Public Goods & Governance

RECENT CHANGES IN GOVERNING PUBLIC GOODS & SERVICES

Volume 5 * Issue 1 *** 2020**

Journal of the MTA-DE Public Service Research Group

REGULATORY CHALLENGES OF CONSUMER PROTECTION

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IMPRINT

PUBLISHER:

MTA-DE Public Service Research Group
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http://publicgoods.eu

ISSN 2498-6453 (Print)
ISSN 2498-6453 (Online)

JOURNAL DOI 10.21868/PGnG
ISSUE DOI 10.21868/PGnG.2020.1.

Aims and Scope

Public Goods & Governance is a semi-annual academic journal, aims to publish original material within the field of public policy, public management, governance and administration. This includes articles, shorter notes and comments based on theoretically and empirically grounded research on public goods, public service delivery and other public functions in a wide range of sectors, especially focused on recent challenges of governmental roles and new governance models in the market economies.

The journal welcomes submissions (articles, notes and comments) from anywhere in the world from both academics and practitioners. The maximum word limit for articles is 2500 words. Notes (not full academic papers presenting new phenomena, ideas or methods in a brief form) and comments providing additional thoughts and critical remarks to previously published articles should not exceed 1000 words.

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EDITORIAL COMMENTS

REALLY SAFEGUARDED? A DEBATE ON REGULATORY ASPECTS OF CONSUMER PROTECTION[1]

> ***"Minister:*** *By the end of next year we shall be waving goodbye to the good old British sausage and we'll be forced to accept some foreign muck like salami or bratwurst or something in its place.*
>
> ***Sir Bernard****: They can't stop us eating the British sausage, can they?*
>
> ***Minister:*** *They can stop us calling it the sausage though. Apparently it's going to be called the emulsified, high-fat offal tube."*[2]

The above dialogue on 'EuroSausage' standardization exemplifies only one segment of a more general process of recent decades as regulation of trade in goods and services has undergone a significant transformation. The gradual opening of national markets and their integration into global markets, and later the strengthening of governmental roles against liberalization efforts, not to mention technological development including the emergence of new forms of sales, have brought both benefits and disadvantages to businesses and consumers. At the same time, the concept of consumer has also changed, consumer needs have become more diverse, and the range of vulnerable consumers and those in need of special protection more differentiated. This process is strongly influenced by the economic, social, historical and political context, such as the financial and economic crisis of 2008, the challenges raised by climate change or the current epidemiological situation.

In this context, the ways how to ensure effective consumer protection has been subjected to intense academic debates. The present issue of the *Public Goods & Governance* journal examines the challenges of consumer protection in various policy areas focusing on the role and instruments of regulatory actors at different levels of governance. We use the term 'consumer' in a broad sense in this volume covering a wide range of users of goods and services including users of public goods and public services.

The first paper (by *Haekal Al Asyari S.H.* and *Yaries Mahardika Putro S.H.*) discusses the challenges of online marketplace primarily from the point of view of product safety concerns and presents the wide variety of tools available in the United States to overcome these challenges. The next contribution (by *Zsolt Hajnal*) also focuses on products sold online and safety aspects associated with them by analysing the operation of the European market surveillance system including the novelties

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[1] by *Tamás M. Horváth*, Leader of the MTA-DE Public Service Research Group, Professor of Law and Political Sciences at the University of Debrecen and *Ildikó Bartha*, Senior Research Fellow of the MTA-DE Public Service Research Group, Associate Professor of Law and Political Sciences at the University of Debrecen

[2] Dialogue from the British television series „Yes Minister" (episode 22nd), first broadcasted on 17 December 1984.

introduced by a new regulation of the European Union. Remaining with the European context, the third article (by *Dániel Szilágyi*) examines the concept of vulnerable consumer compared to 'average consumer' as was developed by the case-law of the Court of Justice of the European Union, with a special focus on financial services. Vulnerability is an important aspect of the analysis provided by the fourth paper (by *Ildikó Bartha*) too, discussing changes in EU consumer protection rules and Member States' motivation to follow these provisions in the field of services of general interest. After the 'European block', a country-specific study (by *Bernadett Veszprémi*) examines how consumer protection is ensured in e-Administration, in particular in public administration proceedings in Hungary. The sixth article (by *Ágnes Bujdos*) closing this volume focuses on the right to water as a fundamental right declared by General Comment No. 15 of the UN Economic and Social Council and analyses the rate of agricultural water supply as determined by the Water Management Act of Hungary in light of the requirements laid down by this international instrument.

The consumer protection aspects of regulation in different goods and services sectors raise a number of additional questions that have not been discussed in this journal issue. The academic website (blog) of the MTA-DE Public Service Research Group publicgoods.eu offers an opportunity to continue the debate, even after the publication of the present volume (see subpage publicgoods.eu/consumer-protection specifically dedicated to this topic). The blog aims to provide a public forum for analysing and discussing recent changes in government functions and regulatory challenges in different policy areas in the wider Europe and its global environment.

The preparation and publication of the present volume was carried out under the scope of the Ministry of Justice's program on strengthening the quality of legal education.

U.S. CONSUMER PROTECTION AND PRODUCT SAFETY LEGAL FRAMEWORK OVERVIEW: AN INSIGHT FOR NON-FOOD PRODUCTS IN THE ONLINE MARKET*

Haekal Al Asyari S.H. and Yaries Mahardika Putro S.H[3]

Digital transformation is profoundly impacting our economies and societies, changing the ways in which consumers interact with each other and the online marketplace. Unlike the traditional market, an online market is a convenient way for customers to purchase products without having to leave their home. On the online market, buyers may also shop from the comfort of their computer or tablet, able to make an easier price comparison and also able to take advantage of discounts offered by the digital marketplace to the buyers. Commonly the products that are sold on the internet are non-food products. Non-food products are tangible products, which are – in foreseeable conditions – intended for consumption not as foodstuffs. In the United States, the number of online purchases increases year by year. This study observes that a large number of customers in the United States are at a risk of negative impacts from transactions through the cyber market. Unsafe products are one of the negative facets of customers making transactions online. It shall be noted that in the online market, consumers are generally unable to inspect products thoroughly before purchasing them, also the access to safety information and warnings is more limited compared to the ones in a traditional market. Moreover, for market surveillance authorities, it is difficult to detect and track unsafe products. Therefore, this study tries to highlight the development of U.S consumer protection, product safety and also shows several challenges that the online market presents to the consumer and the government along with the methods that are sought through to tackle the issues at stake.

Introduction

By virtue of developments in information and communications technology in the last decade, opportunities are created for businesses to open an extensive new market on the cyberspace attracting an unlimited source of consumers. Inevitably, balance has to be struck between these opportunities and the challenges that are completely new as opposed to offline commercial transactions (Federal Trade Commission 2001). These challenges have to be appropriately and adequately addressed due to their sensitivity for consumers (Micklitz & Durovic 2017, 10).

Consumer protection in the United States started in response to the pressure against the development of freedom of contract and the principle of *caveat emptor* (Waller 2011). This phenomenon is rooted to the 19th century common law (Saharay 2010, 120–135). The consumer protection authority is a system guaranteeing the private rights of

* DOI 10.21868/PGnG.2020.1.1.

[3] *Haekal Al Asyari S.H. and Yaries Mahardika Putro S.H.,* LLM students of the European and International Business Law Program, Faculty of Law, University of Debrecen. The study was made under the scope of the Ministry of Justice's program on strengthening the quality of legal education.

consumers to claim compensation for damages of specific products and illegal practices of a seller. Providing of course, a burden of proof from he/she who consumes (Waller 2011, 20).

Historically, due to the inevitable existence of unsafe products, the need for government regulation was pioneered by the Consumer Bill of Rights by President Kennedy (Presidential papers 1962) and the growth of "Great Society" program of the Johnson Administration (Lyndon B. Johnson [University of Michigan] 1964, 22 May). Progressively, the growth of consumer protection took another significant portion in the 20th century (during Franklin Roosevelt's era) that gave birth to a large number of federal, state, and local regulatory agencies and laws dealing with consumer protection (Truth in Lending Act 1968, Fair Credit Billing Act 1974, Petroleum Marketing Practices Act 1978, Comprehensive Smokeless Tobacco Health Education Act 1986, Do Not Call Registry Act 2006).

The underlying principle of American consumer protection law could be found in the Federal Trade Commission Act [hereinafter FTC Act] (Free Trade Commission Act 1914). It's important to shine a light on section 5 highlighting unfair methods of competition (Free Trade Commission Act 1914) which becomes a standard for determining deceptive acts for judicial decisions (Horvath 2009, 1). The FTC Act has jurisdiction over the entire economy, including business and consumer transactions on the internet (Free Trade Commission 2001).

Likewise, the development of technology is followed by the emergence of disruptive innovation. The physical example of this can be seen in the shifting activity from the traditional market to the online market. The significant reason behind the increase in demand of the online market is the active modern lifestyle and economic growth (Sharma 2013, 364–376). The online market is distinguished from the traditional market in many ways such as the product descriptions, gift options, home delivery and payment modes that are easy to access through online shopping nowadays. The online market is a virtual, online space on which buyers and sellers meet to carry out transactions involving goods or services (Corrot & Nussenbaum 2014, 7).

As of today, nine in ten American adults use the internet, which is equal to 90% of the population for the year 2019 (Pew Research Centre 2019). With an ever-increasing number of people accessing the internet, boosted by the development of technology and globalization, the numbers will continue to grow. The internet has made the sales of goods easier, quicker, and more competitive, while at the same time, becoming less susceptible to certain kinds of fraud and misrepresentation (Winn 2006, 24).

One of the underlying arguments of this essay is that the lack of reliability of intangible information is not governed by a unified system of liability for misrepresentations of material fact, which may cause economic or even physical harm (Traynor 2006, 82). Under the European Union, a product safety legal framework (General Product Safety Directive 2001), empowered by an authority network (Commission Notice on the Market Surveillance of Products Sold Online 2017) to survey the market is in existence but should be enhanced in response to the new challenges of online market. To that end, the objective of this essay is to observe the legal framework of the United States, in regards to the consumer protection system in general, alongside its procedures and functions, as well as focusing on the legal

framework and enforcement of product safety in particular, to the extent of addressing challenges to overcome and methods of protecting consumers from unsafe products in the online market.

1. Consumer Protection Framework in the United States

1.1. Federal Level

The models of enforcement of consumer protection in the United States can involve Competition Law Statutes, issued by the Antitrust Division of the United States Department of Justice, and the competence of the independent Federal Agency known as the FTC (Waller 2005, 631). As the subsequent focus of this research will deal with product safety and market surveillance framework, particularly of non-food products in the online market, we will focus on the latter.

a. Mechanisms Under the FTC

The main goals of the FTC are to protect consumers by preventing fraud, deception, and unfair business practices in the marketplace (Free Trade Commission Act 1914). Its jurisdiction is enshrined under the same article. Additionally, to help support the FTC, there are 37 other consumer protection related statutes that represent an extension of the FTC's jurisdiction both in terms of enforcement and administration (Waller 2005, 31). Consumer protection under the structure of the FTC is given its own bureau alongside competition and economic affairs (Free Trade Commission 2019). The bureau of consumer protection enforces consumer protection laws by conducting investigations, litigations, rulemaking proceedings, and business education (Smith 2019).

One of the primary tools for enforcing consumer protection law by the Bureau of Consumer Protection is the Civil Investigative Demand (CID) (Free Trade Commission Act 1914, Sec.20), initiated by an internal research, consumer complaints, court referrals, congressional requests, and by the President himself (Waller 2005, 4). A hearing can only be held in front of an administrative law judge if the FTC have established both a reason to believe, and that the case at hand is in the interest of the public (Free Trade Commission Act 1914, Sec.20). A cease and desist order may then be issued by the judge where a violation of such order will result in civil penalties amounting to $10,000 per violation (Free Trade Commission Act 1914, Sec.20). Redress for the order may be sought through an appeal, federal appeal, and lastly the Supreme Court (U.S Constitution Amendment 1868, Art.3).

Aside from the CIDs, the FTC has two other jurisdictions which are to create trade regulation rules defining the concept of unfair or deceptive trade practices (U.S Code 1926) and to seek restitution for victimised consumers (U.S Code 1926). However, criminal charges are outside of FTC's jurisdiction and are under that of the U.S. Department of Justice (Department of Justice 2018).

b. Other federal agencies

Aside from the FTC, other federal agencies play an important role in protecting consumers. First, the U.S. consumer product safety commission (CSPC) develops policies in protecting the public against unsafe products alongside its safety standards and enforcement. Second, the Food and Drug Administration (FDA) regulates the manufacture, marketing, and distribution of food. Third, the National Highway Traffic Safety Administration (NHTSA) covers automobile, truck, and motorcycle safety under the Traffic and Motor Vehicle Safety act of 1996, unifying the standards through federal oversight of automobile safety (National Traffic and Motor Vehicle Act 1966). Our focus will be directed towards the CSPC.

1.2. State level

State governments act as both consumer law enforcement agencies and consumer advocates in a decentralized and non-integral system (Waller 2005, 17). The investigation and enforcement of consumer protection is generally the same in most of the 50 states, whereas attorneys general have the authority to enforce the laws (Waller 2005, 37). Attorneys general may file lawsuits and obtain restitution on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, bring criminal cases when authorized, and make rules to govern trade practices (Waller, 2011). Among the state attorneys general, cooperation is done through an association in order to ensure the effectiveness of consumer protection activity and litigation.

State attorneys general may issue CIDs by requesting documents or oral testimony from specific individuals or companies when there is a possibility of violation with a reason to believe that the violation in question has occurred or will occur, and without a probable cause (U.S Constitution Amendment IV). Criminal investigations may be conducted through a grand jury process (U.S Code 1926) and must be proved beyond reasonable doubt in the appropriate state court. Civil and criminal litigation under the Consumer Protection Branch of the Civil Division (CPB) of the United States Department of Justice is conducted upon appropriate certification by the FTC (Department of Justice 2018).

2. Consumer Product Safety Framework in the United States

2.1. Mandatory Regulations

The United States regulates consumer products, toys, medicines, medical services, motor vehicles, and a wide of array of other products by means of mandatory standards (Winn 2006, 99). These compulsory rules are mostly federal, set by statutes or regulations that define requirements for consumer products (U.S Consumer Product Safety Commission 2017). The responsible federal agency to set these regulations would be the CPSC (Consumer Product Safety Act 1998). The CPSC develops mandatory standards through rulemaking, where staff inputs are taken from consumers,

industries, and other government agencies. These mandatory standards are expressed in the form of performance requirements (Annual Report 2017).

a. Consumer Product Safety Act

In 1972, the Congress of the United States passed the Consumer Product Safety Act with consideration for the growing number of consumer products which present unreasonable risk of injury, the diversity of nature and abilities of consumers in using such products, public interest, and control of the state (Consumer Product Safety Act 1972). All in the aims of protecting the public against reasonable risk of injury, assisting consumers in evaluating the comparative safety of products, and above all to develop a uniform safety standard for consumer products (Consumer Product Safety Act 1972). The Act provides definition, public disclosure information, consumer product safety standards, procedural rules, legal redress, product certification and labelling, inspection and recordkeeping, import and export, as well as civil and criminal penalties (Consumer Product Safety Act 1972). The Act acts as an umbrella statute, establishing the CPSC along with its basic authority (Consumer Product Safety Act 1972).

b. Consumer Product Safety Improvement Act

In response to many high profile product recalls in 2007, the Congress passed the CPSIA (Consumer Product Safety Improvement Act 2008) to establish consumer product safety standards and other safety requirements for children's products and to reauthorize and modernize the CPSC (Williams 2008). The CPSIA contains product safety rules concerning lead content, phthalates, toy safety, durable infant or toddler products, third-party testing and certification, tracking labels, imports, ATVs, civil and criminal penalties (Consumer Product Safety Improvement Act 2008), and a public-search database of reports of harm. The CPSIA also requires domestic manufacturers to issue a General Certificate of Conformity (GCC) to be applied as consumer product safety rule or any similar CPSC rule, ban, standard, or regulation enforced by the commission.

c. Federal Hazardous Substances Act

The FHSA *(Federal Hazardous Substances Act 1960)* requires precautionary labelling on the immediate container of hazardous household products to help consumers safely store and use products provide information on the first aid steps taken in cases of emergency *(Federal Hazardous Substances Act 1960)*. The act also allows the CPSC to ban certain products that are highly dangerous or the nature of the safety instructions is not adequate to protect the consumers *(Federal Hazardous Substances Act 1960)*.

d. Other mandatory regulations

Under the CPSC, there are other regulations governing specific product safety consumer protection rules such as the Children's Gasoline Burn Prevention Act, *(Children's*

Gasoline Burn Prevention Act 2008) Child Safety Protection Act, Flammable Fabrics Act (*Flammable Fabrics Act 1953)*, Poison Prevention Packaging Act (*Poison Prevention Packaging Act 1970)*, Refrigerator Safety Act (*Refrigerator Safety Act 1956)*, Child Nicotine Poisoning Prevention Act, and the Drywall Safety Act. However, for the focus and interest of our issue, the aforementioned acts will not be discussed.

2.2. Voluntary Standards

Safety standards are a consensus, prescribing a set of rules, conditions, or requirements concerning definitions of product-related terms, classification of components, specification of materials, performance, systems, services, or practices relating to the safety of consumer products used (U.S Consumer Product Safety Commission 2017). These voluntary standards are sufficient when substantial compliance would eliminate or adequately reduce the risk of injury (U.S Consumer Product Safety Commission 2017). There are many voluntary standard organizations such as ASTM, CSA Group, and UL.

3. Consumer Product Safety Agency

3.1. CSPC

Rulemaking by the CSPC is under the Administrative Procedure Act *(Administrative Procedure Act 1946)* involving publication in the federal register of a notice of the proposed rules. This is a two-stage process, which explains the proposed rule, provides opportunity for public comment, includes agency considerations, and then the agency's issuance of the final rule (U.S CPSC 2019).

3.2. National Electronic Injury Surveillance system (NEISS)

NEISS is a database providing statistical estimates of consumer product-related injuries from a probability sample of around 100 hospital emergency rooms (Marker & Lo 1996). It also gathers additional data at either surveillance or investigation level. NEISS collects its data through ongoing routine surveillance of ERs, special emergency department surveillance activities, follow-back telephone interviews with the injured, and on-site investigations with the injured and witnesses (National Electronic Injury Surveillance System 2000, 7). The collected data will identify injuries related to specific consumer products, and enables further study of that particular product. These data will also be used as evidence by the CPSC for product recalls, public awareness campaigns, and product safety standards *(Consumer Product Safety Act 1972)*. Furthermore, the CPSC helps the enhancement of user interfaces, expanding data elements, and sources, along with seeking input from other stakeholders such as federal agencies in order to ensure NEISS' data is up-to-date (National Electronic Injury Surveillance System 2000, 8).

4. Procedure of detecting unsafe and hazardous products on the market

4.1. Market Surveillance Programs

a. Import Surveillance Program

The CSPC Office for Import Surveillance works closely with the U.S. Customs and Border Protection by allocating staff alongside the Customs and Border Protection personnel at major ports of entry throughout the United States. The CSPC develops risk assessment methodology to identify shipments having a high risk of containing harmful products (Consumer Product Safety Improvement Act 2008). Additionally, CSPC conducts establishment inspections of manufacturers, importers, retailers, monitors internet and resale markets, responds to industry-generated reports about potentially unsafe products, and tests products for compliance with specific standards and mandatory regulations (U.S Consumer Product Safety Commission 2017, 21).

b. Trusted Trader Program

The Trusted Trader Program was designed to help committed importers in maintaining a high level of product safety compliance and to help prevent import of unsafe products. Importers who are in compliance will enjoy benefits, such as faster and easier access to the market (U.S Customs and Border Protection 2016).

c. Risk Assessment Methodology (RAM) System

This system was developed in 2011 to analyse imported products by using a risk-scoring algorithm to identify shipments that have an increased risk probability of noncompliance or defect (U.S Consumer Product Safety Commission 2017, 28). A shipment will be denied entry into the State if a violation is detected, which prevents it from entering the marketplace.

d. Fast-track product recall program

In implementing this program, a business must be prepared to apply a corrective action plan including a consumer-level recall such as refund, repair and replacement, within 20 working days of submitting a report to the CSPC. This way, it will help consumers by removing potentially hazardous products from the marketplace quickly and efficiently (Federal Register 1997).

e. Regulatory robot

The CSPC developed a regulatory robot to help customers identify which safety regulations may apply to their products by asking questions to provide guidance towards the relevant regulations. This program also helps businesses to identify important

product safety assessments (CSPC Regulatory Robot 2019) before manufacturing and importing products.

5. Challenges and new tools for the better detection of unsafe non-food products on the online market

The expansion of the global market and globalized supply chains triggers concern for product safety, requiring a divergence of regulations and standards (Consumers International 2018). Nowadays, the online market is becoming popular as the most convenient way of shopping, as a result of and influenced by the explosion of the internet which affected the people living in a digital era (Massad & Berardelli 2016, 26–37). Unlike a traditional market, the online market is a convenient way for customers to purchase products without having to leave their home (Huseynovv &Yildrim 2016, 452–465). On the online market, buyers may also shop from the comfort of their computer or tablet, able to make an easier price comparison and also able to take advantage of discounts offered by the digital marketplace to the buyers (Jadhav & Khanna 2016, 1–15). Commonly the products that are sold on the internet are non-food products. Non-food products are tangible products, which are – in foreseeable conditions – intended for consumption not as foodstuffs (Tichoniuk 2018, 155). As one of the biggest marketplaces, an online market such as Aliexpress, provides many non-food products. There are several categories to choose from, such as women's and men's fashion, watches, bags and shoes, toys, sports equipment, home improvement and tools and also phone and telecommunications equipment (Yazdanifard & Hunn Li 2014, 33–40).

Advances in communication technologies within the last decade of the twentieth century paved the way for innovations, promoting rapid globalization. The convergence of telecommunications and computer technology has given birth to a new business organizational system called the internet, presenting a revelation of ecological business development (Javalgi et al. 1983, 420–435). Electronic commercial transactions over the internet, known as e-commerce, have rapidly grown until nowadays (Pons et al. 2003, 130–138). The online market as a platform or online space for business-to-consumer and business-to-business transactions has been growing year by year.

The numerous benefits of the online market influence the decision of consumers to shop through it instead of traditional markets. Comparison shopping, better prices and convenience are among the benefits of the online market. With regards to comparison shopping, the consumer may compare prices, models and options more easily and quickly through the online market instead of a traditional market (Gupta, Bansal & Bansal 2013, 1–10). Subsequently, many online marketplaces offer discount coupons and rebates which reduce the prices, increasing the level of interest of customers to shop through the online market (Atchariyachanvvanich, Sonehara & Okada 2008, 101–110). Unlike the traditional market, the online market is offering its convenience to the customer by its continuous availability for 24 hours and 7 days from the customer's computer or smartphone (Khan 2016, 19–22). The customer is able to do transactions from the whole world without any barrier. The customers are no longer restricted to

products, models and the availability of options from local retailers (Khan 2016, 19–22).

Due to these benefits, the number of digital shoppers is always increasing. Recently, *Statista,* one of the most trustworthy statistics companies based in Germany, released the statistics of the number of US online shoppers from 2016 until 2019. In the United States, the amount of online shoppers was 209 million in 2016 and it grew to 224 million people in 2019. It is predicted to be 230 million people in 2021 (Clement 2019).

Nevertheless, the large number of customers in the United States are at risk of suffering a negative impact from transactions through the online market. Lack of product safety is one of the negative impacts for the customer doing online transactions. Despite several benefits that are offered by the online market, lack of safety is the main concern for the customer or even the government to tackle in this regard. In line to that issue, an unsafe product is defined as a product that does not comply with a safety rule issued under the Consumer Product Safety Act (CPSA), or contains a defect which could create a substantial risk of injury to the public or presents an unreasonable risk of serious injury or death (U.S Code 1926).

It shall be noted that on the online market, consumers are generally unable to inspect products before purchasing them, also, their access to safety information and warnings is more limited that in a traditional market. Moreover, while in traditional markets, manufacturers distribute their goods in large number to brick-and-mortar stores, on the online market, products may be distributed through a number of channels such as e-commerce platforms, online retailers' websites, online auction websites and social media, where it is not easy for the consumer to identify who is manufacturing and delivering a product. Also, for market surveillance authorities, it is difficult to detect and track the unsafe products. This does not only apply to new products but also to second-hand products (OECD 2016).

According to the OECD, in different jurisdictions, there are at least three categories of unsafe products that are available online and that have been reported as a potential source of consumer harm, possibly affecting injury, adverse effects on health or even death to the consumer (OECD 2016). The first category is that of banned products, which are prohibited from sale in certain countries, either online or offline, as well as products that have been recalled from the market in a voluntary or mandatory manner. Subsequently, the products which possess inadequate labelling and safety warning are categorized as the second tier of unsafe products. The final (third-tier) category of unsafe products are products that do not meet voluntary or mandatory safety standards.

With regards to the first-tier category, banned product, it is described as unsafe products that are prohibited from sale in one or more jurisdictions. A ban can be limited in time or permanent. In the United States, consumers have been able to buy banned products online despite existing prohibition. For instance, consumers are freely able to purchase small high powered magnets online which had been listed as banned products in the United States (CPSC 2019). The US CPSC also noted that these kinds of magnets are available to be purchased by consumers through e-commerce platforms in the People's Republic of China (New York Times, 2019). It should be noted that the responsibility for ensuring the goods are not banned in the jurisdictions where they are offered for sale to consumers generally lies with the business selling the goods. The US

Customs Border Protection (US CBP) has explained on its website that individuals purchasing goods online form foreign countries are regarded as importers and are responsible for ensuring that the products comply with the US state and federal import regulations, which include the issues of product safety (CBP 2019).

The first-tier category, recalled products, whether the recall was mandatory or voluntary, concerns defective products which raise safety concerns for the consumer. In an e-commerce context, product manufactures, which often carry out the recalls, can face the challenges in tracking the sale of recalled products which may be available through a wide variety of channels worldwide (Tan 2008, 48–55). In the US, products that have either violated safety standards or present a significant risk of injury to the public are recalled and announced to the public via press release by the CPSC (Kirschman & Smith 2007, 228–231). In the year 2014, the US CPSC and a large consumer electronics supplier announced that 10 different consumer products that had already been recalled in 2012 and 2013 were still on offer online. The products included cameras, televisions, dishwashers, electric ranges, office chairs and toys that could cause hazards such as fire, burn, expelled parts or skin irritation (CPSC 2019a).

The data shows that an estimated 130,000 annual visits to emergency departments in the United States are due to injuries from toys (U.S Consumer Product Safety Commission 2003). Poorly designed children's products have been associated with suffocation, entrapment, asphyxiation, burns, poisonings, falls, and lacerations (Centre for Disease Control and Prevention 1997, 1185–1189). Recalls on children's products have been found to account for 43% of total recalls announced by the CPSC and account for over 50% of injuries due to recalled products reported (Kids in Danger 2002, 25). In the last decade there have been 60 million units of child products recalled in the US. However, there are many unsafe products sold in large number, with only 16–18% return rates reported for all recalled products (Wentraub 2008). Children's products may have particularly low return rates because they are lower cost items and often do not include product registration cards (U.S. Consumer Product Safety Commission 2003b).

Subsequently, providing consumers with clear, accurate and easily accessible information about goods on offer is key to helping consumers make informed decisions on e-commerce (OECD 2010). Most of the consumers in e-commerce do not always receive proper access to product labelling and safety warning information before purchasing products on the online market, which may cause injury and harm to the consumer. In the US, the 2008 Consumer Product Safety Improvement Act requires that advertising for a product on offer online must cover relevant cautionary statements, in order to prevent the consumer getting injured or harmed (*Consumer Product Safety Improvement Act 2008)*.

With regards to the products that do not meet voluntary or mandatory safety standards: based on the survey of consumer usage of domestic e-commerce carried out in 2013 in the US, a relatively small number of consumers complained about problems with goods that did not meet voluntary or mandatory safety standards in force in the US. It was only 4,7% of people in the US who did complain concerning their products not meeting safety standards (METI 2014). However, the low level of complaints did not indicate that there are no problems with the products sold online that do not meet

voluntary or mandatory safety standards. The low level of complaints may be affected by the unawareness of consumers of such problems.

On the other hand, in order to overcome these challenges posed by unsafe products, the US government put their attention to detecting and also combating the existence of unsafe products which are sold on the online market. These methods are conducted under the considerations to protect the consumer's interest. There are at least four main methods that are undertaken by the US Government in order to overcome the challenges of unsafe products which are sold on the online market. The establishment of organizations which are dedicated to e-commerce market surveillance, market surveillance cooperation with customs authorities, cooperation between authorities and e-commerce platforms, international cooperation between authorities and consumer education about online product safety issues are the methods used by the US Government to tackle and detect unsafe products which are sold on online market (OECD 2011).

Online product safety market surveillance plays an important role in detecting unsafe products on the online market. These entities are responsible for surveillance at those brick-and-mortar shops that often use the Internet to sell their products to consumers and are created specifically to detect unsafe products offered on the online market. In 1999, the Consumer Product Safety Commission launched the operation Safe Online Shopping (S.O.S), which aimed to monitor and find banned and recalled products sold online. Also, in the same year CPSC created the "War-Room" to enable its investigators to monitor the internet and detect sales of unsafe products through mystery shopping. These initiatives resulted in 4000 novelty lighters being recalled, because of their lack of a child-resistant mechanism (CPSC 2019c).

In a cross-border e-commerce context, the seizing of products at the border that do not meet the safety regulations of the jurisdiction is one of the most effective ways to prevent unsafe products from being placed on the market. The customs authorities are usually responsible for checking the conformity of products with regulations on product safety. To help prevent unsafe products from reaching consumers through cross-border e-commerce, co-operation between market surveillance and customs authorities is the solution to detect the unsafe products. As one of the methods to strengthen the work of CPSC in detecting unsafe products, the CPSC cooperated with US Customs Authorities. In 2009, the Commercial Targeting and Analysis Centre (CTAC), which is hosted by the Customs and Border Protection, was established for cooperation between agencies to protect consumers in the United States from unsafe products, including those sold via e-commerce (CBP 2019b). Ten agencies partner with CTAC, including US CPSC, US Food and Drugs Administration (US FDA), US Food Safety and Inspection Service (US FSIS), US Environmental Protection Agency (US EPA) (CBP 2019b). In 2013, US CPSC and US CBP seized a shipment originating from China, which contained 70,000 counterfeit consumer products, including razor blades, toys, sunglasses, markers and batteries, with a whole value estimated at $3.9 million (CBP 2013).

Subsequently, although e-commerce platforms are usually not legally responsible for the safety of the goods supplied by third-party merchants through their platform, they have co-operated with authorities in a number of countries to help protect consumers from unsafe products. In 2015, the US CPSC announced the launching of a consumer

product safety collaboration scheme with *Alibaba*, the largest online and mobile commerce company in the world, based in China. Although the majority of consumers buying products from the platform are located in China, the number of consumers based in foreign countries and purchasing products via *Alibaba*, including consumers in the United States, has been on the increase (Wall Street Journal 2019). The scheme of collaboration is as follows (CPSC 2019d):

a. The establishment of a direct line enabling contacts between US CPSC and Alibaba.
b. The sharing of a list of recalled products with *Alibaba* by the US CPSC, enabling it to block the sale of illegal and recalled products via its platform to consumers in the US.
c. The establishment of access points on *Alibaba* business to business platforms that would direct importers of products to the US to compliance with US Safety Standards.

Even though the US government had sufficiently and effectively worked to detect unsafe products in online market, the need for international cooperation cannot be denied. One issue market surveillance authorities are often facing is the difficulty in identifying the supply chain and the economic operator concerned, such as a manufacturer, a retailer, or an e-commerce platform (OECD 2014). Removing unsafe products when the overseas retailers or e-commerce platforms are reluctant to comply with the request to remove them appears to be even more challenging. Therefore, the establishment of international cooperation between states is important to combating this issue. In North America, US CPSC, Health Canada and the Consumer Production Federal Agency of Mexico (PROFECO) established a cooperative engagement framework in order to provide cooperation, promote an exchange of information on unsafe products and experiences of verification. In June 2015, this cooperation issued a joint recall on portable speakers that were sold online and which could overheat and cause fire (Consumer Protection Federal Agency 2015).

On the other side, the US Government also conducted a bilateral agreement with the People's Republic of China to cooperate in combating and detecting unsafe products on the online market. In 2013, the US CBP and the General Administration of Customs of China (GACC) conducted a joint customs operation focusing on counterfeit products. Over 243 000 counterfeit consumer electronics products, including products with logos of well-known brands, were seized as a result of this long operation. The initiative also led to the arrest by local law enforcement authorities in the United States of those businesses that had imported counterfeit products into the country with an aim of selling them online (CBP 2019c).

In spite of the consumer authority market surveillance and law enforcement actions explained above, there is no guarantee that an unsafe product is completely removed from e-commerce. One way to increase consumer awareness about these problems and risks is to provide consumers with relevant information online. Making product recall information easily accessible to consumers is also key to enhancing consumer protection and trust in e-commerce. In the US, the website of the Rapid Alert System for dangerous non-food products can be easily accessed by the consumer to understand the safety of products. Subsequently, since 2007, the Illinois Attorney General has been

publishing a *Safe Shopping Guide* every year to help consumers avoid purchasing unsafe toys and children's products during their holiday shopping for Christmas. The guide includes pictures and descriptions of recalled products by the US CPSC in a way that consumers can easily read (Illinois Attorney General 2014). Through these preventive actions, the existence of unsafe products on the online market can be easily detected and most importantly, the consumer's interests can be protected.

Conclusions

In the recent years of globalisation and technological advancements that it brings, it has changed not just the form and environment of a traditional marketplace, but also the way that products are designed, manufactured, and distributed. Hence, this phenomenon is accompanied by risks. This study has tried to observe and analyse the framework of consumer protection both in general, and particular to the online market, within the sphere of the largest marketplace in the world.

The framework at hand that exists in the United States to protect consumers from fraud, deceptive acts, unfair business practices, and especially from unsafe products, consists of a mixture of national, state, and local governmental regulations. As the substantial pillar of consumer protection in the U.S., the Federal Trade Commission (FTC) is a model for consumer protection. FTC's jurisdiction covers both aspects of legal enforcement and administration. One of the imperative instruments enshrined in the FTC Act is the Civil Investigative Demand (CID). The issuance of such a demand will instigate research and investigation towards a potential violation of consumer rights in the interest of the public. Additionally, attorneys general play an essential role at the state level for the investigation and enforcement of consumer protection through the aforementioned mechanisms.

Product safety is a priority in consumer protection, both for public and private agencies. The enforcement of such regulatory standards must be supported by a broad array of legislative tools. Under the federal authority, this study introduced the Consumer Product Safety Act (CPSA) which authorizes the Consumer Product Safety Commission (CPSC) to develop standards and bans and to pursue recalls under particular circumstances, alongside the administration of related consumer protection acts such as the CPSIA, FHSA, and other mandatory regulations. Moreover, the National Electronic Injury Surveillance System cooperates with hospitals in the United States in detecting consumers who have been injured by certain unsafe products.

There are several procedures for detecting unsafe products on the market under the CPSC such as the import surveillance program, trusted trader program, risk assessment methodology system, fast-track product recall program and the regulatory robot. Due to the previously discussed challenges of the online market, the U.S. has undertaken four approaches to overcome such challenges: these are the establishment of organizations dedicated to e-commerce, market surveillance, cooperation between market surveillance and customs authorities, and authorities with e-commerce platforms, as well as international cooperation between authorities and consumer education. Despite the sophistication of these mechanisms and cooperation, there are still no guarantees for the elimination of the threat posed by unsafe products via their removal from the online

market. Consumer awareness and sufficient relevant information must always be disseminated by the public and private agencies to both an on- and offline population.

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CURRENT CHALLENGES OF EUROPEAN MARKET SURVEILLANCE REGARDING PRODUCTS SOLD ONLINE*

Zsolt Hajnal[4]

A number of changes and challenges impacted the global economy over the last decades. The trade of goods used to be carried out through relatively controllable and predictable routes, so the market surveillance measures, institutions and powers that could form the foundations of an efficient system are now not necessarily capable of providing the same high level of consumer safety. Rules created in the context of identifiable manufacturers, distributors established in the internal market, physical shops and markets are no longer suitable for facing the market surveillance challenges of the online market. The present study analyses the changes and the latest achievements of the legal framework, that can be considered as milestones of market surveillance and product safety regulations.

Introduction

Many things have changed in the global economy over the last 40 years. The trade of goods used to be carried out through relatively controllable and predictable routes, so the market surveillance measures, institutions and powers that could form the foundations of an efficient system are now not necessarily capable of providing the same high level of consumer safety. Rules created in the context of identifiable manufacturers, distributors established in the internal market, physical shops and markets are no longer suitable for facing the market surveillance challenges of the online market.

The large increase in the movement of goods, the volume of products flowing into the European Union through personal orders can no longer be controlled and tracked by traditional methods (Jadhav & Khanna 2016, 1–15). Behind the displayed offers of an online store a stock of a trader cannot necessarily be found, especially one's that is established in the European Union (Massad & Berardelli 2016, 26–37). In addition, warehouses are being set up within the borders of the EU for goods that had entered the European Union and later were withdrawn, that, until now, have fallen outside the control of market surveillance authorities.

At the same time, consumers expect the same level of protection for products manufactured inside and outside the EU. In our globalized world, it remains a challenge to ensure that the imported products comply with EU standards but also do not gain an unfair competitive advantage by violating EU rules. Imported products should, in principle, be inspected when they enter the single market. However, the volume of imported products makes it impossible to control all shipments. In 2015, more than 30%

* DOI 10.21868/PGnG.2020.1.2.

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of products entering EU markets came from imports. Their estimated worth was almost € 750 billion (EC, 2017c).

In my study, I am looking for the answer whether a high level of protection of the health and physical integrity of consumers can be guaranteed in the internal market in the changed circumstances. Therefore, I review the changes and the latest achievements of the legal framework, that can be considered as milestones of market surveillance and product safety regulations.

1. The inceptions of European product safety regulation

The mid-1980s saw an in-depth legislative review process, marked as a 'New Approach', that established rules for the distribution of products within the EU. The aim was for EU legislation to focus only on public interest requirements for product conformity, while leaving the definition of detailed technical requirements to standards. The New Approach contributed to the development of the European standardization process and the EU harmonization acquis. As part of this process, more than 30 directives were implemented in the Member States' legal systems between 1987 and 2000.

In the early 1990s, with the adoption of the Maastricht Treaty on European Union and the establishment of Economic and Monetary Union, the role of harmonization in the EU's single market was strengthened. On the one hand, the EU has developed a policy aiming to strengthen European standardization, that covered all the technical requirements of product specifications, while giving manufacturers more flexibility to demonstrate compliance. The European standardization process has been consolidated by a number of legislative documents, including Council Directive 93/68/EEC, that amended certain sectoral harmonized legislation by introducing the CE marking. On the other hand, with the Union (Community) Customs Code, the EU supported customs authorities and traders in ensuring the correct application of customs legislation and the right of traders to fair treatment.

With Council Regulation (EEC) No. 339/93. (Regulation (EC) No 765/2008) the EU institutions, for the first time, focused on the system of market surveillance institutions and common rules for the control of products from outside the EU in order to ensure compliance with product safety provisions in the internal market.

In 2001, as the next step of harmonization, the EU legislator improved the level of consumer safety by adopting Directive 2001/95/EC the so-called General Product Safety Directive (GPSD). Taking into account the principle of lex specialis, the general safety requirements of the GPSD did not apply to medical devices, cosmetics and to product categories for which the EU has specific legislation.

The results of the public consultation launched in 2002 suggested the need for a reform process that focuses on the lack of confidence in eligible institutions and the whole notification process, the weaknesses in market surveillance and the need for further enforcement measures, the inconsistencies between different directives and the misunderstandings of the role and value of the CE marking.

In the following years, a lively dialogue between the EU institutions, experts from EU Member States and stakeholders led to a review of New Approach initiatives and

the adoption of a new legislative framework in 2008. As a result, following an impact assessment, the EU institutions adopted Regulation (EC) No 765/2008 that set out the requirements for accreditation and market surveillance relating to the marketing of products, and repealed Regulation (EEC) No 339/93.

The rules laid down in Directive 2001/95/ EC shall be applied to products regardless of how they are sold (including a product provided in connection with a service), but their scope does not extend to services. However, the definition of a product under the Directive is extremely broad, so that it covers all products that are intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned.

As a general rule, the obligation to produce safe products (and allow to be distributed) is imposed on manufacturers. It should also be noted that, under the Directive, distributors shall be required to act with due care to help to ensure compliance with the applicable safety requirements, in particular by not supplying products which they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with those requirements. In this context, EU and national rules on market surveillance are intended to ensure the withdrawal of those products, that may endanger the health or safety of users when used as intended or under reasonably foreseeable conditions and when properly installed and maintained, to prohibit or restrict their distribution, and to ensure adequate publicity and information in this regard. It can be stated that Regulation (EC) No 765/2008 has brought a fundamental change of approach, as it has taken a broader view of market surveillance than the previous regulations and included into its scope the control of compliance with all marketing requirements.

2. Challenges of the market surveillance system in the changed environment

Weaknesses in market surveillance have already been pointed out by many actors in Europe, including consumer organizations, industries, the European Parliament and the European Commission, the reasons for that can be traced back mainly to the following factors and changes. Supply chains have become very complex and manufacturers are often located outside the EU, while in many cases the importer – from a traditional context – cannot be identified. Consumers regularly buy products from third countries via the internet, so the products reach the consumers directly, thus evading the product conformity and import inspections of the customs authorities in most cases. It should be noted here, however, that the power (authority) and obligation to control exist in the same way if the product is delivered to the border control in the form of private consignment or a non-concentrated consignment, but random checks obviously cannot be as effective.

One of the structural weaknesses of the single market for goods is related to the enforcement of harmonized EU product safety rules. Even though there are extensive safety rules, there are still too many illegal and unsafe products on the market. These products pose a high risk to consumers. Another vulnerability factor of the system is

that products that are not covered or only partially covered by harmonized EU product safety rules, such as furniture or certain construction industry products, are not subject to specific rules. These products can be considered safe in one Member State and are in conformity with the public interest, while in another Member State they could have difficulties in accessing the market. EU legislation has established risk-oriented and general product safety rules. Too many new types of products and safety risks are excluded from the scope of the GPSD (despite that its scope is designated in general), while specific rules cannot, by their nature, cover all risks (see the rules on the chemical composition of consumer products, rules on chemicals).

Although there is an institutional, legal framework for cooperation between Member States, it is nevertheless difficult to detect and recall unsafe products from the market. Although the RAPEX system is an effective platform for rapid communication between market surveillance authorities, the institutional acquisition of other information would be necessary to set up a harmonized European product safety risk map. The NEISS database in the USA can serve as a model for this (NEISS 2000, 7.). NEISS is a database that provides statistical estimates of injuries related to consumer products from a probability sample of approximately 100 hospital emergency care departments (Marker & Lo 1996). In addition, it collects additional data both at supervisory and at investigatory platforms. NEISS collects its data through the continuous routine monitoring of emergency the departments, the surveillance of the special emergency departments, the telephone interviews with the injured, and ton-site inspections of injured and witnesses (NEISS 2000, 7.). The data collected identifies injuries related to specific consumer products and allows further analysis of the product.

Recognizing the weaknesses of the European market surveillance system, as a possible solution the European Parliament and the Council of the European Union adopted on 20 June 2019 the Regulation (EU) 2019/1020 on market surveillance and product conformity as part of a program (so-called 'Goods Package') providing measures that can offer adequate solution to some of the problems detailed above (Regulation (EU) 2019/1020). The package contains two ambitious legislative proposals (EC, 2017a). The first proposal aims to improve the compliance with and the enforcement of EU product rules. The second proposal aims to review and facilitate the use of mutual recognition in the single market (EC, 2017b).

3. A possible way for a solution: new market surveillance regulation

The 'Goods Package' is a wider scope of legislative proposal aimed at ensuring that products entering the European Union (EU) single market are safe and in conformity with the public interests protected by EU legislation, such as the protection of health and safety in general, the occupational health and safety, the protection of consumers and the public safety. As a result, the provisions of the Market Surveillance Regulation apply to products that are covered by 90 named EU regulations and directives in sectors such as medical devices, cosmetics, vehicles, toy safety, chemicals, packaging and waste.

The Market Surveillance Regulation aims to meet the challenges posed by global markets and complex supply chains, as well as the increase in online sales to end-users

in the EU. In order to strengthen the current market surveillance system, the challenges posed by the EU, the cross-border e-commerce and online commerce should be addressed, joint activities of market surveillance authorities, other relevant authorities and organizations representing economic operators or consumers of several Member States should be encouraged, also, the digital exchange of information between the authorities, trade unions and the European Commission should be improved. In addition, the regulation aims to establish an EU product conformity network as a platform for coordination and cooperation between Member States' authorities and the Commission; also, it intends to work closely with customs authorities to control products from outside the EU more effectively.

3.1. The focus on the entire supply chain

One of the most important results of the Market Surveillance Regulation is that it pays special attention to economic operators. With this, it is aimed to provide an adequate response to a phenomenon that is becoming quite worrying today, namely that the supply chain, especially for products sold online, has become impenetrable, contingent or even unidentifiable. The effectiveness of the market surveillance system is also significantly hampered by the fact that, as a result of direct sales to consumers, importers can no longer be identified in the classical sense and the consumer cannot be expected to comply with European legislation.

Under the Market Surveillance Regulation, the products covered can only be placed on the market if the underlying economic operator established in the EU can be identified. The economic operator shall be responsible for ensuring that the conformity documentation is available, shall cooperate with the market surveillance authorities and inform the authorities if there are grounds for believing that a product presents a risk. For the purposes of the Market Surveillance Regulation, an economic operator shall be a manufacturer established in the EU, an importer if the manufacturer is not established in the EU, an authorized representative of the manufacturer with a written mandate to act on behalf of the manufacturer; or in all other cases, Fulfillment service providers (FSPs) established in the EU, if there is no other economic operator established in the EU. The purpose of the Regulation is, inter alia, to apply the EU law to all economic operators involved in the supply and distribution chain in accordance with the extent of their intervention or participation.

3.2. The nature of liability extended to fulfilment service providers

Traditionally, economic operators, such as the manufacturer of the goods, the importer (if the manufacturer is not established in the EU) or the authorized representative, are responsible for placing the products on the EU market. However, there is an increasing number of economic operators who sell directly to consumers through e-commerce. Fulfilment service providers that perform the same functions as importers, but which do not always meet the traditional definition of importers in EU law, are now covered by the legislation. With the development of direct sales and online commerce, consumers

may become 'importers' within the EU, but at the same time these consumers are clearly unable to ensure that products entering the EU comply with EU legislation. This is precisely why the legislator has extended the definition of economic operator in the Market Surveillance Regulation to fulfilment service providers who provide at least two of the warehousing, packaging, addressing and dispatch services without owning the products in question. Exceptions to this are postal services; parcel delivery services; and any other postal or freight services.

The Market Surveillance Regulation considers that a product offered for sale online or through other means of distance sales, should be considered to have been made available on the market if the offer for sale is targeted at end users in the Union, thus, if the relevant economic operator directs, by any means, its activities to a Member State. For the case-by-case analyses, relevant factors, such as the geographical areas to which dispatch is possible, the languages available, used for the offer or for ordering, or means of payment, need to be taken into consideration. In the case of online sales, the mere fact that the economic operators' or the intermediaries' website is accessible in the Member State in which the end user is established or domiciled is insufficient.

3.3. Stricter market surveillance powers

The Market Surveillance Regulation confers enhanced powers on national market surveillance authorities to ensure compliance with EU law for products purchased both in the online and offline market. Access to information is essential for the exercise of effective market surveillance powers. Under the Regulation, economic operators are obliged to provide relevant data or information to market surveillance authorities on compliance and technical aspects of the product, on the supply chain, on the structure and actors of the distribution network, on quantities of products on the market, online sales platforms and relevant information for the purpose of ascertaining the ownership of websites.

Under the Regulation, market surveillance authorities are entitled to take measures similar to investigative measures in the future, as they may carry out unannounced on-site inspections, may enter to any premises, land or means of transport that the economic operator in question uses for purposes related to the economic operator's trade, business, craft or profession, in order to identify non-compliance and to obtain evidence. In addition, of course, the obligations known from the previous regulation remain, that is, to require economic operators to take appropriate measures to eliminate non-compliances, to eliminate the risk and to take appropriate measures if the economic operator fails to take appropriate corrective action, or if the non-compliance or risk persists, the right to order the prohibition or restriction of the distribution (marketing) of the product or the withdrawal or recall of the product.

One of the biggest innovations of the Regulation, in addition to redefining the chain of responsibility, is the creation of an effective system of sanctions. The legislator envisages that, in the event of a serious risk, market surveillance authorities would have the right to require the removal of related product content from online interfaces or to oblige the economic operator to explicitly display a warning on its online interfaces.

When such a request is not observed, the relevant authority should have the power to require information society service providers to restrict access to the online interface

4. Where does the future of European market surveillance lead?

In addition to the issues outlined in the study, a number of emerging product types are forcing the expansion of the traditional conceptual framework. More and more consumer goods such as cars, baby monitors, refrigerators and toys that are on the market can connect to the internet (Internet of things). Although these products offer several new services and greater convenience to consumers (even if connection to the internet is not a prerequisite for their operation), research shows that there may be a number of problems with their operation and use. In fact, it can endanger the health and physical integrity of consumers or violate their privacy. At the same time, it should be noted that the general safety of these products is subject to product safety rules, however, there are no compliance standards for new types of risks and hazards.

Algorithm-based decision making (ADM – automated decision making) especially when it is based on Big Data is of particular importance to consumers. ADM processes are the most comprehensive systems that affects consumers, from simpler, rule-based decision-making to a high level of sophisticated machine learning. Nowadays, long-distance cruise control, blind spot/lane/traffic sign detection systems keep the car with minimal intervention on the road and also brake in an emergency instead of the driver. In smart homes, personal assistant programs help with life. But neither the car's sensors nor the assistants are able to work without error yet. The role of algorithm-based decision-making will increase in the future and have an increasing impact on the lives of consumers, raising the issues of information self-determination, sovereign decision-making, including the regulation of the new type of product compliance.

Most of the provisions of the Market Surveillance Regulation will apply from 16 July 2021, so companies distributing products on the EU market that are covered by EU harmonization legislation shall be prepared to apply the rules, including the designation of a responsible representative.

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VULNERABLE CONSUMERS AND FINANCIAL SERVICES IN THE EUROPEAN UNION: THE POSITION OF THE EU COURT OF JUSTICE*

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To a certain degree, owing to the informational asymmetry, the difference in negotiating power and the relative lack of transparency that is often inherent to the private law relationships between individual consumers and the businesses selling goods and services, and due to the ever-present risk of falling victim to unfair commercial practices, all consumers can be considered 'vulnerable'. This is particularly true in the case of financial products and services: transactions involving these goods are considered especially complex and, as the European Commission noted in a 2010 paper, consumers are often ill-prepared to make sound decisions about retail financial products not only due to asymmetric information or limited financial literacy, but also due in part to instincts that drive consumers towards choices that might be inconsistent with their long-term preferences (EC 2010). The European Parliament reached the same conclusions in its 2012 resolution on a strategy for strengthening the rights of vulnerable consumers, which referred to financial markets as a 'particularly problematic sector', the complexity of which could potentially result in any consumer becoming vulnerable. The resolution noted that while this complexity may lead consumers into excessive debt by itself, the situation is made even worse by the fact that 70% of financial institutions' and companies' websites were making basic errors in their advertisements and the basic required information on the products on offer, while the cost was presented in a misleading way (European Parliament Resolution 2011/2272[INI]).

1. The Notion of the 'Average' Consumer

With these issues in mind, we should first discuss, at least briefly, the concept of the 'average consumer' and its interpretation by the European Court of Justice before moving on to a more detailed analysis of how the EU consumer protection regime treats those specific populations of consumers it deems to be 'particularly vulnerable'. When interpreting the legal term 'consumer', defined by the Directives 93/13/EEC (Unfair Contract Terms Directive, Council Directive 93/13/EEC) and 2008/48/EC (Consumer Credit Directive, Directive 2008/48/EC of the European Parliament and the Council) as „*a natural person who, in transactions covered by the Directives, is acting for purposes which are outside his trade, business or profession*", the Court of Justice had to determine the extent of protection that should be afforded to everyone falling under the scope of the term. The question of how the Court should approach the notion of the 'average consumer' was answered in Case *C-210/96 Gut Springenheide*, where the German court asked the ECJ whether, when assessing if statements designed to promote sales are likely to mislead the purchaser, it would base its assessment on an objectified concept of a purchaser, or whether it would consider the actual expectations of the

* DOI 10.21868/PGnG.2020.1.3.

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consumers to whom the statements are addressed; and, in the case of the latter, whether it would use the test of the 'informed average consumer' or that of the 'casual consumer'. In its answer, the Court pointed out that there had been several earlier cases[2] – dating back to the late 1980s – in which the Court had to decide whether a description, trademark or promotional text can be considered misleading; and that in these cases, the Court – without specifically referring to it as a test – consistently based its decisions on the presumed expectations of an *average consumer who is reasonably well-informed and reasonably observant and circumspect* (Waddington 2013). Out of these pre-Gut Springenheide cases, Case *C-470/93 Mars* is of particular interest, as paragraph 24 of the Court's *Mars* decision marks the first explicit reference to the category of „*reasonably circumspect consumers*".

Following the landmark decision in *Gut Springenheide*, the case-law of the ECJ continued to utilize the 'Gut Springenheide formula' when interpreting the behavior of the average consumer: references to the formula in cases such as *C-342/97 Lloyd, C-465/98 Darbo* and *C-239/02 Douwe Egberts* show that a clear legal precedent has been established (Incardona & Poncibo 2007). This consumer benchmark has also made its way into EU consumer protection legislation with Directive 2005/29/EC, the Unfair Commercial Practices Directive, which explicitly refers to the economic behavior of the average consumer of a certain product in its definition of an 'unfair commercial practice' (Article 2). Recital 18 of the Preamble clarifies that the Directive *„takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice"*.

This interpretation of the average consumer – which remains the predominant approach of both EU consumer protection legislation and ECJ case law in assessing consumer behavior to this day – is based on the traditional information paradigm which assumes that by increasing the amount of available information and by ensuring complete transparency, consumers will find it easier to make rational decisions, and as such, any 'weakness' of the consumer can be eliminated solely through the provision of information (Domurath 2018). This standard has been criticized by academia and civil society as unrealistically demanding, overly simplified, and generally, a legal fiction far removed from the actual behavior of the individual consumer, both in terms of informedness and reasonability. An actual consumer – whether or not they are considered 'vulnerable' – cannot always be expected to be able and willing to thoroughly assess the wealth of information available to them before making a consumer decision; nor can they be expected to make perfectly rational choices that are unclouded by emotions and social influences (Incardona & Poncibo 2007, 31–36).

The use of this high standard falls in line with the idea that the EU consumer protection regime is generally ruled by economic, and not social, considerations and, as *Norbert Reich* writes, *„that consumer protection understood as a form of social protection is generally the responsibility of Member States"* (Reich 2018). In this economy-focused approach, the freedom of the internal market – and particularly, a right to free choice in business-to-consumer contracts – is seen as key to the uninterrupted functioning of market integration, and thus, the EU appears generally

[2] The Court mentions, in particular, Cases *C-362/88 GB-INNO-BM*; *C-238/89 Pall*; *C-126/91 Yves Rocher*; *C-315/92 Verband Sozialer Wettbewerb; C-456/93 Langguth* and *C-470/93 Mars*.

wary of restricting the freedom of contract in the name of consumer protection. The information and transparency requirements imposed on the seller by the traditional information paradigm constitute only a minimum deviation from complete contractual freedom, as they do not encroach on the substance of the contract (Domurath 2018, 126).

Examining the legislation further, we can point out that the EU's interpretation of the information paradigm does allow for some leeway. Not only does the Consumer Credit Directive (2004/48/EC) require creditors to provide consumers with extensive information, but they are also required to make this information accessible in a standardized form (Domurath 2018, 127). The Unfair Commercial Practices Directive (2005/29/EC) takes this one step further: its wording shows an attempt at reconciling the two objectives of internal market freedom and adequate consumer protection while also moving from the minimum harmonization approach of previous Directives to one of total harmonization. According to Recital 24 of the Preamble, the objectives of the Directive are *„to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection"*. This approach restricts the discretion of Member States with regard to the social elements of consumer protection while maintaining their responsibility (Reich 2018, 146–147).

2. Interpreting Consumer Vulnerability

The uniform benchmark of the reasonable average consumer can be contrasted with the concepts of 'consumer weakness' and 'vulnerability'. These two terms can be considered synonymous, which takes us back to the proposal, briefly mentioned in the introduction, that all consumers are vulnerable to a certain degree and as such, would universally require a higher standard of protection. Alternatively, we can retain the distinction between the two, defining 'weakness' as an intrinsic condition of all consumers that stems from their disadvantaged position in business-to-consumer transactions, while establishing a separate category of 'vulnerable consumer' to provide additional protection to consumers who are at particular risk of suffering harm or injury from specific market practices or products due to certain personal characteristics. Most of the literature on European consumer protection law takes the latter approach: however, there are significant disagreements in how exactly the vulnerable consumer standard should be applied in practice. Two of the contrasting interpretations are worth mentioning here in greater detail, due to their arguments dealing with issues related to the provision of financial services to consumers.

Irina Domurath argues that vulnerability should replace the traditional information paradigm completely as the normative standard in the field of consumer credit and mortgage law, a segment of the financial services sector characterized by some of the most complex business-to-consumer transactions. This approach is predicated on three key arguments: first, the lack of actual freedom of contract in consumer law due to the stronger bargaining and market position of the commercial party. Second, the concept of the average consumer not being rooted in factual evidence, considering both the fact that actual consumers don't exhibit rational market behavior and the shortcomings of the information paradigm when the quantity and complexity of available information become overwhelming to the consumer. Finally, the lack of an EU model of social

justice due to a preference for an 'access justice' approach – that is, justice interpreted as providing consumers free and non-discriminatory access to the market –-to protect the objective of internal market freedom (Domurath 2018, 133–135).

Norbert Reich, on the other hand, argues that the concept of vulnerability should be restricted to certain identifiable groups of consumers. These include physically and intellectually disabled consumers – two groups traditionally regarded as particularly vulnerable in business-to-consumer relations – and poor or 'economically marginalized' consumers, a group that is talked about much less often in the context of vulnerability. This approach bases economic vulnerability on studies showing that over-indebtedness leads to those living in poverty having to pay risk premiums to access a large number of goods and services, often including essential services such as energy, telecommunications, and housing. In the context of access to financial services, *Reich* posits that only those consumers *"who are in need of basic financial services and who, because of their economic situation, do not have access to them at all or who only have such access at unreasonable prices"* should be considered vulnerable (Reich 2018, 143–145). Regardless of their differences, these two approaches share the notion that the vulnerable consumer concept can constitute an important addition to European consumer law, particularly when it comes to the provision of financial services to customers.

We should touch upon the question of how the vulnerable consumer category found its way into Community law next. First, it's worth mentioning that while the majority of the ECJ's case law followed the information paradigm closely, there were a few cases where the Court took a more protective approach: the earliest and most impactful of these decisions being the Court's 1989 judgment in *Case C-382/87 Buet* (Waddington 2013, 14). In *Buet,* the Court found that a French regulation prohibiting the door-to-door sale of educational material did not constitute a disproportionate restriction of the Treaty provisions on the free movement of goods, given that *„the potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material…"* (para. 13). The Court's decision in *Buet* is very limited in its scope, only applicable in the specific context of the canvassing of educational material, and while a small number of later ECJ judgments (such as the decision in Case *C-441/04 A-Punkt Schmuckhandel v. Claudia Schmidt)* present similar arguments, the approach taken in these cases always remained an exception to the general rule of interpreting the consumer as reasonably circumspect, applicable only in cases where the Court examined national legislation that provides extra protection to a narrow specific group of consumers (Domurath 2018, 126–127). Furthermore, with the EU's more recent consumer protection legislation leaning towards a total harmonization approach – both in general and in the specific context of off-premises sales – it is doubtful whether a case similar to *Buet* would lead to the same outcome (Reich 2018, 140–141).

Beyond these isolated cases, the vulnerable consumer concept has appeared in European Union legislation in the field of services of general economic interest (SGEIs). SGEIs are defined as *„market services subject to specific public service obligations by virtue of a general interest criterion"* and include services such as the supply of electricity, gas, water, and telecommunications (Johnston 2018). Beginning in the 1980s, public service reforms across the EU lead to deregulation, privatization and

trade liberalization in SGEI markets, promising greater choice and lower prices to consumers (Clifton & Díaz-Fuentes & Fernández-Gutiérrez 2019). It is against this backdrop that we can notice the first appearances of the vulnerable consumer concept in Directives 2002/22/EC (Universal Service Directive in electronic communication sector), 2009/72/EC (Electricity Directive) and 2009/73/EC (Natural Gas Directive). While these instruments don't explicitly refer to any consumers as vulnerable, they require the Member States to ensure the universal provision of SGEIs – in particular, telecommunications services, gas, and electricity – to all household customers, at an affordable price and in a specified quality (Domurath 2018, 128–129). This approach moves beyond the view of consumers as purely rational entities whose market participation serves to maximize their individual utility and considers their heterogeneity; that some of them may not be in a position to access the purported benefits of market reform (Clifton & Díaz-Fuentes & Fernández-Gutiérrez 2019, 267–268). While the limited scope of these Directives means that they provide a higher standard of protection to consumers only in the context of the provision of services of general economic interest, the more protective approach taken here has the potential to influence future legal instruments in the field of consumer protection.

Conclusions

When it comes to business-to-consumer transactions in the field of financial services, consumers are in a particularly difficult position, left at the mercy of a commercial party with considerably stronger bargaining power. The shortcomings of the traditional information paradigm become particularly evident in cases where the sheer amount and complexity of available information paradoxically makes it more difficult for the non-specialist consumer to make informed decisions. This imbalance is further exacerbated in the case of certain consumers due to personal factors such as over-indebtedness or disability. In light of these observations, the additional protections provided by the vulnerable consumer concept appear particularly useful in the context of financial consumer protection, whether used sparingly to protect the interests of those consumers that are most vulnerable or potentially replacing the standard of the average consumer entirely.

This deviation from the current European consumer protection regime built on the ideas of the reasonably circumspect consumer and access justice could, however, potentially upset the delicate balance between consumer protection objectives and those of eliminating the barriers to the functioning of the internal market. Understandably, the European Union shows reluctance to raise its standard of consumer protection; however, developments such as the more protective approach taken with regards to services of general economic interest show that there is hope for systemic change.

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PROTECTED BY MONOPOLIES? ACCESS TO SERVICES OF GENERAL INTERESTS ON THE EU INTERNAL MARKET *

Ildikó Bartha[1]

The right to have access to public services is of crucial importance for every citizen. This right also involves the requirement for establishing an effective consumer protection regime both at the national and the EU level. The paper analyses the evolution of consumer protection in this field from the very beginning stage of the European integration until today, with a special focus on secondary legislation of the European Union aiming at liberalization in the telecommunication, postal and energy sectors. We also examine, on the basis of some examples from the electricity and gas sectors, whether the relevant European and national rules are able to grant a real safeguard for consumer interests in any case.

Introduction

The right to have access to public services (in EU terminology 'services of general interests', SGIs and 'services of general economic interests', SGEIs) is of crucial importance for every citizen. It has also been confirmed by the Charter of Fundamental Rights of the European Union. This right also involves the requirement for establishing an effective consumer protection regime both at the national and the EU level.

Due to the evolution of the legal framework, the EU is an important supranational actor in the regulation of public services today. The paper analyses the evolution of consumer protection in this field from the very beginning stage of the European integration until today, with a special focus on secondary legislation of the European Union aiming at liberalization in the telecommunication, postal and energy sectors. In doing so, our analysis focuses on the content of universal services, the scope of social protection granted to consumers with special needs, as well as the rights of users in relation with their service providers. In this context, the role and degree of discretionary powers left to national authorities in defining the underlying concepts and 'appropriate' measures needed to take to protect the interests of consumers will be also analysed. Finally, we examine on the basis of some examples from the electricity and gas sectors, whether the relevant European and national rules are able to grant a real safeguard for consumer interests in any case.

The EU law terminology used in the present paper is based on the categories of Services of General Economic Interest (SGEI) and Services of General Interest (SGI). As regards the former, there is a broad agreement in the case-law of the Court of Justice of the European Union (hereinafter CJEU) and EU Commission practice that SGEI refers to services of an economic nature being subject to specific public service obligations (PSO) as compared to other economic activities by virtue of a general

* DOI 10.21867/KjK/2020.1.4.

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interest criterion (judgements in cases C-179/90 *Merci convenzionali porto di Genova* and C-242/95 *GT-Link)*. The term SGI, the closest EU law equivalent to the traditional notion of public services (Sauter 2014, 17), is broader than SGEI and covers both market and non-market services which public authorities classify as being of general interest and subject to specific public service obligations (Bauby & Similie 2016a). Secondary legislative acts (like those analysed in the present study) also use 'public services', often with similar meaning to SGI. 'Universal services' is a narrower concept than 'public services'. According to the European Commission's definition, universal service obligations (USO) "are a type of PSO which sets the requirements designed to ensure that certain services are made available to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price." (EC 2011)

1. The consumer in the SGI market

In EU consumer law documents [see for instance Directive 1999/44/EC, Art. 1(2)(a)] the 'consumer' is generally defined as a private, human person who purchases goods or services for purposes outside their trade, business or profession. Therefore, at the very beginning stage of the European integration, the 'consumer' has fallen outside the realm of SGI regulation, since these sectors (telecommunications, railways, postal services, electricity and gas) were traditionally operated under the ownership, control or strong oversight of the state and public bodies (Johnston 2016, 93). It means that there was a quite clear distinction between 'citizens' as recipients of public services and consumers as equivalent category in other sectors operating under normal market rules.

Such a distinction is a logical consequence of the fact that, before the adoption of the Single European Act (SEA) of 1986, the matter of public service provision was not at the heart of the European integration process. In line with the principle of subsidiarity under Article 5 of the Treaty of European Union (hereinafter TEU), a consensus has been reached between the Member States that each country has the competence to organize and finance its basic public services (Bauby 2014, 99). It was based on the general idea to balance the EU interest in the free market with the national public interests, which means that public enterprises, state monopolies, special and exclusive rights as well as SGIs are compatible with EU law to the extent that they involve proportionate restraints with regard to the internal market and competition rules (Sauter 2014, 20–21 and 41). This early economic compromise has been expressed in certain (and still existing) provisions dating back to the original Rome Treaty of 1957 (currently Articles 37, 93, 106 and 345 of the Treaty on Functioning of the European Union, hereinafter TFEU), as guarantees for safeguarding the interests linked to the provision of public services.

The "Europeanization of public services"[2] started only in the mid-eighties with the entry into force of the Single European Act. The SEA, together with the Commission's white paper on reforming the common market, set the objective of the creation of a single market by 31 December 1992. As the national markets in transport and energy have become integrated with this conception, public service obligations have been obstacles to market creation (Opinion of AG Colomer in case C-265/08 *Federutility*;

[2] Term borrowed from Bauby & Similie (2016a, 27).

Prosser 2005, 121). Thus, the process engaged by the SEA and confirmed by the Maastricht Treaty of 1993 led to a progressive liberalisation, sector by sector (Bauby and Similie, 2016b).

The opening of SGI markets also brought certain benefits for consumers. The introduction of competition has enabled them to change their supplier in search of better prices and/or higher quality in service provision, and thus it improved the consumer's bargaining position vis-à-vis businesses due to the possibility of shifting to another provider (Nihoul 2009; Johnston 2016). As a result, companies were pushed to perform better on price, quality of services, granting access to information, management of consumer claims etc. (Nihoul 2009; Johnston 2016).

At the same time, the benefits of the introduction of competition do not resolve any problems related to consumer protection. As was emphasised by Nihoul and Johnston, companies faced with new competitive pressures to attract revenues to survive (even extending their activities to illegal behaviour), even at the expense of treating consumers better (Nihoul 2009; Johnston 2016). EU sector regulations were primarily based on the idea of leaving the task of safeguarding consumer interest on independent national regulatory authorities (NRAs). This effort was only partly successful as the analysis of Chapter 3 shows.

2. Consumer protection in specific SGEI sectors

The challenges of consumer protections were also addressed by directives of the European Union aiming at liberalization is specific sectors. Based on these directives, Nihoul identified three directions of protecting consumers: (1) social provisions: this is what we can call as rights or privileges to be granted for specific disadvantaged categories (vulnerable groups) of consumers; (2) definition of universal service and (3) rights granted to users in relations with their providers (Nihoul 2009). In line with this classification, some of the most important SGEI sectors will be examined below.

2.1. Electronic communication

Telecommunications,[3] traditionally characterised by a series of national public monopolies, was among the first public service sectors being subject to liberalization at EU level. The national markets were opened up in several legislative packages, starting in 1988 and culminating in 1998 with full liberalisation.[4] Moreover, it is the sector where the notion of ’universal service’ was firstly used in EU law (Sauter 2014, 183). The liberalization effort is closely linked to the concept of Open Network Provision (ONP), based on the original idea to promote open and efficient access to public networks and to harmonize the conditions of use so that other market actors can begin to

[3] Directive 2002/21/EC defines "electronic communications service" as "a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services [...]" [Article 2(c)]. In line with this definition, the present paper uses 'telecommunication' as a part of the broader category of 'electronic communication'.

[4] https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html [accessed May 3, 2020]

offer new telecommunication services over existing networks even in competition with the incumbent public operator, and on equal terms (Higham 193, 242).

The first ONP Directive on voice telephony (Directive 95/62/EC) did not contain any explicit provision regarding USO. Two of the second-generation ONP Directives (the ONP Voice Telephony Directive and the ONP Interconnection Directive, both belonged to the legislative package introducing a fully liberalized regulatory regime from 1998), however, introduced extensive provisions on universal services (Sauter 2014, 185). The potential conflicts between these dual aims intended to solve by Article 3(2) of the universal service directive (adopted in 2002) which implies that where the services concerned can be, provided under market conditions it would not be necessary to impose USO (Sauter 2014, 187).

The consumer rights have been significantly extended with the legislative package entered into force in 2009 (Bordás 2019, 22). The recent regulatory framework for electronic communication lays a high emphasis on the protection of basic user interests that would not be guaranteed by market forces. The current regulatory package includes five directives and two regulations. In the context of the present analysis, the Universal Service Directive (US Directive) has a crucial importance among them. The provisions of this directive extend to all the three dimensions of consumer protection identified by Nihoul above.

Under the scope of 'universal services', the Directive defines the minimum set of services (public pay telephones, other publics voice telephony access points etc.) of specified quality to which all end-users have access, at an affordable price, and also sets out obligations with regard to the provision of certain mandatory services. Member States are authorized to designate one or more undertakings to guarantee the provision of universal service under the conditions set out by the directive. The US Directive also defines NRAs' task in monitoring the evolution and level of retail tariffs of the services, ensuring transparency and quality of service provided by designated undertakings. Under certain conditions, Member States may introduce mechanism to compensate the net costs that service suppliers incur as a result of providing a universal service (which is not always profitable), from public funds.

In this sector, the constantly changing regulatory needs arising from the technical and social developments is of crucial importance in defining the scope of universal services and the necessary level of consumer protection. Therefore, the Universal Service Directive establishes a process for reviewing the scope of universal service (Sauter 2014, 187). In its report on the results of the second periodic review, the European Commission initiated a process to develop its "broadband for all" policy, taking into account that „the trend towards a substitution of fixed telephony by mobile voice communications, which have very wide coverage and high affordability, could indicate that a USO limited to access at a fixed location is becoming less relevant" (EC 2008). Such a flexible approach towards the scope of universal services also means, in the interpretation of the Commission, that the Universal Service Directive sets only a minimum level of protection that Member States could go beyond (Sauter 2014, 189), but any further financing associated with them must be borne by them (for example through general taxation) and not by specific market players (EC 2008). This view has been also confirmed by the case-law of the CJEU (C-522/08 *Telekomunikacja Polska SA w Warszawie*; C-543/09 *Deutsche Telekom*).

As regards the social aspect, the US Directive authorises Member States to require

designated undertakings to provide to consumers tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the network [Article 9(2)]. Granting these options or packages may also take the form of obliging designated undertakings to comply with price caps or geographical averaging or other similar schemes. Beyond these, Member States may take measure to ensure that 'support' is provided to these vulnerable groups of consumers Article 9(3), however the directive does not identify what 'support' exactly means in this context. Member States are also authorized to take measures to ensure that disabled end-users have access to the services under equivalent conditions enjoyed by other end-users can take advantage of the choice of undertakings and service providers available to the majority of end-users (Article 7).

Rights granted to users under the US Directive in relations with their providers are quite extensive. First of all, liberalisation in the sector does not affect the application of EC consumer law, which means that traditional consumer law provisions remain applicable. Furthermore, the directive provides that 1) a contract (which details the terms and conditions under that connection/access are provided) must be signed with consumers seeking connexion and/or access to public telephone networks; 2) consumers have a right to receive notice from the operator or the service provider in the case of modification of the contract's terms and conditions and consumers have a right to withdraw without penalty; 3) Member States must organise alternative mechanisms for the resolution of disputes involving consumers; 4) network operators must organise the possibility, for consumers, to select the preferred supplier; 5) service suppliers must allow consumers to take their telephone number away with them where they change from them to another supplier (number portability). (Nihoul 2009, US Directive)

From the point of view of promoting consumer interests in the liberalized market, the adoption of Regulation (EU) 2015/2120 was essential. It set out the obligation to abolish retail roaming surcharges from 15 June 2017 in all Member States.

One of the most important objectives of the latest regulatory reform was, as pointed out by the Commission in the Digital Single Market Strategy for Europe in 2015, to ensure effective protection for consumers. The new European Electronic Communications Code (EECC) replaces the current telecommunication framework of the EU, together with the Universal Services Directive from 21 December 2020 [Directive (EU) 2018/1972]. The new rules aim at strengthening all the three dimensions of consumer protection. One of the main results brought by EECC is the extension of the scope of universal services (beyond public telephone) to voice telephone and broadband internet access. The extension of USO also impacts the scope of social rights as the directive obliges Member States to take appropriate measures to ensure affordable retail prices for adequate broadband internet access and voice communications services to consumers with low-income or special social needs, including older people, end-users with disabilities and consumers living in rural or geographically isolated areas. It means that Member States may require providers of internet access and of voice communications services to offer tariff options and/or packages different from those provided under normal commercial conditions.[5] In

[5] https://www.stibbe.com/en/news/2019/january/the-european-electronic-communications-code-is-now-in-force--10-takeaways [accessed May 23, 2020]

addition, a number of provisions aims at granting equivalent access to telecoms services (also beyond universal services) for people with disabilities. User's rights have also been extended by the EECC. The new rules aim to make it easier to switch between service providers, and contain strengthened guarantees for number portability, access to information, as well as against unfair contracting practices (limitation of the contract duration to 24 month, obligation to provide consumers with a summary of the contract etc.)

Electronic communication is generally seen as among the sectors where the process of liberalization was the most successful. Despite the positive results, the European market of electronic communication services is still far from being highly competitive. The mobile communications market, as a result of acquisations (that could not be prevented by the European regulatory framework), is still dominated by a few large service providers in most Member States (Bordás 2019, 25). Even if these are mainly private companies, such a high market concentration may negatively influence the effective excercise of consumer rights granted by the EU legislative acts as detailed above.

2.2. Postal services

As Sauter points out, there may be no other sector where universal service is as engrained in the character of the services concerned as such as in postal services (Sauter 2014, 195). As regards universal service obligation, the first Postal Directive (Directive 97/67/EC, hereinafter Postal Directive) required Member States to provide for the collection and delivery of letters and parcels on at least five working days each week, with a specified quality at all points in their territory (EC 2015). According to data from 2010-2013, the number of Member States where this frequency requirement had been exceeded (i.e. with delivery on more than five days) has been declined over the years (Dieke et al. 2013) and this tendency is still continuing. The weight limit of the postal items concerned by USO was up to 2 kilograms and for packages up to 10 kilograms (which could be raised by the Member States up to 20 kg), and services for registered items and insured items were to be provided (Postal Directive; Sauter 2014, 196). Categories of mail that could be reserved for USO covered essentially domestic correspondence charged at less than five times the relevant standard public rate and weighing less than 350 grams (Postal Directive; Sauter 2014, 196). The directive also provides for an obligation of the Member States to ensure that users are regularly given sufficiently detailed and up-to-date information by the provider(s) regarding the particular features of the universal services offered (including process and quality standard level).

Subsequent changes made to the Postal Directive has modified the scope of universal services. Directive 2002/39/EC reduced the weight limit of those mails (to 100 grams from 1 January 2003 and to 50 grams from 1 January 2006) which may fall under universal service obligation in the Member States. It also reduced the price limit (for which the weight limit is not applicable at all) in relation to public tariff. Thereby the scope for postal services not reserved for USO and consequently the scope for competition has been increased (Sauter 2014, 197). Directive 2008/6/EC went a step further as it abolished special and exclusive rights in postal services including universal services. In line with this modification, the Directive provides for three means of

financing universal services: public procurement, compensation based on public funds or a universal service fund fed by competitive providers and/or user fees.

The scope of universal services and consumer rights is also influenced by the changes in consumers' demand in the postal sector due to technical development. New technologies are driving both e-substitution and an increasing volume of online purchases (EC 2015). According to the Commission, the huge potential of e-commerce means that affordable and reliable parcel delivery services are more important than ever to help realise the potential of the Digital Single Market (EC 2015). Recent years have been characterized by two major opposing pressures in the postal sector: (i) letter volume decline, and (ii) growth in e-commerce packets and parcels volume. The combination of strong letter volume decline and growth in parcel volumes has important operational and economic implications for postal networks. In several instances, it has also called for substantial changes in postal regulation (Okholm et al. 2018).

As regards the other two dimensions of consumer protection, the scope of the Postal Directive is still rather limited, despite the fact that Directive 2008/6/EC introduced some important provisions for the extension of consumer rights. A major difference with the energy and telecommunication sectors is the reduced scope of social protection. Originally, the Postal Directive contained no social provision, i. e. Member States were not granted any power to introduce special tariffs for peculiar categories of the population (Nihoul 2009). Directive 2008/6/EC brought only a slight change in this respect by defining, as a part of USO, the provision of certain free services for blind and partially-sighted persons (Annex I, Part A).

As for the rights granted to users in relations with their providers, the Postal Directive (Art. 19) sets an obligation for the Member States, to establish transparent, simple and inexpensive procedures for the solution of disputes. Originally, the scope of this provision was limited to beneficiaries of the universal service (Nihoul, 2009), but Directive 2008/6/EC extended the application of minimum principles concerning complaint procedures beyond universal service providers (Recital 42). Directive 2008/6/EC also called for cooperation between NRAs and consumer protection bodies. In contrast to electronic communication and energy legislation, the Postal Directive does not contain any obligation, for service providers, to conclude contracts with users, and provide, in these contracts, specific information (Nihoul 2009).

Regulation (EU) 2018/644 introduced some additional provisions for the protection of consumers in relation to cross-border parcel delivery services. These includes the transparency of tariffs, the right to be informed about the cross-border delivery options, as well as the confirmation of regulatory oversight exercised by NRAs.

When compared to telecom and energy sectors, the results of liberalisation in postal services are rather limited. The full accomplishment of the postal internal market was foreseen by the end of 2012 (Directive 2008/6/EC, Article 3). While the express and parcel services market has been opened in almost all Member States, there is no or a weak competition in the domestic letter mail market, and incumbent service providers still continue to play a dominant role. Domestic letter mail services remain subject to monopoly of state-owned universal service providers seeking to protect the market with specialized services.[6] The consequences of the market structure on consumer protection

[6] As it is established in the Commission's report of 2015, all Member States, with the exception of Germany, have formally designated the incumbent national postal operator as the universal service

are twofold. On the one hand, universal service providers are less able to follow technical developments and changes in consumer needs in the postal sector than other market operators. Such a lack of flexibility can have (direct or indirect) negative impact on prices and quality of services (f. e. length of delivery) as well. On the other hand, those type of consumer rights did not develop in this sector which are the essential part of consumer protection legislation in a competitive market (f. e. making easier to switch between service providers etc.).[7]

2.3. The electricity and gas sectors

Gas and electricity are closer to electronic communications as both sectors require a physical infrastructure for the service provision (Nihoul, 2009; Sauter, 2015, 198). Establishing and maintaining of such infrastructure, as well as the electricity and gas supply were traditionally organized in the EU Member States in the form of public monopolies. The process of liberalization of energy services started in the mid-nighties. In contrast to electronic communications, the energy market remained dominated by the presence of natural monopolies, where the specific public service grounds (universal service obligation, security of supply, environmental concerns) gave the Member States more opportunities to derogate from market rules (Prosser 2005, 174 and 192–194; Hancher and Larouche, 2011).

Measures for liberalization were adopted both in the electricity and the gas sectors. Consumer rights have gradually been extended in subsequent „energy packages", i. e. in the amendments of the first electricity and gas directives. The second package has a crucial importance as it opened the electricity and gas markets for all consumers, including household consumers, from 1 July 2007. The first directives permitted Member States to impose on undertaking operating in the electricity/gas sector public service obligations „which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection." (Directive 96/92/EC; Directive 98/30/EC). As we can see, public service obligations formulated this way are wideranging and universality of service provision is not the key to these PSOs (Sauter 2014, 199). The second electricity directive (Directive 2003/54/EC) already contained a separate provision on universal services, an identical clause, however, was missing from the second (Directive 2003/55/EC) and also from the third gas directive (Directive 2009/73/EC). The USO provision remained essentially unchanged in the (currently applicable) third electricity directive (Directive 2009/72/EC) obliging Member States to ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service. The fourth electricity directive [Directive (EU) 2019/944 to be transposed by 31st December 2020 into Member States' legislation] slightly modified the USO clause by repealing the 'small enterprises'

provider. In Germany, the historical national postal operator acts as the universal service provider (EC 2015).

[7] For more details, see Bordás, 2020.

classification thresholds (related to the number of occupied persons and the annual turnover/balance sheet).

While the measures of the first energy package did not contain any social provisions, their subsequent amendments brought significant changes in this respect as well. The second electricity and gas directives empowered Member States to take special measures for vulnerable costumers, including the protection of final customers in remote areas. The third energy package elaborated this authorisation further by providing that „each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times" [Directive 2009/72/EC, Art 3(7); Directive 2009/73/EC, Art 3(3)]. Additionally, in the gas sector, the lack of USO provision has been compensated by broader consumer protection instruments by obliging Member States to take measures on the formulation of national energy action plans that provide social security benefits to ensure necessary gas supplies to vulnerable customers and to address energy poverty, 'including in the broader context of poverty'. Thus, the general social security system instead of a specific universal service obligation is preferred here (Sauter 2014, 200). (An identical provision was also included by the third electricity directive, it has, however, a less significant role due to the existence of a separate USO clause in this directive.) The fourth electricity directive devotes a separate provision to vulnerable costumers. The new Article 28 adds a further element to the existing concept (see above) by saying that „The concept of vulnerable customers may include income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria."

As regards other rights granted to users in relations with their providers, EU energy legislation also introduced an extensive consumer protection regime. The second electricity and gas directives already contained detailed provisions on consumer protection measures (both directives in a separate Annex A). One is that consumers have a right to a contract with specified elements laid down in Annex A, and the service provider must communicate in advance, to consumers, the specific information to be included in the contract. Moreover, service providers must publish information about tariffs and terms/conditions applicable in their relations with clients and a wide choice of payment methods must be granted. Customers must also be warned about their rights regarding the provision of the universal service (Nihoul, 2009). Furthermore, a dispute settlement mechanism was introduced, authorizing the regulatory authority to take decisions on complaints against transmission or distribution system operators, in the framework of „transparent, simple and inexpensive procedures". This set of rights was supplemented by further ones in the third electricity and gas directives such as the right to be able to switch their energy contracts within three weeks. The electricity directive also laid down a general objective that at least 80% of the consumers must be equipped by intelligent metering systems by 2020. The fourth electricity directive went even further by inserting a separate chapter on consumer empowerment and protection (Articles 10–29). It includes, among others, the right to join a citizen energy community, the right to a dynamic price contract (based on prices in the spot or day-ahead market) and the right to request the installation of a smart meter within 4 months.

2.4. The role of regulatory authorities in consumer protection

As was already mentioned, the regulatory functions assigned to NRAs encompasses the safeguard of consumer interests against unwanted consequences of liberalization. The first experiences with the operation of NRAs were similar in each of the three sectors: the responsibilities and tasks of the national regulatory authorities differed significantly between the Member States and national (governmental) influences on decisions of NRAs could not be excluded.[8] Therefore, NRAs could not deliver the consistent regulatory practices that were demanded by market players and consumers (EC 2006). EU decision-makers opted for enhancing the duties and powers of NRAs, with the aim of ensuring consumers' interests and the protection of their rights, as well as promoting effective competition (Bordás 2019; Bordás 2020; Johnston 2016; Lovas 2020b). Parallelly, EU regulatory entities have been established for the coordination of the work of NRAs in each sector [Body of European Regulators for Electronic Communications (BEREC), European Regulators Group for Postal Services (ERGP), European Union Agency for the Cooperation of Energy Regulators (ACER)], in the hope of ensuring a more consistent regulatory practice throughout the EU (Bordás 2019; Bordás 2020; Lovas 2020b). Although these entities played an important role in enhancing coordination and cooperation among NRAs, the results of their activities were limited. Divergencies in practices of NRAs and ensuring their independency from national governments still remained challenges that could not be completely solved.[9]

3. Changes in the 'EU SGI Policy'

There is a common tendency in all the three sectors examined above that consumer rights have been extended by each 'generation' of the legislative packages. It is not independent from the process started in the late nineties that, although market opening and access remained a central policy objective, a stronger emphasis was being given to other priorities. It has been clearly expressed by the first Commission Communication on services of general interest of 1996, which laid a particular emphasis on the social elements of public services as well as the limits of market forces (Prosser 2005, 156). Then, the Treaty of Amsterdam has been amended by a new Article 16 of the Treaty of European Community (TEC) which reinforced the constitutional importance of the role and protection of SGEIs and therefore can be seen as a confirmation of the Member States' traditional prerogatives and discretionary power in the organization of such services (Rusche 2013, 102; Schweitzer 2011, 55). This approach was also confirmed by the adoption of the Charter of Fundamental Rights of the EU (in 2001) including a separate provision (Article 36) on the right to access to SGEIs. The amendments brought by the Lisbon Treaty (ex-Article 16 TEC, now Article 14 TFEU and Protocol No. 26 on SGIs) placed an even higher emphasis on national and local interests and Member States' competence in the organization of such services. Such a change in the approach towards SGIs shed new light on the position of consumers as recipients of

[8] For more on these difficulties see EC 2006; Bordás, 2019 (electronic communication); EC 2015; Bordás, 2020 (postal sector); Lovas, 2020b (energy sector)

[9] Of course, the challenges are specific in each sectors and the degree of the problem varies country by country.

public services, as was reflected by sector regulations analysed in Chapter 3 above. At the same time, consumer protection became one of the 'good reasons' for 'a high tolerance for public service obligations' and thereby the maintenance and even extension of national regulatory competences in this field.

4. The impact of EU consumer rules on national legislation: Examples from the electricity and gas sectors

Although we can see in each of the three sector that subsequent measures developed into a more and more extensive and detailed regulation of consumer's rights, it remains a question, whether the specific provisions are able to grant a real safeguard for consumer interests in any case.

First of all, fundamental concepts linked to consumer protection in the field of services of general interests are not clearly defined (or not defined at all) at EU level. For example, the notion of 'vulnerable customer' in the third electricity and gas directives is highlighted, but exactly who qualifies under this category is left to Member States to define (Johnston 2016, 128-129). The same is true for 'appropriate measures' that Member States might take under certain provisions of these directives. In addition, there are similar categories used in different EU legislative instruments and their usage may thus be inconsistent and sometimes confusing (Johnston 2016, 129). This is the case, for example, with 'household costumer' under Article 3(7) of the third gas directive and 'protected costumer' under Article 1(1) of the gas supply security regulation.

The way of interpretation of the above concepts is also influenced by the relation between sector specific instruments and general rules on consumer protection. Remaining with the example of energy regulation, the electricity and gas directives make clear that their provisions do not prejudice the EU consumer law acquis, in particular the Distance Selling Directive (Directive 97/7/EC) and the Unfair Contract Terms Directive (Directive 93/13/EEC). The former provides, at the same time, that "The provisions of this Directive shall apply insofar *as there are no particular provisions in rules of Community law* governing certain types of distance contracts in their entirety." [Article 13(1)]. The Unfair Contract Terms Directive also puts the ball back in the court of other regulatory regimes by saying that contractual terms based on mandatory statutory or regulatory provisions are not subject to the provisions of the directive [Article 1(2)]. As we can see and as was highlighted by the *RWE Vertrieb* (C-92/11) and the *Schulz and Egbringhoff* judgments (Joined cases C-359/11 and C-400/11) of the CJEU, the relationship between sector specific regulations and general consumer law is not always clear.

In the *RWE Vertrieb* case, a consumer protection association challenged before the Bundesgerichtshof (German Federal Court of Justice), under rights assigned by 25 customers of an energy supply undertaking, price increases effected by that undertaking (de defendant in the case) from 2003 to 2005. At that time, domestic customers and smaller business customers obtained gas either as ordinary standard tariff customers or as special customers. The national regulation, i. e. the Regulation on general terms and conditions for the supply of gas to standard tariff customers ('the AVBGasV'), applied solely to standard tariff customers. Standard tariff customers under the AVBGasV were customers who were eligible for the basic supply (USO) and were supplied on the basis

of generally applicable prices. However, gas customers were able to depart from the requirements of this national legislation. Frequent use was made of this possibility, inter alia because customers paid more favourable prices outside the statutory requirements. With these customers (special costumers), the energy supply undertakings entered into 'special' customer agreements, which did not come within the scope of the AVBGasV, and special contractual conditions and prices were agreed with them. In their general terms and conditions, these agreements either referred to the AVBGasV or reproduced its provisions verbatim. An essential point at issue of the case is whether the energy supply undertaking can rely on a provision of the AVBGasV which confers the right to increase prices on energy supply undertakings. The Bundesgerichtshof requested a preliminary ruling from the CJEU on the interpretation of the relevant provisions of the unfair contract terms directive and the second gas directives.

First of all, the CJEU made clear that Article 1(2) of the unfair contract terms directive „must be interpreted as meaning that that directive applies to provisions in general terms and conditions, incorporated into contracts concluded between a supplier and a consumer, which reproduce a rule of national law applicable to another category of contracts and are not subject to the national legislation concerned." (C-92/11, para 24) Then the Court established that, based on the combined reading of the relevant provisions of the two directives, in order to assess whether a contractual term allowing price variation for the gas supply company complies with the requirements of good faith, balance and transparency laid down by the directives, it is of fundamental importance: 1) whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. *The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation*; and 2) whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances. (C-92/11, para 65) As was pointed out by Johnston, the Court used the relevant provisions of the second gas directives to provide the energy supply context and further details with which the assessment under the Unfair Terms Directive should be conducted (Johnston 2016, 125).

In the *Schulz and Egbringhoff* joint cases, the national and European regulatory context was the same. In these cases, however, the first group of costumers, namely standard tariff costumers falling under the AVBGasV were concerned by changes in supply charges, since gas and electricity suppliers operating on the basis of USOs increased prices on several occasions within a relative short period of time. Hence, by contrast with the contracts at issue in *RWE Vertrieb,* which were deliberately excluded from the scope of the national legislation on contracts for universal supply, the contracts contested in the *Schulz and Egbringhoff* cases were governed by the ABVGasV. In its judgment brought in these cases, the CJEU concluded that the relevant provisions of the second electricity and gas directives preclude national legislation which determines the content of consumer contracts for the supply of electricity and gas covered by a universal supply obligation and allows the price of that supply to be adjusted, but which does not ensure that customers are to be given adequate notice, before that adjustment comes into effect, of the reasons and preconditions for the adjustment, and its scope.

As we can see, the level of consumer protection established in this judgment is less than that was required by the *RWE Vertrieb* decision (which expressly declared that being informed in good time of a price modification did not reach the adequate level of protection). What are the reasons for making such a distinction? First of all, the Court pointed out that in the *RWE Vertrieb* case, the obligation to provide pre-contractual information was based on the Unfair Contract Terms Directive. This directive was, however, not applicable in the *Schulz and Egbringhoff* cases, since the content of the contracts at issue was determined by German legislative provisions which were mandatory and therefore were not to be subject to the directive [see Article 1(2) of the directive again]. The Court also emphasized that service provider operating under a USO are required to enter into contracts with customers who request this and are entitled to the conditions (including reasonable prices) laid down in the legislation imposing USO. Therefore, the economic interests of these suppliers must be taken into account in so far as they are unable to choose the other contracting party and cannot freely terminate the contract.

The combined reading of the *RWE Vertrieb* and the *Schulz und Egbringhoff* judgments lead us to the following conclusions. The economic interests of suppliers operating under a USO must be taken into account which means that, in their case, informing consumers in good time of a price modification is enough to reach the adequate level of consumer protection, whereas the same is not true for providers operating under normal market conditions as they are required to inform the consumer of the content of the provisions at issue *before* the contract is entered into force. The question remains, however, how to evaluate this approach in light of the *Altmark* judgment (C-280/00) declaring the discharge of PSO out of the realm of state aid [Article 107(1) TFEU] where it merely compensates the provider of a public service mission for the costs that arise due to the performance of the PSO. The conditions for such a compensation formulated in the *Altmark* judgment (C-280/00, paras 89-93) suggest that the economic interests of public service providers have already been taken into account when calculating their public support and this calculation also serves as a basis for saving them from the state aid prohibition under Article 107(1) TFEU. If this is the case, why it is necessary to pay special attention to economic concerns related to suppliers operating under USO as was made by the CJEU in the *Schulz and Egbringhoff* judgment? Such a potential imbalance between USO providers and normal market operators is even more striking in light of the *RWE Vertrieb* case indicating that prices offered by the latter may be more favourable for the consumers.

The conclusions drawn from the above judgments raise further issues regarding the relationship between consumer protection and price regulation. As was already mentioned, ensuring access to basic public services at affordable prices is an essential element of a universal service obligation. The question is, first and foremost, whether the requirement for granting affordable consumer prices is able to be met in a liberalized market, without any public intervention. In the early 2000s, central regulation of energy prices still existed in the majority of EU Member States, often explained by the rising oil prices on the international markets and therefore the need to prevent consumers from paying the increased cost of the raw material. The European Commission, in its communication of 2007 summarising the experiences after adoption of the second energy package, established that intervention in gas (and electricity) pricing was simultaneously one of the causes and one of the effects of the current lack of

competition in the energy sector. The Commission saw, on the one hand, 'regulated prices preventing entry from new market players' among the main obstacles in the transposition of the second energy and gas directives. On the other hand, it also highlighted that, as a result, 'incumbent electricity and gas companies largely maintain their dominant positions', which had 'led many Member States to retain tight control on the electricity and gas prices charged to end-users'.[10]

With the aim of reconciling the interest of liberalization and the need to ensure access for consumers to public services, the possibility of intervention in the price of supply is contemplated in the electricity and gas directives as well. From the adoption of the second energy package onwards, Member States are expressly permitted to impose public service obligations on undertaking operating in the electricity and gas sectors, which may in particular concern „the price of supplies". In this context, it is also emphasized that „public service requirements can be interpreted on a national basis, taking into account national circumstances […]". In addition, the gas directive authorizes Member States to take „appropriate measures" to protect final costumers, especially vulnerable ones, and to ensure high levels of consumer protection (see Article 3 of the second and third electricity and gas directives). Such an authorisation is inherent in the universal service obligation provided by the electricity directive, including the obligation to protect the right of consumers to be supplied with electricity at reasonable prices (Article 3 of the second and third directive).

Price interventions were also examined in the case-law of the CJEU. In the *Federutility* case (C-265/08), Italy adopted a Decree Law in 2007 (just a few days before 1 July, which was the deadline for completing the liberalization of the gas market under the second gas directive) which allocated to the national regulatory authority the power to define 'reference prices' for the sale of gas to certain costumers. The reference prices had to be incorporated by distributors and suppliers into their commercial offers, within the scope of their public service obligations. The CJEU established that the second gas directive did not preclude national legislation of this kind provided that certain conditions (aiming at safeguarding competition on the gas market) defined by the Court were met.[11] In its *ANODE* judgment of 2016 (C-121/15) (issued in a case concerning regulated gas prices in France), the CJEU extended the application of the principles set out in the *Federutility* ruling to the third gas directive too.

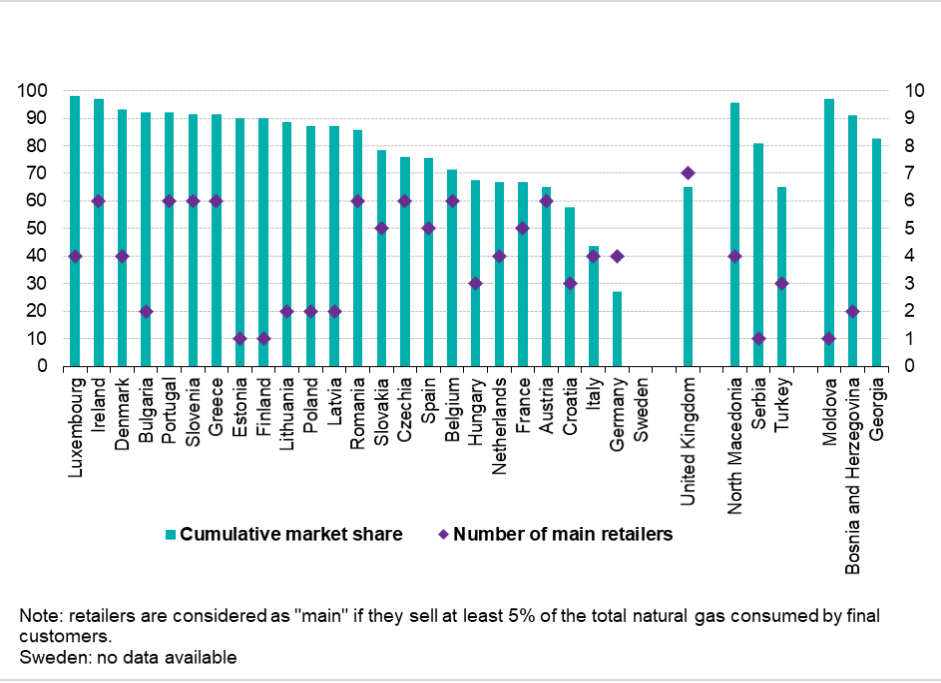
Although the *Federutility* judgment is generally seen as largely reducing Member States' powers in price regulations, some notes should be taken in this regard. Firstly, the CJEU has not defined its position on the legality of the Italian legislation but left the final decision to the national court (submitting the request for preliminary ruling). As a result, the Italian regime survived the CJEU procedure and remained, with some modification, in force (Nagy 184; Cavasola & Ciminelli 2012, 114.). Secondly, it is doubtful, whether the Federutility ruling encompasses only general industry-wide price regulation or it extends also to prices secured through a universal service provider

[10] For a detailed analysis on the negative market impacts of public price intervention, see Lovas 2020a.

[11] These conditions are the following: the intervention constituted by the national legislation (1) pursues a general economic interest consisting in maintaining the price of the supply of natural gas to final consumers at a reasonable level; (2) compromises the free determination of prices for the supply of natural gas only in so far as is necessary to achieve such an objective in the general economic interest and, consequently, for a period that is necessarily limited in time; and (3) is clearly defined, transparent, non-discriminatory and verifiable, and guarantees equal access for EU gas companies to consumers.

(Nagy 184). The question is crucial since, although natural gas is not considered to be an EU universal service, quite a few Member States characterize it as such (Nagy 184) as the gas directive neither contains a prohibition to do this. Finally, the 'Federutility test' seems rather to be able to filter obvious breaches of the above principles only (like in case C-36/14 *Commission v Poland*) and not to address complex or structural problems which might be hidden behind well-formulated national provisions.

Figure 1: Number of main natural gas retailers to final customers and their cumulative market share, 2018



Note: retailers are considered as "main" if they sell at least 5% of the total natural gas consumed by final customers.
Sweden: no data available

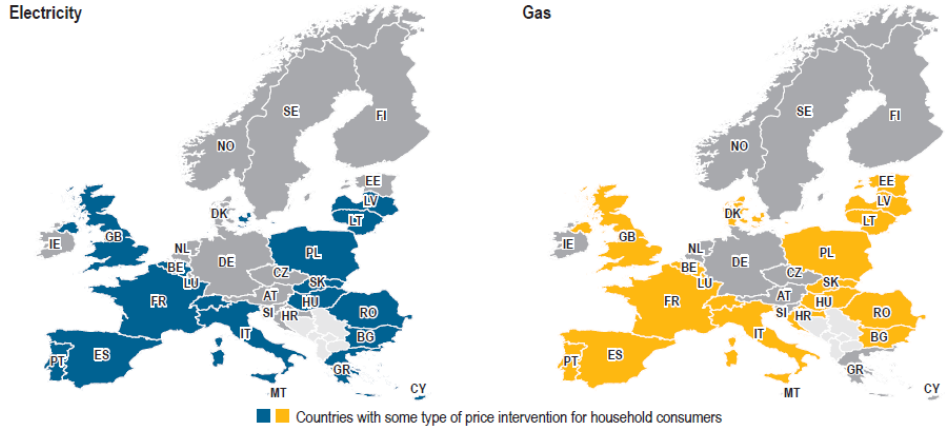
Source: Eurostat

When evaluating the impact of subsequent energy packages and relevant CJEU case-law from a consumer perspective, one must consider the development of retail electricity and gas markets in recent years. A high number of suppliers and low market concentration is viewed as the indicators of a competitive market structure. CEER (Council of European Energy Regulators) data of 2014 show that retail electricity and gas markets for households were still highly concentrated in more than 2/3 of the EU Member States (EC 2016) and the situation has remained largely unchanged in the last few years. In 2019, Hungary, Lithuania, Croatia and Luxembourg recorded the highest values (between 95% and 100% concentration rate) (ACER & CEER 2020, 44). *Figure 1* illustrates the number as well as the cumulative market shares of main natural gas retailers[12] to final (not only household) costumers for 24 EU Member States and the

[12] Retailers are considered as "main" if they sell at least 5% of the total natural gas consumed by final customers.

United Kingdom in 2018. As we can see, in the majority of Member States, the retail natural gas market is dominated by a limited number of main retailers, while the market coverage of non-main companies is below 40% in almost all the countries (except of Croatia, Italy and Germany).

Figure 2: Existence of price intervention in electricity (left) and in natural gas (right) in 2019[13]



Source: ACER & CEER 2020, 10

According to data from 2019, public price intervention still exists in certain Member States, both in the electricity and the gas sectors (see *Figure 2*). 80% of these countries reported that the reason for intervention in the price setting is the protection of consumers against price increases (ACER & CEER 2020, 10). The long-term market impact of these measures may even be detrimental to consumers themselves. The ability of users to effectively make choices between suppliers is one of the key indicators for a well-functioning energy retail market. Such an ability is often measured by switching rate which is calculated by dividing the number of consumers who switched suppliers in a given period by the total number of consumers on the market. In line with the Commission's observation quoted above, today it is also true that countries with regulated retail prices tend to have lower levels of retail competition as regulated prices discourage entry and innovation, increase suppliers' uncertainty regarding long term profitability levels and reduce consumers' incentive to switch supplier (Pepermans 2018). CEER data of 2016 show a clear correlation between the share of household customers under regulated prices and the average number of suppliers per citizens (EC 2019). It is also indicated that switching rates in Member States that have either deregulated or had a minority share under regulated prices are substantially higher than in markets where a majority of households are under regulated prices, both in the electricity and the gas sectors (EC 2019). According to the ACER (European Union

[13] Countries with priece intervention in the *electricity sector*: BE, BG, CY, ES, FR, GB, GR, HU, IT, LT, LV, LU, MT, PL, PT, RO, SK; in the *gas sector*: BE, BG, EE, ES, FR, GB, HR, HU, IT, LT, LV, LU, MT, PL, PT, RO, SK.

Agency for the Cooperation of Energy Regulators) Market Monitoring Report of 2019, regulated prices are in the first place among regulatory barriers of switching (ACER & CEER 2020, 11, 59).

In sum, the above analysis suggests that interventionist measures taken by Member States for the protection of consumers rather strengthen a way towards fragmentation than integration of energy retail markets. Moreover, the gradually extension of Member States' power to deviate from the general rules of the energy directives on the basis of the social legitimacy of such measures (as laid down by the directives themselves) may hide further dangers for the functioning of the internal market. In particular, the objective of consumer protection may be (mis)used to hide the initial aim of certain forms of public intervention (like price regulation having the effect of excluding targeted actors from the market).[14]

Conclusions

At the beginning stage of the European integration, the 'consumer' has fallen outside the realm of SGI regulation at the EU level, since public services sectors were traditionally organized and financed by states or public entities without being open to competition in international markets. This approach has changed in the mid-eighties, with an extensive liberalization process engaged by the Single European Act which also extended to significant economic sectors of public services such as electricity, gas, water supply or waste management. The 'paradigm shift' has also changed the position of the consumer from a mere 'user' to be supplied to a relevant market actor. Initially, the liberalization program was based on the presumption that the interests of consumers could best be served via the processes of market opening and competition, unless the pursuit of other legitimate objectives beyond competition and free trade was in itself justifiable (Johnston 2016, 95). Over time, the scope and significance of these 'other objectives' increased (Bartha & Horváth, 2020). The protection of consumers (especially vulnerable ones) gradually received a higher rank in EU legislative documents addressing specific SGEI sectors. In this line, Member States' power to safeguard consumer interest by measures deviating from the general rules of sector liberalization has also been extended.

Apart from the general tendency as described above, the development of consumer protection regulation was unique and different in each public services sector. Among them, the present paper examined telecommunication and electronic communication, postal services as well as electricity and gas supply in more details. The level and focus of consumer protection have strongly been determined by the results and intensity of liberalization in these sectors. In telecommunication and energy regulation, the rights of users in relation with their providers (such as facilitating conditions for changing supplier, the right to be provided with information or [phone] number portability) are strongly promoted. At the same time, social provisions also play an important role as providing 'compensation' for the negative side effects of liberalization. This is particularly true for the energy sector, where the subsequent legislative packages, in line with gradually opening of the electricity and gas markets, significantly extended the social dimension of consumer protection. The third category of rights (user rights in

[14] For a detailed analysis of this issue see Horváth, 2016; Horváth & Bartha, 2018.

relation with providers), are less promoted in the postal sector, where the results of liberalisation, compared to energy and telecom services, are rather limited. This is especially the case for domestic letter mail services that remained mainly subject to monopoly of state-owned universal service providers.

In the telecommunication and postal sectors, the scope of universal services and rights to be protected is largely influenced by the changes in consumer demand due to technical development. However, state-owned monopolies proved to be less able to follow technical developments and changes in consumer needs in the postal sector than other market operators. Such a lack of flexibility may also have a negative impact on prices and quality of services (f. e. length of delivery) which are the essential factors of availability of universal services.

There are in-depth studies from previous years (Nihoul 2009; Johnston 2016) analysing the impact of liberalization in different public utility sectors, i. e. whether these measures have done any good to consumers. In the relevant academic discussions, the consumer is even mentioned as an agent of liberalisation (Johnson 2016, 115) or the 'justification tool kit' put forward by the European Commission to advance the liberalisation agenda (Nihoul 2009), and similarly the USO logic as an instrument being used to legitimize and promote liberalization. Our question raised in the present study is different as it addresses the impact of strengthening national competences (as a turn from the extensive liberalization) on consumer welfare. In doing so, we have focused on the energy sector where liberalization is, even if much more extended than in the postal sector, still not complete. Regulated prices preventing entry from new market players seem to be among the main obstacles in the completion of the internal market in electricity and gas. Member States are, however, expressly authorized, in the framework of their public service obligation, to take measures concerning the price of supply. Today, public price intervention still exists in certain Member States both in the electricity and the gas sectors, and the majority of countries invoked the protection of consumers as a justification for maintaining such measures. Nevertheless, it is quite doubtful that the long-term market impact of intervention is beneficial for consumers. Recent data on the relation between price regulation and the ability of users to switch suppliers clearly confirms the potential negative effects of public intervention.

The examples analysed in the paper have also shown that the interest of consumer protection is able to legitimize not only the promotion of liberalization (as was stated by the above mentioned authors) but also the extension of national regulatory competences in the field of public services. The relevant European legislative framework also supported this line of evolution or at least it did not raise any serious obstacles to enhance Member States' powers, even to the detriment of consumers.

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CONSUMER PROTECTION ASPECTS OF E-ADMINISTRATION*

Bernadett Veszprémi[1]

This essay studies the consumer protection aspects of e-Administration, specifically how consumer protection is achieved within the sphere of Hungarian public administration proceedings. The title of this study may be confusing at first sight, as the public administration system does not deal with 'consumers'; typically, legal relations in this field involve a public administration organisation on one end, and the client on the other (Ákr., Article 10., Para. [1]). The scope of Act CLV of 1997 on Consumer Protection (1997. évi CLV. törvény a fogyasztóvédelemről; hereinafter Fgytv.) also does not cover this field. That said, the effects that these two areas have on each other are still worth investigating.

1. The Basic Principles of Public Administration Proceedings

Although the applicable laws have been urging for the application of the principles of client-friendly administration and service-oriented public administration for years, the current administrative proceedings still leave clients in a vulnerable position, due to the unequal and asymmetric nature of the existing legal relations between the administrative organisations and the client. This necessitates the implementation of certain guarantees into the existing administrative procedures, something that legislation has always been striving for when developing the related procedural Acts (*Act IV of 1957 on the General Rules of State Administration Proceedings* [1957. évi IV. törvény az államigazgatási eljárás általános szabályairól; hereinafter Áe.], *Act CXL of 2004 on the General Rules of Administrative Proceedings and Services* [2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól; hereinafter Ket.], *Act CL of 2016 on the Code of General Administrative Procedure* [2016. évi CL. törvény az általános közigazgatási rendtartásról; hereinafter Ákr.]).

These guarantees manifest in basic principles. As the preparatory report of the Ákr.'s concept states, „*[these] basic principles are the manifestations of the Fundamental Law's erga omnes provisions, and specifically are the manifestations of the basic rights in public proceedings*" (Részletes Jelentés, 7). When defining these principles, legislation had to consider the provisions of the European Convention of Human Rights and the EU Charter of Fundamental Rights too, along with the recommendations of the Council of Europe and the case-law of the European Court of Human Rights.

The basic principles can be classified in two ways; however, certain principles are included in both classifications. These include the ones deriving from the Fundamental Law of Hungary, such as the right to fair and speedy proceedings, concluding rulings within a reasonable time, the duty to state reasons, equality before the law, or the

* DOI 10.21867/KjK/2020.1.5.

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prevention of discrimination. The first classification is based on the classic three-tier segmentation of administrative duties: according to this, the principles are classified by whether they are based on the principles of general penal, civil and administrative procedural law, or on principles that appear and are enforced via special administrative proceedings. Based on this classification, principles such as the right to transparent information, the acting bodies' obligation to inform clients, decision-making based on facts, or the right of access to the case file are based on common, general principles, while the principles of the expectation to act in good faith, cooperation between the client and the authorities, the authorities having to act on their own motion, and cost-effectiveness are based on special administrative proceedings.

The other method of classification observes only the principles derived from the Fundamental Law of Hungary and the principles aligned with the peculiarities of public administrative proceedings. The Act specifies the latter group as „*basic procedural rights and responsibilities*", thus reinforcing the notion that the defined responsibilities are applicable not just to the authorities (for more information, see Lang 2018), but to the clients as well.

„The Ákr. was meant to follow the [Ket.'s] system of basic principles by putting a greater emphasis on the principles outlined in the Fundamental Law of Hungary" (Árva 2019, 49, also see Fábián & Bencsik 2017), albeit it does not go into detail on them (for more information, see Hajas 2016). The Act also clearly defines the role of these principles (they are meant to facilitate legal interpretation); however, it does so while emphasizing that no ruling can be made solely based on these principles. The principles can be consulted in any stage of the proceedings, they protect and oblige their every participant, and as the preamble of the Ákr. states, „*they can be directly executed as normative provisions*" (T/12233). This proved to be a major step forward from a legislative perspective, as the questions of whether the basic principles should be declared and how they should be referenced were the source of constant debate (for more information, see Turkovics 2013, 60 and Ivancsics 2009, 43). The related case-law also points to this direction (see decision Kfv.IV.35.817/2012/5. of the Hungarian Supreme Court [Kúria], for more details, see Balogh-Békesi 2016, 12).

2. The Basic Stipulations of Ákr.

The Act includes a separate chapter regulating the so-called basic stipulations; these are not standalone principles, but rather means to define and ensure the effectiveness of the Act's principles (such as exclusions or procedural obligations). This chapter also includes stipulations on language usage and the legal protection principles related to minors, adults who are legally considered partly or fully incapacitated, or persons with disabilities.

According to the Fundamental Law, „*Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of […] language*" (The Fundamental Law of Hungary, Article XV., Para. [2]). Moreover, „*[n]ationalities living in Hungary shall have the right to use their mother tongue*" (The Fundamental Law of Hungary, Article XXIX., Para. [1]). When it comes to languages, however, the Ákr. differentiates between the Hungarian citizens belonging to certain nationalities and the non-Hungarian citizens. These rules are also

complemented by provisions related to interpreting and (due to equal opportunity principles) rules to enforce the rights of deaf, mute, and deaf-mute clients.

The Ákr. also devotes a separate legal title for the protection of minors, aiming to ensure their personal rights and the regulation of their personal data. These principles are asserted through various means, such as child support and representation institutions, or priority rules.

3. Enforcing the Right to Information in E-Administration Proceedings

Based on the definition of *Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers* (2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról; hereinafter Fttv.), a commercial practice is considered unfair if it sensibly decreases the consumer's chance to make an informed decision on a product based on the required and available information (Fttv., Article 3., Para. [2], bullet b). Properly informing consumers is an important aspect of consumer protection, something that fundamentally also exists in public administration, in the form of the aforementioned basic principle of procedural law, defined both as a right and as a set of responsibilities. Clients have the right to be duly informed regarding a public process, including:

- Getting to know the data regarding public administration activities,
- Access to the rules of official procedures,
- Sharing the details of procedural law (as part of the requirements of electronic publication),
- The possibility of requesting information,
- Knowing the prerequisites of initiating proceedings,
- Maintaining communication and sharing information throughout the entire process,
- The right to access files.

The client's right to be duly informed is also a responsibility on the part of the authorities. This obligation is apparent in two cases: on the one hand, by allowing clients to request information on their proceedings or on data of public interest; and on the other hand, through the mandatory automatic electronic disclosure of certain data, in line with the regulations of Act CXII of 2011 on Informational Self-Determination and Freedom of Information (2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról; hereinafter Info tv.).

3.1. Requesting Information on Data of Public Interest

According to the Fundamental Law of Hungary, „*[e]veryone shall have the right to […] access and disseminate data of public interest*" (The Fundamental Law of Hungary, Article VI., Para. [2]). Additionally, as the related directive of the European Union states, „*[m]aking public all generally available documents held by the public sector – concerning not only the political process but also the legal and administrative process – is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy*" (Directive 2003/98/EC, Recital 16).

As a prerequisite of making data of public interest discoverable, „*Hungary […] ensure[s] the conditions for free dissemination of information necessary for the formation of democratic public opinion*" (The Fundamental Law of Hungary, Article IX., Para. [2]). The *Info tv.* also confirms the related provisions of the Fundamental Law, and provides additional details as well. As it states, „*[b]odies with public service functions shall promote and ensure that the general public is provided with accurate information in a prompt manner concerning the matters under their competence, such as the budgets of the central and municipal governments and the implementation thereof, the management of assets controlled by the central and municipal governments, the appropriation of public funds, and special and exclusive rights conferred upon market actors, private organizations or individuals*" (Info tv., Section 32).

The subject of data of public interest could be a person or organisation performing either a state duty or a local municipal responsibility. The matter of the data of public interest, on the other hand, is defined by the Act as a piece of data, information, or knowledge that is handled by the person or organisation in question, and which contains information on their activities. The Act also contains some examples of such data types (Info tv., Section 3., Bullet 5).

Information may be requested on several data types. It might be requested to get information on a specific case (as described in Chapter 3.3 of this study), on the data management practices concerning the personal data of the applicant (Info tv., Section 14., Bullet a), or to publish and release data of public interest or data accessible on public interest grounds.[2] This study will provide more details on the latter cases.

All data handled by persons or organisations who perform state duties, municipal responsibilities, or other public service functions defined in legislation must make sure that the data they handle is made available either as data of public interest or data accessible on public interest grounds (Info tv., Section 26., Para. [1]). These persons and organisations can publish data as such either through individual requests or by regularly publishing data (as described in Chapter 3.2 of this paper).

The request to access data of public interest may be submitted orally, in writing, or through electronic means. However, the right to access data of public interest may be restricted if it concerns defence and national security interests, or if it contradicts valid EU legal acts. The person or body with public service functions that manages the requested data is then obliged to provide it to the applicant as soon as possible but within a maximum of 15 days from receiving the application.

3.2. Mandatory Electronic Disclosure

„*If certain data affects or interests larger groups of society, then those data must be made available in a way so that it can be accessed without additional requests. This is facilitated by the institution of disclosure, an approach that urges the actors who manage data of public interest to proactively disclose as much of the data they handle as possible for the general public without waiting for any individual requests*" (Szilágyi, Jóri & Szabó 2008, 80).

[2] Every piece of data that is not designated as „*data of public interest",* but is still deemed releasable, researchable, and accessible by the Act due to the public interest is designated as „*data accessible on public interest grounds",* according to Section 3., Bullet 6. of Info tv.

While the Ket. had originally regulated electronic disclosure under a separate legal title as an electronic information provider service, the Ákr. specified the authorities' obligation to inform only in regards to the types of maintaining communication. The general rules were also carried over to the Info tv. Besides, *Act CCXXII of 2015 on the General Rules for Electronic Administration and Trust Services* (2015. évi CCXXII. törvény az elektronikus ügyintézés és a bizalmi szolgáltatások általános szabályairól; hereinafter: Eüsztv., providing a general definition on the rules of e-Administration) also references the Info tv. regarding the provisions of data management and publication.

In practice, the obligation to inform (or in other words, the authorities' obligation to electronically disclose data) is realised by operating homepages and keeping their respective disclosure lists[21] publicly accessible.

However, *Government Decree 451/2016. (XII.19.) on the Detailed Rules of Electronic Administration* [451/2016. (XII.19.) Korm. rendelet. az elektronikus ügyintézés részletszabályairól; hereinafter e-Administration Decree] also imposes additional content requirements in addition to the provisions of the Info tv., by defining specific rules for electronic means of providing information. These requirements cover:

- The electronic contacts of the organisation offering e-Administration services,
- The availability of the organisation's customer service,
- The substantial facts of data management,
- The policy to follow in case of shutdown or malfunction,
- The available electronic services,
- The available electronic identification services,
- The availability of electronic forms and the proceedings available by filling such forms,
- The available electronic methods of paying the fees of the requested proceedings (E-Administration Decree, Article 37).

Upon request, an electronic legal confirmation must be created for the current or former contents of the disclosed official information. Regarding the electronic disclosure of data, the Act specifies the acceptable means of publishing them depending on the type of actor. Central state administration bodies and county government offices are required to disclose data of public interest on their own websites. Other public administration organisations may choose to fulfil their legal obligations by disclosing the data of public interest they manage on a web page that

- they own, or
- they operate jointly with a public administration association, or
- is maintained by the organisation tasked with their supervision, professional management, or operational coordination (Info tv. Section 33., Para. [2]-[3]).

In the case of jointly operated association web pages, care must be taken to clearly separate the data of the individual municipalities.

The e-Administration Decree specifies the www.magyarorszag.hu, www.kormany.hu, and www.kormanyablak.hu websites as the minimum targets of electronic disclosure locations. However, it also mandates that the data of public interest

be disclosed on the personalised administration interface (https://szuf.magyarorszag.hu), and advocates the termination of duplicate or parallel contents.

In addition, *Government Decree 305/2005 (XII.25.) on the Detailed Rules of the Electronic Publishing of Data of Public Interest, the Single Public Information Retrieval System, Data Containing of the Central Electronic List of Public Information and Data Integration* (305/2005. (XII.25.) Korm. rendelet a közérdekű adatok elektronikus közzétételére, az egységes közadatkereső rendszerre, valamint a központi jegyzék adattartalmára, az adatintegrációra vonatkozó részletes szabályokról; hereinafter: Electronic Data Decree). also specifies further responsibilities; namely, the reporting obligation of the data handler to ensure the constant completeness of the single public information retrieval system and the central electronic list as well. All these online resources (that is, the central web page of www.magyarorszag.hu, the central electronic list of data of public interest at www.kozadat.hu, and the single public information retrieval system on www.kozadattar.hu) are operated by the *National Infocommunications Service Company* (Nemzeti Infokommunikációs Szolgáltató Zrt; hereinafter NISZ) (Electronic Data Decree, Article 12., Para. [1]-[2]). It is important to point out here that the two obligations (that is, the electronic disclosure of data of public interest with the contents, destination, and format aligned with the legal requirements, and the uploading of data to the www.kozadattar.hu public information retrieval system) are separate requirements, independent of each other. Based on the provisions of the Info tv. on the municipalities' obligation to electronically disclose data, Resolution NAIH-419-2/2014/V of the National Authority for Data Protection and Freedom of Information (Nemzeti Adatvédelmi és Információszabadság Hatóság; hereinafter NAIH), and Section 37/B, Paragraph (2) of the Info tv., having a municipality merely being connected to the public information retrieval system is not enough to meet the legal requirements of data disclosure, and they are expected to keep maintaining and updating their public data on both the central electronic list (www.kozadat.hu) and on the public information retrieval system (www.kozadattar.hu) as well (NAIH 2014). However, the related legislation also confirms that it is enough to include only a simple reference to indicate where the disclosed data is available. For example, in case of decrees, a direct link to the data's location on www.njt.hu is sufficient, while in the case of the public information retrieval system, the subpage of the municipality's web site is enough.

According to Section 33, Paragraph (1) of Info tv., data handlers must send data of public interest to the central electronic list (www.kozadat.hu) as well, whose detailed rules are included in the Electronic Data Decree. Bodies with public service functions may use the public information retrieval system (www.kozadattar.hu) as their primary information interface.

Besides the disclosure lists, the Info tv. also specified several *general requirements* that must be observed for electronic disclosure. These are the following:

- Data of public interest must be disclosed in digital form.
- The opening page (i.e. index page) of the website must contain a „*Data of Public Interest*" link (Ministry of Information and Communication Decree No. 18/2005 (XII.27) on the Publication Samples Required for the Publication of Data Included in Publication Lists, Article 2., Para. [2]).

- The opening page must also contain a reference to the public information retrieval system.
- The data must be accessible to anyone without the need for identification.
- The data must also be accessible without any restrictions.
- The disclosure lists must be published separately in accordance with the Act's annex, under their own separate icons. Alternatively, a link may be placed instead, pointing to the exact location of the data.
- The data must be printable.
- The data must also be available for copying without data loss or distortion.
- Access to the data must be provided free of charge (both in regards to copying and to general network data transfer).
- Applicants shall not be required to provide personal information to access the disclosed data (Info tv., Sections 32 and 33, Para. [1], also Section 35., Para. [1]–[2]).[3]
- The site must contain a „*Rules of accessing/requesting access to data of public interest*" icon that describes the rules of how to request access to data in plain language (Info tv., Sections 26–31). This summary must also inform users of the available legal remedies. In addition, the data handler must also prepare a policy that defines how the individual data access applications are fulfilled.
- The site must also contain a disclosure policy, containing the detailed rules of disclosing, correcting, updating, and removing data, along with the related procedures of each of these activities (Electronic Data Decree, Article 3). In addition, the web page must also contain data protection and data security policy (Info tv., Section 24., Para. [3]).
- In case of any change in the disclosed data, the site must indicate the fact and time of the change. The previous version of the data must be kept available until the end of the retention period. In case the body handling the data of public interest ceases to exist, then the page must indicate the fact and legal basis of the termination, along with the successor body of the organisation.

Besides the Info tv., general guidelines for indicating and dividing disclosure lists are also provided by *Decree No 18/2005 (XII.27.) on the Publication Samples Required for the Publication of Data Included in Publication Lists* [18/2005. (XII.27.) IHM rendelet a közzétételi listákon szereplő adatok közzétételéhez szükséges közzétételi mintákról, created by the former Ministry of Information and Communication]. According to this decree, pages must indicate even the disclosure units that are not applicable to the specific body, but for the sake of precise information, it must be indicated that the data is unavailable.

[3] For more information on the technical and layout requirements of municipal portals, see Budai 2014; Budai & Szakolyi 2005; Kópiás & Molnár 2008, 62–69.

3.3. Informing Clients in Public Proceedings

A specific case occurs when the client (or a participant of the proceedings) requests information on the details of the public proceedings in progress or a specific piece of data concerning them. In such cases, the authority shall inform them of any activities relevant to their case and related to their rights. While the Ket. used to specify detailed rules on notifying and informing participants on the various stages of the public proceedings (such as starting the procedure or informing clients on its current state), the Ákr. superseding it does not go into such details. It is worth mentioning though that the current legislation does not oblige authorities to inform clients when the proceedings they requested have been started – however, clients must be informed about the procedure's status during the investigation phase at the latest (akr.kormany.hu).

If the client specified their e-mail address, or the phone number of their mobile phone capable of receiving short text messages, or any other channel for electronic communication in their application that they sent to the authority offering e-Administration services, and made no specific administrative stipulations on their usage, then said the authority is allowed to inform the client on the status of their proceedings through the provided electronic communication means (Eüsztv. Article 15., Para. [5]). The authority may also provide information through the electronic means specified in the Eüsztv., e-mail, or via electronic audio channels (E-Administration Decree, Article 6., Para. [3]).

Authorities must observe the regulations of Eüsztv. regarding the allowed forms of communication. However, the specific form of communication to use during a procedure is selected by the client – for example, through an administrative stipulation – based on the information provided by the authority (Ákr., Article 26., Para. [2]). In case an electronic means of communication is preferred, restrictions from the authority's side may apply in the available channels; however, the authority must inform their clients on its supported means of e-Administration (Eüsztv., Article 10., Bullet b).

The Annex of the E-Administration decree specifies the file formats allowed for use during e-Administration procedures; however, in accordance with the rules on electronic information, the authorities must inform their clients on the file format(s) they accept during electronic public proceedings. Authorities may only impose the usage of electronic forms and file formats that can be filled and created with freeware and freely accessible software. Authorities have the right to consider a submitted form or file as unsubmitted (E-Administration Decree, Article 17., Para. [1]–[2]) and Article 19., Para. [1]) if it is not in the acceptable format, or it is not sent to the contact address specified by the authority, or it is not sent through the secure electronic delivery service specified by the authority.

However, if a client submits their form or file in an incorrect format instead of the format specified by the authority or the rules of electronic communication because the fillable and downloadable version of the form has not been published by the authority (in accordance with the rules of electronic communication), then clients shall face no adverse legal consequences (Eüsztv., Para. 9., Article [4], Bullet c).

Confidence towards e-Administration is also reinforced by legislation, as the current provisions allow clients to request copies of their electronically submitted documents (E-Administration Decree, Article 21).

In the case of electronic proceedings, the procedure does not automatically start with the receipt of the request: the client's proposal is bound to the receipt of the request, while the actual administrative procedure should start on the first working day following the receipt at the latest. The submission of the document(s) may be proven with the authority's confirmation of receipt. Moreover, if the applicant requests so and provides an electronic return address, then the recipient authority can also send an electronic confirmation to the client on the documents' arrival, provided that the documents have been sent electronically and via an unsecured delivery service. The authority's confirmation must contain the feedback of receipt, along with the unique identifier of the document's arrival.

When using a secure delivery service for submitting documents or requests, the recipient authority must prepare and send a secure confirmation to the client, provided that the sender's message has been made available to the recipient authority without changes. In such cases, the confirmation must be an electronic document possessing at least an advanced security electronic signature. The applicant must also receive documentary evidence (an acknowledgment of receipt) if the delivery of the documents/request cannot be performed within a set time. This acknowledgment must contain information on the time (and if possible, also the reason) of failure (Eüsztv., Article 1., Bullet 11).

Conclusions

Based on the above analysis, it can be concluded that similarly to general consumer protection, public administration (and especially e-Administration proceedings) also require proper practices of client orientation and support. This includes ensuring client rights, maintaining the public trust, and constantly providing information on the state of public proceedings to facilitate the transparency of public administration. These aspirations are especially pivotal for automated e-Administration proceedings, as they are typically devoid of any human contact. As a way forward, the related basic principles of client protection must be legally specified and must be properly detailed not just for public administration but for e-Administration as well, in a way that would cover all segments of legislation regulating these administrative areas.

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THE RATE OF THE AGRICULTURAL WATER SUPPLY IN THE LIGHT OF GENERAL COMMENT NO. 15*

Ágnes Bujdos[1]

Article 15/F. (4) of Act LVII of 1995 *on Water Management (hereinafter Water Management Act) stipulates those factors based on which the rate of the agricultural water supply fee must be determined. In doing so, the following obligations have to be respected: a) to provide coverage for the continuous and efficient operation and long-term maintenance of agricultural water supply; b) to contribute to the safe supply of agricultural water services; c) to encourage the provision of agricultural water services at a minimum cost and d) to comply with the principle of cost recovery under this Act. Interestingly, a number of key elements of these provisions can be also detected in General Comment No. 15 on the right to water (hereinafter General Comment No. 15) as both addresses water supply service though for a different function, notably agricultural and human use. Armed with this information, first, General Comment No. 15 will be discussed followed by the detailed examination of Article 15/F. (4) of the Water Management Act in the light of General Comment No. 15. Finally, some conclusions will be drawn.*

1. General Comment No. 15 on the Right to Water

In 2002, the United Nations Economic and Social Council adopted General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), that contributed to clarifying the scope of the right to water and provided a guideline for states based on Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. Article 11 declares *„the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"*, while Article 12 ensures the *„right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". Recital 2 of General Comment No 15 stipulates that the *„human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses"*. This acknowledgement is crucial as without drinking water humans cannot survive for more than a week, whereas without food we may survive for a month (Verschuuren 2006, 427). Therefore, this approach reflects the human rights approach which puts the people's needs first in comparison with other uses and is especially used to challenge the economic and social injustice affecting the most vulnerable groups (Klawitter & Qazzaz 2007, 284).

In relation to the provisions of the General Comment No. 15, part II concerning the *Normative content of the right to water* and part III regarding *State parties' obligations* must be highlighted. Embarking upon part II, Recital 10 lays down that *„The right to*

* DOI 10.21867/KjK/2020.1.6.

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water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water".

As stated by Recital 11 and 12, the elements of the right to water must be adequate for human dignity, life, and health, in accordance with Articles 11, paragraph 1, and 12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances: water availability, quality, and accessibility (including physical and economic accessibility, non-discrimination, as well as information accessibility).

Moving onto the State parties' obligations, first, Recitals 18 and 19 contain the general legal obligations, such as *„States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water. Realization of the right should be feasible and practicable, since all States parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant."* or *„There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant"*. Second, under Recitals 21 and 23, specific legal obligations are listed. Starting with the obligation to respect, it *„requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water"*. It is followed by the obligation to protect that *„requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water"*. Finally, Recital 25 mentions the obligation to fulfil which *„can be disaggregated into the obligations to facilitate, promote and provide".*

2. The Agricultural Water Supply Fee

Annex I to the Water Management Act stipulates agricultural water supply as the *„irrigation of agricultural and forestry land, water supply for ponds and other agricultural water use, and for other purposes related to the agricultural water supply system".* It is noteworthy that even though several water uses are mentioned in this paragraph, in practice, the dominance of the irrigation of agricultural land can be observed. The phrase 'agricultural water supply' forms part of Article 15/F. (1) of Act LVII of 1995 on Water Management, which declares that *„The user of the agricultural water supply service shall pay an agricultural water supply fee to the service provider. The State may assume the water service fee for water use for irrigation, rice production and fish farming as defined in the Government Decree".*

In addition, 15/F. § (3) of the Water Management Act sets out an agricultural water supply fee as a two-factor fee consisting of, on the one hand, the basic fee for the availability and the amount of water used, for water supply season and *pro rata temporis*.

3. The Rate of the Agricultural Water Supply

Article 15/F. (4) of the Water Management Act determines four requirements that must be taken into consideration when determining the rate of the agricultural water supply. This part wishes to analyse all these requirements as well as the potential link to General Comment No. 15.

(a) to provide coverage for the continuous and efficient operation and long-term maintenance of agricultural water supply

This provision determines three requirements regarding the agricultural water supply. First, the operation is required to be continuous. Under General Comment No. 15, the term continuous is understood as *„the regularity of the water supply is sufficient for personal and domestic uses".* If we consider the irrigation of the agricultural land as an example, based on Article 6(5) of Regulation KHVM 2/1997. (II. 18.), we can see that the water supply season runs from 1 March to 31 October; nonetheless, the operator and the water user may agree on a different time if the directorate agrees. Given that irrigation is a seasonal activity, whereas the drinking water supply has to be ensured throughout the year, we can conclude that the term continuous does not mean the same thing for these two activities. However, similarly to the definition of General Comment No. 15, concerning agricultural water supply, the term continuous must also involve uninterrupted water supply during the water supply season. Additionally, it is worth noting that on the one hand, it is not uncommon that agricultural lands are covered with either snow or inland inundation in the spring, including March and early April, that makes agricultural activities impossible or excessively difficult to carry out during this period, therefore there is no need for irrigation. These phenomena affect primarily the Great Plain. At the same time, interestingly, an extended period of water stress was issued until 30 November 2018 that exceeded the water supply season by a whole month. So, in harmony with this phenomenon and the authorization of the Water Management Act, 'continuous' may imply that water supply service can be provided even after the agricultural water supply season thanks to the agreement between the operator and the water user. In other words, in practice, the period in which agricultural water supply service is ensured can be either shorter or longer than the agricultural water supply season. Not to mention, the number of factors determine whether or to what extent receiving agricultural water supply service can be justified at all, including but not limited to the temperature, the water need of the soil and the crop, and the precipitation. Nonetheless, low interest in receiving this service cannot have an impact on ensuring continuous water supply, but even the opposite might happen and the water service provider has to be able to satisfy (at least temporarily) higher water needs than usual without compromising on the requirement of continuous water supply.

Second, the requirement of efficient operation is imposed on the operator. Water efficiency means „*wasting less water and increasing productivity per volume*". It is both *„an economic and environmental opportunity that serves sectors and functions that use water, helps economic growth and, at the same time, safeguards the environment".* The requirement of efficiency must be linked to the problem of water leakage from supply

systems that is still 'substantial' in certain parts of Europe due to the construction and maintenance of water-related infrastructure (EEA 2018, 75). As regards efficiency under Recital 28 of General Comment No. 15, it is referred to in relation to sufficient and safe water and addressed as a recommendation towards state parties, namely:

"States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; […] (f) increasing the efficient use of water by end-users."

As can be seen, this provision highlights the significance and responsibility of the end-users as well. It is evident that efficient operation and efficient water use by the water user must go hand in hand. An efficient operation system is worth nothing if the users do not treat water as a valuable resource with limited renewable capacity, and instead, water is used in a wasteful or inefficient way. Conversely, the efforts made by environmentally conscious and responsible water users are unable to compensate for the failures derived from the inefficient operation.

(b) to contribute to the safe supply of agricultural water services

A safe supply of agricultural water services may cover both sufficient water quantity and quality. These aspects can be illustrated, among others, with the water needs of crop production. When it comes to the quantitative aspect of irrigation, a safe supply may imply water in sufficient quantity throughout the water supply season. The irrigation water requirement of crops is determined by several factors, such as the crop water requirement, as well as by the water naturally available to the crops including *inter alia* effective precipitation and soil moisture. Accordingly, the irrigation water requirement of crops can be calculated with knowledge of climatic conditions and the physiological processes at the plant level (FAO). Importantly, crops differ widely in terms of their water intensity and drought tolerance capacity. Turning our attention to General Comment No. 15, it opts for referring to the World Health Organization's guidelines to define the minimum water quantity in order to fulfil the right to water. In addition, Recital 12 (a) of General Comment leaves scope for a derogation for those individuals and groups who „*require additional water due to health, climate, and work conditions*".

As currently calculated by the World Health Organization, *„Based on estimates of requirements of lactating women who engage in moderate physical activity in above-average temperatures, a minimum of 7.5 litres per capita per day will meet the requirements of most people under most conditions. […] A higher quantity of about 20 litres per capita per day should be assured to take care of basic hygiene needs and basic food hygiene"* (WHO).

As regards water quality for irrigation, it has to be stressed that although irrigation does not claim a level of water quality as high as, among others, drinking water, but it does not mean that all qualities of water would be acceptable for this type of water use. Water for irrigation is required to have a dissolved salt content of less than 100-500 mg/l and the percentage of sodium should be less than 35-45%. These values depend on the soil to be irrigated and the method of cultivation (Pregun & Juhász). Moving onto Recital 12 (b) of General Comment No 15., the requirements concerning water quality

are summarized in the following way: *„The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use".*

In addition, Recital 28 of General Comment No 15. confirms the obligation „*to ensure that there is sufficient and safe water for present and future generations".* This approach can be strongly linked to sustainable development.

(c) to encourage the provision of agricultural water services at a minimum cost and d) to comply with the principle of cost recovery under this Act

It is practical to discuss the two cost-related provisions together. Embarking upon the provision of agricultural water service at a minimum cost, some aspects of irrigation have to be referred to. First, irrigation plays and will play a special role in agriculture in Hungary since the damage caused by persistent drought affects degraded soils in their physical and biological state, as well as soils with a low nutrient level much more severely. Conversely, the good physical and biological condition of soils improves the drought tolerance of the field (VAHAVA 2005, 29). Second, it cannot be overemphasised that *„irrigated agriculture is, on average, at least twice as productive per unit of land"* (FAO). As a result, productivity can be linked to food security and farmers' income.

However, according to the revised National River Basin Management Plan adopted in 2015, merely 1-2 per cent of agricultural land is irrigated depending on the weather conditions, whereas the proportion of irrigable land is 3.3 per cent (OVGT 2015, 268). Based on the Research Institute of Agricultural Economics, in 2016, more than three-quarters of the areas, namely 128 823 ha, where authorisation for irrigation was granted, were located on the Great Plain (AKI 2017, 4). Interestingly, a big discrepancy can be detected between the areas where authorisation for irrigation was granted and where irrigation actually took place, as merely 53.35 per cent of those areas where authorisation for irrigation was granted were actually irrigated (AKI 2017, 6).

These phenomena, notably the low proportion of irrigated land as well as the high proportion of areas where authorisation for irrigation was granted but was actually not irrigated might be explained by the high installation and maintenance cost of the irrigation systems as well as the price of water for irrigation. These concerns are reflected in Kovách's research on Hungarian land users, which identified the heterogeneity of farmers in terms of their economic power and farm size as well as the increasing concentration of agricultural lands (Kovách 2016). As a result, on the one hand, the provision of agricultural water services at a minimum cost can encourage irrigation even for those who have lower incomes. At the same time, it raises questions such as whether it can be justified to favour farmers with high income who could pay higher costs as well or whether the requirement of minimum cost can be compatible with the efficient operation.

In sharp contrast to the supply of agricultural water, the use of which, although beneficial, is still voluntary, costs regarding drinking water are way more sensitive. This question is addressed in Recital 12(c)(ii) of General Comment No. 15 in relation to

availability as economic accessibility, namely *„Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights".*

Moving onto the obligation to comply with the principle of cost recovery under this Act, Article 15(7) of the Act on Water Management states that *„Pricing policy must take into account the principle of recovering the costs of water services, depending on the purpose of the demand for water (distinguishing at least household, industrial, agricultural uses), taking into account the costs of protecting the environment and water resources, the polluter pays principle. When setting prices, account shall be taken of the social, environmental and economic impact of the return".*

Inspired by the previous paragraph on the cost of the agricultural water supply system as well as the economic affordability of water under the General Comment, one major difference between agricultural water use and water for human use must be reaffirmed. This difference follows from the fact that humans cannot exist without water and they need water in sufficient quantity and quality to survive and satisfy their basic needs. However, receiving agricultural water supply is voluntary though beneficial for farmers. In addition, even though increasing food supply and food security by irrigation is justifiable goals, it cannot be ignored that not all crop productions support these goals.

Conclusions

Article 15/F. (4) of the Water Management Act concerning the rate of the agricultural water supply fee as well as General Comment No. 15 on the right to water share a number of similarities, whereas differences are attributable to the different functions of drinking water and water for irrigation. Similarities can be observed in relation to the operation of the water supply service, including the requirements of 'continuous and efficient operation' and the 'safe supply' of water service. Nonetheless, in relation to the costs, it has to be mentioned that receiving agricultural water supply is voluntary as the majority of agricultural lands are rainfed in Hungary, whereas drinking water is received primarily through the water supply system that should be affordable to everybody.

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- *Reference to a chapter in an edited book:*

Marcou, G. (2016). The Impact of EU Law on Local Public Service Provision: Competition and Public Service. In Wollmann, H., Koprić, I., & Marcou, G. (Eds.), *Public and Social Services in Europe: From Public and Municipal to Private Sector Provision*. Basingstoke: Palgrave Macmillan, pp. 13–26

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