to the official guidance on the use of guiding cases,<sup>58</sup> Guiding cases issued by the SPC need to be considered by lower courts, and, consequently,

<sup>58</sup> Provisions of the Supreme People's Court Concerning Work on Guiding Cases (n 49).

these 'subsequent' cases in which guiding cases are cited and discussed can also offer useful insights into the notion of a 'consumer' in practice. According to Stanford Law School's China Guiding Cases Project, 519 subsequent cases that referred to previously released guiding cases had already been issued in the first three months of 2017—almost three times the total of 181 subsequent cases reported in 2016.<sup>59</sup> Subsequent cases, therefore, can offer a useful and growing insight into how the People's Courts are applying the guiding cases in practice. Indeed, guiding cases and the subsequent judgments in which they are cited can even be considered as a new source of law in China,<sup>60</sup> which offers a novel tool to legal researchers.

Guiding Cases no. 17 and no. 23 have been directly cited in several subsequent judgments. For example, in *Fan Jungang v China Sanminxia Hydropower 11 Bureau Millenium Trading Company and Lingbao Yuan Village Natural Foods Ltd*, which involved a contractual dispute at second instance, the appellant (Fan) had purchased a large quantity of 'low-sugar' apple cider vinegar drinks from the Millenium store but later claimed that the drinks' labelling did not list any additives, as required under food safety legislation.<sup>61</sup> Fan sought to claim as a 'consumer' in order to receive punitive damages of ten times the purchase price under Article 96 of the Food Safety Law—the same provision under which Sun Yinshan had successfully claimed in Guiding Case no. 23. Nevertheless, Fan's appeal was dismissed by the Intermediate People's Court of Sanmenxia Municipality, Henan Province and distinguished from Guiding Case no. 23 on the grounds that food safety was not at issue in this case; rather, the issue was that the drinks had merely been inadequately labelled. Thus, although Fan's claim did not fail on the grounds that he falls outside of the scope of 'consumer' under Article 2 of the Consumer Protection Law, nevertheless, the court could be seen as less sympathetic to the 'consumer' claimant in this case.

In another subsequent case, *Zhu Ying v Hangzhou Chunyi Automobile Sales and Services Limited*, the courts again appeared reluctant to find in favour of an individual 'consumer' seeking to claim statutory punitive damages under the Consumer Protection Law.<sup>62</sup> In this case, a contractual dispute at first instance, Zhu Ying had purchased a used Ferrari car from the defendants in

<sup>59</sup> Full-text judgments available at Stanford Law School's China Guiding Cases Project <<https://cgclaw.stanford.edu/judgments/>> accessed 16 January 2018.

<sup>60</sup> William Jing Guo, 'Cases as a New Source of Law in China? Key Features of and Reflections on China's Case Guidance System' (2016) 1(1–2) *China L & Society Rev* 61.

<sup>61</sup> *Fan Jungang v China Sanminxia Hydropower 11 Bureau Millenium Trading Company and Lingbao Yuan Village Natural Foods Ltd* (2015) San Min Zhong Zi no 00168 (Intermediate People's Court of Sanmenxia Municipality, Henan Province, 5 March 2015) <<https://cgclaw.stanford.edu/judgments/henan-2015-san-min-zhong-zi-00168-civil-judgment/>> accessed 14 June 2017.

<sup>62</sup> *Zhu Ying v Hangzhou Chun Yi Automobile Sales & Service Co Ltd* (2014) Hang Shang Shang Wai Chu Zi no 27 (Shangcheng District People's Court of Hangzhou Municipality, Zhejiang Province, 10 November 2014) <<https://cgclaw.stanford.edu/judgments/zhejiang-2014-hang-shang-shang-wai-chu-zi-27-civil-judgment/>> accessed 14 June 2017.

January 2014 and later found out that it had been involved in a fire in December 2011. The defendant had not disclosed this previous fire damage to the plaintiff and the plaintiff, Zhu Ying, was thus entitled to a full refund of the purchase price. However, the court held that Zhu Ying was not entitled to claim punitive damages under Article 49 of the 1993 Consumer Protection Law as the defendant successfully presented evidence that Zhu had intended to purchase the Ferrari for resale purposes rather than for personal use. Thus, the court held that Zhu was unable to claim as a 'consumer' under Article 2 of the Consumer Protection Law as Zhu was not acting for the needs of daily consumption. The court also distinguished this case from Guiding Case no. 17 on the grounds that this case involved the sale of a second-hand car, whereas the buyer in Guiding Case no. 17 believed that they were purchasing a new vehicle.

Guiding Case no. 17 was also considered by the Chongqing no. 5 Intermediate People's Court in an appeals case concluded in October 2016. In *Wei Dewei and Guo Zhimei v Chongqing Wanbo Automobile Co. Ltd*, the claimant consumers, who were husband and wife, lost their claim against the defendant sellers of a new automobile as they could not prove that the car that they had purchased as 'new' had previously had another owner, despite the registration and warranty documents listing both an earlier start date for the warranty and a different customer name as owner.<sup>63</sup> Nevertheless, both the court at first instance and the appeal court held that this evidence was insufficient to prove that the car was not 'new'. This case was distinguished from Guiding Case no. 17 on the grounds that Guiding Case no. 17 had involved a car that proved to not be new after repairs, whereas the only evidence in this case of a previous owner was the mention of another name on the registration documents, which the defendant seller automobile company claimed to be a mere administrative error.

Again, despite the relevant guiding case appearing to support and even encourage claims brought by individual consumers, the judgment in this subsequent case arguably shows a less lenient attitude to 'consumers' seeking to claim the statutory compensation available to them under the 1993 and 2013 Consumer Protection Law. Specifically, Guiding Case no. 17 suggests that the burden of proof of showing fraudulent behaviour is on the claimant, but this case of *Wei Dewei and Guo Zhimei v Chongqing Wanbo Automobile Co. Ltd* confirms how difficult this standard of proof can be to achieve. Thus, although the claimants Wei Dewei and Guo Zhimei did not lose their claim because they fell outside of the definition of a 'consumer' under Article 2, nevertheless, they lost their claim because they were unable to meet the high burden of proof set by the court to prove fraudulent behaviour.

In another recent case, the judge also discussed the standard of proof that an individual claimant 'consumer' needs to reach in order to claim the

<sup>63</sup> *Wei Dewei & Guo Zhimei v Chongqing Wanbo Automobile Co Ltd*, Yu 05 Min Zhong No 5399 (Chongqing no 5 Intermediate People's Court, 8 October 2016).

statutory compensation available under Article 55 of the Consumer Protection Law. In *Cheng Yugang v Sichuan Province Urban Vehicle Ltd Co*,<sup>64</sup> the claimant had purchased an automobile from the defendants that was described as 'new' in their sales contract. However, two days after taking possession of the car, the claimant suffered minor paint damage from driving on an uneven road. When Cheng Yugang, the claimant, took the car to be repaired, he was surprised to learn that the vehicle paint was not original, with evidence of a re-spray already having been carried out. The claimant subsequently contacted the defendant in order to not only revoke the sales contract but also to claim the triple compensation available under the punitive damages provision in Article 55 of the amended Consumer Protection Law.

In this case, the Chengdu High-Tech Industry Development Zone People's Court held that the sales contract between the claimant and the defendant should be revoked and the purchase price should be refunded to Cheng as the buyer. However, the court refused Cheng's claim for triple compensation under the punitive damages provisions of the 2013 PRC Consumer Protection Law on the grounds that the burden of proof to prove fraudulent conduct by the defendant lay on the claimant consumer. As the claimant could not prove that the defendant either knew or should have known about the respray of the claimant's 'new' car, they were unable to prove fraud under Article 55 and were thus ineligible to claim the triple compensation.

In the court's judgment, it is interesting to note that in discussing the burden of proof, the judge stated that in considering how to assign the burden of proof between the parties, attention should be paid to fulfilling the legislative purpose of the law. The judge, thus, distinguished between food safety cases, in which a presumption of fraud may exist on policy grounds, and cases such as Cheng's in which no real danger existed in the product. This case was also distinguished from Guiding Case no. 17 as the claimant in that case could more clearly prove that the repairs had been carried out before the vehicle sale, whereas Cheng could not prove when the respray of the car had been performed.

Thus, there is some indication from these subsequent cases citing Guiding Cases nos. 17 and 23 that the courts are becoming broadly less sympathetic to the claims of 'consumers' who are seeking to claim the statutory punitive compensation to which they are entitled under either the Consumer Protection Law or the Food Safety Law. In addition, it is clear that the reasoning of the courts in denying these individual claims is not always based solely on whether the claimant falls within the notion of a 'consumer' under Article 2 of the Consumer Protection Law, but, nevertheless, the perception from the subsequent judgments that cite Guiding Cases nos. 17 and 23 is that 'consumer' claimants are latterly much less likely to succeed in their claims.

<sup>64</sup> *Cheng Yugang v Sichuan Province Urban Vehicle Ltd Co*, Chuan 0191 Min Chu no 4235 (Chengdu High-Tech Industry Development Zone People's Court, 29 July 2016).

## Analysing the Chinese notion of a 'consumer': striking a delicate balance

It is evident from the interpretation of the notion of a 'consumer' in judicial practice that there appears to be some inconsistency in the court's treatment of 'consumer' claimants seeking compensation from potentially unscrupulous sellers. On the one hand, the selection of Guiding Cases nos. 17 and 23 appear to signal the court's support for 'consumer' claimants; however, it is also clear from surveying the subsequent cases in which these two guiding cases have been cited that the courts appear more reluctant to award large amounts of compensation to such individual 'consumer' claimants, with the burden of proof requirements seemingly strictly applied.

In Chinese judicial practice, one of the specific areas in which the Article 2 definition of a 'consumer' has been hard to apply is to so-called 'counterfeit hunters', 'consumer activists', or 'professional consumers' who seek to exploit the punitive damages clauses in the Consumer Protection Law or the Food Safety Law by deliberately purchasing large quantities of fake or expired goods solely in order to claim enhanced compensation—typically, two or three times the purchase price.<sup>65</sup> As these activists are solely motivated by compensation, it is debatable whether they should fall under the Article 2 definition of 'consumer' as they are not purchasing goods or services for daily consumption needs. In other words, these activists have no desire to actually consume the goods; they typically return the goods immediately after purchase and claim the statutory damages at the same time, as in Guiding Case no. 23.

Furthermore, it has also been argued that such consumer activists who knowingly purchase fake goods in order to exploit the punitive damages provisions in the Consumer Protection Law should not be treated as 'consumers' because they are breaching the good faith requirement.<sup>66</sup> On the other hand, such activists do shine a spotlight on counterfeit or shoddy traders and, thus, could be seen as playing a positive role in the marketplace, particularly as China continues its transition to a market-based economy. Furthermore, with counterfeits and fakes so rife in the Chinese marketplace, the notion of crowd-sourcing some element of anti-counterfeiting measures must hold some appeal, not only to officials but also potentially to rights holders.<sup>67</sup>

On 9 January 2014, the SPC held a press conference to announce the SPC Provisions on Several Issues concerning the application of law in trials of food

<sup>65</sup> For more detailed analysis of the question whether 'consumer activists' should fall under the Chinese definition of a 'consumer', see Kristie Thomas, 'The (Re)Birth of the Consumer Activist in China: The 'Wang Hai' Phenomenon in the Light of Guiding Case No. 23' (2014) *China Guiding Cases Project*, <<https://cgc.law.stanford.edu/commentaries/12-kristie-thomas/>> accessed 14 June 2017.

<sup>66</sup> Guoming Rui, 'Should Those Who Knowingly Purchase Fakes Be Protected by the Consumer Protection Law?' (2015) 29(6) *Dangdai Faxue* (Contemporary Law) 68.

<sup>67</sup> Jack Ellis, 'China May Prohibit "Counterfeit Hunters": But Encouraging Consumers to Root Out Fakes Should Not Be Given Up' *World Trademark Review* (7 December 2016).

and drug disputes. These SPC Provisions display a clear intention of increasing consumer protection, particularly in the field of disputes concerning the quality of food or medicines.<sup>68</sup> Article 3 of these provisions is of vital interest as it states that in the event of any dispute over the quality of food or medicine, the defendant is not permitted to use the claimant's knowledge of the quality of the food or medicine as a defence. In other words, even if the claimant is aware that the food or medicine that they are purchasing is fake or expired, this should not prevent them from subsequently bringing a claim against the seller or manufacturer as a 'consumer'.<sup>69</sup> Furthermore, Lixin Yang of Renmin University supports the position evident in these SPC Provisions of 2014 that claimants should be permitted to assert their legitimate rights and interests as 'consumers' even if they are aware that the goods they are buying are fake because such consumer claims can help to 'unify judicial standards, crack down on unscrupulous businessmen, safeguard the rights and interests of consumers and purify the market environment for food and drugs'.<sup>70</sup> This provision, thus, reinforces the idea of Chinese 'consumers' playing a crucial role in fighting against inferior, unsafe, and counterfeit products within the developing market economy.

Considering the issue of whether such professional counterfeit hunters should qualify as 'consumers' in comparative perspective, it is unclear how such claimants would be treated in other jurisdictions. Arguably, by claiming large amounts of punitive damages as statutory compensation, such claimants could be seen as acting for professional or commercial purposes as their purpose in entering into the transaction is solely for monetary gain and, as such, they should not fall within the notion of a 'consumer' under either the EU or US definitions. The question of professional counterfeit hunters qualifying as 'consumers' under the Consumer Protection Law is, thus, a difficult issue for the Chinese courts to resolve.

In both Guiding Cases nos. 17 and 23, the court held that the burden of proof was on the defendant seller to prove that the buyer fell outside of the definition of 'consumer' under Article 2 of the Consumer Protection Law. In both of these guiding cases, the concept of everyday or daily consumption needs could also be said to have been interpreted relatively broadly to include a new automobile, which may be thought of as an exceptional, one-off luxury purchase rather than for everyday consumption needs (in Guiding Case no. 17), and fifteen packets of sausages (in Guiding Case no. 23), which seems to be

<sup>68</sup> 'Jujiao Zuigao Fayuan Guanyu Shi Yao Jiufen Sifa Jieshi Si Da Kan Dia' ('Focus on Four Major Aspects of the Supreme People's Court Judicial Interpretation on Food and Drug Disputes') *Xinhua* (19 January 2014) <[http://www.gov.cn/jrzq/2014-01/09/content\\_2563327.htm](http://www.gov.cn/jrzq/2014-01/09/content_2563327.htm)> accessed 16 January 2018.

<sup>69</sup> General Administration of Quality Supervision, Inspection and Quarantine, *Jiedu Zuigao Renmin Fayuan Guanyu Shenli Shipin Yaopin Jiufen Anjian Shiyong Falu Ruogan Wenti De Guiding (Interpretation of the Supreme People's Court Provisions on Several Issues Concerning the Application of Law in Trials of Food and Drug Disputes)* (2014) <<http://www.aqsiq.gov.cn/xgk.13386/zvfg/zcjd/201402/t20140210.403207.htm>> accessed 16 January 2018.

<sup>70</sup> As discussed in 'Four Major Aspects of the SPC Interpretation' (n 68).

too large a quantity to be considered as for the everyday consumption needs of an individual consumer.

Thus, the interpretation of the phrase ‘for the needs of daily consumption’ in the definition of ‘consumer’ to be found in Article 2 of the Consumer Protection Law in Guiding Cases nos. 17 and 23 seems to be consistent with a literal approach that does not place undue restrictions on what purpose of transaction may qualify as for everyday consumption needs. Furthermore, by selecting two judgments in which the individual ‘consumer’ claimant is awarded large amounts of punitive damages from an unscrupulous seller as guiding cases, it could be posited that the SPC was tacitly signalling support for individual ‘consumer’ claimants bringing civil cases against sellers or manufacturers of defective, counterfeit, or unsafe goods and services.

In addition, the 2013 revision of the Consumer Protection Law significantly increased the punitive damages available under Article 55 from twice the purchase price to three times the purchase price and also introduced a minimum level of compensation of 500 RMB. Such amendments again emphasized the desire of policy-makers to support the further development and confidence of domestic consumers. Tackling counterfeits also chimed with State priorities encouraging domestic innovation<sup>71</sup> and consequently seeking to strengthen intellectual property rights protection for homegrown brand owners. Additionally, it was predicted at the time of the revised Consumer Protection Law coming into effect in March 2014 that this sharp increase in the amount of punitive damages available for ‘consumer’ claimants would ‘stimulate the birth of more professional anti-counterfeiters’.<sup>72</sup>

The work of professional ‘consumer’ anti-counterfeit activists could be said to:

demonstrate a relationship of cooperation between consumers and the State: the State supported and encouraged fake fighters to show people that market problems could be addressed and there was no need to organize protests; meanwhile, the fake fighters relied on the State to promote their works and provide legal assistance.<sup>73</sup>

This State-consumer relationship is unique to the Chinese context with other types of (political) activists suppressed for questioning the extent of corrupt relationships between State officials and businesses, whereas ‘consumer’ activists

<sup>71</sup> See eg the thirteenth five-year plan announced in 2015. Ben Moshinsky, ‘Here’s Why China Mentioned the Word “Innovation” 71 Times after a Meeting to Decide Its 5-Year Plan’ *Business Insider UK* (8 November 2015) <<http://uk.businessinsider.com/chinese-government-said-innovation-71-times-after-a-meeting-to-decide-its-5-year-plan-2015-11?r=US&IR=T>> accessed 19 August 2016.

<sup>72</sup> Zhang Wei, ‘Jingming Que Bu Yu Ju Zhugong Shi Yao Dajia’ (‘Smart, but Not Yet Going Beyond the Main Attack on Fighting Food and Drug Fakes’) *Legal Daily* (17 March 2014) <<http://epaper.legaldaily.com.cn/fzrb/content/20140317/Articel06001GN.htm>> accessed 16 January 2018.

<sup>73</sup> I-Liang Wahn, ‘The State-Consumer Relationship and the Instituting of Consumer Protection in East Asian Societies’ *Journal of Consumer Culture* (3 August 2017) <<https://doi.org/10.1177%2F1469540517708829>> accessed 16 January 2018.

are allowed to play a role in market governance due to their focus on the economic sphere only. Nevertheless, demands for wider policy or central regulatory changes would not be tolerated and, thus, this delicate balance that is argued to exist between individual 'consumer' claimants within the Consumer Protection Law is based on a very specific dynamic whereby consumers only focus on market ethics in the economic sphere.<sup>74</sup>

However, there is a clear distinction between the State encouraging individual consumers pursuing claims based on serious quality or safety issues and pursuing claims based on minor labelling errors, with some observers claiming that most claims for punitive damages under Article 55 are based on the latter, less serious category.<sup>75</sup> It is evident that this distinction is beginning to be recognized by the courts and reflected in court judgments regarding who can claim punitive damages as a 'consumer'. As outlined in the previous two sections of this article, the 'subsequent' judgments following the publication of Guiding Cases nos. 17 and 23 seem to show a less lenient approach to allowing individual 'consumer' claimants to claim for fraud than the courts in the relevant guiding cases. Although there is a need to distinguish between cases where the focus has been on qualifying as a 'consumer' under Article 2 of the Consumer Protection Law and those cases where the focus has instead been on the burden of proof on the 'consumer' claimant to prove that the defendants were acting, nevertheless, the unifying thread between these 'subsequent' cases is how easy or otherwise the court makes it for individual 'consumers' to claim statutory punitive damages for fraud.

In addition, recent proposed legislative changes would also result in a significant shift away from the encouragement that previously appeared to be offered to individual 'consumer' claimants in tackling unscrupulous or fraudulent traders. In particular, draft Implementing Regulations for the Consumer Protection Law were released for comment in August 2016, with a revised version open for comment in December 2016.<sup>76</sup> The Implementing Regulations would be welcome to offer some clarity on imposing a consistent interpretation of some of the key provisions of the Consumer Protection Law. Regulation 2 of the draft Implementing Regulations is particularly noteworthy as it seems to restrict the definition of a 'consumer' by excluding natural persons, legal persons, and other organizations acting for profit. Thus, as well as appearing to exclude professional counterfeit hunters who are individuals purchasing fake goods solely to claim the statutory punitive damages, the draft Regulation 2

<sup>74</sup> Ibid 6.

<sup>75</sup> According to James Zimmerman, Chair of the American Chamber of Commerce, see Sui-Lee Wee, 'Though Awash in Fakes, China Rethinks Counterfeit Hunters' *New York Times* (30 November 2016).

<sup>76</sup> Implementing Regulations for the Consumer Protection Law, 'State Administration for Industry and Commerce, Implementing Regulations for the PRC Law on the Protection of the Rights and Interests of Consumers (Draft for Comments)', *China Law & Practice*, 25 August 2016 <<https://www.chinalawandpractice.com/sites/clp/2016/08/25/state-administration-for-industry-and-commerce-implementing-regulations-for-the-prc-law-on-the-protection-of-the-rights-and-interests-of-consumers-draft-for-comments/>> accessed 14 November 2018.

also appears to exclude small businesses who have previously been explicitly included in the definition of ‘consumer’ under some local and provincial level regulations. If this draft regulation passes into law, it would mark a significant departure from the current legal position under which individual professional consumers or counterfeit hunters are tolerated, if not even somewhat encouraged, in order to curb counterfeit goods and services.

Thus, it is evident that Chinese courts are striving to strike a delicate balance in these ‘consumer’ claimants’ cases between encouraging such claimants as vital for tackling unscrupulous traders while not wishing to explicitly endorse such professional consumer activists as a kind of unofficial career. As a result, the 2013 amendments to the Consumer Protection Law could be seen in a similar light of encouraging individual consumers to claim against sellers of shoddy goods by increasing the punitive damages provision in Article 55 of the Consumer Protection Law from twice to three times the price of the goods and specifying the minimum claim under this article to 500 RMB. Again, this change could be seen as encouraging individual enforcement of consumer rights in order to tackle deficiencies in the market and to improve the quality of Chinese goods and services.

Nevertheless, Zhang Yongjian, chief judge of the First Civil Division of the SPC has commented that ‘professional fighting against fakes is a “double edged sword”,<sup>77</sup> with courts not seeking to explicitly encourage professional consumer activists to make a living from bringing multiple lawsuits and claiming significant amounts of punitive compensation. Furthermore, the draft Implementing Regulations of the Consumer Protection Law circulated in 2016 seem to restrict the notion of a ‘consumer’ by excluding any persons acting for profit. Such contradictory changes could be seen as reflecting the rationale behind the Consumer Protection Law, which appears primarily focused on supporting further domestic economic development in China, rather than enhancing individual consumer rights.

## Conclusion

Defining the notion of a ‘consumer’ in a clear and coherent manner is emphatically not a uniquely Chinese problem and is problematic for many jurisdictions around the world as there is no clear unifying rationale behind the use of a specific consumer protection measure.<sup>78</sup> Furthermore, without a clear understanding of who a ‘consumer’ is and exactly why they are in need of

<sup>77</sup> ‘Zuigao fa: ‘zhi jia mai jia’ bu yingxiang weiquan zhiye dajia ren shangwei guiding’ (‘Supreme People’s Court: “Knowingly Buying Fakes” Does Not Affect the Right to Be Designated a Professional Fighting Fakes Activist’) *Zhongguo Ribao (China Daily)* (9 January 2014) <<http://www.chinadaily.com.cn/dfpd/2014-01/09/content.17226975.htm>> accessed 14 June 2017.

<sup>78</sup> For discussion, see Iain Ramsay, *Consumer Protection: Text and Materials* (Weidenfeld and Nicolson 1989), ch 1; Colin Scott and Julia Black, *Cranston’s Consumers and the Law* (3rd edn, Butterworths 2000) 8–11.

legal protection, the formal definition of such a notion in the law is inevitably going to be problematic. China is not alone in lacking a coherent and consistent notion of a 'consumer'. As can be noted from examining the definitions from the EU and from the USA, it is difficult, if not impossible, to clearly define a 'consumer' in law. There are particular issues with claimants at the boundaries of a 'consumer' such as claimants conducting transactions for both business and personal purposes<sup>79</sup> or claimants conducting transactions solely to claim statutory compensation for expired or counterfeit goods.<sup>80</sup>

In addition, China's notion of a 'consumer' under the Consumer Protection Law reflects the specific context of contemporary China. As an emerging economy, China has to deal with the specific issues arising from completing its transition from a seller's market under the former command economy to a buyer's market in a market-based economy.<sup>81</sup> China is still in this process of transition and continues to build confidence and the framework of regulations necessary to support a consumer economy. Thus, it is inevitable that the Consumer Protection Law contains some unique features, particularly the opaque definition of a 'consumer'. Finally, the wider role of individual consumers in modern Chinese society and economy cannot be ignored. In 2016, consumer spending in China grew by 10.5 per cent, reaching 33,511 billion RMB, and outstripping growth in GDP, which increased by 6.7 per cent, reflecting the increasing importance of domestic consumption in the development of the Chinese economy.<sup>82</sup> Thus, consumers will continue to act as primary drivers of economic growth and in rebalancing the economy away from reliance on low cost exports towards more domestic consumption through the continued growth of a middle class.<sup>83</sup> The central aim of China's Consumer Protection Law remains firmly focused on promoting consumer confidence in order to support and further stimulate domestic consumption. However, as consumers become increasingly savvy, the quality of products and services becomes of mounting concern<sup>84</sup> and with consumers less willing to accept inferior goods, the legal mechanisms to support 'consumer' claimants, as outlined in this article, will be crucial.

Overall, consumers in China have a key role to play in tackling shoddy and fraudulent traders to improve the marketplace overall, but their role is tempered by the State desire to avoid encouraging individuals to become so-called 'professional consumers' making a living through exploiting punitive damages provisions in the legislation. This delicate balance struck in the somewhat

<sup>79</sup> Discussed eg in *Johann Gruber v Bay Wa AG* (n 45).

<sup>80</sup> Eg Guiding Case no 23 (n 55).

<sup>81</sup> Geng Cui and Qiming Liu, 'Emerging Market Segments in a Transitional Economy: A Study of Urban Consumers in China' (2001) 9(1) *J Intl Marketing* 84.

<sup>82</sup> 'The Chinese Consumer 2017: Redefining Quality and Value' *Mintel* <<http://www.mintel.com/the-chinese-consumer-2017>> accessed 16 January 2018.

<sup>83</sup> Minglei Gao, 'Restructuring Economic Development in China: A Better Consumer Protection Regime in a Consumption-Driven Economy' (2018) *Cornell Policy Rev* <<http://www.cornellpolicyreview.com/consumer-protection-china/>> accessed 15 August 2018.

<sup>84</sup> Yuval Atsmon and others, 'China's New Pragmatic Consumers' *McKinsey Quarterly* (October 2010).

limited role for 'consumers' in enforcing the Consumer Protection Law thus demonstrates the wider tensions between individual rights and the collective interest, and between the central government and local stakeholders in the evolving legal system in contemporary China.