

# The Definition and Defining Method of Consumer Concept

Concurrently Commenting on Article 2 of “The Regulations for the Law on the Protection of the Rights and Interests of Consumers (Submitted for Examination and Approval)”

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**Abstract**—There are great differences in the definition of the concept of consumer in different provinces of China. Therefore, when "the Regulations for the Law on the Protection of the Rights and Interests of Consumers (submitted for examination and approval)" is seeking opinions from the whole society, it is necessary to integrate the concept of consumers. Not only the concept of consumer should be stipulated, its composition should be clarified. The subject shall be limited to natural persons, excluding legal persons and other organizations. In terms of behavior, the subject of profit-making behavior should also be excluded. Therefore the definition of the concept of consumer is a natural person who purchases, uses goods or accepts services for the purposes of daily consumption. The rights and interests of consumers shall be protected by these regulations. But those whose act is profitable shall be excluded.

**Keywords**—consumer; the regulations for the law on the protection of the rights and interests of consumers; implementation regulations; legal definition

## I. INTRODUCTION

Although the Article 2 of "The Law on the Protection of Consumers' Rights and Interests", which came into effect on March 15, 2014, stipulates the scope of protection, it does not explicitly define the concept of consumers, which leads to conceptual confusion in judicial practice. (Referring to the guiding case no. 23 of the Supreme People's Court, in this case, the court recognized the identity of consumer of the plaintiff's consumer even though the plaintiff knew that the sausage sold by the defendant exceeded the expiration date.) On November 15, 2016, "the Regulations for the Law on the Protection of the Rights and Interests of Consumers (submitted for examination and approval)" were brought out to solicit opinions from the whole society. Article 2 of these regulations stipulates that the rights and interests of consumers who purchase or use commodities or receive services for the purpose of daily consumption shall be protected by these regulations. However, these regulations shall not apply to any natural person, legal person or other organization that purchases or uses commodities or accepts

services for the purpose of making profits. Based on this discussion, this paper attempts to put forward a clear definition of the concept of consumers rather than adjusting the scope. In addition, the concept of consumers should be defined by excluding specific behaviors.

## II. THE STATUS OF CURRENT CONSUMER RIGHTS AND INTERESTS PROTECTION LAWS AND LOCAL REGULATIONS ON THE CONCEPT OF CONSUMER

Based on the introduction of "the Law on the Protection of Consumers' Rights and Interests" on March 15, 2014 as a reference point, the "Regulations on the Protection of Consumers" in a total of 31 provinces in China are taken as comparative samples, and the provisions on the concept of consumers are compared and analyzed. Basically, the current situation can be summarized as follows:

- A total of 17 provinces (including autonomous regions and municipalities directly under the central government) have not directly defined the definition of consumers, but have adopted the provisions of "the Law on the Protection of Consumers' Rights and Interests". It is generally expressed as: "the rights and interests of consumers who need to purchase, use goods or receive services for daily consumption shall be protected by these regulations". The regulation in Beijing alone, in which neither the definition of consumer nor the behavior means of consumers are concluded, stipulated from the perspective of operators instead; the other 13 provinces (including autonomous regions and municipalities directly under the central government) have clearly defined the definition of consumers, but they are also different in the scope of subjects. Twelve of the provinces (including autonomous regions and municipalities directly under the central government) specify that consumers shall be "units and individuals" or "organizations and individuals". Only Sichuan province limits the subject of consumers to the category of "individuals" (see "Table I").

**TABLE I. THE CATEGORY OF CONSUMER**

Take an indirect definition approach	Take the direct definition approach			have no such regulations
	Use the expression "individuals and units"	Use the expression "individuals and organizations"	Use the expression "individuals"	
	11	1	1	
17	13			1

- Seen from the timeline, after March 15, 2014, a total of 7 provinces (including autonomous regions and municipalities directly under the central government) amended "the regulations on consumer protection" of the province, while only Jiangxi province alone stipulated the definition of consumer. When China's law on the protection of consumer rights and interests was amended for the first time in August 2009, only three provinces, namely Hubei, Henan and Guangdong, amended their local laws and regulations during this period. In terms of the regulations on consumers, both Hubei and Guangdong provinces

adopted clear regulations, but there were differences in the expressions. Hubei province adopted the expression of "paid" + "organization and individual" in the definition of consumer, and Guangdong province adopted "individual and unit", while Henan province still used the indirect definition. Before 2009, in "the regulations on consumer protection" of all provinces (autonomous regions and municipalities directly under the central government), except Beijing, a total of 10 provinces adopted explicit regulations, and the remaining 10 provinces adopted indirect regulations based on behavior method (see "Table II").

**TABLE II. THE DEFINING METHOD OF CONSUMER**

After March 15, 2014		August 2009 to March 2014		Before 2009 years		
Take a direct definition approach	Take an indirect definition approach	Take a direct definition approach	Take an indirect definition approach	have no such regulations	direct definition	indirect definition
1	6	2	1	1	10	10
7		3		21		

- In the regulations before 2009, the number of provinces directly defining the concept of consumers was the largest, reaching as many as 10; But in terms of proportion, it was 66.7% between 2009 and 2014; Since the promulgation of the new law on the protection of consumers' rights and interests in 2014, the number and proportion of consumers directly defined in the regulations on consumer protection of all provinces have been the lowest, respectively 1 and 14. 3%; In addition, the number and proportion of indirect definitions both show a trend of decreasing first and then increasing, and gradually become the mainstream, decreasing from 47.6% to 33.3% and finally increasing to 85.7%. This clearly shows the influence of the definition of "the Law on the Protection of Consumers' Rights and Interests" on the definition of consumers in "the regulations on consumer protection" of provinces, autonomous regions and municipalities directly under the central government.

On the whole, there are basically no homogenized special provisions on how to define a consumer, which can be roughly divided into three ways: direct definition, indirect definition and undefined. In the case of direct definition, the limits on the scope of the subject of consumers are not exactly the same in different regions. Apart from that, in the

direct definitions, there are some differences in the definition of standards, such as whether should the act of consumer only limited to "life consumption", whether the standard of "paid" is needed and other elements. (See Article 2 of "Regulations of Jilin Province on the Protection of the Legitimate Rights and Interests of Consumers": consumers refer to units and individuals that have paid for goods and services they receive for their daily needs.)

### III. REFLECTION ON THE DEFINITION OF CONSUMER STIPULATED BY CURRENT LAWS AND REGULATIONS

Any phenomenon reflects the legislative environment at that time, and vice versa, the reason of the heterogeneity of the definition of consumer is formed by many factors.

#### A. Being Confined to the Relationship Between Consumer Law and Civil Law

As the basic civil law to adjust the property relationship and personal relationship between equal subjects, China's civil law hasn't pinpointed the relationship between consumer law and civil law. This is reflected in the debate that consumer law belongs to the category of civil law or economic law. (See Yang Lixin: "significance and reference of the concept of integrated definition of consumer stipulated in German civil code", *Law Science Magazine*, no. 1, 2013;

Li Yanfang, Ed. Textbook series of law in 21st century: Case Analysis of Economic Law, China Renmin University Press, 2006, p. 185.) Based on this argument, if the consumer law belongs to the nature of economic law, it will emphasize the control of the state. Therefore, as stipulated by Beijing, it only stipulates the obligations of operators and the responsibilities of the industrial and commercial administration departments without protecting consumers. If consumers are included in the protection scope of civil law, it is necessary to clarify their rights and obligations from the perspective of consumers. However, because the civil law is limited to the equality of the subject, the relationship between consumers and operators will be artificially elevated to an equal position, which will make it difficult to apply many special rules that can be adopted for preferential protection when consumers are actually in a weak position. This actually leads to the question of whether consumers are individuals or "unit + individual".

#### *B. A More Ambiguous Concept of Consumers Caused by Judicial Practice*

One of the typical cases of the judicial documents published by the supreme people's court, guiding case 23 can be retrieved: Disputes over sales contracts of Sun Yinshan's appeal to Nanjing Auchan Supermarket co., LTD. Jiangning Store. In the judgment, the court held that "consumers are relative to the concept of sellers and producers when judging whether Sun Yinshan is a consumer or not. As long as the purchase or use of commodities or the acceptance of services in market transactions is for the needs of individuals and families, rather than for production, business or professional activities, consumers shall be identified as consumers for the needs of daily consumption and shall fall within the scope of the management of "Law on Protection of the Rights and Interests of Consumers". (See (2012) Jiangning Development District Civil Litigation First Trial Judgment no. 646) This typical case basically adopts the form of negation of negation, and the subject that is not the so-called production and business activities or professional activities is identified as the consumer in principle.

In a case in Nanning, when confirming whether the plaintiff was a consumer, the court adopted the statement that "the plaintiff purchased commodities from the defendant Guanchao trading co., LTD. Dongkai shop and did not resell and operate the purchased commodities, and the defendant Guanchao trading co., LTD. Dongkai shop as well as the Guanchao trading co., LTD. also failed to prove that the plaintiff purchased commodities for production and operation." This statement makes the concept of consumers vaguer in the form of negation of negation: it takes whether to conduct business sales again as a standard, and concludes that the purchaser is consumer if he or she don not operate or sell the commodities.

Other courts adopt the concept of "knowing-it-is-fake-and-buying" when identifying consumers, which further blurs the concept of consumers. As can be seen in the case no. 90, the course held that "a consumer, as opposed to the concept of a producer or seller, shall be recognized as long as it has the consumption behavior of purchasing or using a

commodity or receiving a service and cannot be proved to use the commodity or service for sale. The "knowing-it-is-fake-and-buying" act of Wu Hailin cannot deny the fraudulent conduct of the pharmacy run by Zhu Wangqi to consumers." In this case, the court introduced the concept of "knowing-it-is-fake-and-buying", but explain it as shopping motivation to explain, and hold that whether such motivation exist or not could not deny the identity of consumers. Regarding "knowing-it-is-fake-and-buying", some courts regard it as the standard to judge whether it is a consumer, but the official attitudes is very inconsistent. "The Summary of Discussion by the Higher People's Court of Jiangsu Province on Several Issues Concerning the Trial of Consumer Rights and Interests Protection Dispute Cases (no. 10 [2016])" is an example. In this "Summary", the third article stipulates that "Where a business operator maintains that a purchaser purposely purchases a commodity or accepts a service knowing that there is a quality problem with the commodity or service, it shall provide preliminary evidence to prove the same; The people's court shall not recognize the purchaser's claim if it just put that the purchaser purposely purchases a commodity or accepts a service knowing that there is a quality problem with the commodity or service as a defense without providing preliminary evidence." A different argument is that a purchaser that purposely purchases a commodity or accepts a service knowing that there is a quality problem with the commodity or service shall be admitted as a consumer but shall not ask for punitive damages, as can be seen in "Answers to Several Questions on the Trial of Consumer Rights and Interests Protection Dispute Cases" of Chongqing Higher People's Court. The inconsistency of the standards of consumer identification by the court further aggravates the difficulty of the unity of consumer concepts.

#### *C. Different Opinions on the Concept of Consumers in China's Current Theoretical Circles*

In addition to the practical aspects, scholars have many different views on the concept of consumer in theory in China. In terms of the subject, there is the proposition of restricting the subject of consumers to natural persons; there are also those who advocate that units should also be included in the concept of consumer. Professor Liang Huixing advocates that consumers are natural persons who buy goods or receive services for the needs of daily consumption. (Liang Huixing: "the Understanding and Application of Article 49 of 'Law on Protection of the Rights and Interests of Consumers'", *People's Court Daily*, March 29, 2001) However, professor Yang Lixin believes that the subject of consumers should not be limited to natural persons, but should include partnerships, societies without rights and abilities, non-profit organizations and other organizations. (See Yang Lixin: "significance and reference of the concept of integrated definition of consumer stipulated in German civil code", *Law Science Magazine*, no. 1, 2013). There are divergences in the scope of subjects, as well as argument in definition method. There are those who advocate positive substantive definition and those who advocate negative formal definition as well. The former is as defined by Professor Liang Huixing, while the latter believes that any

behavior in the form of consumption, as long as it has non-profit purpose, belongs to the category of elements of consumer behavior. This scope is clearly broader than the range of actions that are actively defined. Professor Wang Liming believes that consumers refer to people who buy goods or receive services for non-profit-making purposes. (Wang Liming: "the Concept of Consumers and the Scope of Adjustment of 'the Protection Law on the Rights and Interests of Consumers'", *Political Science and Law*, no.2, 2002) Scholars are also divided over whether the "knowing-it-is-fake-and-buying" belong to consumers. Scholars who hold negation deny the qualification of consumers who know and buy fake goods beyond the needs of life consumption by the standard of motivation. (Rao Shiquan. "On the Act of 'Knowing-it-is-fake-and-buying' and 'the Protection Law of Consumers' Rights and Interests'", *Journal of Shanghai University of Political science & Law*, no.4, 2003.) Scholars who affirm the identity of consumer of people that believes that "as long as the purpose of purchasing goods and receiving services is not to re-sell goods or services, nor to engage in commodity trading activities, he or she is a consumer. Since in the market, consumers are only opposite to producers and merchants, even those who buy goods knowing that the goods have certain defects should not be denied the identity of consumers as long as they do not buy goods for sale or put them into the market again." (Wang Liming: "the Concept of Consumers and the Scope of Adjustment of 'the Protection Law on the Rights and Interests of Consumers'", *Political Science and Law*, no.2, 2002) A compromise theory hold that the standard "Rule of thumb" + whether goods or services are consumer goods should be used to determine whether a subject is consumer or not: Where a commodity purchased or used or a service received is of the nature of a consumer good that is basically consistent with the general standard and belongs to a consumer good, the act is a consumer act and thus the actor is a consumer. As long as one of the two items of the above standards is not met, the actor cannot be identified as a consumer. (The First Division of Civil Trial of the Supreme People's Court, "Judicial Interpretation and Application of Food and Drug Disputes of the Supreme People's Court on, People's Court press, November 2015, 2nd edition, Page 59.)

#### IV. SEEKING BREAKTHROUGHS: TO RE-ESTABLISH THE ELEMENTS OF CONCEPT OF CONSUMER

##### A. *Pinpointing the Defining Method of Consumer Concept*

"The law on the protection of consumers' rights and interests" in China does not directly define the concept of consumers, but only defines its scope of application. Only 13 of the 31 provinces, autonomous regions and municipalities directly under the central government have adopted the direct definition of consumers, accounting for less than half of the total. This is the fundamental reason why the original defendant maintains that the other party is not a consumer in judicial practice. From the perspective of comparative method, the consumer protection law that originates from the United Kingdom and the United States should change the veiled definition method, since the Article 2, paragraph 5, of "the European Consumer Law" and article 12 of "the British

1977 sales of goods act" both directly define the definition of a consumer; "the German Civil Code" even juxtaposes consumers, producers and natural persons in the part of "human" in the general provisions, and stipulates the concept of consumers in article 13. (International organizations or countries that adopt direct definitions include national standardization organizations, the European Union, Germany, the United Kingdom, Japan, etc. Article 13 of the German civil code stipulates that the consumer refers to any natural person who has concluded a legal act neither for the purpose of his profit-making activities nor for the purpose of his independent professional activities.) Compared with the indirect way, the direct way of defining consumers is more advantageous to emphasize the particularity of consumers' status, in terms of defining method. Although different countries have different expressions of the concept of consumers, as long as the direct definition is adopted, it will be reflected in the coordination of the following chapters "rights of consumers". If the rights of consumers are directly stipulated without definition of the concept of consumers, there are concerns about the lack of subjects. In addition, since consumer organization can be defined directly in the chapter v, Consumer Organizations of "the Law on the Protection of the Rights and Interests of Consumers", why should the concept of consumer not be defined clearly? This is a way of putting the incidental before the fundamental. On the other hand, if the mode of clearly defining the concept of consumers is adopted, the possibility of independent definition of the concept of consumers in different regions can be avoided to a large extent, which reduces many differences in judicial practice and legal interpretation. What's more noteworthy is that if the method of directly defining the concept of consumers is adopted, it will show that legislators hope to establish this concept and integrate laws and regulations at all levels in the field of consumers organically, so as to improve the legislative system of China's consumer protection law. The author thinks that the protection of consumer rights and interests itself is different from the characteristics of ordinary civil activities, but the view that consumer law is regarded as the public law such as economic law is unfavorable to the protection of consumers. By directly defining the concept of consumers on the basis of the special law of civil law, it is helpful to emphasize the category of the subject of civil law to which consumers belong, which also the proper is meaning in defining the concept of consumers.

Some scholars believe that China should stipulate the concept of consumers in the main body of the general principles of civil law. They believe that "only in this way can the legal norms of consumer protection improve the regulatory capacity of the relationship between consumers and business operators." (See Yang Lixin: "Significance and Reference of the Concept of Integrated Definition of Consumer Stipulated in German Civil Code", *Law Science Magazine*, no. 1, 2013.) The author does not agree with such views either. Japan and Taiwan, both of which have the same continent law system as the Mainland of China, have not unified the concept of consumer into the civil code, but have legislated separately. "Japan Consumer Contract Law" and "Taiwan Consumer Protection Law" are all examples. And

this method is more favorable to the protection of consumers. Such stipulation makes clear the status of consumer law as a special law of private law. Compared with the basic principle of equality with the subject of civil law, the right of consumer law can be strengthened by tilting protection.

### *B. Determining the Scope of Consumer Subject*

Direct or indirect definition is the first level of the concept of consumers, and the focus of the second level falls to the scope of the consumer. According to the statistics of "the regulations on consumer protection" in 31 provinces, there are two modes of consumer subject: individual and "individual + unit". There are also different opinions on the determination of consumer scope in the academic circle and judicial practice. One of the most important issues is whether the scope of consumer subject should be limited to natural person. Some scholars believe that units should be taken in the scope of consumer subjects, such as public institutions, social groups and so on. (Suggestions to extend the scope of consumers to the unit include: Liu Zhongdong: the law on the protection of the rights and interests of consumers is also applicable to unit consumption, *Journal of Law Application*, no. 3, 2005; Yang Lixin: "significance and reference of the concept of integrated definition of consumer stipulated in German civil code", *Law Science Magazine*, no. 1, 2013.) The author holds that the scope of consumer subject should be limited to natural person. The reason is that China's "General Principles of Civil Law" stipulates that the civil subject is a natural person or a legal person, and there is no corresponding name of "unit". However, even if the "unit" is not used, it is improper to allow the legal person to become the subject of consumers. As early as 1985, "the General Provisions on the Use of Consumer Commodities" clearly stipulated that "consumers refer to individual members of society who purchase or use goods or services to meet the needs of individuals or families". The individual members of society should be perceived as natural persons rather than units. From the perspective of the system of consumer protection law, the subject of consumers should also be defined as a natural person. The Chapter II, "Rights of Consumers" stipulated the rights of the person, property, the right to know, self-choice right etc.. These are the rights that should be shared by natural persons, and the rights to supervise and enjoy the right to personal dignity and respect for national customs and habits in particular, are not possible to be shared by units. Since "the legal system must be consistent", if the scope of consumer is expanded to units, the "rights protection" that makes the behavior of units valid as consuming behavior cannot be implemented. What the scholars that holds units should be included in the scope of consumer concern are the situations where a unit purchases commodities or services in its own name to meet the demand of its members and then distributed the commodities or services to the members who cannot well protect their rights and interests so the unit has to be the consumer on their behalf. However, such concern is unnecessary. Although the two parties to the contract can be a unit and the other party operator, meaning the parties to a contract are sometimes not the consumers themselves, this does not mean that the natural person who uses or consumes the commodities

purchased as the final product cannot claim his or her rights in his or her own name. This requires that when defining the concept of consumers, legislators should not ignore the consumer status of those natural persons who accept or use commodities even though they do not purchase them directly.

### *C. Investigating the Factors of the Consumer Concept*

In the 13 "regulations on consumer protection" that define the concept of consumer in China, almost without exception, the word "for the needs of life" is used to define the factors in the concept of consumer, which is also one of the controversies that lead to the debates whether "knowing-it-is-fake-and-buying" belongs to the subjective elements of consumers in practice. As mentioned above, as for the non-legal term "knowing-it-is-fake-and-buying", the court holds that it is only a motive and the identity and claim of consumer should not be denied. The author holds that "knowing-it-is-fake-and-buying" corresponds to the concept of "knowingly", which refer to the act of consumer that knowingly buy the commodity while be aware of it is counterfeits and unqualified product. Counterfeits and unqualified commodities refer to the commodities whose quality does not conform to the relevant provisions of state quality control. (The First Division of Civil Trial of the Supreme People's Court, "Judicial Interpretation and Application of Food and Drug Disputes of the Supreme People's Court on, People's Court press, November 2015, 2nd edition, page 55.) However, China's civil law does not stipulate "knowingly" as an essential element that constitutes civil juristic act. Article 55 of the "General Principles of Civil Law" only stipulates that the actor has the corresponding capacity for civil conduct, true expression of will, and does not violate the law or the public interest. "The contract law" only stipulates that the parties to a contract shall have the corresponding capacity for civil rights and civil conduct. None of these provisions impose any special restrictions on the subjective psychology of the parties involved in civil activities. As a Civil Special Law, "the law on the protection of consumers' rights and interests" should not stipulate whether consumers implement the purchase or receive the service "knowingly" or not. Therefore whether it is those who hold affirmative attitude or those who are for negative theory or people for compromise theory, all fail to jump out of the fixed thinking pattern which sets "knowingly" in the judgment standards. The author believes that, in the identification of consumers, there is no need to consider the subjective factors of "knowingly", no matter whether the party are subjectively "knowing-it-is-fake-and-buying" or not does not constitute a premise of the negation of its identity as a consumer. This is not just because the "knowing-it-is-fake-and-buying" itself that belongs to motive is a psychological thought internalized in people's mind and thus it cannot be aware by the counterparty, but also because what the law considers is action instead of motive. The limitation of "for the purpose of daily consumption", in addition to its subjective meaning, has a more important role of limiting the actions of potential consumers. "Purchasing commodities and receiving services" is a regulation of consumer behavior, which does not in itself become a reason to deny the actors' identity as "consumers". But there remains

a huge gap between the subjects of consumers in china that are limited to natural persons and the "knowing-it-is-fake-and-buying" subjects. The "knowing-it-is-fake-and-buying subjects" in itself has the characteristic of "making profit for oneself and the purchase is not for daily life consumption", thus the stipulation of "for the purpose of daily life consumption" should be adhered to. However, it is just because of the semantic ambiguity in the expression "for the purpose of daily life consumption" that lead to the confusion in the application of the law, and to improve this situation the objective behavior that should be limited need to be considered first. A natural person who has the factor of making profit from his or her action shall have his or her qualification of consumers limited. "The Japanese Consumer Contract Law" defines consumers as individuals, except in cases where they are parties to a contract as a business or for the purpose of business. This stipulation, through the behavior restriction, has set the limit to the consumer's core behavior very well. This is more operable and identifiable than the subjective judgment of "knowingly". In this way, arrangements have also been made for whether professional counterfeiters belong to consumers. That is, if it is certain that a person's behavior is profit-making, the possibility of him or her as a consumer shall be excluded. The distinction between consumers and professional counterfeiters does not mean that the two are completely unrelated, but that there are differences in their protection results. Such case can be assumed: a consumer has dispute with an operator but have to find a professional counterfeiter given that he or she does not have the time or professional skills needed, therefore the professional counterfeiter, whether it is organization or individual, is a presence of an agency of this consumer that can claim all the rights of the consumer as stipulated by law. However, if a "party to the transaction" is identified as a non-consumer, it does not enjoy the rights belonging to the consumer. Therefore, at the time when "the Regulations for the Law on the Protection of the Rights and Interests of Consumers (submitted for examination and approval)" is seeking advice from the society, the authors suggests that the concept of consumers be clearly defined as: Consumers refer to natural persons who purchase or use commodities or receive services for the purposes of daily consumption. The rights and interests of consumers are protected by these regulations. But those whose act is profitable shall be excluded.

## V. CONCLUSION

Based on the above analysis, the concept of consumer proposed by the author is basically obtained. The new concept of consumer can play the role of providing general rules in terms of system, which is favorable for integrating the inconsistent consumer protection regulations in different parts of China, and also provides guidance for the construction of a perfect consumer law system.

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