

**The Necessity of Consumer Law for Effective Competition and a More
Robust Enforcement of Competition Law**

A Comparative Analysis of the EU and Georgian Legal Systems

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Abstract

In 2012, in the midst of negotiations to sign the free trade agreement with the EU, the Georgian Parliament adopted a new competition law. The new statute was based on the EU competition law model, in accordance with the recommendations of the EU Commission. The law reform was rather unusual, not only because it reintroduced competition law seven years after abolishing the existing antimonopoly law and closing down the Antimonopoly Service, but also because it was immediately followed by the abolishment of the law on consumers rights protection, effectively eliminating consumer law and its enforcement system in Georgia. This dissertation uses the case of Georgia and conducts a comparative analysis of the EU and Georgian legal systems, to demonstrate the impossibility to foster market competition, maintain its high level and enforce competition law and antitrust policies fruitfully, in the absence of consumer law.

According to a widely shared opinion, a high level of market competition is in the interests of consumers, as it delivers to them low prices, good quality and a wide selection of goods and services. Contrary to this belief, this work argues that while market competition has immense potential, the mere liberalisation of markets and introduction of competition do not guarantee any benefits for consumers, unless the process is accompanied by effective consumer protection policies.

Consumers fail to take advantages of competitive market structure. Moreover, neither market competition can be successfully maintained, nor competition law enforced without actively engaging consumers. The latter hold a critical role in daily market operations and in

competition law enforcement. However, consumers are not naturally prepared and equipped with suitable skills for this role. The average consumer is a weak, irrational thinker, can be easily manipulated, and lacks knowledge and confidence to protect her interests. It is the goal of consumer law to turn her into a market actor who can contribute to competition with their rational behaviour and actively participate in the law enforcement process as well.

In order to verify this assumption, the research analyses substantive, procedural and institutional aspects of competition and consumer laws. It identifies consumer welfare as one of the primary objectives of competition law, and employs comparative-historic analysis to explore the rationale of consumer law, criticising the narrowness of the legal notion of consumers, for leaving all the non-human actors out of the regulations. The research relies on the finding of behavioural law and economics and challenges the mainstream consumer image for being unrealistic. It examines procedures through which consumers can participate and contribute to competition law enforcement process, and seeks to define the optimal institutional design for the enforcement authority in Georgia, after advocating for and predicting the inevitable reintroduction of consumer law.

Table of Contents

Introduction

Chapter I. Goals of Competition Law

1. The need for clarity of objectives
2. Historical overview
 - 2.1 The birth of antitrust law
 - 2.2 Transformation of the European approach throughout the twentieth century
3. Influential schools of thought of competition law and antitrust theory
 - 3.1 The Harvard School
 - 3.2 The Chicago School
 - 3.3 Ordoliberalism
4. Objectives of EU competition law
 - 4.1 Introduction
 - 4.2 Market integration
 - 4.3 Competition process
 - 4.4 Consumer welfare
5. The notion and statutory basis of consumer welfare
6. The birth, evolution and current state of competition law in Georgia
 - 6.1 The total absence of market competition in Georgia, until restoring independence in 1991
 - 6.2 The rise and fall of the first antimonopoly legislation of Georgia
 - 6.3 The contribution of Europeanization process to the development of Georgian competition law
 - 6.4 Objectives of Georgian competition law
 - 6.5 Seeking for consumer welfare in Georgian competition law
7. Conclusion

Chapter II. The Notion of Consumer and the Rationale of Consumer Law

1. Introduction
2. The notion of consumer in competition law

2.1 Defining consumer in EU competition law

2.2 Defining consumer in Georgian competition law

3. The notion of consumer in EU consumer law

4. The birth and evolution of consumer protection law

5. The history of consumer protection law in the EU

6. The rationale of consumer protection and contradictory aspects of the notion of consumer

6.1 Market failures and a critical role of consumer law in addressing them

6.2 The economic nature of consumer law and other secondary features

6.3 Market evolution and the emergence of active and confident consumers

6.4 Challenging the narrow notion of consumer

6.5 Vulnerability of legal entities and a crucial role of consumer law in addressing the problem

6.5.1 The rise of SMEs and challenging traditional views regarding business decision-making

6.5.2 Behavioural biases in a decision-making process of SMEs

6.5.3 Outdated stereotypes of the powerful business and the weak consumer

6.5.4 Redefining consumer in EU law

6.5.5 Classifying SME-involved market transactions

7. History of consumer rights protection law in Georgia

7.1 1918 Constitution of the Democratic Republic of Georgia

7.2 Georgia in the period of the Soviet Union

7.3 Development of Georgian consumer law after 1991

8. Consumer-related legal provisions in Georgian legislation

9. Defining consumer in Georgian consumer law

10. Conclusion

Chapter III. The Image of the Consumer

1. Introduction

2. Consumer images
 - 2.1 The average consumer benchmark
 - 2.2 The average consumer standard discussed in EU case law
3. Challenging the average consumer benchmark
 - 3.1 Behavioral analysis of the image of the consumer
 - 3.1.1 Relevance of behavioral analysis for the subject matter of this dissertation
 - 3.1.2 The origins of behavioral economics
 - 3.1.3 Consumer behaviour
 - 3.2 Lessons from behavioral studies
 - 3.2.1 “Calimero” Consumers
 - 3.2.2 “Calimero” legal entities
4. Vulnerable Georgian Consumer
5. Primary directions of EU consumer law
6. Informational remedies
 - 6.1 Information as for the primary tool in the hands of consumers
 - 6.2 The costs of informational remedies
 - 6.3 Motivating the private sector to provide information and educate consumers
 - 6.4 The limitations of informational remedies and how to avoid them
 - 6.5 Nudges, when informational remedies are not effective
7. The inevitable failure of competition law in the absence of consumer law
8. The contribution of consumer law to competition law enforcement
9. Conclusion

Chapter IV. Consumers’ Access and Participation in Competition Law Enforcement

1. Introduction
2. Primary objectives and forms of competition law enforcement
3. Public enforcement of competition law in the EU
 - 3.1 The need for engaging consumers in the process of public enforcement
 - 3.2 Lodging a complaint to the enforcement authority
 - 3.3 Limited resources of the enforcement authorities and a practice of priority setting

- 3.4 Rejecting a complaint, due to the complainant's ability to litigate
- 3.5 Settlements and informal procedures of the enforcement authorities
- 4. Public enforcement of competition law in Georgia
 - 4.1 Initiating an investigation
 - 4.2 Non-existence of priority setting mechanism
 - 4.3 The need for innovative and informal forms of enforcement
 - 4.4 Summary
- 5. Private enforcement of competition law in the EU
 - 5.1 A brief history of private enforcement in the EU
 - 5.2 Ex-ante deterrence with private actions
 - 5.3 Consumers as private enforcers
 - 5.4 The most common challenges for private enforcers
 - 5.4.1 Legal standing
 - 5.4.2 Pass-on defense
 - 5.4.3 The damages suffered without purchasing infringement-related goods and services
 - 5.4.4 Access to evidence
 - 5.4.5 Calculation of damages
 - 5.4.6 The litigation culture
 - 5.5 Collective actions
 - 5.6 Summary
- 6. Private Enforcement in Georgia
 - 6.1 The current status-quo
 - 6.2 Problems of Georgian private enforcement system
 - 6.2.1 Time limitation to take an action
 - 6.2.2 Collective redress
 - 6.2.3 Suffering from damages without purchasing infringement related goods and services
 - 6.2.4 Relevance of the case law of the EU courts
 - 6.2.5 The competent court

6.2.6 Summary

7. Conclusion

Chapter V. Institutional Design of the Enforcement Authorities

1. Introduction
2. Defining the scope
3. Literature review and research gap
4. Institutional autonomy of EU Member States and consequential challenges
5. The wave of redesigning market regulating authorities around the EU
 - 5.1 EU Commission and DG Comp
 - 5.2 CNMC, Spain's "super-regulator"
 - 5.3 Netherlands, Authority of Consumers and Markets
 - 5.4 The UK, Competition and Markets Authority
 - 5.5 Denmark, Competition and Consumer Authority
 - 5.6 Finland, Competition and Consumer Authority
 - 5.7 Ireland, Competition and Consumer Protection Commission
 - 5.8 Portugal, sole responsibility authorities
 - 5.9 France, rejecting a two-pillar model
 - 5.10 Common tendencies
6. Design of enforcement and regulatory authorities in Georgia
 - 6.1 Brief historical analysis
 - 6.2 Georgian competition agency
7. Issues to be considered regarding institutional design
8. Designing future Georgian enforcement authority of competition and consumer laws
9. Conclusion

List of Abbreviations

AA - EU-Georgia Association Agreement

ACM - Authority for Consumers and Markets [Netherlands]

AdC - Portuguese Competition Authority (*Autoridade da Concorrência*)

AFTC - Agency of Free Trade and Competition

AG - Advocate General

B2B - Business to business

B2C - Business to consumer

CA - the Netherlands Consumer CA Authority

CC - Competition Commission [the UK]

CCG - Constitutional Court of Georgia

CCPC - Competition and Consumer Protection Commission [Ireland]

CEO - Chief Executive Officer

CESL - Common European Sales Law

CFR - Common Frame of References

CFREU - Charter of Fundamental Rights of the European Union

CJEU - Court of Justice of the European Union

CMA - Competition and Markets Authority [the UK]

CNMC - National Authority for Markets and Competition [Spain]

DCFR - Draft Common Frame of references

DCFTA - Deep and Comprehensive Free Trade Agreement

DG - Directorate-General

DG COMP – Directorate General for Competition

DG ECFIN - Directorate-General for Economic and Financial Affairs

EAEC - European Atomic Energy Community (Euratom)

EC - European Community

ECJ – The Court of Justice

ECSC - European Coal and Steel Community

EEC – European Economic Community

EEC Treaty - Treaty Establishing the European Economic Community

EU - European Union

GC - General Court (former the Court of First Instance)

GCA – Georgian Competition Agency

GCC - Georgian Civil Code

GCPC - Georgian Civil Procedural Code

GNCC - Georgian National Communication Commission

GNERC - Georgian National Energy and Water Supply Regulatory Commission

ICN- International Competition Network

KFST - Danish Competition and Consumer Authority

KKV - Finish Competition and Consumer Authority

LE - large enterprise

LGC – Law of Georgia on Competition

MeE – Medium enterprise

MeE2MeE – Medium enterprise to medium enterprise

MiE – Micro enterprise

MiE2MeE - Micro enterprise to medium enterprise

MiE2SE - Micro Enterprise to small enterprise

NCA - National Competition Authorities

NMa - the Netherlands Competition Authority

OECD - Organisation for Economic Co-operation and Development

OFT - Office of Fair Trading [the UK]

OPTA - the Netherlands Independent Post and Telecommunication Authority

PCA - Partnership and Cooperation Agreement (Georgia & EU)

R&D – Research and development

SE – Small enterprise

SE2MeE - Small enterprise to medium enterprise

SE2SE - Small enterprise to small enterprise

SME - Small or medium enterprises

SME2B - Small or medium enterprise to business

SME2C - Small or medium enterprise to consumer

SME2LE - Small or medium enterprise to large enterprise

SME2SME - Small or medium enterprise to small or medium enterprise

TEU - Treaty on the European Union

TFEU - Treaty on the Functioning of the European Union

UN –United Nations

US/USA – United States of America

WWII - World War II

The Necessity of Consumer Law for Effective Competition and a More Robust Enforcement of Competition Law

A Comparative Analysis of the EU and Georgian Legal Systems

Introduction

Competition is an essential feature of a free market economy. Scholars claim and empirical studies manifest the beneficial effects of market competition.¹ It is an engine that runs market efficiently, creates choice among the diversity of goods and services, ensures their high quality and competitive prices. Moreover, competition encourages care for consumers, efficient production and turns the economy into a stronger and competitive one in the global arena.²

Despite the widespread ideas about a self-regulating market,³ this dissertation shares the

¹Adam Smith, *Wealth of Nations* (Hayes Barton Press 2001); William Kovacic, 'Antitrust Policy: A Century of For the limitation of competition, see: Maurice Stucke, 'Is Competition Always Good?', *J Antitrust Enforcement* (2013) 1 *Journal of Antitrust Enforcement* 162–197. AE Rodriguez and Ashok Menon, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010).

² See: Chapter I, Section 4, *Objective of EU Competition Law*

³ As Adam Smith claims in his outstanding work *The Wealth of Nations*, market self-regulates itself, by the help of the "invisible hand," and there is no need for further intervention from outside. In the words of Smith, "Every individual [...] neither intends to promote the public interest, nor knows how much he is promoting it [...] he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention." See: Smith (n 1). Book IV, Chapter II, 456, [9].

Based on Smith's work, Vincent de Gournay developed a theory of *laissez-faire*, in the eighteenth century. More information about *laissez-faire* theory and regarding the attempt of implementing it in Georgia will be discussed in Chapter I, Section 6.2. *The rise and fall of the first antimonopoly legislation of Georgia*; See also: UC Mandal, *Dictionary Of Public Administration* (Sarup & Sons 2007) 25; Gilbert Faccarello and Heinz D Kurz, *Handbook on the History of Economic Analysis Volume II: Schools of Thought in Economics* (Edward Elgar Publishing 2016) 89; David Williams, *The Enlightenment* (Cambridge University Press 1999) 51.

position that competition cannot be maintained naturally. So-called market failures⁴ make perfect, self-regulating competition⁵ unachievable. In order to avoid or correct market failures and ensure intense competition, state intervention in the market is necessary. For that purpose competition law is one of the most widely used and effective legal mechanisms worldwide. Moreover, as noted by Nagy, competition law is globally used thanks to its universal language of economics that does not limit its suitability only to particular jurisdictions.⁶

Competition law of the EU is one of the world's leading competition law systems.⁷ Arguably, it is the best-developed field of EU law as well.⁸ There is a compelling reason why the EU dedicates such an exceptional attention to its competition policies. Already for more than 60 years, the EU has been striving toward economic integration.⁹ The internal market is the

⁴ For more information about market failures, see: Chapter II, Section 6.1 *Market failures and a critical role of consumer law in addressing them*

⁵ Perfect competition is not a real life phenomenon, but a theoretical concept, acting as a “guiding star” and a reference, in order to explain certain business behavior. It will be further discussed in Chapter I, Section 3, *Influential schools of thought of competition law and antitrust theory*

See also: Robert H Bork, *The Antitrust Paradox. A Policy at War with Itself*. (New York: Free Press 1978) 98; Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 46, 47; Mark Steiner, *Economics in Antitrust Policy: Freedom to Compete Vs. Freedom to Contract* (Universal-Publishers 2007) 60; Richard L Gordon, *Antitrust Abuse in the New Economy: The Microsoft Case* (Edward Elgar Publishing 2002).

⁶ Csongor István Nagy, *EU and US Competition Law: Divided in Unity?: The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints* (Routledge 2013) 1.

⁷ It is conventional wisdom that the US and the EU possess the leading competition law systems. Despite the fact that the US antitrust law has much longer history, Gerber argues that nowadays, majority of competition law systems in the world resemble the European model. See: Thomas MJ Möllers and Andreas Heinemann, *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007) 431; Kirsty Middleton, Barry Rodger and Angus MacCulloch, *Cases and Materials on UK and EC Competition Law* (OUP Oxford 2009) 14; Mario Siragusa and Gianluca Faella, ‘Trends and Problems of the Antitrust of the Future’ (2012) 1, 2.

⁸ Raphael Bossong and Helena Carrapico, *EU Borders and Shifting Internal Security: Technology, Externalization and Accountability* (Springer 2016) 142.

⁹ What can be referred as the European project, started in 1950, with Robert Schuman's proposal to establish the ECSC. However, a more direct ancestor of the EU can be the EEC, established in 1957. The same year was established Euratom. In 1967 so called the Merger Treaty was enacted, uniting the ECSC with the EEC and Euratom, forming the EC. In 1993, the EC was transformed into the EU. Despite changing names, increasing the number of Member States, expanding its territories and competences, all these communities are parts of the same process, with shared history. Therefore, when talking about the past of the EU, it automatically implies the EC and the EEC.

ultimate economic objective for the EU; competition law, as a common economic policy for the union, is particularly suitable and efficient mechanism to achieve this goal.¹⁰

The origins of EU competition law dates back to the 1950s and are related to the founding fathers of the European Community and their vision of economically inter-related European states.¹¹ For decades EU competition law has been evolving, changing, growing substantially and expanding geographically.¹² If in the past the process had been limited within the borders of the EU,¹³ nowadays EU competition law has become a product of export. As a mechanism of Europeanisation,¹⁴ it is actively used by the EU's partner states, to harmonise with the *acquis communautaire*, as a necessary preparatory step to integrate with the internal market.¹⁵

It was under such circumstances, within the framework of the negotiations regarding the AA/DCFTA with the EU, that Georgia adopted the LCA in 2012. The law was modelled after the EU competition law system. After signing the AA with the EU in June 2014, the GCA was also created. For many years, this was one of the most significant and highly anticipated legal reforms in Georgia. Being a Georgian national and specialised in EU law, I found it

'EUROPA - The History of the European Union' <http://europa.eu/about-eu/eu-history/index_en.htm> accessed 28 October 2017.

¹⁰ See: Chapter I, Section 4.2, *Market Integration*

¹¹ Daniel Sokol, 'A Legal-Historical Review of the EU Competition Rules' 8 April 2013, Antitrust & Competition Policy Blog.

¹² Kiran Klaus Patel, Heike Schweitzer and Stephen Wilks, *The Historical Foundations of EU Competition Law* (OUP Oxford 2013) 11; Siragusa and Faella (n 7). 1, 2

¹³ Inge Govaere and others, *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers 2013) 373; Van Bael & Bellis (Firm), *Competition Law of the European Community* (Kluwer Law International 2005) 118; Maher M Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 180, 181.

¹⁴ Katalin J Cseres, 'Accession to the EU's Competition Law Regime: A Law and Governance Approach' (2014) 7/9 Yearbook of Antitrust and Regulatory Studies, (YARS) 35.

¹⁵ A study of this phenomenon, on the example of Georgia is given in Chapter I, Section 6.3, *The contribution of Europeanization process to the development of Georgian competition law*

interesting to conduct a comprehensive research of this new field of law and compare it to the “parent” European model.

Apparently, legal transplantation does not create clone systems, but it transforms the existing one into a new model, suited to the local environment.¹⁶ The generated model is already different from its source, with its unique features and objectives, and the Georgian transplant is not an exception either. Before maturing itself to the point of conducting this large-scale reform, Georgia has gone through a long and unusual path of a love-hate relationship with antimonopoly law and other market-related policies.¹⁷ Apparently, this experience has influenced the development of the transplant. Another noticeable difference is the nature of the Georgian and EU models. Georgia adopted a national competition law, while EU competition law is a supranational legal framework and evidently there will be specific differences only because of that factor. Moreover, as noted by Zukakishvili, the Georgian transplant, compared to its highly developed source model, is downsized, simplified and adapted to the local legal order and market conditions.¹⁸ Georgian law does not follow the EU model in every aspect. In the opposite, there are some significant deviations in the competences of the GCA, in its enforcement powers and procedural rules.¹⁹

¹⁶ Otto Khan-Freund, ‘On Uses and Misuses of Comparative Law’ (1972) 37 *Modern Law Review* 1. M. Freidman, ‘Review of Society and Legal Standing by Alan Watson, 6, n. 1, 1979’ (1979) 6 *British Journal of Law and Society* 127–129..

¹⁷ See: Chapter I, Section 6.2, *The rise and fall of the first antimonopoly legislation of Georgia*

¹⁸ Zukakishvili, ‘Two Years after the Legal Transplantation in Georgia – the Best yet to Come’ [2016] SCF (Sofia Competition Forum) Newsletter 42.

¹⁹ For example, the GCL establishes much lighter fines and penalties for infringers and shorter investigation period for the authority. The Agency is also significantly limited in procedural and enforcement competences. There is no a system for priority setting, in order to filter the cases. There are no individual exemptions from restrictive agreements. The rules on state aid are also not aligned with the EU model, allowing the authority to issue only recommendations, which are optional for the government. See: Zukakishvili (n 17). 43; ‘Sofia Competition Forum Newsletter’ (November 2016). 3; Law of Georgia on Competition 2012 [No 2159]. Art. 7, 12-15, 24, 25, 32, 33

Beyond the given procedural and enforcement differences, there is a much bigger and systematic problem that distinguishes Georgia from the EU model. While EU law recognizes the close connection between competition law and consumer protection and in the EU the given fields are developed, applied and enforced in a harmonious, cooperative manner, Georgia does not even have a functioning consumer law.²⁰ However, this has not barred Georgia from adopting similar consumer-oriented standards of competition law, as they are in the EU. More specifically, Georgia reintroduced competition regulations in 2012 and abolished already existent consumer law on the same year.²¹ While competition law was heavily amended in 2014, no advancements have taken place in the field of consumer law.

The current regulations of Georgia are illogical and do not fit either the EU approach or the economic rationale of the given legal bodies. Georgia uses an interventionist approach on the supply side of the market but favours a *laissez-faire* approach on the demand side.²² These two models do not fit but contradict each other. This dissertation aims to prove this point, using comparative analysis methodology. More specifically, this work is determined to demonstrate the vanity of any attempt to maintain a high level of competition in a market and enforce competition law effectively, without paying due attention to consumer rights protection.

Georgia gives an extreme example of neglecting consumer protection while attempting to develop a competition law system. In this manner, Georgian transplant is an interesting phenomenon and a good reference to study interdependence between competition and

²⁰ See: Chapter II, Section 7.3, *Development of Georgian consumer law after 1991*

²¹ See: Chapter I, Section 6.2 *The rise and fall of the first antimonopoly legislation of Georgia*

²² More information about *laissez-faire* theory and regarding the attempt of implementing it in Georgia will be discussed in Chapter I, Section 6.2. *The rise and fall of the first antimonopoly legislation of Georgia*

consumer laws. However, the relevance of the topic is not strictly limited to Georgia. While analysing the stated question, the research will demonstrate not only necessity of consumer law for effective competition and more robust competition law enforcement, but it will take a broader approach to examine close ties between the given legal bodies and evaluate potential synergies. The study will cover existing regulations within both jurisdictions, in order to identify their weak points and seek improvements, suggesting how to regulate problematic issues. Therefore, the paper not only demonstrates the vital need for consumer law but it also explores the means and ways, to utilize the potential of consumer law most fruitfully. In light of the context of the adoption of competition law in Georgia, the analysis also covers the dynamics and risks connected to legal transplants, and how adequately the EU promotes such processes.

In order to successfully answer the raised questions, the dissertation employs the comparative analysis methodology. Each chapter dedicates separate parts to study the same issues simultaneously in the EU and Georgia. The research analyses Georgian and EU legal acts, decisions of the enforcement authorities and case-law of the EU courts, along with judgments of Georgian Constitutional and Common Courts. While the two jurisdictions are necessarily the primary focus of the research, in particular instances, references are made to other well-developed systems, such as US antitrust law. Moreover, while EU law is predominantly discussed at the Union level, in various parts the dissertation turns to selected Member States' legislation and case-law, with the aim to show the best practices developed within the EU, or the common problems met at the national level. This approach is most extensively used in the analysis of the institutional design of enforcement authorities (Chapter 5).

Most of the academic contributions in the field focus on substantive law aspects. However, in order to get a complete picture, this dissertation studies the topic also from a procedural and institutional perspective. Moreover, in light of the economic inspirations of the two bodies of law, ample attention is devoted to relevant economic concepts and theories, to demonstrate better the rationales underlying the regulations in force. The paper also actively relies on behavioral sciences, which, by questioning the classical economics' assumption of the perfectly rational consumer, illustrates the risks inherent to consumer behaviors, when they lack protection and empowerment, provided only by consumer law. In addition, the historical analysis of the evolution of consumer protection and competition law is employed to better explain the intertwined rationales and functions of the two disciplines, and to allow the readers to understand the context of their landmark developments better.

There is an exceptionally rich academic output that studies various aspects of competition and consumer laws from legal and economic perspectives, particularly in Europe. The same cannot be said for Georgia, where it is only possible to find a few relevant short academic articles and dissertations, studying only some aspects covered by this paper. A particularly interesting source is Fetalava's dissertation.²³ In his capacity of being a former Deputy Chief of the Antimonopoly Service, he provides a valuable first-hand insight into the daily operations of the authority. However, due to his professional relations, one might question the neutrality of some of his assessments. Other relevant sources include articles of Lapachi,²⁴

²³ Slava Fetalava, 'The Evolution of the Competition Theory and Antimonopoly Regulation in Georgia' (Grigol Robakidze State University 2008).

²⁴ See: Ketevan Lapachi and Natia Kutivadze, *The Institutional Framework for Competition Regulation in Georgia*, (EUGBC 2015); Ketevan Lapachi and Mamuka Tivlisvili, 'Georgia', *Competition Regimes in the World - A Civil Society Report* (CUTS International 2006) 383, 384.

Menabdishvili,²⁵ and blogs of the ISET Policy Institute, which often publishes behavioral analyses of consumer-related issues.²⁶

All the sources mentioned above discuss only some aspects of this dissertation. In this perspective, the given work represents the first large-scale and comprehensive analysis of Georgian competition and consumer laws. Moreover, this research started in 2013, in the birth phase of Georgian competition law. Therefore, as a contemporary witness and chronic of the initial years of the reform, its implementation, setting up of the authority and the first significant cases, the paper contains valuable information and analysis, which can be revisited and re-evaluated by interested scholars in the future. However, the novelty and contribution of this dissertation are not limited only to Georgian law.

While competition and consumer laws are widely covered in academic literature and their mutually beneficial nature is commonly recognised, there are specific factors that make this dissertation innovative. As Stuyck manifests, competition policy and consumer welfare have been vastly discussed by economists, but not by lawyers.²⁷ An exceptional work in this perspective is Cseres' *Competition Law and Consumer Protection*,²⁸ which has been a valuable source for this study as well but differs from this dissertation in its jurisdictional focus.

²⁵ See: Solomon Menabdishvili, 'For the Issue Related to the Definition of Key Terms of Provisions Prohibiting the Cartel Activities', *Journal of Law*, Ivane Javakhishvili Tbilisi State University, N1, 2015' [2015] *Journal of Law*, Ivane Javakhishvili Tbilisi State University 160.

²⁶ The ISET Policy Institute (ISET-PI) is a think-tank in Georgia, based at the International School of Economics of Ivane Javakhishvili Tbilisi State University. To see the blog, visit: <http://iset-pi.ge/index.php/en/iset-economist-blog-2>

²⁷ Jules Stuyck, 'EC Competition Law After Modernisation: More than Ever in the Interest of Consumers' (2005) 28 *Journal of Consumer Policy* 1. 6

²⁸ Cseres, *Competition Law and Consumer Protection* (n 5).

This paper analyses the relationship between competition law and consumer protection law from a specific, original angle. Whenever the interdependence of the two disciplines is discussed, usually the emphasis is made on a beneficial nature of competition law for consumers. There are no comprehensive studies on how essential consumer law is in supporting competition law enforcement, and how vital role it plays to maintain a competitive market.²⁹ Moreover, while it is possible to find some contributions on the interplay between competition and consumer laws, their scope is limited to specific, narrow aspects.³⁰ This dissertation aims to build on the existing scholarship to provide a comprehensive analytic framework and answer the questions that remain open and unanswered at European level and beyond. This goal is attained by employing a combination of methodologies and bringing a new emerging jurisdiction into the discussion, in order to offers solutions which are not merely theoretical but have a paramount practical relevance.

The paper is organized in five chapters Chapter I starts with an examination of the primary goals of competition law, seeking for the presence of consumers and their interests. It

²⁹ For example, 2015 book by Ioannidou is an excellent study regarding consumers' role in competition law enforcement, but its scope is rather narrow and limited to consumer involvement in private EU competition law enforcement. See: Maria Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (Oxford University Press, Incorporated 2015).

³⁰ For example, Kovacic, Jenny, Lowe, Crane, Fox, Ottow, Hyman, Cseres, have published fascinating articles about institutional design of competition and consumer law enforcement authorities. Even regarding that narrow field, each of the given authors stresses about existing research gap and the necessity to explore the topic further. See: Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century — the Experience of the European Commission and DG Competition' <http://ec.europa.eu/competition/publications/cpn/cpn2008_3.pdf> accessed 18 October 2015.; Annetje T Ottow, 'Erosion or Innovation?The Institutional Design of Competition Agencies—A Dutch Case Study' (2014) 2 *Journal of Antitrust Enforcement* 25. Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2011) pt Introduction; William E Kovacic, 'The Institutions of Antitrust Law: How Structure. Shapes Substance' (2012) 110 *Michigan law review*. William E Kovacic and David A Hyman, 'Competition Agency Design: What's on the Menu?' (2012) 8 *European Competition Journal* 527, 135. William E Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future' [2012] *GWU Legal Studies Research Paper No. 2012-22*; Katalin J Cseres, 'Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law' 9.

emphasises the importance for competition law to have clear objectives in order to be effective and properly enforced. Through a historical analysis, it reviews the process of birth of antitrust law in the US and later in the EU, identifying the background circumstances that led to its creation. Then, it provides an overview of the mainstream economic schools, with their diverging and sometimes even contradictory ideas on the role, functions, and objectives of competition law.

On this basis, Chapter I identifies the dominant goals of EU competition law, in those of market integration, competition process and consumer welfare. While each goal is, to a different extent, related to consumer protection, consumer welfare is the most evident *trait d'union* between competition law and consumer law. Therefore, its notion is further analysed, only to conclude that the concept is highly obscure, and fails to be a practical guide for competition law application and enforcement.

The final part of Chapter I focus on Georgia. The historical overview of the birth and evolution of its competition law during the last two and a half decades shows clear geopolitical motivations behind the recent reform, and the central role played by the EU in this process. The textual analysis of the law and its declared objectives also demonstrate the indirect presence of Europeanisation purposes. Consumer welfare, it is not listed as a goal, but the law seems to be concerned about consumers and their interests.

In order to lay the foundations for the subsequent analysis of the interplay between competition law and consumer law, Chapter II defines the notion of consumer, to clarify who or what stands behind the term and to verify whether or not competition and consumer laws interpret the concept similarly, and with which rationales. The analysis of the EU and

Georgian competition law systems evidences how the notion of consumer is interpreted in its broadest meaning and is used as a synonym for the concept of customer. On the contrary, EU consumer law defines consumers in a very narrow manner – a decision that Chapter II challenges on the basis of the economic rationale of consumer law.

The analysis includes an extensive historical review, which illustrates the reasons that triggered the introduction of consumer protection rules. It argues that emergence of consumer societies, in the post-WWII period, created new forms of market failures, which were unresolvable with traditional legal institutions. Inability to correct or avoid them damaged market competition. In response, consumer protection rules were specifically designed to deal with the given market failures. While competition law is also a necessary instrument in this perspective, particular market failures are treatable only by educating, empowering and protecting consumers – a goal that is primarily pursued through consumer law.

After having established the economic nature of consumer law, its dependence on the market and its developments become even more evident when observing how new business models challenge traditional views on consumers and urge the law to respond to such developments with the introduction of new concepts and theories. Eventually, this discussion leads to conclude that EU consumer law vastly fails to comply with its economic rationale, by artificially narrowing down the notion of consumer and tying the concept to human nature. As a result, the consumer can only be a natural person. Such interpretation lacks any economic reasoning and can predominantly be justified by political purposes.

The discourse is consequently directed to scrutinise the vulnerability of SMEs. The application of the rational decision-making theory and the discoveries of behavioural studies

prove that the general perception of business as always powerful is flawed, and that small enterprises bear significant risks, similar to individuals. Such enterprises are equally capable of creating market failures and distorting market competition, the avoidance of which is the primary function of consumer law. A more in-depth analysis of the recent EU legislative interventions shows a visible trend towards the recognition of this problem and a slow expansion of the scope of EU consumer law to cover also legal entities.

The chapter ends with exploring the notion of consumer in Georgia. It analyses the former law on Consumer Rights Protection, abolished in 2012, various consumer-related norms scattered around Georgian legislation and the draft law that has been submitted to the Parliament in 2013. While currently Georgian law does not contain any precise definition of a consumer, the bill introduced in 2013 defines consumer in a narrow manner, similarly to the EU model. Interestingly, the old law had a more advanced approach, offering protection to legal entities in exceptional cases.

In line with the majoritarian doctrine, this dissertation distinguished between the notion and the image of consumer. The latter defines the consumer's nature and characteristics, in order to establish a standard model of average consumer, to be used as a benchmark for legal regulations. Chapter III explores the image of consumer provided by EU directives and the case law of EU courts, showing the emergence of a notion of average consumer who is a reasonably well-informed, observant and circumspect market player, to which EU consumer law tailors its protection and support. However, the validity of the average consumer benchmark is increasingly questioned, as behavioral studies have demonstrated that actual consumers are far more vulnerable, and that in addition to the asymmetry of information and

weak bargaining position, they also suffer from cognitive biases and bounded rationality. Similar studies also reaffirm that the image of legal entities as always powerful side of the market transactions is false, and that companies might also suffer consumer-like weaknesses.

Building on these results, Chapter III argues that consumers should be empowered, supported and protected taking into consideration their actual abilities. Only in such case consumer law will be able to effectively address consumers' vulnerability, allowing them to play a critical role in supporting market competition and competition law enforcement. The latter is an essential part, as no objective of competition law will be attained without its successful enforcement. Involving consumers in this process is important. They can play a significant role in public enforcement and can be a particularly crucial catalyst for private enforcement development. The potential of consumers is vast, but its realisation critically depends on their rationality, education, confidence, and ability to make thoughtful decisions.

Chapter IV first identifies the objectives of competition law enforcement, focusing on deterrence, compensation, and remediation. While such goals are shared for public and private enforcement, each of them may give more weight to specific objectives than to others. Initially, the study focuses on public enforcement and particularly focuses the limited resources of enforcement authorities and the inevitable need they have to prioritise specific cases. A system of priority setting allows the public authority to easily reject consumer initiated cases, once they do not fit with its pre-determined priorities. This makes, however, the EU and Georgian public enforcement system offering little room for consumers. To tackle the problem, the chapter explores potential alternative and informal procedures, which competition authorities can successfully experiment with.

The second part of the analysis focuses private enforcement, showing the increasingly more important role it has been playing in EU competition law, and the potential consumers have in its operation. Steps have been taken to simplify private actions for consumers. Yet, the path to start an action and successfully seek redress is full with barriers. Stand-alone claims of individual consumers are almost unwinnable, making collective actions an extremely useful alternative. The chapter analyses them, and the significant progress recently taken in the EU in this direction. However, critical issues remain unregulated, making the system not ineffectively functional, and still in need of further reform.

Chapter V studies the institutional design of enforcement authorities, to demonstrate the interconnections between competition law and consumer law at the institutional level. State authorities, often the same one, enforce both legal fields and how effectively the laws will be enforced and how successfully the established goals will be achieved vastly depend on the ways these authorities are constructed, funded or managed. The chapter focuses on selected national institutional reforms occurred in recent years across the EU, with the aim to identify modern trends and best practices, and formulate on this basis some recommendations for Georgia, to be followed, upon the adoption of a proper consumer protection statute, which would end its paradoxical regulation of the market.

On the basis of these findings, the dissertation concludes that consumer law is vitally important to develop and maintain competition in the market and to ensure the effective application and enforcement of competition law. The two fields are so closely intertwined that one simply cannot function properly without the support of another. Under this assumption, the paper advocates for the introduction of consumer law in Georgia, providing

recommendation and suggestions for this purpose, and advances a set of proposals tackling substantive, procedural and institutional matters, oriented to make the cooperation between competition law and consumer laws smoother and more successful.

Chapter I. Goals of Competition Law

1. The need for clarity of objectives

A starting point for this dissertation is to define the objectives of competition law. How important and necessary consumer law is for competition law is the primary question of this research, and to successfully address it, the values that competition law targets to attain should be clearly established. For this purpose, relevant EU legal acts, case law, and soft law instruments will be analysed, along with scholarly materials. Initially, the analysis will inquire whether EU competition law has a single dominant goal or there is a multitude of objectives. The research will then proceed to determine the role of consumers and the presence of their interests in principal objectives of competition law.

Purposefully targeting consumers and caring for their interests is a demonstration that consumers are direct or at least indirect beneficiaries of competition law. If their well-being and welfare are essential issues for competition law, then consumer law might also be a relevant and necessary tool, to accomplish competition law objectives, as it is tailor-made for the purpose to protect consumer interests. This analysis, exploring the correlation between consumers and competition law goals, will create the basis to examine the significance and necessity of consumer law for competition law.

Consumers, as end-users of all goods and services, are either ultimate beneficiaries or ultimate victims of the functioning of the market.³¹ In this perspective, the beneficial nature

³¹ Thomas Erickson J., 'Congressional Record, V. 148, PT. 3, Government Printing Office' (2006) 3398. Hans-W Micklitz, Jules Stuyck and Evelyn Terryn, *Consumer Law: Ius Commune Casebooks for a Common Law of Europe* (Bloomsbury Publishing 2010) ch 1, Section IB; Ioannidou (n 27) 195. Lowe (n 28). Herbert Giersch,

of competition law for consumers is an indisputable conventional wisdom in the legal and economic literature,³² as a more competitive market means lower prices, higher quality and more extensive choice for consumers.³³ However, the question that will be discussed in this chapter is whether these and other advantages are incidental ones, or the policy is intentionally aimed at benefiting consumers.³⁴ The purpose of this inquiry is not merely theoretical, but it has a practical significance, as the objectives of a legal body determine the directions of its enforcement. No system can function properly without having clear tasks it wants to accomplish. Definiteness is even more essential in case of a multitude of goals, in order to rank a specific value in the hierarchy of objectives.³⁵

Clarity of objectives is among the primary elements needed to apply a law in practice, design its system and enforce it successfully. Moreover, explicitly declared goals allow assessing who will benefit, once they are achieved.³⁶ At the same time, specifying the aimed outcomes as definite and measurable ensure that they are successfully implemented without the risk of diverging interpretations.³⁷ This is why economic criteria and concepts are often introduced

Merits and Limits of Markets (Springer Science & Business Media 2012) 232; David A Shore, *The Trust Prescription for Healthcare: Building Your Reputation with Consumers* (Health Administration Press 2005) 36.

³² Daniel Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing 2012) 226; Cseres, *Competition Law and Consumer Protection* (n 5) 1. See also: Eugène Buttigieg, *Competition Law: Safeguarding the Consumer Interest: A Comparative Analysis of US Antitrust Law and EC Competition Law* (Kluwer Law International 2009).

³³ Zimmer (n 30) 223; Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 27) 24; Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press 2010) 88; Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007) 100; Sweta Rao, 'Consumer Protection under Competition Law' (2014) 3 *International Journal of Science and Research* (IJSR) 1500-1504.

³⁴ Frederic Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends', *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer, Cham 2016) 46.

³⁵ Bork (n 5) 50.

³⁶ Ali Farazmand, *Strategic Public Personnel Administration: Building and Managing Human Capital for the 21st Century* (Greenwood Publishing Group 2007) 303.

³⁷ Zimmer (n 30) 56–61; Ronald D Smith, *Strategic Planning for Public Relations* (Routledge 2013) 95–113.

into competition law, as they are traceable and less abstract.³⁸ Otherwise, it would be very challenging to conduct a performance assessment and purpose accomplishment analysis. For the sake of market stability, it is essential that the actions of enforcement authorities are predictable.³⁹ Such certainty can only be achieved when everyone knows what a competition authority strives for. Substantive law should establish clear objectives, to ensure consistency in enforcement and avoid that its goals are redesigning every time a new chair is appointed to the authority.⁴⁰

The Inconsistent interpretation of objectives is a particularly relevant, topical issue for EU competition law system, where the European Commission and EU courts enforce the law at the Union level, but they share authority with 28 NCAs and national courts.⁴¹ This multitude already creates a challenge, and in order to coordinate coherent enforcement of the law at the national level, it is essential for EU competition law to have well-defined and clear objectives that are not open to different interpretations and speculations.

According to Locke's goal setting theory, the chosen objective should be specific enough to convey what things will be like when the goal is achieved.⁴² It should also identify who or what will benefit and in what specific ways after accomplishing the set purposes. Eventually, once the beneficiaries are known, objectives can guide enforcers in the law enforcement process, facilitating the identification of infringement, according to whose interests they

³⁸ Claus-Dieter Ehlermann and Laraine Laudati, *European Competition Law Annual 1997: Objectives of Competition Policy* (Bloomsbury Publishing 1998) 51.

³⁹ Philip Lowe (n 29) 2.

⁴⁰ Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission' (n 28) 58.

⁴¹ Fabrizio Cafaggi and Horatia Muir Watt, *Making European Private Law: Governance Design* (Edward Elgar Publishing 2010) 152.

⁴² Edwin A Locke and Gary P Latham, *A Theory of Goal Setting & Task Performance*, vol xviii (Prentice-Hall, Inc 1990) 48–52.

harm. To answer the research questions underlying this study, this chapter examines whether harm to consumers is an essential element for finding a competition law infringement and whether the evaluation of an anti-competitive conduct may change if it offers some benefits for consumers. Eventually, reversing this methodology and analysing the factors that are taken into account at the enforcement stage can contribute to identifying the goals when they are not explicitly declared in legislation.

Obscure and abstract objectives can lead a legal body to tremendous practical challenges at the stage of application and enforcement. Bork analysed this issue in the 1970s by examining the dilemmas encountered by an antitrust judge. The author initially discusses whether a judge should be guided by one or several different values. In case of a multitude of objectives, a judge might face conflicting goals that creates the necessity to hierarchise them.⁴³ Bork underlines the importance of definite and hierarchically organized objectives, as “*only when the issue of goals has been settled, is it possible to frame a coherent body of substantive rules.*”⁴⁴

Bork was among the pioneers, who criticised his contemporary antitrust regulations for lack of clarity,⁴⁵ arguing that “*antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law - what are its goals? Everything else follows from the answer we give.*”⁴⁶ The quoted statements demonstrate that the analysis and debate regarding objectives is not a recent one, but the subject to constant discussion.

⁴³ Bork (n 5) 50.

⁴⁴ *ibid.*

⁴⁵ Bork’s idea was that economic efficiency (he referred to it as ‘*consumer welfare*’ but nowadays it is known as total welfare) should have been the single object of competition law. See: Ioannis Lianos, “Some Reflections on the Question of the Goals of EU Competition Law” (CLEs Working Paper Series 3/2013, January 1, 2013) 1.

⁴⁶ Bork (n 5). 50.

Throughout the past century, a number of schools of thought have emerged, analysing disputed aspects of competition law, discussing its goals and suggesting their ideas on what the regulations should aim for. However, the decades-long discussion does not mean that the issue has already been resolved. The questions asked by Bork remain very much topical until today, and this chapter aims to address them from the perspective of EU and Georgian law.

In order to identify the primary objectives of competition law, it is not sufficient to merely look into the legislation, as they might not be clearly and explicitly defined there. The text of the law should be read and analysed along with enforcement decisions and relevant case-law. In the case of the EU, a comprehensive analysis should cover its treaties, the case law of EU courts, the NCAs' practices, and the abundant scholarly sources.

Moreover, policy goals evolve and change in time. In order to identify the current objectives correctly and understand them fully, it is essential to look into their roots through the prism of history. To this end, the following sections will review the birth and evolution of antitrust and competition regulations and the mainstream schools of thought that have strongly influenced and shaped modern antitrust theories and competition laws. Some of the landmark events occurred outside the borders of the EU, but as long as their impact was global, they are relevant and will still be included in this analysis. A similar method will be used with Georgian law. Although the case law and academic scholarship are limited, it will be possible to rely on certain findings in EU law, being it the primary source of inspiration and a model for Georgian competition law.

2. Historical overview

2.1 *The birth of antitrust law*

The creation of antitrust and competition regulations was a response to the industrial, technological and economic developments by the end of the nineteenth century. This context determined their role and objectives; however, the initial goals were not universal, and they evolved throughout time and across multiple jurisdictions. The first country to introduce an antitrust law was Canada when it adopted the Act for the Prevention and Suppression of Combinations in 1889.⁴⁷ In the same period of time, Senator John Sherman submitted his antitrust bill to the US Congress (1888). This landmark statute was approved in 1890 and named as the Sherman Act.⁴⁸ Although Canada adopted antitrust law first, it is the US act that is often credited for originating modern competition law, due to its tremendous influence worldwide.⁴⁹ In both countries the introduction of antitrust rules was a governmental reaction to the public concern over the growing number and power of trusts in the North American economies.⁵⁰

Trust is an ancient legal concept, existing since Roman times.⁵¹ It was further developed in the common law system as a three-party relationship, with a separation of legal and beneficial

⁴⁷ Thomas W Ross, 'Introduction: The Evolution of Competition Law in Canada' (1998) 13 *Review of Industrial Organization* 1, 3; Bruce Dunlop, David McQueen and Michael Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Canada Law Book Inc 1987) 208–231; Brian Cheffins, 'The Development of Competition Policy, 1890-1940: A Re-Evaluation of a Canadian and American Tradition' (1989) 27 *Osgoode Hall Law Journal* 449, 449; WT Stanbury, 'The Legislative Development of Canadian Competition Policy, 1888-1981' [1981] *Canadian Competition Policy Record* 1; Paul K Gorecki, WT Stanbury and Institute for Research on Public Policy, *The Objectives of Canadian Competition Policy, 1888-1983* (IRPP 1984).

⁴⁸ Jenny (n 32). Rudolph JR Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2001) 5, 9.

⁴⁹ 'Competition – Law – History, the Hungarian Cartel Legislation Is 85 Years Old' 10 <http://www.gvh.hu/en//data/cms1032703/gvh25_jogtorteneti_kiadvany_2015_en.pdf>.

⁵⁰ Jonida Lamaj, 'The Evolution Of Antitrust Law in USA' (2017) 13 *European Scientific Journal*, ESJ 154.

⁵¹ Wayne D Collins, 'Trusts and the Origins of Antitrust Legislation' (2013) 81 *Fordham Law Review* 2315.

interests in a group of assets, where one holds and manages another person's property for the benefit of others.⁵² The traditional understanding of the term was challenged and changed from the second half of the nineteenth century, when many corporations started creating cartels, using trust organisational form, allowing them to keep control over multiple subjects while avoiding restrictions of state corporation laws.⁵³ Soon term trust became synonymous for large scale businesses, with centralized management, despite its organisational form.⁵⁴ The "*rise of big business*"⁵⁵ started already in the 1850s, with railroad and communication industries.⁵⁶ During the second half of the 1800s, sugar, steel, petroleum, and transportation industries were dominated by near-monopolistic trusts.⁵⁷

If a single trust has to be selected as paradigmatic of the period, it would be John Rockefeller's Standard Oil.⁵⁸ That is why, probably the best symbol of the era of "*big business*" became an illustration by Udo J. Keppler, published in the *Puck* magazine on September 7, 1904. The cartoon depicts Standard Oil Trust as an octopus, having an oil storage tank as head and wrapping its multiple tentacles around steel, copper and shipping

⁵² Nertila Sulçe, 'Trust as a Relationship Treated by Common Law Legal Systems and as a Relationship Treated by Civil Law Legal Systems. Things in Common and Comparison between the Two Systems.' (2015) 4 *European Journal of Sustainable Development* 102, 221–226; Rino Falcone and Christiano Castelfranchi, *Trust Theory: A Socio-Cognitive and Computational Model* (Wiley 2010) 198.

⁵³ Eleonora Poli, *Antitrust Institutions and Policies in the Globalising Economy* (Springer 2015) 9–29. Collins (n 49) 2279.

⁵⁴ Collins (n 49) 2280.

⁵⁵ The "*Rise of big business*" is a derogatory term, popularized by the end of the nineteenth century, referring to emergence of large scale corporations and common usage of unfair business practices by them. See: David O Whitten and Bessie Emrick Whitten, *The Birth of Big Business in the United States, 1860-1914: Commercial, Extractive, and Industrial Enterprise* (Greenwood Publishing Group 2006); Ron Olson, *Homework Helpers: From Reconstruction Through the Dawn of the 21st Century. U.S. History (1865-Present)* (Career Press 2007) 43–57.

⁵⁶ Richard F Selcer, *Civil War America, 1850 To 1875* (Infobase Publishing 2014) 89.

⁵⁷ Guy B Peters, 'United States Competition Policy Institutions: Structural Constraints and Opportunities' in Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market* (Clarendon Press 1996) 41.

⁵⁸ Collins (n 49) 2315.

industries and their workers, grabbing the US Capitol, the State House and gazing at the White House, as the caption states “next”.⁵⁹ Keppler’s illustration was not particularly original, as similar themes and allegories were often used by various satire cartoonists in the late 1800s and early 1900s, to depict the vast power and greedy nature of monopolies.⁶⁰ These cartoons well illustrate the hostile public opinion toward trusts, usually coming from farmers, small business owners and workers for running roughshod over “the little man’s” interests.⁶¹

In response to the public pressure, politicians started to seek for ways to limit the power of trusts. The process was called “*trust-busting*” and it eventually ended with the adoption of the Sherman Act.⁶² According to the majoritarian opinion, the Act was passed in order to restore the balance between the “*big business*” on the one hand and workers, farmers and smaller businesses on the other.⁶³ It remains disputable what was the ultimate goal of the Congress when adopting the law, whether to increase economic efficiency, to promote small enterprises and create equal opportunities for the business, to achieve consumer welfare, to pursue distributive goals or other social and public policy objectives.⁶⁴ Some even argue that it was a mere populist reaction to the major public outcry against trusts and monopolies.⁶⁵

⁵⁹ Wendy Conklin, *Analyzing and Writing with Primary Sources* (Teacher Created Materials 2015) 185.

⁶⁰ For example, see the following illustrations: Frederic G Keller, ‘The Curse of California’; William Rogers, ‘The Forty T---s, [Thieves], Harper’s Weekly.’; George Luks, ‘The Menace of the Hour’; John Pughe, ‘An English Country Seat and Racing Stable Cost a Lot of Money - and He Knows How to Get It.’; Luther Bradley, ‘Before the Trojan Horse Is Admitted the Puzzled Citizen Will Have to Be Shown a Little More Fully’.

⁶¹ Peters (n 55) 40–41.

⁶² *ibid* 41.

⁶³ Collins (n 49) 2280.

⁶⁴ See: *ibid* 2279–2348. Robert H Lande, ‘Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged’ [1982] 34 *Hastings L.J.* 65. 67; D Turner and Phillip Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Little, Brown & Co, 1978). Bork (n 5). Richard A Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976);

⁶⁵ Peters (n 55) 40.

Whatever the Congressmen's intentions were, the Sherman Act established a new legal order in the marketplace, created business opportunities for SMEs, as it restricted previously widely spread abusive practices of controlling prices and establishing tariff barriers. The US made a choice in favour of competition⁶⁶ and did so while the rest of the world thought that cartels were vastly beneficial.⁶⁷

2.2 Transformation of the European approach throughout the twentieth century

It might be hard to imagine nowadays, but neither has competition been always a desired concept in Europe,⁶⁸ not cartels have been viewed as a “*conspiracy against public*”.⁶⁹ Very much to the opposite, cartels were seen as a legitimate industrial policy and a form of national market governance, often associated with economic stabilisation, security, and welfare.⁷⁰ Cartelization allowed the creation of large-scale producers that were highly valued in the midst of industrialisation.⁷¹ Eventually, certain industries became near synonymous with cartelization.⁷² Furthermore, not only certain industries but whole economies were

⁶⁶ Michael A Utton, *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies* (Edward Elgar Publishing 2011) 20.

⁶⁷ For a comparison, while the US prohibited cartels already by the end the nineteenth century, the rest of the world continued actively to engage with cartels, making them the vital parts of national economies. Eventually, by the end of the WWII, cartels governed around 40% of the world trade. See: Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Edward Elgar Publishing 2010) 23. Jeffrey R Fear, *Cartels and Competition: Neither Markets Nor Hierarchies*, vol Working papers, Vol. 07,011 (Harvard Business School 2006) 15.

⁶⁸ John Agnew and J Nicholas Entrikin, *The Marshall Plan Today: Model and Metaphor* (Psychology Press 2004) 156.

⁶⁹ “*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*” Smith (n 1). Volume I, 145

⁷⁰ Fear (n 65) 1, 15.

⁷¹ ‘Competition – Law – History, the Hungarian Cartel Legislation Is 85 Years Old’ (n 47) 13.

⁷² For example: steel, copper, aluminium, lead, potash, explosives, pharmaceuticals, nitrates, chemicals, salt, cement, paper, fertilizer, oil, alkalis, dyestuffs, hormones, cement, batteries, cables, lamps, glass, electrical equipment, railroad cars, rayon, and many other minor sectors. Fear (n 65) 15; Agnew and Entrikin (n 66) 156.

dominated by cartels. The most notable one was Germany, which was even nicknamed as the “*land of cartels*”.⁷³ Already by 1900, it hosted more than 400 cartels, and the number grew to more than 3000 by 1929.⁷⁴ Almost 2000 cartels existed in Czechoslovakia.⁷⁵ In rather smaller quantities, but still, dozens of cartels existed in other European countries, such as: Austria, Hungary, Britain, and France, as well as in Belgium, Luxemburg, Poland, Finland, Sweden, Netherlands, Norway, Switzerland and Russia.⁷⁶

The conventional wisdom of the time was that too much and too little competition was equally harmful, and the emergence of cartels was a natural process in response to overproduction.⁷⁷ Predominantly, cartels were of voluntary nature. However, there were cases of state-managed forced-cartelization,⁷⁸ as it happened in Germany when National Socialists came into power.⁷⁹ In the UK, for example, so-called “*distress cartels*” were created in response to the decline of some industries, such as textiles and shipbuilding.⁸⁰ Similar measures were used during the Depression⁸¹ in various European states, including Spain, France, and Germany.⁸²

⁷³ Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford University Press 2003) 63–70.

⁷⁴ ‘Competition – Law – History, the Hungarian Cartel Legislation Is 85 Years Old’ (n 47) 13.

⁷⁵ Joel Mokyr (ed), *The Oxford Encyclopedia of Economic History: 5 Volumes: Print and e-Reference Editions Available* (Oxford University Press 2003) vol 1, 125.

⁷⁶ *Ibid.* Fear (n 65) 11; Pál Szilágyi and András Tóth, ‘Historical Developments of Cartel Regulation’.

⁷⁷ Szilágyi and Tóth (n 74) 9.

⁷⁸ Fear (n 65) 9.

⁷⁹ Szilágyi and Tóth (n 74) 15; Owen E Hughes and Deirdre O’Neill, *Business, Government and Globalization* (Palgrave Macmillan 2008) 102.

⁸⁰ Utton (n 64) 20. Regarding other cases, see: Robert Liefmann, *Cartels, Concerns and Trusts* (Arno Press 1932); Harm Schröter, ‘Risk and Control in Multinational Enterprise: German Businesses in Scandinavia, 1918-1939’ (1988) 62 *The Business History Review* 420, 420–443.

⁸¹ So called, the Great Depression, a decade long worldwide economic depression that started by the end of 1920s and lasted until the end of 1930s.

⁸² Fear (n 65) 12.

The situation changed only after the WWII, albeit not immediately. According to Schröter “it took 60 years and two generations to thoroughly cartelize Europe up to the 1930s, and another 60 years for a complete change in policy in favour of intense decartelization.”⁸³ Rejection of cartelization was partially related to the condemnation of the Nazi regime in Germany and its practice of using cartels to extend its power.⁸⁴ However, the ground was also prepared by the emergence of the Ordoliberal school of thought and the introduction of new pro-competitive economic theories in Europe.⁸⁵

In 1957 cartels were prohibited in West Germany;⁸⁶ however, many remained and as late as 1997 there were more than 300 legal cartels. The UK adopted the Fair Trading Act in 1973, but its effectiveness was rather low until 1998, when the new Competition Act was passed, bringing UK law in line with EU Competition Law.⁸⁷ In France certain abusive practices were also prohibited, but cartels were not illegal until the mid-1980s.⁸⁸ Similar processes occurred in other European states, while Baltic and the former Eastern Bloc countries joined this tendency only after the fall of the Soviet Union.⁸⁹ This process was particularly intensified in the 2000s when the EU massively expanded to the East and transplantation of EU competition law system became a part of the accession process.⁹⁰

⁸³ Harm G Schröter, ‘Cartelization and Decartelization in Europe, 1870 - 1995: Rise and Decline of an Economic Institution’ (1996) 25 *The Journal of European Economic History* 153.

⁸⁴ Mokyř (n 73) 125.

⁸⁵ Cseres, *Competition Law and Consumer Protection* (n 5) 83.

⁸⁶ Hughes and O’Neill (n 77) 102.

⁸⁷ *Ibid.* 103

⁸⁸ Fear (n 65) 15.

⁸⁹ Jurgita Malinauskaite, *Merger Control in Post-Communist Countries: EC Merger Regulation in Small Market Economies* (Routledge 2010) 209; Junji Nakagawa, *International Harmonization of Economic Regulation* (Oxford University Press 2011) 200.

⁹⁰ Cseres, ‘Accession to the EU’s Competition Law Regime: A Law and Governance Approach’ (n 13) 35. Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (n 43) 542; Anestis S Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge University Press

Modern EU competition policies find their origins in the 1950s when the first European Communities emerged. In 1957 Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands signed the Treaty of Rome.⁹¹ The treaty introduced the "four freedoms" - free movement of people, goods, services, and capital. It also established the common market.⁹² That is when the first community competition regime was introduced, but it took a while before the policy matured.⁹³ As time passed, competition law became a vital and central part of the EU. How this process has evolved, what theories influenced modern EU competition law and what values it set as a target, will be discussed in the following sections.

3. Influential schools of thought of competition law and antitrust theory

Since the adoption of the first antitrust regulations in North America, academic debates about the objectives that should be achieved by state intervention never stopped. Many theories have been suggested and further developed by prominent scholars. According to their shared views, reasoning and approaches,⁹⁴ these thinkers and their theories can be linked to various schools of thought, which significantly shaped the development of antitrust policies in the

2010) 96; Pradeep S Mehta, *Evolution of Competition Laws and Their Enforcement: A Political Economy Perspective* (Routledge 2012).

⁹¹ 'EUROPA - The History of the European Union' <http://europa.eu/about-eu/eu-history/index_en.htm> accessed 28 September 2015.

⁹² Laurie Buonanno and Neill Nugent, *Policies and Policy Processes of the European Union* (Palgrave Macmillan 2013) 142; Harald Badinger and Volker Nitsch, *Routledge Handbook of the Economics of European Integration* (Routledge 2015) 55–56; Theodora Kostakopoulou, *Citizenship, Identity, and Immigration in the European Union: Between Past and Future* (Manchester University Press 2001) 40; Gilles Grin, *Battle Of Single European Market* (Routledge 2012) 36.

⁹³ Cseres, *Competition Law and Consumer Protection* (n 5) 83; Utton (n 64) vi; Fear (n 65) 15; Edward Montgomery Graham and J David Richardson, *Global Competition Policy* (Peterson Institute 1997).

⁹⁴ Ejan Mackaay, 'General' in Boudewijn Bouckaert and Gerrit De Geest, (eds), *Encyclopedia of Law and Economics*, vol I, The History and Methodology of Law and Economic (Edward Edgar 2000) 402–415.

US, influencing both courts and antitrust authorities,⁹⁵ and had their fair share of influence over European competition policies as well.⁹⁶ From this perspective, two schools of thought can be identified as the most influential ones: the Harvard School and the Chicago School of Economics. As for their practical application, the US Supreme Court's decisions demonstrate that the court adopted a hybrid view of both schools and it has not unconditionally accepted one while rejected the other.⁹⁷

3.1 The Harvard School

The Harvard School emerged during the 1950s⁹⁸ and continued throughout the 1960s, studying market power and structure. It is sometimes referred as the "*structure-conduct-performance*" school of economics and is most strongly associated with Bain, Mason, Turner and many others.⁹⁹ The Harvard School theory argues that the market structure determines market conducts. For example, features such as the number of undertakings on a market, entry barriers, vertical integration, product differentiation and others impact price settings, investment choices, advertising campaigns, focus or negligence of research and development. Eventually, the resulting market conducts determines performance, meaning that it will affect

⁹⁵ Steiner (n 5) 54.

⁹⁶ Nicola Giocoli, 'Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy' (2009) 5 *Journal of Competition Law & Economics* 747. Steiner (n 5) 56–57.

⁹⁷ Patrice Bougette, Marc Deschamps and Frédéric Marty, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' [2014] *Groupe de Recherche en Droit*, Working paper N. 2014-23 5.

⁹⁸ The Harvard school of thought fully emerged in 1950s, but this process started earlier, already in 1930s. See: Barbora Jedličková, *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law* (Edward Elgar Publishing 2016) 71. Cseres, *Competition Law and Consumer Protection* (n 5) 42.

⁹⁹ Steiner (n 5) 53.

price-cost margins, product quality and variety, how innovative or profitable a market will be and so forth. In order to measure performance, the theory offers sophisticated econometric tools.¹⁰⁰ As the Harvard School paid particular attention to market structure and distrusted large-scale corporations, its theory argued that the principal objective of competition policy should be to avoid market concentration and barriers to entry.¹⁰¹

3.2 *The Chicago School*

The Chicago School developed in the 1950s and 1960s,¹⁰² soon becoming another dominant antitrust school of thought,¹⁰³ with leading scholars such as Director, Stigler, Tesler, Bork, Posner, Demsetz, Easterbrook and others.¹⁰⁴ Its model originated from the neo-classic price theory.¹⁰⁵ Economists of the school used models of perfect competition and monopoly that served as a point of reference, “*a guiding star*” as Bork calls it.¹⁰⁶ However, the concept of perfect competition was not viewed as a realistic, achievable objective.¹⁰⁷ On the contrary, the school tried to explain the real functioning of the market as driven by a desire of profit-maximisation, and used it as a basis to explain business behaviors under such

¹⁰⁰ *ibid.* Cseres, *Competition Law and Consumer Protection* (n 5) 42–45; Thomas Piraino, ‘Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century’ (2007) 82 *Indiana Law Journal* 345 (2007) 345–409; Joshua H Soven, ‘Afterword: Does Antitrust Need More Schools?’ (2012) 78 *Antitrust Law Journal* 273; Papadopoulos (n 88) 268–272.

¹⁰¹ Papadopoulos (n 88) 272; Stephen H Sosnick, ‘Antitrust Policy, an Economic and Legal Analysis, Carl Kaysen and Donald Press, 1959. (1960) 42 *American Journal of Agricultural Economics* 933

¹⁰² Cseres, *Competition Law and Consumer Protection* (n 5) 45–46; Bougette, Deschamps and Marty (n 95) 6.

¹⁰³ According to Posner, the Chicago School started with Aaron Director’s works from 1950s. See: Richard Posner, ‘The Chicago School of Antitrust Analysis’ (1979) 127 *University of Pennsylvania Law Review* 925, 926; Cseres, *Competition Law and Consumer Protection* (n 5) 45–46; Lamaj (n 48) 156.

¹⁰⁴ Steiner (n 5) 60.

¹⁰⁵ Cseres, *Competition Law and Consumer Protection* (n 5) 47.

¹⁰⁶ Bork (n 5) 98.

¹⁰⁷ Cseres, *Competition Law and Consumer Protection* (n 5) 46–47; Steiner (n 5) 60.

circumstances.¹⁰⁸

The school assumes that market participant act rationally and autonomously. Consumers are believed to be able to collect necessary information and consider all available alternatives before making choices, thus being able of disciplining business. Even misleading practices fail to deceive consumers in the long term, as they learn from their experience and reject not trustable producers.¹⁰⁹ Eventually, a competitive market structure is attained without government intervention, and the latter needs to be restricted to laying down the minimum legal framework.¹¹⁰ While the issue of concentration was particularly problematic for the Harvard School, as harmful to competitive market structure,¹¹¹ Bork argues that dominance or a monopolistic position can be an outcome of effective business doing and therefore a natural result of efficient production. However, the issue will be problematic if there are artificial barriers to entry, indicating that the concentration is not natural.¹¹² In 1980s, Baumol went further and developed the theory of contestable markets, arguing that as long as a market is free from barriers and there are no sunk costs,¹¹³ even in case of monopoly the dominant undertaking will be obliged to adopt competitive behaviours, due to the potential competitive pressure.¹¹⁴

¹⁰⁸ Gordon (n 5).

¹⁰⁹ Cseres, *Competition Law and Consumer Protection* (n 5) 46, 47; Steiner (n 5) 60; Ross Cranston, Julia Black and Colin Scott, *Consumers and the Law* (Butterworths 2000) 21–23.

¹¹⁰ Ibid.

¹¹¹ Papadopoulos (n 88) 272;

¹¹² Sandra Marco Colino, *Competition Law of the EU and UK* (OUP Oxford 2011) 11.

¹¹³ Sunk costs are the expenses an undertaking has to take in order to enter a market or become active, but these costs cannot be recovered once the undertaking leaves the market. See: Cseres, *Competition Law and Consumer Protection* (n 5) 62.

¹¹⁴ William Baumol, 'Contestable Markets: An Uprising in the Theory of Industry Structure' (1982) 72 *American Economic Review* 1, 1-15; William Baumol, 'Contestable Markets: An Uprising in the Theory of Industry Structure: Reply' (1983) 72 *American Economic Review*, 491-496. William J Baumol, John C Panzar and Robert D Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich 1982);

The Chicago School considered that antitrust policy should focus on consumer welfare maximisation.¹¹⁵ However, the concept of consumer welfare itself was mistakenly understood by Bork as total welfare.¹¹⁶ This misconception will be further analysed below. As for objectives of antitrust law, the Chicago School considered that only economic efficiency is a legitimate goal, while competition law should not worry about non-economic issues, such as income distribution, or other social and political problems.¹¹⁷ In this perspective, the Chicago School was influential not only in the US, but also in the EU, as particularly visible in the introduction of "*more economic approach*" in the 2000s.¹¹⁸

3.3 Ordoliberalism

In order to better understand modern EU competition law, one needs to be familiar with its origins and the ideas that strongly influenced its design and the single market.¹¹⁹ The theories that shaped EU competition law were predominantly developed within the school of thought of Ordoliberals, also known as the Freiburg School of Law and Economics,¹²⁰ a German neo-liberal school that emerged in the 1930s and strongly influenced post-WWII economic policies.¹²¹ The most notable scholars, related with the Freiburg School, were Eucken, Bohm,

William Baumol, 'Contestable Markets and the Theory of Industry: Review Article' (1983) 91 *American Economic Review* 1055.

¹¹⁵ Bork (n 104) 90.

¹¹⁶ Kenneth Heyer, 'Consumer Welfare and the Legacy of Robert Bork' (2014) 57 *Journal of Law and Economics* S19, s19-32. Cseres, *Competition Law and Consumer Protection* (n 5) 47–48; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (n 43) 1.

¹¹⁷ *Ibid.* See also: Gordon (n 5).

¹¹⁸ Bougette, Deschamps and Marty (n 95) 23.

¹¹⁹ Cseres, *Competition Law and Consumer Protection* (n 5) 83. Ignacio Herriera, 'Competition Law Through an Ordoliberal Lens' [2015] *Oslo Law Review* 139, 139.

¹²⁰ Cseres, *Competition Law and Consumer Protection* (n 5) 83. Herriera (n 116) 139.

¹²¹ Cseres, *Competition Law and Consumer Protection* (n 5) 83.

Miksch, Alfred Müller-Armack, Grossmann-Doerth and others.¹²² They prepared the foundations on which social market economy was based later.¹²³

Ordoliberals searched for an alternative from Western neo-liberalism and the Soviet state-planned economy, and proposed a “third way”, envisioning an open market with a considerable degree of *laissez-faire*, but with emphasis on social justice, humanistic values and individual freedom.¹²⁴ A clear demonstration of Ordoliberal influence on the European project is Article 3.3 TEU, which emphasises the Union’s aspiration to establish a market with sustainable development, full employment, and social progress, improvement of the quality of the environment, scientific and technological progress.

The Freiburg School theories developed out of classical liberalism, as it recognises a central role of competition to achieve free, prosperous and equitable society, with economic and political freedom.¹²⁵ It suggests that a state-regulated competitive process can guarantee individual economic freedom on a market. Ordoliberals impose an active role to the state in fostering competition. Considering their native German experience of powerful cartels, they developed a strong distrust against concentrated powers, as limiting individual freedom.

¹²² Roger E Backhouse, *Liberalism and the Welfare State: Economists and Arguments for the Welfare State* (Oxford University Press 2017) 59–60.

¹²³ Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (Kluwer Law International 2009) 160.

¹²⁴ Herriera (n 116) 144–145; Cseres, *Competition Law and Consumer Protection* (n 5) 83.

¹²⁵ It is worth mentioning that Ordoliberalism is not limited with competition policy, but it views competitive process as a part of a holistic political economy and societal order. See: Cseres, *Competition Law and Consumer Protection* (n 5) 83–84; Herriera (n 116) 139; Manfred E Streit, ‘Economic Order, Private Law and Public Policy The Freiburg School of Law and Economics in Perspective’ (1992) 148 *Journal of Institutional and Theoretical Economics* (JITE) / *Zeitschrift für die gesamte Staatswissenschaft* 675, 675; Hildebrand (n 120) 162.

Moreover, if monopolies would arise, good governance would be quickly undermined, as the economic power of undertakings would be inevitably transformed into political power.¹²⁶ A powerful government is seen as necessary, but since the concentration of power is considered risky also in the public sector, governmental competences have to be limited.¹²⁷ Over time Ordoliberalism has strongly influenced the EU, and their theories have been translated into actual policies,¹²⁸ making the competition process an attractive value for cartel-dominated European economies, and channelling social elements into a field, concentrated on economics.¹²⁹ Albeit necessarily concise, this overview constitutes a sufficient background to better delve into the analysis of the goals of competition law.

4. Objectives of EU competition law

4.1 Introduction

Antitrust theory is a well-researched, but a widely disputed subject. As various schools hold conflicting theories, there is no general agreement regarding the goals of competition law.¹³⁰

Since the creation of EU competition law, determining its primary objectives has been a topic

¹²⁶ Hildebrand (n 120) 159–160.

¹²⁷ *ibid* 160.

¹²⁸ Flavio Felice and Massimiliano Vatiero, 'Ordo and European Competition Law', *A Research Annual*, vol 32 (Emerald Group Publishing Limited 2014) 147–157; David J Gerber, 'Competition Law and International Trade: The European Union and the Neo-Liberal Factor Competition and Trade Policy: Europe, Japan and the United States - Part I: Historical Foundations and Original Lessons' (1995) 4 *Pacific Rim Law & Policy Journal* 37, 46, 49–54.

¹²⁹ Jedličková (n 96) 165. Herriera (n 116).

¹³⁰ In the previous section were analysed theories of a few dominant economic schools. While each of them has multiple offspring and there are many other less influential theories, the given review cannot be considered to be exhaustive. See: Soven (n 98) 273. Posner, 'The Chicago School of Antitrust Analysis' (n 101); Bork (n 5). Daniel Crane, 'Chicago, Post-Chicago, and Neo-Chicago' in R Pitofsky (ed), *Review of How Chicago Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, *U. Chi. L. Rev.* 76, no. 4 (2009): 1911–33 (The University of Chicago Law Review 76 2009); Bougette, Deschamps and Marty (n 95); Piraino (n 98) 345–409; Robert D Atkinson and David B Audretsch, 'Economic Doctrines and Approaches to Antitrust' [2011] Indiana University-Bloomington: School of Public & Environmental Affairs Research fPaper Series; Cseres, *Competition Law and Consumer Protection* (n 5) 41–96.

of discussion. However, it remains disputed until today, including the question whether EU competition policies have a plurality of objectives or a single, dominant goal.¹³¹ Some authors argue that EU competition law has a unitary goal.¹³² However, the theory, supported in this dissertation, argues that competition law has a few economic-objectives, it also serves to public interests, and there are other goals in between them.¹³³ This thesis, suggested by the OECD¹³⁴ and shared by Ioannidou, maintains that competition law goals can be divided into three groups: public interest objectives, such as social goals, core competition objectives, aiming at greater economic efficiency and so called “Grey Zone”, for example protection of SMEs.

It can be argued that while competition policy can and should contribute to social issues and generate public good, such non-economic goals should not be its ultimate objectives. Any field of law should be in line with general public policy goals; however, the specific nature of competition law should not be ignored.¹³⁵ Competition law is dedicated to ensure the effective functioning of a market, and to prevent/correct market failures. These functions determine its strict economic nature. Therefore, competition law, its enforcement and strategies should always make economic sense. There is a reason why the leading antitrust theories come from economic schools and each decision issued by a competition authority

¹³¹ Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (n 43) 3.

¹³² Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006); Frank Easterbrook, ‘Limits of Antitrust’ [1984] *Texas Law Review* 1; Rojer Blair and Daniel Sokol, ‘Roger D. Blair & D. Daniel Sokol, The Rule of Reason and the Goals of Antitrust: An Economic Approach, 78 *Antitrust L.J.* 471 (2012). In the contrary, Stucke rejects even the possibility of antitrust law to have a single objective. See: Maurice E Stucke, ‘Reconsidering Antitrust’s Goals’ (2012) 53 *Boston College Law Review* 551, 551–629.

¹³³ Maria Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (Oxford University Press, Incorporated 2015) 15–25.

¹³⁴ OECD Glossary of Statistical Terms - Consumers’ Surplus Definition’ 3–4
<<https://stats.oecd.org/glossary/detail.asp?ID=3176>> accessed 4 October 2015.

¹³⁵ Walter Frenz, *Handbook of EU Competition Law* (Springer 2015) 1131. B Baarsma, ‘Rewriting European Competition Law from an Economic Perspective’ [2011] *European Competition Journal* 585.

needs to have sound economic reasoning and evidence.¹³⁶ As stated by Freemant, competition law “*is entirely empty without the economic theory.*”¹³⁷

When such specific field of law aims to achieve social objectives and satisfy public interests, the risks of “hijacking” a market rise.¹³⁸ Jenny explains that while the economic goals of competition law are rather concrete and narrow, public policy objectives can be more broad and abstract.¹³⁹ This makes the competition policy oriented on social objectives particularly vulnerable and easy to be manipulated. Populist argumentations can be effectively employed to criticise economically justified policies, as harmful for public good or social justice.¹⁴⁰ That is why competition rules should only be analysed through economic prism. There might be another practical reason why competition law should stick to economic goals; it is not the best-suited mechanism to achieve non-economic objectives. For example, income distribution is a noble social objective, but there are far more superior and efficient tools to achieve it, instead of competition law.¹⁴¹

Yet, it would not be correct to argue that there is no place for public good and social objectives in competition law, at all. In fact, the above-mentioned categorization among core-economic goals, public interest objectives and “Grey-Zone” is not absolute. If theoretically these groups are distinct, in practice we meet objectives that have signs of more than one

¹³⁶ Piraino (n 98) 346; Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International 2003) 47.

¹³⁷ ‘Speech by Peter Freeman on Significance of Economic Evidence in Competition Cases’ (The Institute of Economic Affairs (IEA), London, the UK, 15 October 2009).

¹³⁸ Jenny (n 32) 7. See also: Rodriguez and Menon (n 1) 162–166.

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Bloomsbury Publishing 2012) 37–40; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP Oxford 2011) 41; John B Kirkwood and Robert H Lande, ‘The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency’ [2008] *Notre Dame L Rev* 84 191; Christopher Townley, *Article 81 EC and Public Policy* (Bloomsbury Publishing 2009) 177–181.

group and simultaneously generate various economic, as well as non-economic benefits.¹⁴² For example, the meaning of consumer welfare is disputable, and its interpretation can embed some non-economic values; however, as an objective of competition law, consumer welfare is “*understood through the lens of economic efficiency calculations.*”¹⁴³ Moreover, multiple objectives offer a possibility for competition law to have economic and non-economic goals together and in such case the primary objectives should always make economic sense.

Bork indicates that in case of multitude of objectives, there is the need to establish a hierarchy and identify a superior goal;¹⁴⁴ however, there might be a problem of identification. We meet different interpretations of decisions of the CJEU and ranking various objectives “*remains an academic exercise.*”¹⁴⁵ Although there is much disagreement about the primary goals of competition, meeting similar theories and positions is commonplace. Analyzing these theories, and supporting their arguments with EU legal acts and the case law, allows generating a list of the paramount goals. The following sections will be dedicated to this analysis. Due to the research interests of this dissertation, the role of consumers will also be determined in each of the identified competition law objectives.

While analysing the major aims of EU competition law, it is important to distinguish between intermediary and ultimate goals. There is much controversy on whether certain values act as ultimate goals or as instrumental tools to achieve other higher objectives. For example, there is a dispute whether the competition process is an intermediary mean or the ultimate end in

¹⁴² Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (Oxford University Press 2015) 15–25; OECD, ‘The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency’ (2003) 5 OECD Journal: Competition Law and Policy 7, 3–4.

¹⁴³ Rutger JG Claassen and Anna Gerbrandy, ‘Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach’ (2016) 12 Utrecht Law Review 2.

¹⁴⁴ Bork (n 5) 50.

¹⁴⁵ *ibid* 22.

itself.¹⁴⁶ Therefore, whenever relevant, this analysis will cover the nature of the identified objectives.

One more question, after defining the goals, is to examine whether the given objectives are truly pursued at the stage of enforcement, or they are just nominal values. In order the objectives to be successfully achieved, in addition to their clear and specific nature and existence of political will to follow them, it is crucial that they are binding, in order to make enforcement authorities committed to their achievement. This is the case when goals are clearly manifested by the treaty or are determined by courts' judgments.¹⁴⁷ However, in practice, it is more complicated than it sounds and these challenges will also be duly analysed.

4.2 Market integration

Seeking to identify the objectives of EU competition law takes us back to the origins of the EU.¹⁴⁸ In 1957, the EEC was created and the common market was established.¹⁴⁹ Behind launching this large-scale European project, there were two major interrelated goals, one political, the other economic. Europe, tired of endless wars and bloodsheds, sought peace through a novel method, that is to integrate European states' economies closer to each other,

¹⁴⁶ Laura Parret, 'Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy' (2010) 6 European Competition Journal 340. Katalin Cseres and Joana Mendes, 'Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits' [2014] Common Market Law Review, 51(2) 483.

¹⁴⁷ Parret (n 143) 340–341.

¹⁴⁸ See: (n. 111)

¹⁴⁹ 'EUROPA - The History of the European Union' (n 89).

thus to encourage cooperation instead of confrontation.¹⁵⁰ Since then, many new treaties have been signed,¹⁵¹ the communities were renamed, new Member States were accepted, but the major economic goal of market integration has never been abandoned, and until today it remains the core economic rationale of the EU.¹⁵²

As noted above,¹⁵³ Ordoliberalism influenced the architects of united Europe, bringing strong social elements in the economic policies of the Community. Since proposing the common market,¹⁵⁴ economic integration was viewed as a way to achieve economic welfare, high standard of living and sustainable development. The successful execution of the project was believed to deliver numerous economic, as well as non-economic incentives, including a high level of employment, social protection, equality between men and women, environmental protection and so forth.¹⁵⁵ All of these have been and remain to be objectives of the EU;

¹⁵⁰ Anonymous, 'EUROPA - A Peaceful Europe – the Beginnings of Cooperation' (European Union - European Commission, 16 June 2016) <https://europa.eu/european-union/about-eu/history/1945-1959_en> accessed 25 August 2017.

¹⁵¹ For detailed information, see: 'EUROPA - EU Treaties' <http://europa.eu/eu-law/decision-making/treaties/index_en.htm> accessed 29 September 2015.

¹⁵² Pablo Ibáñez Colomo, *Article 101 TFEU and Market Integration* (LSE Legal Studies Working Paper No 07/2016 2016) 3.

¹⁵³ See: Chapter I, Section 3.3 *Ordoliberalism*

¹⁵⁴ "The concept of a common market [...] involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market." This paragraph mentions three different concepts: the common market, the single market and the internal market. While they are often used synonymously there are some important nuances that need to be underlined. The common market was introduced by the EEC Treaty in 1957 and is a rather archaic concept, mostly mentioned when referring to former treaties and the epoch of the EEC. The internal market can be defined as an economic area within the EU, without borders, allowing free movement of goods, persons, services and capital. The internal market is a richer concept, "embodying a holistic view of wider political and social objectives, going beyond economic objectives", with which the common market was limited. With regard to the single market, unlike the internal market and the common market concepts, it is not mentioned in the European treaties, but it is an essential part of the EU vocabulary and generally used as an interchangeable term for the internal market. Similarities or differences between the concepts are not very clear and disputed among authors. See: *Case 15/81, Gaston Schul, Douane Expeditie B V v Inspecteur der, Invoerrechten en Accijnzen in Roosendaal* [33]. Füsün Yenilmez and Esin Kiliç, *Handbook of Research on Unemployment and Labor Market Sustainability in the Era of Globalization* (IGI Global, Business Science Reference 2016) 75; Rita de la Feria, *The EU VAT System and the Internal Market* (IBFD 2009) 28–35; Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (OUP Oxford 2014) 320–323.

¹⁵⁵ Parret (n 143) 342.

however, the union is predominantly of economic nature¹⁵⁶ and its competencies are concentrated on economic issues.¹⁵⁷ In order to achieve its economic goals, integrate markets of its Member States to a maximum level and build a highly competitive, well functioning internal market, competition policy is of the most efficient tools within the EU competences, and this instrument has always been actively utilized.¹⁵⁸

Market integration is a unique feature of the EU and eventually, EU competition law inherited this feature and made it as its primary goal. This makes it a unique model worldwide. Competition policies are often promoted by international organisations, along with trade agreements, as a necessary tool in a modern globalised economy;¹⁵⁹ however, such integration of national markets is purely an EU phenomenon, and supporting this process is a special characteristic of EU competition law. Article 3(b) TFEU, states that the Union has exclusive competence to establish “*competition rules necessary for the functioning of the internal market.*” Article 101(1) TFEU explicitly restricts any agreements or concerted practices, “*which may affect trade between Member States.*” In order to annul such agreements, it is not even necessary for these agreements to have certain undesired and illegal consequences, for example, to harm consumers.¹⁶⁰ Even the *de minimis* rule¹⁶¹ does not

¹⁵⁶ Caroline Wehlander, *Services of General Economic Interest as a Constitutional Concept of EU Law* (Springer 2016) 105; Jonathan Chaplin and Gary Wilton, *God and the EU: Retrieving the Christian Inspirations of the European Project* (Routledge 2015) 224; Ronald Tiersky and Erik Jones, *Europe Today: A Twenty-First Century Introduction* (Rowman & Littlefield Publishers 2011) 323; Eric Marlier, *Europe 2020: Towards a More Social EU?* (Peter Lang 2010) 34.

¹⁵⁷ ‘Treaty on the Functioning of the European Union (Consolidated Version 2012)’ Art. 3.

¹⁵⁸ Parret (n 143) 342.

¹⁵⁹ Jenny (n 32) 1.

¹⁶⁰ *Case T-168/01, GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 [118].

¹⁶¹ *De Minimis* rule exempts agreements and concerted practices of minor importance from the application of TFEU Art. 101(1). *De Minimis* applies to agreements between actual or potential competitors (horizontal agreements) if their aggregate market share does not exceed 10%. In case of agreements between non-competitors (vertical agreements), the market share held by each of the parties should not exceed 15% to benefit from the notice. If there is a cumulative effect of parallel networks of similar agreements on the market where,

exempt such violations, as they are considered to be hardcore restrictions. Such agreements cannot benefit from the block exemption regulations,¹⁶² and they rarely satisfy Article 101(3) TFEU requirements to get an exception.¹⁶³

Yet another demonstration of the significance of market integration, as a value for EU competition law, can be found in the EU guidelines regarding vertical restraints.¹⁶⁴ According to Colomo, EU competition law changes its methodological approach whenever market integration considerations are at stake.¹⁶⁵ It embraces the positive role in promoting trade between Member States and allows certain collaboration between undertakings, even when this might lead to undesired restrictions. This is the case for exclusive distributorship agreements, which usually lead to territorial protection and limits competition. However, the Commission seems to be more concerned about market integration and tolerates such practices.¹⁶⁶ The case of *Consten-Grandig* is a clear demonstration of the CJEU's struggle to keep a balance between goals of market integration on the one hand and competition and efficiency on the other.¹⁶⁷

Market integration is not merely a program for the EU. This multidimensional process includes numerous benefits in itself, from economic, social or political perspectives. By

the above-mentioned market share thresholds are reduced to 5%. See: 'Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition under Article 81(1) of the Treaty Establishing the European Community (de Minimis)'.

¹⁶² So called Block Exemption Regulations are adopted by the Commission. They are a safe harbour for certain categories of agreements and concerted practices which in case of falling within the terms of the Block Exemption are exempted from the regulation of TFEU Art. 101(1)

¹⁶³ Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (n 43) 14.

¹⁶⁴ European Commission, 'Guidelines on Vertical Restraints' [118, 152].

¹⁶⁵ Ibáñez Colomo (n 149).

¹⁶⁶ Richard Whish and David Bailey, *Competition Law* (Oxford university press 2015) 23–24.

¹⁶⁷ *Joined Cases 56/64 & 58/64, Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299. See also: Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press 2016) 772; Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) 177.

sustaining this process EU competition law also contributes to all the consequential outcomes. Along with other advantages, market integration benefits consumers immensely. Free circulation and goods and services makes the internal market much more competitive, with numerous participating undertakings. Higher competition indirectly benefits consumers with better quality of goods and lower prices. Moreover, a borderless economic zone makes the choice of goods and services much wider than in a closed national market.¹⁶⁸ In the past, these advantages were viewed as self-evident. Thus, there was no need to stress consumer benefit as a separate goal. In fact, even if consumer welfare was not specifically indicated as an objective, it has always been implied as a part of the process of economic integration of Europe. Eventually, it will be unfair to claim that consumer interests used to be ignored by competition law, as the latter was indirectly supporting consumers, by building an integrated economic area among the Member States.¹⁶⁹

The CJEU is never reluctant to clarify how final consumers benefit from this process. As it was stated in *GSK* judgement,¹⁷⁰ regarding parallel exports, alternative sources of supply “necessarily bring some benefits to the final consumer of those products. [Moreover,] parallel trade in medicines from one Member State to another is likely to increase the choice available to entities in the latter Member State.”¹⁷¹ Another interesting issue, discussed in this judgment, is the application of the *rule of reason* to cases of consumer harm. The decision shows a distinctive attitude toward the objectives of market integration and consumer welfare.

¹⁶⁸ Cseres, *Competition Law and Consumer Protection* (n 5) 206.

¹⁶⁹ Parret (n 143) 347.

¹⁷⁰ *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157).

¹⁷¹ *ibid* 54–56.

As it has been alluded, territorial restrictions and allocations, affecting trade between Member States, are considered to be hardcore violations and are *per se* illegal. The primary difference between *per se* rule and *rule of reason* is that the former considers certain types of actions automatically harmful and recognises them to be competition law infringements, without further investigation. As for *rule of reason*, it evaluates pro and anticompetitive effects of the agreement, and makes the final decision according to their balance. In the judgment, the court paid particular attention to describe the benefits parallel trade bring to final consumers, implicitly recognising that its restriction may have adverse effects on consumer welfare. However, this is not an absolute presumption of consumer harm and can be rebutted. Therefore, while *per se* rule is used in consumer harm, territorial restrictions are *per se* infringement.¹⁷² This is a clear demonstration of the important value of market integration for the EU. Moreover, it is not a phenomenon of the past.¹⁷³ Economic integration is an ongoing process, which remains in the agenda of EU competition law and it will continue to play significant role in the future as well.

4.3 Competition process

In 1986, after signing the Single European Act the common market was replaced with the

¹⁷² *ibid* 56, 57, 66, 69. Generally, *per se* ruling has been subject to fierce dispute over the years. The EU courts used to interpret the article narrowly, and *per se* rules declared certain arrangements automatically void. There have been many talks whether a US-style *Rule of Reason* should have been introduced in EU law as well. The latter means to make decisions based on an evaluation of their beneficial and negative effects. In the *Metropole* judgement the GC openly rejected the possibility to weight pro and anti-competitive effects under 101(1). The same approach was maintained by the GC in the *Mastercard* case, but the Court also stated that the analyses of weighing pro and anti-competitive effects of an agreement “*can take place only in the specific framework of Article 81(3) EC*” (now Article 101(3) TFEU). See: *Case 26/27, metro v commission (No1)* [1977] [72]; *Case T-111/08, MasterCard, Inc and Others v Commission* [2012] ECLI:EU:T:2012:260 [80].

¹⁷³ Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (n 139) 17.

single market and its completion was set as an objective for the EC, mobilising all of the policies toward this direction.¹⁷⁴ As it was mentioned in the introduction,¹⁷⁵ it is possible to categorise goals as ultimate and intermediary ones. Following the given criteria, it can be argued that, by the time the single market was introduced, competition policy was seen as an intermediary mechanism used to achieve the ultimate goal: the completion of the single market. This was demonstrated by *Metro I* judgment¹⁷⁶ in 1977, stating that a concept of workable competition, contained in Articles 3 and 85 of the EEC treaty, implied to maintain the degree of competition that would be necessary for “*the creation of a single market achieving conditions similar to those of a domestic market.*”¹⁷⁷ On the contrary, we see a radically different approach in the current treaty.

The TFEU defined that “*the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market.*”¹⁷⁸ The Protocol 27 of the TFEU also indicates that the internal market “*includes a system ensuring that competition is not distorted.*” Since the single and internal markets are largely synonymous concepts,¹⁷⁹ there is a noticeable shift in the relationship between them and competition. In the past competition was supposed to adjust itself to the requirements of the market, so that the single market could be achieved. Nowadays, the perspective has reversed, and competition is viewed as a value and not a mechanism to achieve other goals. As a study analysis from the DG

¹⁷⁴ ‘EUROPA - The History of the European Union’ (n 89).- *EU Treaties*, accessed September 29, 2015, http://europa.eu/eu-law/decision-making/treaties/index_en.htm.

¹⁷⁵ See: Chapter I, Section 4.1. *Introduction*

¹⁷⁶ Case 26/27, *Metro v. Commission* (No.1) (n 169).

¹⁷⁷ *Ibid.* [20]

¹⁷⁸ ‘Treaty on the Functioning of the European Union (Consolidated Version 2012)’ (n 154) Art. 26 .

¹⁷⁹ See: (n 175)

ECFIN suggests, the internal market is a powerful instrument to promote economic integration and increase competition within the EU.¹⁸⁰

The recognition of competition process as a value on its own might seem a recent phenomenon, but its roots are actually closely linked to Ordoliberalism.¹⁸¹ The Freiburg School viewed competition as an effective way to determine prices and govern economic processes in the market, instead of government intervention to set prices or centrally plan the economy.¹⁸² The school developed a competition-democracy nexus, arguing that economic order impacts not only on the economic sphere, but also on the social and political arena. Therefore, it is necessary to maintain the competition process, as its disruption would be detrimental to public interest.¹⁸³

Viewing the competition process as a utility turned it into an objective for competition law. This approach suggests that competition law should not aim for other higher economic or social goals and worry about the ultimate beneficiaries of the process. Instead, it should focus on maintaining the competition process and once this is ensured, the objective has been achieved. The full-fledged emersion of this principle can be seen in the ECJ's decision in *T-mobile* case.¹⁸⁴ The Court ruled that "*Article 81 EC, [current article 101 TFEU] like the other competition rules of the Treaty, is designed to protect not only the immediate interests*

¹⁸⁰ Bureau of European Policy Advisers and Directorate-General for Economic and Financial Affairs, 'Enlargement, Two Years after: An Economic Evaluation' <http://ec.europa.eu/economy_finance/publications/publication784_en.pdf> accessed 29 September 2015.

¹⁸¹ See: Chapter 1, Section 3.3 *Ordoliberalism*

¹⁸² Felice and Vatiello (n 125) 147–157.

¹⁸³ Elias Deutscher and Stavros Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11, *The Competition Law Review* 183.

¹⁸⁴ *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* [2009] ECR -04529.

*of individual competitors or consumers but also to protect the structure of the market and thus competition as such.*¹⁸⁵

The argumentation used by the Court caused some confusion, as some scholars considered that the decision overturned the earlier judgments of the GC, which identified in the well-being of consumers the ultimate goal of competition law.¹⁸⁶ According to those scholars, after the *T-mobile* decision, the court has established competition process as the ultimate objective, superior to consumer welfare or any other goals.¹⁸⁷ However, there is a flaw in this interpretation. It is true that competition process has been elevated to the level of ultimate goals, but it is highly debatable whether it is the only one. The wording of the court ruling itself explicitly rejects the idea that there is only one exclusive objective for Art. 81 EC [now Article 101 TFEU]. On the contrary, the provision is deemed to serve the interests of individual competitors or consumers and protects market structure and “*thus competition as such.*”¹⁸⁸ This statement also answers the question of whether competition law has a single or a number of goals, indicating that not a single value can claim to be recognized as dominant against the others.

The *T-mobile* judgement can be misinterpreted as to imply that protecting consumers’ interests and competition process are two conflicting alternatives, among which law enforcers should decide which one should prevail. In reality, these two values are interrelated.

¹⁸⁵ Ibid 38.

¹⁸⁶ Cseres and Mendes (n 143) 489; *Joined Cases T-213 & 214/01, Österreichische Postsparkasse* [2006] ECR II-1601 [115]; *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [118].

¹⁸⁷ Cseres and Mendes (n 143) 489; *Joined Cases T-213 & 214/01, Österreichische Postsparkasse* (n 183) [115]; *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [118].

¹⁸⁸ *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181) [38].

Protecting competition process includes itself care for consumers, as the latter benefit from competitive markets in different ways,¹⁸⁹ “such as low prices, high-quality products, a wide selection of goods and services, and innovation.”¹⁹⁰ On the contrary, distortions of competition limit or take away the benefits offered by a competitive market to consumers.¹⁹¹ Eventually, by striving to avoid them, competition law supports consumers, at least indirectly.¹⁹²

Competition as such is rewarding in many ways and is seen widely desirable due to its contribution to the economy, market, society and consumers.¹⁹³ According to Ordoliberals, it even contributes to democracy.¹⁹⁴ It is because of its beneficial nature that competition process has emerged as an objective of EU competition law. According to some interpretations of the *T-mobile* case, competition as such is currently the primary objective of EU competition law.¹⁹⁵ Going back to above-discussed division of goals in ultimate and intermediary ones,¹⁹⁶ it is interesting to examine whether competition process can be an ultimate goal itself, or it is still an intermediary ring in a chain to achieve other substantial

¹⁸⁹ Zimmer (n 30) 223; Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 27) 24; Gormsen (n 31) 88; Monti (n 31) 100; Rao (n 31). Laura Parret, ‘Do We (Still) Know What We Are Protecting? The Discussion on the Objectives of Competition Law from Different Perspectives’ 346; David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998) 16, 248.

¹⁹⁰ EU Commission, DG Competition, ‘Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses’ Art. 4. See also: *Joined Cases 56/64 & 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*. (n 164).

¹⁹¹ Michael Hutchings and Peter Whelan, ‘Consumer Interest in Competition Law Cases’ (2006) 16 *Consumer Policy Review* 180.

¹⁹² Micklitz, Stuyck and Terryn (n 29) ch 1 Section IB. Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 131) 195; Philip Lowe (n 29) 3.

¹⁹³ James M Cypher and James L Dietz, *The Process of Economic Development* (Psychology Press 2004) 126.

¹⁹⁴ Deutscher and Makris (n 180) 183.

¹⁹⁵ Cseres and Mendes (n 143) 489; *Joined Cases T-213 & 214/01, Österreichische Postsparkasse* (n 183) [115]; *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [118].

¹⁹⁶ Chapter I, Section 4.1 *Introduction*

aims.¹⁹⁷ As argued by Ioannidou, everyone agrees that competition is desirable, but that is not the end of the question.¹⁹⁸ In order to fully understand and appreciate the value of market competition, it is necessary to know for what purpose is it desired for, that is to promote efficiency, market integration, economic freedom or other values.¹⁹⁹ Following this logic, competition is only desirable as far as it allows access to these benefits. However, if we recognise competition process as the ultimate goal, this means that competition has a value irrespective of its consequences.²⁰⁰

When law targets achieving a goal, for example market integration, competition is useful as long as it supports the process. In order to determine this necessary level of competition, theory of effective competition is used. This theory, initially named as workable competition, was developed by the prominent American economist John Clark in the 1940s.²⁰¹ It was later adopted by the EU with the above-mentioned *Metro I* case,²⁰² and it is still employed by the EU courts. As the GC states in *GSK* case “*the competition referred to in Article 3(1)(G) EC and Article 81 EC [now Article 101 TFEU] is taken to mean effective competition, that is to*

¹⁹⁷ See: *Case 26/27, metro v. commission (No.1)* (n 169).

¹⁹⁸ Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 131) 29.

¹⁹⁹ *ibid.*

²⁰⁰ Ioannis Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*. 28

²⁰¹ After accepting that perfect competition is not a real world phenomenon and impossible to be attained, the idea of workable competition was introduced, which aims to reach the best competitive arrangements what is practically possible, closest to the ideal. See: Ali M El-Agraa, *The European Union: Economics and Policies* (Cambridge University Press 2011) 199; Patel, Schweitzer and Wilks (n 11) 139; Papadopoulos (n 88) 271–272. JM Clark, ‘Toward a Concept of Workable Competition’ (1940) 30 *The American Economic Review* 241, 241–256; Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press 2014) 32.

Regarding perfect competition, see also: JL Kellogg Graduate School of Management, *Frontiers of Research in Economic Theory: The Nancy L. Schwartz Memorial Lectures, 1983-1997* (Cambridge University Press 1998) 17–18; Rhona C Free, *21st Century Economics: A Reference Handbook* (SAGE 2010) 35; Papadopoulos (n 88) 268–272.

²⁰² The theory was developed further in the later years. As The EU Commission’s report declared in 1985, an effective competition strives for economic liberty and social goals. “*it fosters the spirit of enterprise. It creates an environment within which European industry can grow and develop in the most efficient manner and at the same time take account of social goals.*” Cited in Cseres, *Competition Law and Consumer Protection* (n 5) 245; Patel, Schweitzer and Wilks (n 11) 22.

say the degree of competition necessary to ensure the attainment of the objectives of the treaty.”²⁰³ Once the focus is moved from the benefits of a competitive market to competition itself and the latter is set as an objective, the effective competition theory becomes irrelevant, as in this case the ultimate goal that is the reference to determine the necessary level of competition is the competition process itself.

In simple terms, competition is a market structure, where many undertakings operate and sell interchangeable goods and services and none of them has a dominant position.²⁰⁴ Competitive market is a relative term. It can be argued for sure that there is no competition only when one company operates in the market.²⁰⁵ Reality is not that clear-cut. In practice, perfect monopoly²⁰⁶ and perfect competition cases are extremely rare.²⁰⁷ In most instances, whether a market is competitive is not readily ascertainable. There is no quantitative threshold of the number of undertakings present in the market, above which it can be said that the market is competitive.²⁰⁸ Another problem is that the number of entities in a market can dramatically

²⁰³ *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [109].

²⁰⁴ N Gregory Mankiw, *Principles of Microeconomics* (Cengage Learning 2016) 322, 330; Alina Kaczorowska-Ireland, *European Union Law* (Routledge 2016) 943; Ghai & Gupta, *Microeconomics Theory And Applications* (Sarup & Sons 2002).

²⁰⁵ According to Waschik, Fisher and Prentice, between perfect monopoly and perfect competition there is a whole range of different market structures. A market structure, coming next after monopoly with its high concentration rate, is duopoly, where an industry has only two undertakings. For example there are only two producers of large commercial airlines in the world: Boeing and Airbus. The authors argue that after duopoly come markets with three, four, five other small number of firms, but they do not have special names and they all fall within a category of oligopoly. As for oligopoly, it is the most common form of market structure for the majority of industries. See: Robert Waschik, Tim Fisher and David Prentice, *Managerial Economics, Second Edition: A Strategic Approach* (Routledge 2010) 23–24.

²⁰⁶ Perfect monopolies were wide-spread in certain industries, for example electricity generation, telephone services and others, until the wave of deregulation liberalized them, since the late 1980s, in a number of North American and European states. See: *ibid* 23.

²⁰⁷ Environments under which near-perfect competition can be possible usually do not exist naturally. Proper conditions can mostly be artificially created by heavy governmental regulations. The best example would be stock exchanges. See: GC Allen, *Monopoly and Restrictive Practices* (Routledge 2013) 51.

²⁰⁸ Mankiw (n 200) 320.

increase or decrease depending on how the market itself is defined.²⁰⁹

In addition to the given difficulties, setting competition process as an objective recognises the competitive market structure as an absolutely supreme model over its alternatives. However, competition is not always possible or desirable, and in some sectors monopoly or oligopoly might be a more suitable substitute.²¹⁰ According to the theory of contestable markets, developed by the Chicago School's²¹¹ economist Baumol, sometimes even an oligopolistic market can act as a competitive one.²¹² All these factors question the rationality of establishing competition process as the ultimate goal and directing law enforcement to achieve competitive market structure, disregarding the outcomes for the stakeholders.

Since 1990s, the role of economic analysis in EU competition law has grown.²¹³ This process was named as “*economization*” or “*modernization*” of EU competition law. As Lachnit explains the new policy changed the approach to sanctioning. Eventually, behaviours should not be sanctioned merely because they are prohibited by law, but because of the effects they deliver.²¹⁴ As the GC stated in *GSK*,²¹⁵ the necessary degree of competition is the one which can achieve the Treaty goals.

The EU has an outcome-based approach to competition law, and in order for effective competition to be ensured, one needs to examine not only market structure and number of

²⁰⁹ Ibid.

²¹⁰ Paul White and Sardar MN Islam, *Formulation of Appropriate Laws: A New Integrated Multidisciplinary Approach and an Application to Electronic Funds Transfer Regulation* (Springer Science & Business Media 2008) 113; Kaczorowska-Ireland (n 200) 217.

²¹¹ See: Chapter 1, Section 3.2 *The Chicago School*

²¹² Baumol, ‘Contestable Markets’ (n 111); Baumol, ‘Contestable Markets’ (n 111) 491–196; Baumol, Panzar and Willig (n 111).

²¹³ Saskia Lavrijssen, ‘What Role for National Competition Authorities in Protecting Non-Competition Interests after Lisbon? - Dialnet’ (2010) 35 *European Law Review* 636.

²¹⁴ Eva Lachnit, *Alternative Enforcement of Competition Law* / (Eleven International Publishing 2016) 13 n. 53.

²¹⁵ *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157). [109]

undertakings, but actual market performance as well. The effects of a conduct on the market matter, the benefits it has delivered need to be demonstrated and assessed, otherwise one cannot assume that competition is effective.²¹⁶ On this point, Bishop and Walker state that an economic goal of EU competition law is protection and promotion of effective competition; however, this is a goal insofar it benefits EU consumers.²¹⁷ Kroes shares the same position, stating that “*free competition is not an end itself, - It is a means to an end.*”²¹⁸

The *T-Mobile* decision has not been overruled and it still remains the last declared position of the CJEU regarding the goals of competition law. Therefore, it is beyond doubt that competition process has indeed emerged as one of the primary objective; however, it would be a misinterpretation of the judgement to argue that competition as such is the only and ultimate aim of EU competition law. Ioannidou criticizes the decision, arguing that competition process or competition as such are not straightforward and can only be clarified with referencing to a further objective.²¹⁹ This is particularly true nowadays, in the post-financial crisis Europe, where the attitude of society has turned towards scepticism and competition as such is not viewed as a necessarily beneficial phenomenon, but stronger emphasis is put on public interest.²²⁰

²¹⁶ Colm O’Cinneide, George Letsas and Christopher Campbell-Holt, *Current Legal Problems 2009* (Oxford University Press 2010) 385.

²¹⁷ Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010) 20–21.

²¹⁸ Neelie Kroes, “‘Free Competition’ Is Not an End in Itself... - Concurrences’ [2007] Concurrences Review N° 3-2007 1; Jones and Sufrin (n 164) 25.

²¹⁹ Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (n 139) 29–30.

²²⁰ Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015) 91, 92.

4.4. Consumer welfare

One of the expected outcomes from effective competition policies is to deliver benefits to consumers. The objectives of competition law are not static. As the body develops its objectives also evolve and change; therefore, it should not be surprising that it had taken a long road before the modern concept of consumer welfare emerged and became the primary goal of EU competition law. However, it would be untrue to say that consumer was entirely invisible in EU law during its earlier days.

As it was underlined in the previous sections,²²¹ consumers' benefits were presumed to be a natural outcome of the market integration process. Some better established public goals also included benefits for consumers. Yet, consumer welfare did not exist as an independent objective. It was through the focus on welfare economics that conditions for consumers were supposed to improve. However, by that time the standard initially adopted by the European Communities seems to be more close to total welfare,²²² rather than consumer welfare.²²³ The role of consumers has dramatically increased, particularly since the end of the 1990s.²²⁴ In the 2000s consumers were elevated and placed in the heart of EU competition policies.²²⁵

The process increased its pace when the influence of economic theories grew stronger. Traditionally seen as a feature of US antitrust laws,²²⁶ consumer welfare emerged among the

²²¹ See: Chapter 1, Section 4.2 *Market Integration*. note 146

²²² Total welfare can be defined as a sum of consumer and producer surplus, while consumer welfare focuses exclusively on consumer surplus. See: Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011) 173.

²²³ Akman, *The Concept of Abuse in EU Competition Law* (n 138) 100.

²²⁴ Cseres, *Competition Law and Consumer Protection* (n 5) 20, 251.

²²⁵ Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (n 139) 3.

²²⁶ Bork (n 5). Robert Pitofsky, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008) 92–97; Claus-Dieter Ehlermann and Laraine Laudati, *European Competition Law Annual 1997: Objectives of Competition Policy* (Bloomsbury

principal objectives of EU competition law as well. In 2004, the Commission declared in its guidelines that Article 101 TFEU protects competition in the market, insofar it enhances consumer welfare and ensures the “*efficient allocation of resources throughout the Community for the benefit of consumers.*”²²⁷ A similar assertion was made by the Commission in its guidelines regarding Article 102 TFEU.²²⁸ In 2005, Commissioner Kroes stated that consumer welfare was a standard that “*the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies.*”²²⁹

Many scholars consider consumer welfare to be the ultimate goal of EU competition law.²³⁰ However, it should not be forgotten that *T-mobile* judgment has explicitly rejected an idea of a single objective.²³¹ Moreover, different objectives do not stand alone, but they are interdependent. The Commission views market integration and competition process “*as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.*”²³² EU courts also share the position that damaging competition process harms consumers.²³³ In brief, market integration and high level of competitiveness are integrally

Publishing 1998) 18; Buttigieg (n 30) 3–4; Philip Marsden, *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar Publishing 2008) 566–594.

²²⁷ Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty (Text with EEA Relevance)’ [13].

²²⁸ EU Commission, DG Competition (n 187); *C-209/10, Post Danmark A/S v Konkurrencerådet*, (CJEU) [20]; *TeliaSonera Sverige [2011] ECR I 527* *Case C 52/09 TeliaSonera Sverige [2011] ECR 527* 24.

²²⁹ Neelie Kroes, ‘European Competition Policy – Delivering Better Markets and Better Choices. Speech at European Consumer and Competition Day’ <http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm> accessed 27 August 2017.

²³⁰ Referring to (n 223) 13. and *Joined Cases 56/64 & 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*. (n 164). Kokkaris claims that even market integration is merely a proxy of consumer welfare and not an aim itself. See: Ioannis Kokkoris, *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2010) 401. see also: Mel Marquis, ‘O2 (Germany) v Commission and the Exotic Mysteries of Article 81(1) EC’ 1, 29–47. Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 23.

²³¹ *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181). See also: Chapter I, Section 4.3 *Competition Process*

²³² (n 223). [13]

²³³ Peters (n 55) 40.

related in the EU, while most of consumer benefits are direct outcomes of these two processes.

This brief review demonstrated that there is not one dominant objective for EU competition law. The discipline is too broad and multidimensional to be focused only on one value, as openly confirmed by the T-mobile judgment.²³⁴ Yet, it is possible to identify certain primary purposes that EU competition law aims to achieve, by analysing its history, legal acts, case law and academic literature. These values motivate, or should motivate, every decision, made by competition authorities or courts.²³⁵ While the objectives might be conflicting in some parts, an element of care for consumers and their interests is included in each of the primary goals. Consumer interest is a value that is explicitly or subtly, directly or indirectly but always present among EU competition law goals. However, the only objective that is fully focused on consumers is consumer welfare.

In the beginning of this chapter, we emphasised how the goals of law should be clearly expressed in order to be effective and guide its application and enforcement.²³⁶ Well developed goals should clearly indicate who will benefit once it is achieved.²³⁷ In the case of consumer welfare, the answer to this question is evident immediately from the title. However, the notion fails on the side of another necessary feature, which is to be definite and

²³⁴ C-8/08, *T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181).

²³⁵ The given three objectives of market integration, competition process and consumer welfare does not constitute an exhaustive list of EU competition law goals. There are various other purposes, even though they are less frequently mentioned. For instance, some authors identify the goals of economic freedom and efficiency, industrial policy, SME protection, justice and fairness, political objectives (such as Europeanisation in case of Georgia) and others. See: Parret (n 143). Laura Parret (n 186); Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (n 43).

²³⁶ See: Chapter 1, Section 1. *The need for clarity of objectives*

²³⁷ Farazmand (n 34) 303.

measurable.²³⁸ Ambiguity and uncertainty of the concept make it somehow an abstract value, and reduce its practical impact and possibility for consumers to rely on it.²³⁹ As Brodley claims, consumer welfare is even the most absurd and misunderstood term in modern antitrust analyses.²⁴⁰ Its meaning, how clear the concept is and what challenges and difficulties it might face, at a stage of enforcement, will be discussed in the following section.

5. Notion and statutory basis of Consumer Welfare

While consumer welfare remains among the core objectives of competition law, its meaning remains vague.²⁴¹ Its nebulous concept does not have a straightforward definition,²⁴² nor has it ever been clearly interpreted by the CJEU. What is its exact meaning and whether it can be considered as a synonym for similar concepts of consumer protection or consumer surplus, is only a matter speculation.²⁴³ Authors call it "shocking" and "ironic" that consumer welfare has been the ultimate primary goal for competition law for many years already and its meaning is still obscure.²⁴⁴ Paradoxically, it was introduced for the very purpose to bring clarity and uniformity, as EU competition law enforcement system was about to get reformed and decentralised.²⁴⁵ Failure to develop this uniformity and general consent about its meaning creates significant problems for the coherent and consistent interpretation of competition law

²³⁸ Zimmer (n 30) 56–61; Smith (n 35) 95–113.

²³⁹ This question will be further discussed in the following section.

²⁴⁰ According to Brodley himself, “*Consumer welfare can be reached by a direct and explicit economic benefits received by the consumers of a particular product as measured by its price and quality*“ See: Joseph Brodley, ‘Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress’ [1987] New York University Law Review 62 1020, 1032, 1033.

²⁴¹ Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (n 139) 22, 23.

²⁴² Victoria Daskalova, ‘Consumer Welfare in EU Competition Law: What Is It (Not) About?’ (2015) 11 The Competition Law Review 133, 134.

²⁴³ Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (n 43) 16.

²⁴⁴ Victoria Daskalova, *Consumer Welfare in EU Competition Law: What Is It (Not) About?* 133

²⁴⁵ *ibid* 113.

among the 28 EU Member States. The ICN discussion document from 2012 well demonstrates that the NCAs use widely different readings of consumer welfare and cannot agree on its notion.²⁴⁶

The existing confusion can be partially explained by the origin of the notion, borrowed from economics and made popular by pioneering scholars such as Bork. According to him “*consumer welfare is greatest when society’s economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense is merely another term for the wealth of the nation*”²⁴⁷ Nowadays, it is a widely shared idea that this definition was unfortunate,²⁴⁸ and that Bork confused the notion of “consumer” welfare with another economic concept, known as total welfare.²⁴⁹ Since then, the obscuring mist has never abandoned the notion.

In fact, the use of the definition offered by economic theories is a common mistake.²⁵⁰ According to the OECD glossary, consumer welfare is about the individual benefits a consumer can obtain from consumption.²⁵¹ Theoretically, individual welfare is based on the consumer’s subjective satisfaction from goods or services, considering the balance between prices and her personal income.²⁵² Eventually, when there is the need to measure not a specific individual’s welfare but consumer welfare, generally consumer surplus value is used,

²⁴⁶ For detailed information, see: International Competition Network (ICN), ‘Competition Enforcement and Consumer Welfare, Setting the Agenda’, <<http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf>>.

²⁴⁷ Bork (n 112) 90.

²⁴⁸ Heyer (n 113) s19-32.

²⁴⁹ Consumer welfare is similar to consumer surplus, while total welfare along with consumer surplus includes producer surplus and economic efficiency. Heyer (n 135) s20

²⁵⁰ Daskalova (n 238). 134

²⁵¹ ‘OECD Glossary of Statistical Terms - Consumers’ Surplus Definition’ (n 132).

²⁵² *ibid.*

which can be “*defined as the excess of social valuation of product over the price actually paid.*” This economic meaning can be helpful to understand its origins; however, it is wrong to refer to it in order to clear up the uncertainty surrounding the concept when used in the legal sphere.

According to Kokkoris, an interesting feature of economic transplants is that their interpretation is often different from their original meaning in economics.²⁵³ The transplanted notion always changes and adapts its meaning to the new environment it is transplanted into; eventually it always goes through some modification. If in economics consumer welfare is primarily focused on prices, in competition law it needs to apply further developed and comprehensive methods to assess consumers’ satisfaction. Price is a significant part of consumer benefits, but there are other advantages provided to consumers by competition law.²⁵⁴ The Commission indicated low prices, high quality products, a wide selection of goods and services, and innovation when talking about consumer welfare.²⁵⁵ The same approach was used by the CJEU in *Post Danmark*,²⁵⁶ when it first mentioned consumer welfare without offering any definition, but still making a reference to “*price, choice, quality, or innovation*”.²⁵⁷

Consumer welfare gains additional features in competition law, as it becomes multidimensional and focused on multiple objectives, which may eventually present mutual tensions and inconsistencies. For instance, consumer welfare strives to ensure low prices in the market, but obviously the more benefits a producer offers to consumers, the higher will

²⁵³ Kokkoris (n 226). 239

²⁵⁴ Daskalova (n 238) 135, 137.

²⁵⁵ EU Commission, DG Competition (n 187) [13].

²⁵⁶ *C-209/10, Post Danmark A/S v Konkurrencerådet*, (CJEU).

²⁵⁷ *Ibid*, [22]; See also: Daskalova (n 238) 135, 137.

be the price. In economics, in order to define consumer surplus, the actual price is compared to the price paid, and the smaller the difference the higher is consumer surplus.²⁵⁸ However, as well explained by Tepperman and Sanderson, innovative undertakings need to invest plenty of resources in R&D constantly, and in order for them to undertake such investments, they need to get positive returns per sold unit. "In other words, innovating firms anticipate a period of 'incumbency' during which they are able to sell a product at a price exceeding not only the short run marginal cost of production, but potentially also the price of existing products (if any) that do not incorporate the innovation."²⁵⁹

The authors indicate that the R&D process as such does not bring any incentives itself, and consumers do not actually benefit from the overcharge of R&D spending until the overpaid cost "results in an increased likelihood of either a new product being developed or an existing product being made available for a lower price."²⁶⁰ This is an illustration of effect based approach, which takes into consideration the actual positive outcome and disregards the potential benefits until they are realized. Investing in research might sound good, but what actually matters in competition law is the outcome of a specific practice. The final decision about the legality of a practice cannot be made without considering its effects over consumers.²⁶¹

A clear demonstration of the validity of this argument from recent history would be the case of Turing Pharmaceuticals and its notorious former CEO Martin Shkreli. In 2015, the pharmaceutical company acquired rights over a decades-old, life-saving drug and raised its

²⁵⁸ James D Gwartney and others, *Economics: Private and Public Choice* (Cengage Learning 2016) 58.

²⁵⁹ Andrew Tepperman, Margaret Sanderson, 'Innovation and Dynamic Efficiencies in Merger Review' (9 April 2007) 5, 6

²⁶⁰ Ibid

²⁶¹ Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' 19.

price over 5000%, from \$13.50 to \$750, per pill. In response to public outrage, Shkreli justified his actions by indicating that he was using the boosted profit to invest more in “doing research for diseases no one cares about.”²⁶² In this case, it will be hard to prove any value and benefit for consumers in this alleged research, until it is realised into new products, practical and beneficial for consumers.

As noted above, one of the problems with the definition of consumer welfare is that it is not clearly defined in hard law. Similar to other economic transplants, it has been introduced to EU law through soft law instruments.²⁶³ However, this still does not mean that there is no presence of the concept or its supporting clauses in primary EU law. The main sources for EU competition law are Articles 101 and 102 TFEU, which contain fundamental provisions on anti-competitive agreements or concerted practices between undertakings and abuse of dominant position. If consumer welfare is the ultimate goal of competition law, it should be at least indirectly or subtly mentioned in these articles.

Article 101 TFEU is one of the cornerstones of EU competition law, forbidding agreements, decisions and concerted practices that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. When an agreement is caught by Article 101(1) TFEU there still is a chance to justify the restrictions, if it meets the requirements determined by Article 101(3) TFEU. One route is for the restriction to generate benefits such as “*improving the production or*

²⁶² John LaMattina, ‘Martin Shkreli Has A Research Plan For Turing Pharmaceuticals -- Is It Viable?’ (*Forbes*) <<https://www.forbes.com/sites/johnlamattina/2015/12/15/martin-shkreli-has-a-research-plan-for-turing-pharmaceuticals-is-it-viable/>> accessed 27 August 2017; ‘Everything You Know About Martin Shkreli Is Wrong—or Is It?’ (*Vanity Fair*) <<https://www.vanityfair.com/news/2015/12/martin-shkreli-pharmaceuticals-ceo-interview>> accessed 27 August 2017.

²⁶³ Daskalova (n 238) 134. Kokkoris (n 226). 239

distribution of goods or to promoting technical or economic progress”, but only if consumers are allowed to get a fair share of them. As the GC ruled in the *Mastercard* case,²⁶⁴ Article 101(3) TFEU is the specific framework to analyse and weight pro and anticompetitive effects of an agreement, which also takes into consideration the benefits consumers might get.

In order to examine whether the benefits considered by Article 101(3) TFEU correspond to the objective of consumer welfare, it is interesting to take a look at examples of what needs to be done in order to avoid a violation of Article 101(1) TFEU. Based on the interpretations of the Commission, some kind of economic advantages for consumers are required, like increasing quality of the goods or services, or increasing diversity.²⁶⁵ The CJEU formulated the balancing test in *Consten and Grundig* case.²⁶⁶ As the court stated *„improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.”*²⁶⁷ The EC Guidelines on the Application of Article 81(3)²⁶⁸ underlines the importance of a case-by-case assessment of restrictive agreements, which must be made *“within the actual context in which they occur and on the basis of the facts existing at any given point in time.”*²⁶⁹

Another crucial issue regarding consumer benefits is how quickly the promised beneficial effects will be realized. The Commission’s position is that the shorter time they take, the higher the chances are the infringement to get exempted from the application of Article 101(3) TFEU. The Guidelines state that *“a gain for consumers in the future [...] does not fully*

²⁶⁴ Peritz (n 46) 5, 9.

²⁶⁵ Cseres, *Competition Law and Consumer Protection* (n 5) 256, 257.

²⁶⁶ *Joined Cases 56/64 & 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community.* (n 164).

²⁶⁷ *ibid* 13.

²⁶⁸ (n 223).

²⁶⁹ *ibid* 44.

compensate for a present loss to consumers of equal nominal size [...] so that [...] the value of saving 100 euro today is greater than the value of saving the same amount a year later”²⁷⁰

The guidelines also determine that “*the fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3) [now Article 101(3) TFEU]. However, the greater the time-lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.*”²⁷¹ The text pays particular attention to the concept of fair share, stressing that the overall impact over consumers should not be negative in any case and “*the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement.*”²⁷² If the consumers are worse off following the agreement, the second condition of Article 101(3) TFEU is not fulfilled and therefore, no exemption can be granted to the infringer party.

Overall, the EU approach from the perspective of Article 101 TFEU can be summarised as follows. Market competition should not be distorted with anticompetitive agreements and concerted practices; while competition is maintained, consumers get benefits of low prices, high quality of goods and broader selection to choose; once an illegal collusion occurs, infringers will be sanctioned, and can be exempted only if their anticompetitive agreement offers some value for the market, out of which consumers should enjoy a fair share. Law enforcement in this case shows concern toward consumers. However, there is no any reference to consumer welfare, and its notion still remains vague.

²⁷⁰ *ibid* 87, 88.

²⁷¹ *ibid*.

²⁷² *ibid* 85.

Article 102 TFEU is another pillar of EU competition law. If Article 101 TFEU restricts anticompetitive cooperation between undertakings, Article 102 TFEU focuses on unilateral conduct by market dominants and restricts abuse of their powers and position, as incompatible with the internal market. Unlike Article 101 TFEU, Article 102 does not refer to consumers. However, this does not necessarily mean that the article completely neglects their interests.

Abuse of dominant position can be realized through exploitative or exclusionary conduct.²⁷³ The former refers to activities from a dominant undertaking aiming to exploit consumers and other market participants directly, e.g. by establishing excessive prices meaning “*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied.*”²⁷⁴ Such conduct is sanctioned by Article 102 TFEU, as “*directly exploitative of consumers*” and the Commission intervenes “*where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured.*”²⁷⁵ In this case, even though there is no mention of consumers in the text of the article, the benefits for them are obvious, as the prohibition restricts the conduct, harmful for consumers. In case of exploitative conduct, harm to consumers is direct.²⁷⁶ With regard to exclusionary conduct, it is less clear-cut and more subtle in its dangers for consumers.

²⁷³ Pranvera Këllezi, Bruce Kilpatrick and Pierre Kobel, *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How* (Springer 2017) 13; Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier, *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer Science & Business Media 2008) 151; Barry E Hawk, *International Antitrust Law & Policy: Fordham Competition Law 2008* (Juris Publishing, Inc 2009) 612; Jones and Sufrin (n 164) 351; Barry J Rodger and Angus MacCulloch, *Competition Law* (Cavendish Publishing 2001) 90.

²⁷⁴ *Case 27/76, United Brands v Commission* [1978] Eur Court Rep 1978 -00207 [250].

²⁷⁵ European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ II.7.

²⁷⁶ “*for example charging excessively high prices*”. See: Ibid. [7]

However, its anticompetitive effects impact consumer welfare and harm their interests directly or indirectly.²⁷⁷

When the Commission, EU courts, as well as the NCAs and national courts use Article 102 TFEU against exclusionary conduct, particular attention is paid to actions directed to change a market structure.²⁷⁸ The Commission-issued a Guidance Paper on enforcement priorities when applying Article 102 TFEU to exclusionary conduct²⁷⁹ explains that “*it is better to prevent than to cure – i.e. if markets are not functioning properly, it makes more sense to prioritise the tackling of unilateral conduct which undermines the structure and functioning of the market itself than to address the symptoms.*”²⁸⁰ The Commission also stressed that the Guidance Paper aimed to contribute to the introduction of a more economics-based approach to European competition law enforcement.²⁸¹ This modernization process, which occurred in the 2000s, was widely seen as strengthening the positions of consumers and enhances consumer welfare.

The Guidance Paper outlines an effects-based approach, which aims to protect competition and consumer welfare. It refuses to selectively support single weaker undertakings, as against

²⁷⁷ Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier, *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer Science & Business Media 2008) 35.

²⁷⁸ Richard S Markovits, *Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law: Volume II Basic Concepts and Economics-Based Legal Analyses of Oligopolistic and Predatory Conduct* (Springer Science & Business Media 2014) 131.

²⁷⁹ European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (n 271) 7–20.

²⁸⁰ ‘European Commission - Press Release - Antitrust: Guidance on Commission Enforcement Priorities in Applying Article 82 to Exclusionary Conduct by Dominant Firms – Frequently Asked Questions’ <http://europa.eu/rapid/press-release_MEMO-08-761_en.htm?locale=en> accessed 8 October 2015. Question 12

²⁸¹ *Ibid.* question 1

fair competition principles and of no proven benefit for consumers.²⁸² There is no preference for smaller and weaker undertakings over large-scale dominants. On the contrary, dominant companies are fully free to compete, without using any anticompetitive practices and „as long as this competition is ultimately for the benefit of consumers.”²⁸³ The Guidance stresses that Article 102 TFEU should be focused on the types of conduct „that are most harmful to consumers”²⁸⁴ and one of such practices is exclusionary conduct. The latter aims to deliberately exclude real competitors from the market, avoid their expansion or create barriers to entry.²⁸⁵ The Commission explains that such distortions are harmful for consumers because they neutralise the benefits they receive from a competitive market. This is why it should be ensured that „markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.”²⁸⁶

Article 102 TFEU uses a similar effect-based approach as Article 101 TFEU, measuring effectiveness from the perspective of competition and ultimately from the consumer’s point of view. After demonstrating how an alleged abusive conduct might restrict competition and what harm can be brought to consumers, the only way to rebut the findings is to prove the existence of efficiencies, which leaves consumers overall better off.²⁸⁷ Objective justifications can be similar to those stated in 101(3) TFEU or others as well, such as

²⁸² Ibid. question 6

²⁸³ Ibid. Questions 2, 6

²⁸⁴ European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (n 271).

²⁸⁵ *ibid.*

²⁸⁶ *ibid* II.5.

²⁸⁷ ‘European Commission - Press Release - Antitrust: Guidance on Commission Enforcement Priorities in Applying Article 82 to Exclusionary Conduct by Dominant Firms – Frequently Asked Questions’ (n 274) Question 2, 6.

protecting one's commercial interests, when under attack.²⁸⁸ Moreover, paragraph 28 of the guidelines underlines that no conduct can be justified, unless it “*produces substantial efficiencies which outweigh any anti-competitive effects on consumers.*”²⁸⁹

Similar to Article 101 TFEU, Article 102 TFEU shows a declared care and concern regarding consumers and their interests, which is negatively affected in case of abuse of dominance. If exploitative conduct is an evident violation of consumer interest, in case of exclusionary practices consumer harm is less straightforward and indirect, as it harms consumer interests through the exclusion of competitors.²⁹⁰ This is even more confusing, as certain means of exclusion can even be beneficial for consumers, at least for a certain amount of time. For example in the *Microsoft* case²⁹¹ consumers enjoyed a free media player that was tied to Windows operating system. Benefits are also evident in case of predatory pricing, like in the landmark *Akzo* case,²⁹² when customers of its competitor ECS could buy goods from Akzo for a price lower than average. However, in both cases what matters is not a temporary reward, but the ultimate harm that will be unavoidable once the abusing undertaking achieves its goal.²⁹³ Eventually, Article 102 TFEU protects consumers from direct or indirect harms, and allows certain undesired conducts only in exchange for consumer benefits.

To summarize, the analysis of Article 101 and 102 TFEU helped to assure that these primary clauses of EU competition law do not leave consumer out of sight, and are genuinely

²⁸⁸ *Joined Cases C-468/06 to C-478/06 Sot Lélou kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proionton, formerly Glaxowellcome AEEVE* [2008].

²⁸⁹ European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (n 271) 28.

²⁹⁰ Akman, *The Concept of Abuse in EU Competition Law* (n 138) 1.

²⁹¹ *Case T-201/04, Microsoft Corp v Commission* [2007].

²⁹² *Case C-62/86, Akzo Chemie BV v Commission* [1991] ECR -3359.

²⁹³ Steven Salop, ‘Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard’ [2006] *Georgetown Law Faculty Publications and Other Works* 311–374.

concerned to avoid any harm to them, while ensuring some benefits. This analysis also demonstrated that in order to support consumer interests it is not necessary to explicitly refer to consumer welfare as an object. Articles 101 and 102 TFEU manage to be consumer-oriented without even mentioning consumer welfare, and it is partially because of this that the analysis of the provisions does not help much to understand the obscure concept of consumer welfare.

Consumer welfare can be interpreted as a broad framework policy that restricts any agreement or practices detrimental to consumers and supports measures that benefit them. Eventually, consumer welfare is an approach when every competition law related decision is supposed to bring some benefit for consumers, either by offering benefits or ending practices detrimental to consumers. Unlike its meaning in economics, in competition law consumer welfare is not limited exclusively to price factor, but it takes into consideration various values and is open for non-economic interests as well.²⁹⁴

Consumer welfare is not a synonym for consumer surplus. The concept does not have a purely economic or legal rationale.²⁹⁵ It is a broader policy objective, which ensures that consumers will get a fair share from generated welfare.²⁹⁶ Such approach includes an element of wealth distribution, based on the assumption that consumers are weak, and there is the need to eliminate this asymmetry between producers and consumers and establish some balance.²⁹⁷ With such approach, consumer welfare shows strong similarities with the

²⁹⁴ Claassen and Gerbrandy (n 140) 2.

²⁹⁵ Katalin Judit Cseres, 'The Controversies of the Consumer Welfare Standard' 127.

²⁹⁶ Ibid

²⁹⁷ *ibid*; Jarig van Sinderen and Ron Kemp, 'The Economic Effect Of Competition Law Enforcement: The Case Of The Netherlands' (2008) 156 *De Economist* 365.

rationale of consumer protection, eventually making a competition law system aiming for consumer welfare even more closely tied and intertwined with consumer law.

The major flaw of the concept of consumer welfare remains its indefinite, unclear nature. It encourages general care for consumer interests and their welfare, but it is not concrete and programmatic enough to be effective in accomplishing these objectives. Its notion is very broad and leaves room for diverse interpretations.²⁹⁸ The obscurity of the concept, however, does not change the fact that it is among the primary goals of competition law. However, it makes questionable whether this objective is actually followed at the enforcement stage. Studies demonstrate²⁹⁹ how diversely it is interpreted and understood by various enforcement authorities. In practice it translates to radically different policies, or sometimes into no policies at all. Despite the disadvantages, consumer welfare succeeds to highlight the vital role of consumers in competition law enforcement and makes consumer perspective, their harm and benefits an important and relevant question for each competition law related decision or judgement.

6. The birth, evolution and current state of competition law in Georgia

This chapter would not be complete without expanding analysis to cover the second jurisdiction of this research – Georgia. To define the goals of Georgian competition law, the same methodology will be used that was already applied to EU law. A brief historic review will demonstrate how Georgian antimonopoly and competition law was born and has been

²⁹⁸ Daskalova (n 238) 144.

²⁹⁹ Steiner (n 5) 60.

evolving up to date. Analysing history and examining reasons and objectives of specific ways of development will allow a better understanding of modern Georgian competition law and what it strives for.

6.1 The total absence of market competition in Georgia, until restoring independence in 1991

Georgia has been part of Russian Empire since 1801, when Tsar Alexander I annexed the Kingdom of Kartli-Kakhetia initially and then gradually the rest of the Georgia.³⁰⁰ Eventually, for more than a century, the Georgian economy existed within heavily agrarian economy of Tsarist Russia. As estimated, more than 80% of labour force in the Russian Empire was working in agriculture, and modern manufacturing sector was underdeveloped.³⁰¹ Although there were attempts to launch modernisation and industrialisation reforms, in the second half of the nineteenth century they all largely failed.³⁰² Overall, the size of Russian economy remained small, and corporations were in much smaller numbers compared to other contemporary European states.³⁰³ Access to the market was limited due to significant barriers to entry, while monopolies dominated industries such as iron, steel, oil, coal, railway

³⁰⁰ Ronald G Suny, *Armenia, Azerbaijan, and Georgia* (DIANE Publishing 1996) 159; Dominik Gutmeyr, *Borderlands Orientalism or How the Savage Lost His Nobility: The Russian Perception of the Caucasus Between 1817 and 1878* (LIT Verlag Münster 2017) 46.

³⁰¹ Anton Cheremukhin and others, 'The Industrialization and Economic Development of Russia through the Lens of a Neoclassical Growth Model' (2017) 84 *Review of Economic Studies* 613, 613–621. Oscar Sanchez-Sibony, *Red Globalization: The Political Economy of the Soviet Cold War from Stalin to Khrushchev* (Cambridge University Press 2014) 29.

³⁰² *Ibid*

³⁰³ By 1914, there were 2263 corporations in Russia, while the same index amounted to more than double number of companies in Germany, equaling to 5488 and meanwhile, Britain had as many as 65700 corporations. Sanchez-Sibony (n 295) 7-8

engineering, as well as non-heavy industries, such as textile.³⁰⁴ Soviet historians later named the period “monopoly capitalism”.³⁰⁵

Needless to say, the Georgian economy did not develop significantly under the Russian rule, with Georgia remaining a predominantly agrarian county. Despite rich natural resources, raw materials were exported and consumer goods – imported; therefore, no large-scale production was taking place locally.³⁰⁶ After the revolution of 1917,³⁰⁷ Georgia seized the moment and declared independence in 1918, bringing a Socialist-Democratic government into power. Due to severe lack of budgetary resources, the government decided to monopolise key sectors of the national economy and direct profits straight to the state budget.³⁰⁸ Eventually, decisions were made to monopolize export of tobacco leaves and manganese from Tchiatura mines, as well as wool and silk industries.³⁰⁹ The government also nationalised mineral spas, water and mud resorts, as well as all the natural ores.³¹⁰ However, the ongoing monopolisation and nationalisation processes were not completed due to the invasion of Georgia by the Red Army, in 1921.

³⁰⁴ Cheremukhin and others (n 336) 619–622.

³⁰⁵ Ibid. Roger D Markwick, *Rewriting History in Soviet Russia: The Politics of Revisionist Historiography, 1956-1974* (Palgrave Macmillan 2001) 79.

³⁰⁶ Tamar Atanelishvili, *Economic Reforms in the Georgian Democratic Republic (1918-1921)* (Tbilisi University publishing, Tbilisi 2006) 9.

³⁰⁷ See: Rex A Wade, *The Russian Revolution, 1917* (Cambridge University Press 2005); Daniel H Kaiser, *The Workers' Revolution in Russia, 1917: The View from Below* (Cambridge University Press 1987); Edith Rogovin Frankel and Jonathan Frankel, *Revolution in Russia: Reassessments of 1917* (Cambridge University Press 1992); Gerard Turley and Peter J Luke, *Transition Economics: Two Decades On* (Routledge 2012) 18.

³⁰⁸ Atanelishvili (n 300) 34

³⁰⁹ Ibid. 34-38

³¹⁰ Ibid. 42-43

Soon the Soviet Union emerged and started an aggressive process of collectivisation³¹¹ and Sovietization of economy.³¹² The Centrally planned Soviet economy did not function according to the rules of free market. The state kept absolute monopoly over production and distribution process,³¹³ there was no private ownership and property was seen as robbery,³¹⁴ while market competition was considered to be an evil and was artificially substituted by socialist emulation.³¹⁵ In addition to competition, consumer society was also inexistent in the Soviet Union.³¹⁶ During the 70 years of Soviet regime, propaganda popularised communist ideology and stigmatised competition and market economy.³¹⁷ At the dusk of the Soviet Union, as economic crisis deepened, so-called *Perestroika*³¹⁸ reform was initiated, in an attempt to modernise the economy. Cooperatives and collective enterprises started to form,

³¹¹ Collectivisation was a program in the Soviet Union to effectively abolish private property and transform agricultural sector into a party controlled collective farms. The process was met with strong resistance that led to Dekulakisation, meaning "liquidation of kulaks as a class" as formulated by Stalin. The latter was carried out by killing or deporting millions of peasants, who were accused of being anti-Soviet elements and making trouble for execution of collectivisation process. See: Alex F Dowlah and John E Elliott, *The Life and Times of Soviet Socialism* (Greenwood Publishing Group 1997) 76–105; Sheila Fitzpatrick, *Stalin's Peasants: Resistance and Survival in the Russian Village After Collectivization* (Oxford University Press 1996) 48–80; Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (Oxford University Press 1987). Irwin T Sanders, *Collectivization of Agriculture in Eastern Europe* (University Press of Kentucky 2015).

³¹² Alexander Mikaberidze, *Historical Dictionary of Georgia* (Scarecrow Press 2007) 35–36.

³¹³ Cseres, *Competition Law and Consumer Protection* (n 5) 166–167. David L Prychitko, 'Marxism' (*Library of Economics and Liberty*) <<http://www.econlib.org/library/Enc/Marxism.html>> accessed 27 August 2017.

³¹⁴ Vladimir Lenin, 'Speech Delivered at a Conference of Chairmen of Uyezd, Volost and Village Committees of Moscow Gubernia' (15 October 1920) <<https://www.marxists.org/archive/lenin/works/1920/oct/15b.htm>> accessed 27 August 2017.

³¹⁵ Various alternative methods were engaged in Soviet Union in order to ensure some level of quasi competition and increase labour productivity, such as: all-union socialist competition race, introduction of various titles, such as: shock workers, shock brigades, transferable red banners and so forth. See: Tatiana Maximova-Mentzoni, *The Changing Russian University: From State to Market* (Routledge 2012) 208–209. Karl Marx, *The Poverty of Philosophy* (Cosimo, Inc 2008) 158–168; Iacob Futkaradze, 'Article 30.' in Paata Turava (ed), *Commentaries of the Constitution of Georgia. Vol. II. Citizenship of Georgia, Basic Human rights and freedoms.* (Petiti 2013).

³¹⁶ This topic will be further analysed in Chapter 2. *The notion of consumer and the rationale of consumer law*

³¹⁷ Stephen Kotkin, *Magnetic Mountain: Stalinism as a Civilization* (University of California Press 1997) 239.

³¹⁸ *Perestroika* literally means restructuring and refers to Mikhail Gorbachev's reformation policies, named after his book of the same name, published in 1987. *Perestroika* reforms attempted to introduce elements of democracy to Soviet political system and transform stagnant Soviet economy, allowing simple forms of private business doing. See: Alfred J Rieber and Alvin Z Rubinstein, *Perestroika at the Crossroads* (Routledge 2016) 1; Craig A Lockard, *Societies, Networks, and Transitions: A Global History* (Cengage Learning 2014) 712.

which were not owned by the state.³¹⁹ However, reforms could not deliver any significant changes anymore, and in 1991, due to complex various factors, including its inefficient economic system, the Soviet Union dissolved.

6.2 The rise and fall of the first antimonopoly legislation of Georgia

As a former Soviet republic, Georgia had not received any valuable legal heritage on competition and market regulation, when it restored independence in 1991. After decades of living under the Soviet regime, Georgia entered into the unknown realm of market economy. Like many other Soviet republics, Georgia welcomed the fall of the Soviet Union.³²⁰ The 1980s were dominated by national-liberation movement in Georgia, therefore when the Union collapsed, it was celebrated.³²¹ However, as there was the need to go through the transition from a centrally planned economy to a free market model, there was no clear understanding and readiness for the colossal changes, as the processes of Soviet disintegration occurred rapidly and unexpectedly.³²²

Georgia was one of the first countries, among the former Soviet and Eastern Block Member

³¹⁹ Festschrift Festschrift and others, *The Revival of Private Law in Central and Eastern Europe: Essays in Honour of Ferdinand J.M. Feldbrugge* (Martinus Nijhoff Publishers 1996) 252; Leo Paul Dana, *When Economies Change Hands: A Survey of Entrepreneurship in the Emerging Markets of Europe from the Balkans to the Baltic States* (Routledge 2013) 209.

³²⁰ Elgin F Hunt and David C Colander, *Social Science: An Introduction to the Study of Society -- Pearson EText* (Routledge 2015) 224; Archie Brown, *The Gorbachev Factor* (OUP Oxford 1997) 258.

³²¹ Timothy C Dowling, *Russia at War: From the Mongol Conquest to Afghanistan, Chechnya, and Beyond [2 Volumes]* (ABC-CLIO 2014) 861.

³²² Mark R Beissinger, *Nationalist Mobilization and the Collapse of the Soviet State* (Cambridge University Press 2002) 2; Susanne Michele Birgerson, *After the Breakup of a Multi-Ethnic Empire: Russia, Successor States, and Eurasian Security* (Greenwood Publishing Group 2002) ix.

States, to introduce antimonopoly regulations, already in 1992.³²³ The adoption of the Decree on Limitation of Monopoly Activities and Development of Competition (the Decree)³²⁴ can be viewed as a part of larger process of de-Sovietization and shifting from communism to capitalism, getting rid of the Soviet economic legacy and setting up modern free market economy.³²⁵ The reform was an economic one, but the process of de-Sovietization had a strong political context as well.³²⁶

In the early 1990s, the Georgian economy was too young to have any powerful private undertakings on the market, but as mass privatisation was planned to be carried out, there were the risks that state monopolies would be captured and transformed into private monopolies.³²⁷ Therefore, when the privatisation process started it became necessary to monitor it. The voucher-based mass privatisation was handled in a rather hasty manner and suffered numerous shortcomings;³²⁸ however, an increasing number of private enterprises started entering the market, and early forms of competition started to appear. The State Council³²⁹ saw the need to introduce some antimonopoly regulations, and without waiting for

³²³ Ekaterine Udesiani, 'Establishing Competition Policy According to the Deep and Comprehensive Free Trade Agreement between Georgia and EU' 10.

³²⁴ Fetelava (n 21) 4, 5, 16.

³²⁵ Ibid 15, 16.

³²⁶ De-Soviatization was a part of the transformation process, experienced by the former Soviet republics, conducted through democratization, marketization and de-colonization what was often accompanied with raised nationalism. In early 1990s Georgia was going through post-colonial nationalism and actions were often triggered not by pragmatic but by populist and emotional reasoning. See: Stephen Jones, *Georgia: A Political History Since Independence* (IBTauris 2015) 51-54.

³²⁷ Fetelava (n 21) 17.

³²⁸ Anna-Katharina Hornidge, Anastasiya Shtaltovna and Conrad Schetter, *Agricultural Knowledge and Knowledge Systems in Post-Soviet Societies* (Peter Lang 2016) 186; Mr Oli Havrylyshyn and Mr Donal McGettigan, *Privatization in Transition Countries: A Sampling of the Literature* (International Monetary Fund 1999) 28.

³²⁹ By the end of 1991, a military *coup d'état* took place in Georgia, overthrowing the government and seizing the power. In the beginning of Jan. 1992, an interim government - the Military Council was formed, which by March 1992 was reconstituted into the State Council.

formation of the parliament it adopted the Decree.³³⁰

In the 1990s, Georgia was a fragile, new-born state, facing challenges in every direction.³³¹

However, an interesting feature was that in this period legal reforms were, in some perspective, more in line with international and European tendencies than current legal developments. This is particularly visible when examining how competition and consumer laws emerged together and developed hand in hand, for more than a decade. There was understanding that these two separate fields of law are actually interrelated so closely that it is impossible to advance one field, without developing the other as well.

The Decree adopted in 1992 was dedicated to establish a competitive environment on the market and protect the interests of consumers.³³² The Anti-Monopoly Department was created within the Ministry of Economy, with the task to enforce the decree. It was given the competence to enforce both antimonopoly and consumer protection regulations.³³³ The tendency of bundling competition law and consumer protection provision together continued in the Constitution of Georgia, adopted in August 1995. Part 2 of Article 30 of the Constitution prohibits monopolies and establishes guarantees for free competition and consumer rights protection,³³⁴ placing free competition and consumer protection guarantees

³³⁰ Fetelava (n 21) 4, 5, 16.

³³¹ Mikheil Saakashvili and Kakha Bendukidze, 'Georgia, the Most Radical Catch-up Reforms' in Anders Aslund and Simeon Djankov (eds), *The Great Rebirth: Lessons from the Victory of Capitalism over Communism* (Peterson Institute for International Economics 2014) 236; Lorenz King and Giorgi Khubua (eds), *Georgia in Transition: Experiences and Perspectives* (Peter Lang 2009); Tamar Burduli, 'Economic Transitions in Georgia: On The Path from Shock Therapy to DCFTA'.

³³² Givi Bedianashvili, Shalva Gogiashvili and Solomon Pavliashvili, 'European Integration and Institutional Aspects of Competition, Globalisation and Business, N1 – Special Edition' (2016) Special edition Globalisation and Business 26, 26.

³³³ Lapachi and Tivlisvili (n 22) 383, 384.

³³⁴ "The State shall be bound to promote free enterprise and competition. Monopolistic activity shall be prohibited, except as permitted by law. Consumer rights shall be protected by law." Constitution of Georgia 1995 Art. 30.2.

under the same provision in the Constitution, thus recognising that the two fields are interrelated.

The existence of common links was once more stressed by the Law on Monopoly Activity and Competition, adopted a year later.³³⁵ The law determined that its objective was to promote entrepreneurship and to create a legal framework to foster a competitive environment and protect consumer rights. The Law on Protecting Consumer Rights was adopted a few months earlier.³³⁶ By 1998, the Law on Advertising was also adopted, including provisions regarding consumer protection from misleading advertising. The Antimonopoly Service was also established, and the first article of its charter defined it as a monitoring-regulatory body, responsible for the enforcement of anti-monopoly, consumer rights protection and advertising legislation. Moreover, the initial antimonopoly law of Georgia was very clear about recognising consumer protection as one of its primary objectives, as stated in its first article.³³⁷ The authority was invested with broad competences to intervene on the market, in order to facilitate its consumer rights protection. This approach lasted until 2005.³³⁸

In June 2005, the Georgian government took a U-turn and abolished antimonopoly law, which despite its flaws was considered by the local and international experts to be quite progressive.³³⁹ The Antimonopoly Service was also shut down and a new authority, the AFTC was established. The latter was a classic case of a symbolic authority that was neither supposed to lead any policy changes nor enforce the law. Such authorities are usually

³³⁵ Law of Georgia on Monopoly Activity and Competition 1996.

³³⁶ The Law on the Protection of Consumers' Rights 1996.

³³⁷ Law of Georgia on Monopoly Activity and Competition (n 329) Art. 1(1).

³³⁸ Fetelava (n 21) 135.

³³⁹ Bedianashvili, Gogiashvili and Pavliashvili (n 326) 27; Fetelava (n 21).

formally established, with limited personnel, resources and competencies.³⁴⁰ The Agency was set up to enforce a new law on Free Trade and Competition, adopted in 2005, a nominal law itself. It did not even contain basic competition law provisions, such as those sanctioning anticompetitive agreements, or abuse of dominance, or regulating mergers and acquisitions. The law was limited to some state aid rules. The personnel of the Agency were limited to seven employees.³⁴¹ As a result of the reform, all effective legal state interventions and correction mechanisms were eliminated, marking the beginning of the Georgian *laissez-faire* experiment.³⁴²

The results of the reform were quite devastating. Georgia started to grow into an economy dominated by monopolies and oligopolies.³⁴³ A few large enterprises effectively captured the markets of the most commonly-used goods and services, ousting numerous SMEs,³⁴⁴ whose share in the total turnover of the country's economy decreased by more than 50%, compared to 2000.³⁴⁵ The reform has been heavily criticised by various organisations and scholars as

³⁴⁰ Claus-Dieter Ehlermann and Isabela Atanasiu, *Constructing the EU Network of Competition Authorities* (Hart Publishing 2004) 228, 229.

³⁴¹ Solomon Menabdishvili, 'For the Issue Related to the Definition of Key Terms of Provisions Prohibiting the Cartel Activities', *Journal of Law*, Ivane Javakhishvili Tbilisi State University, N1, 2015' [2015] *Journal of Law*, Ivane Javakhishvili Tbilisi State University 161.

³⁴² *Laissez-faire* is a theory developed by Vincent de Gournay within the Physiocratic movement, in France, in the eighteenth century. The doctrine was developed out of Adam Smith's Invisible Hand theory and opposes interventionism on a market. In the early and mid nineteenth century, the phrase became a synonym for free market economics. The title comes from a phrase: *Laissez-faire, laissez-aller, laissez-passer* that can be translated as: let do, let go, let pass. See: Mandal (n 3) 25; Faccarello and Kurz (n 3) 89; Williams (n 3) 51.

³⁴³ Lado Papava, 'Georgia's Socio-Economic Development: Prospects over the Medium Term' <<http://www.international-alert.org/blog/socio-economic-development-english>> accessed 27 August 2017.

³⁴⁴ Transparency International Georgia, 'Competition Policy in Georgia' (Transparency International Georgia 2012).

For a case study of Georgian oil market, see: *Order №81 on the investigation of car fuel commodity market* (Georgian Competition Agency).

³⁴⁵ National Statistics Office of Georgia, 'Statistics on the Operation of Undertakings' <http://www.geostat.ge/cms/site_images/_files/georgian/business/Press%20Release%202014_II.pdf> accessed 27 August 2017.

well.³⁴⁶ The situation remained unchanged for years, until 2012-2014.

6.3 The contribution of Europeanisation process to the development of Georgian competition law

Before abolishing the antimonopoly law and shutting down the enforcement authority in 2005, Georgian market-related regulations had been developing toward approximating with EU law.³⁴⁷ In some ways, Georgian regulations³⁴⁸ were quite modern and advanced for the given period of time.³⁴⁸ This was a programmatic harmonization, in accordance with the PCA, signed between Georgia and the EU, in 1996.³⁴⁹ Georgia took an obligation to approximate its existing and future legislation, including competition and consumer regulations,³⁵⁰ to EU law.³⁵¹ The PCA was a landmark agreement, but the cooperation

³⁴⁶ Lapachi and Tivlisvili (n 22) 22; Ketevan Lapachi and Kutivadze (n 22) 27. Zurab Gvelesiani, 'The Georgia's First Steps in Competition Law Enforcement: The Role and Perspective of the Private Enforcement Mechanism' (2015) 8 (12) Yearbook of Antitrust and Regulatory Studies, (YARS) 215

³⁴⁷ Fetelava (n 21) 5.

³⁴⁸ For example, see a discussion in the previous section, regarding a holistic approach used in Georgia, to regulate competition and consumer issues coherently, the approach that is very modern and widely used even nowadays. See: Chapter I, Section 6.2 *The rise and fall of the first antimonopoly legislation of Georgia*

³⁴⁹ 'Partnership and Cooperation Agreement between the European Communities and Their Member States, of the One Part, and Georgia, of the Other Part - Protocol on Mutual Assistance between Authorities in Customs Matters' Art. 44.

³⁵⁰ Generally, a tendency of approximating existing and future Georgian laws to European legislation was not only limited with the fields, mentioned in the PCA. After restoring independence and gaining control over national law-making process, a decision was made to build the national legislation after European model, instead of the Soviet heritage. For example, Civil Code of Georgia, adopted in 1997, was not based on its predecessor Soviet civil law, but was instead designed after German and partially French models. As Rusiashvili emphasises, the newly adopted civil code prided itself for rejecting the principle of the Soviet law, in favour of European systems. See: Giorgi Rusiashvili, 'Georgian Law and European Tradition' in Zurab Karumidze, Mariam Rakviashvili and Zaza Shatirishvili (eds), *Georgia's European Ways* (2015) 13.

³⁵¹ 'Partnership and Cooperation Agreement between the European Communities and Their Member States, of the One Part, and Georgia, of the Other Part - Protocol on Mutual Assistance between Authorities in Customs Matters' (n 343) Art. 44.

between Georgia and the EU, had started already in 1991-1992 years.³⁵² In the first years of independence, Georgia redefined its foreign policy and declared the integration with the EU and Euro-Atlantic institutions as its objective.³⁵³ Other than political purposes, approximation with the European family was viewed as an issue of national identity³⁵⁴ and part of the process of “returning to the roots”.³⁵⁵

Since the early 1990s, active steps have been taken to establish close links with the EU. The cooperation was not limited only to political, economic and cultural cooperation, but was multidimensional and can be named as the process of Europeanisation.³⁵⁶ According to Bache and Jordan, this entails the “*reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of*

³⁵² For more information, visit: ‘Partnership and Cooperation Agreement (PCA)’ (*Office of the State Minister of Georgia on European & Euro-Atlantic Integration*) <<http://eu-nato.gov.ge/en/eu/agreement>> accessed 27 August 2017.

³⁵³ For more information, visit: ‘Georgia-EU Cooperation’ (*Office of the State Minister of Georgia on European & Euro-Atlantic Integration*) <<http://www.eu-nato.gov.ge/en/eu/cooperation>> accessed 27 August 2017.

³⁵⁴ On 27 April 1999, at the accession ceremony of Georgia to the Council of Europe, The chairman of the parliamentary assembly, Lord Russel-Johnston, addressed to the Georgian delegation with the following words: “*Georgia, welcome back home!*” The late Prime minister of Georgia, Zurab Zhvania, delivered his historic speech, stating: “*I am Georgian and therefore I am European.*” For more information, see: Natia Mestvirishvili and Maia Mestvirishvili, “‘I Am Georgian and Therefore I Am European:’ Re - Searching the Europeanness of Georgia’ (2014) 8:1 CEJISS 52. ‘Address by Minister of Foreign Affairs of Georgia, H.E. Mr. Grigol Vashadze at the Parliamentary Assembly of the Council of Europe’ (Strasbourg, 25 January 2012) <http://www.spain.mfa.gov.ge/index.php?lang_id=ENG&sec_id=142&info_id=13766> accessed 27 August 2017. Also, see: Saakashvili and Bendukidze (n 325) 150.

³⁵⁵ At the campaign concert “*We Choose Europe*” dedicated to signing the Association Agreement between Georgia and EU, Giorgi Margvelashvili, the president of Georgia, stated during his speech: “*All of us here today are united for a bright goal, which is not just the choice of some political union, neither is this the choice of any politician or a state official; this is not the choice made only by us; this is the choice made by our ancestors, who created this free country – Georgia, who built the freedom, freedom of soul, acceptance of others, tolerance, in the basement of the Georgian culture. That’s why, we are here not only for our choice, but for the choice made by our predecessors.*”

See: ‘The President of Georgia Attends Campaign Concert “We Choose Europe”’ (*president.gov.ge*) <[https://president.gov.ge/en-US/pressamsakhuri/siakhleebi/The-President-of-Georgia-attends-campaign-conc-\(1\).aspx](https://president.gov.ge/en-US/pressamsakhuri/siakhleebi/The-President-of-Georgia-attends-campaign-conc-(1).aspx)> accessed 27 August 2017. See also: Ivliane Khaindrava, ‘Island Georgia’ in Zurab Karumidze, Mariam Rakviashvili and Zaza Shatirishvili (eds), *Georgia’s European Ways* (2015).

³⁵⁶ In January 2014, the Chair of Parliament of Georgia named Europeanisation as Georgia’s dream. See: David Usupashvili, ‘Georgia’s Dream: Europeanization as Democratic Consolidation’ <<http://neurope.eu/article/georgia%E2%80%99s-dream-europeanization-democratic-consolidation/>> accessed 10 October 2017.

governance".³⁵⁷ According to Cseres, competition law has long been "a significant mechanism and the most acute illustration for Europeanisation."³⁵⁸ A particular nature of competition law in the Europeanisation process is related to its active role in an accession process. The practice of transplanting EU the competition system is not only limited to the candidate states, but it also extends to partner states. It is a preparatory phase necessary for gaining access to the single market. Therefore, it serves to elevate the national market regulation standards for partner states, making them better prepared and more compatible with the EU's internal market.³⁵⁹

In the 1990s, the introduction and development of antimonopoly regulations in Georgia occurred within the context of Europeanisation.³⁶⁰ Since Georgia changed the course in 2005 and repealed all its antimonopoly regulations, it was again the process of EU integration that obliged the Georgian government against its political will to bring the country back to the old track. In 2008 the EU mission highlighted the need to improve Georgia's competition policy.³⁶¹ As a priority area for the successful completion of negotiations on the DCFTA, the government was obliged to follow the EU recommendations. Eventually, in 2010 a Comprehensive Strategy on Competition Policy has been prepared and issued by the

³⁵⁷ Ian Bache and Andrew Jordan, 'Britain in Europe and Europe in Britain', *The Europeanisation of British Politics* (Palgrave Macmillan, London 2006) 30.

³⁵⁸ Cseres, 'Accession to the EU's Competition Law Regime: A Law and Governance Approach' (n 13) 35.

³⁵⁹ Abel Czekus, 'Motivations of the Common European Competition Policy and Lessons for the Western Balkans, European Perspectives' (2014) 6 *Journal on European Perspectives of the Western Balkans* 35. Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicted Trade Power' (2006) Vol. 13 *Journal of European Public Policy*.

³⁶⁰ Fetelava (n 21) 5.

³⁶¹ Center for Social and Economic Research, 'Economic Feasibility, General Economic Impact and Implications of a Free Trade Agreement Between the European Union and Georgia' 83–84 <<http://www.case-research.eu/en/economic-feasibility-general-economic-impact-and-implications-of-a-free-trade-agreement-be>> accessed 27 August 2017.

government.³⁶² In May 2012, a new Law on Free Trade and Competition was adopted. While these steps were significant, they were more formal reactions to the EU's demands, rather than a genuine reformation. Therefore, it was not surprising that the law was heavily criticized as incompatible with modern EU standards.³⁶³

The law was reformed in March 2014. In addition to renaming it as the Law on Competition, the substance was so heavily amended that the parliament practically adopted a new law. The amendments solved some problematic issues of the 2012 version of the law and brought Georgian competition law in compliance with EU standards.³⁶⁴ Although, it remained a simplified and downsized version of the EU model.³⁶⁵ Shortly after renaming and reforming the LGC, a new independent authority, the GCA was formed.³⁶⁶ Both the current law and the Agency are constructed according to the EU model.³⁶⁷ In addition to solving national legal and economic problems, the adoption of the law and establishment of the authority are seen to be an achievement in a process of integration with the EU. These facts have actually been included in the DCFTA Implementation report as a demonstration of Georgia's devotion to the terms agreed with the EU.³⁶⁸

³⁶² Decree on the Approval of the Comprehensive Strategy in Competition Policy 2010.

³⁶³ Ketevan Lapachi and Kutivadze (n 22) 30–31; Eva Anderson and Natia Kutivadze, 'TI Georgia Recommendations for the Parliament on Competition Policy' <<http://www.transparency.ge/en/blog/recommendations-for-the-parliament-on-competition-policy>> accessed 27 August 2017. Transparency International Georgia (n 338) 1, 14.

³⁶⁴ Ketevan Lapachi and Kutivadze (n 22) 32–36.;

³⁶⁵ Zukakishvili (n 17) 42.

³⁶⁶ Ordinance on Adopting the Charter of LEPL Competition Agency. 2014.

³⁶⁷ Nicola Mariani, 'Georgia's Competition Agency Is a Reality | Lexology' <<https://www.lexology.com/library/detail.aspx?g=6fab2551-b797-4936-b7c5-536ec166b7dd>> accessed 27 August 2017; Ordinance on Adopting the Charter of LEPL Competition Agency. (n 359).

³⁶⁸ Ministry of economy and sustainable development of Georgia, 'Deep and Comprehensive Free Trade Agreement (DCFTA) 2014-2017 Action Plan Implementation Report for 2015' (2015) 2015 annual report <http://www.economy.ge/uploads/dcfta/DCFTA_Annual_Report_2015.pdf> accessed 27 August 2017.

This context of Europeanisation, in the process of competition law reform, raises questions about consumer law, or more specifically, about its absence in Georgian legislation. As it was demonstrated in the previous section, during the 1990s Georgian competition and consumer laws were developing hand in hand, fully in line with contemporary European trends.³⁶⁹ During the last decade, the role of consumers in EU competition law has only been strengthened³⁷⁰ and these two fields of law are maintained intertwined, at substantial, procedural and institutional level.³⁷¹ Meanwhile, in Georgia consumer law practically disappeared from the national legislation.³⁷²

As frequently stated, competition and consumer law are “intimately related”, have common roots, shared objectives and represent two sides of the same coin.³⁷³ Not only they support each other and create synergies by harmonious and coherent enforcement, but effective market regulation is impossible without regulating both the business and consumer side of the market. Competition law can offer a wide range of goods and services, but its benefits can be enjoyed only by empowering and protecting consumers. This is the only way consumers can actually exercise their right to choose.³⁷⁴ Considering this, it does not make much sense that Georgia reintroduced competition law, but abolished its consumer protection legislation.

³⁶⁹ See: Chapter I, Section 6.2 *The rise and fall of the first antimonopoly legislation of Georgia*

³⁷⁰ See: Chapter I, Section 4.4. *Consumer Welfare*

³⁷¹ Each of these topics will be further discussed in the following chapters.

³⁷² Georgian Law on Consumer Right Protection was abolished in May, 2012

³⁷³ Reto M Hilty and Frauke Henning-Bodewig, *Law Against Unfair Competition: Towards a New Paradigm in Europe?* (Springer Science & Business Media 2007) 94. Aneta Wiewiórowska-Domagalska, *Consumer Sales Guarantees in the European Union* (Walter de Gruyter 2012) 54. Rogier W De Vrey, *Towards a European Unfair Competition Law: A Clash Between Legal Families: A Comparative Study of English, German and Dutch Law in Light of Existing European and International Legal Instruments* (BRILL 2006) 61; Buttigieg (n 30) 130; Cseres, *Competition Law and Consumer Protection* (n 5) 326; Spencer Waller, ‘In Search of Economic Justice: Considering Competition and Consumer Protection Law’ [2005] Faculty Publications & Other Works 631 <<http://lawcommons.luc.edu/facpubs/228>>.

³⁷⁴ OECD, ‘The Interface between Competition and Consumer Policies’ [2008] DAF/COMP/GF/WD(2008)37 8.

However, the more non-coherent and irrational the governmental approach might seem, the more it demonstrates that European integration was the primary objective behind competition law reform in Georgia. Such a willful disregard of the consumer aspects of market regulation only proves that the legal changes were primarily formalistic, for the sake of satisfying the EU recommendations and moving forward in signing new agreements with the EU³⁷⁵ and the reformer were not keenly interested in delivering actual changes and improvements on the national market.

6.4 Objectives of Georgian competition law

There is no doubt that the integration process with the EU has played an important role in developing competition law in Georgia and on the contrary, the development of Georgian competition law contributes to the process of integrating Georgia with the EU. However, despite the geopolitical motives that so far have driven Georgia's legal harmonisation process with the EU, there is no direct mention of them in competition law. Unlike the EU treaties, Georgian competition law explicitly states its goals, demonstrating an economical approach, as there is no recognition for any public good, social or geopolitical aim and all the stated ones are so-called core, economic objectives. However, a closer look demonstrates that even the economical objectives indirectly manifest the geopolitical motive.

Article 2 LGC states that *“the goal of this Law is to support the liberalisation of Georgian market, promotion of free trade and competition.”* Term liberalisation is commonly used to

³⁷⁵ The initial version of Georgian competition law, (Law on Free Trade and Competition) was adopted in May 2012. In March 2014, the law was renamed and heavily amended. The Association Agreement between Georgia and the EU was signed in June 2014.

refer to a process of removing government control from a regulated sector and opening it up for competition.³⁷⁶ However, this is not the case in LGC. The law explicitly limits competence of the Agency over the regulated sectors. It can only assist relevant regulatory authorities, by providing support and consultancy.³⁷⁷ Therefore, setting liberalisation as a goal can be understood in much broader, general terms. The goal is not to liberalise certain sectors, but to open up the whole national market of Georgia to competition. By the time of enactment of this law, Georgian market had been developing under a *laissez-faire* regime for already nine years. Therefore, it can be justified to assume that the market was highly concentrated, with a low level of competition.

The goal of promoting competition has the same spirit to introduce and foster competition throughout Georgian market. With regard to the objective of promoting free trade, it can be viewed as homage paid to the process of Europeanisation. As discussed above, negotiations between the EU and Georgia were the primary catalyst for the competition law reform and they were negotiations regarding a free trade agreement.³⁷⁸ Overall, the three goals stated in the LGC can be translated as fostering competition on the Georgian market; consequently, making it more competitive at an international level and preparing the national market for opening its borders to the single market and starting free trade with the EU.

³⁷⁶ See: European Commission, ‘Liberalisation’
<http://ec.europa.eu/competition/general/liberalisation_en.html> accessed 27 August 2017.

³⁷⁷ See: Law of Georgia on Competition 2012 (6148-Is). Ch VI

³⁷⁸ See: Chapter I, Section 6.3. *The contribution of Europeanization process to the development of Georgian competition law*, See also: Decree on the Approval of the Comprehensive Strategy in Competition Policy (n 355); Gvelesiani (n 340) 18.

6.5 Seeking for consumer welfare in Georgian competition law

As the historical review³⁷⁹ demonstrated, the former antimonopoly legislation of Georgia explicitly declared consumer protection as its objective and realisation of this goal was one of the primary functions of the Antimonopoly Service as well. The LGC apparently has a different approach. That can be partially explained by the fact that Georgian law was based on EU model which does not explicitly refer to consumer welfare as a goal in the primary sources of law. However, as discussed above,³⁸⁰ consumer welfare is one of the major objectives of EU competition law. Therefore, it can be interesting to seek indirect presence of consumers and their interests in the LGC text.

When discussing competition process as an objective of EU competition law,³⁸¹ choosing competition itself as a goal already includes care for consumer interests indirectly, as far as competition is believed to deliver benefits to consumers. The LGC explicitly declares market liberalisation and competition promotion as its goal. While this means more competition on the market, the anticipated benefits for consumers might not be realized that simply. The mere introduction of competition will not deliver benefits for consumers automatically. Consumers will keep suffering until they are empowered by a protection mechanism specially designed for that goal, enabling them actually to take advantage of competitive markets. The European experience demonstrates that market liberalisation even contains threats for

³⁷⁹ See: Chapter I, Section 6.2 *The rise and fall of the first antimonopoly legislation of Georgia*

³⁸⁰ See: Chapter I, Section 4.4 *Consumer Welfare*

³⁸¹ See: Chapter I, Section 4.3 *Competition Process*

consumers unless they get due care and attention.³⁸² More about this issue will be discussed in the following chapters.

As for other signs of indirect presence of consumers in the LGC, analogies can be drawn between Articles 6 and 7 LGC and Articles 101 and 102 TFEU. Article 6 LGC forbids abuse of dominant position, and among the non-exhaustive list of abuses it includes conducts “*limiting production, markets or technical development to the prejudice of consumers.*” Article 7 LGC prohibits anti-competitive agreements, decisions and concerted practices. The list of hardcore infringements includes to “*share markets or sources of supply by consumers, location or other characteristics.*” Article 9 LGC offers exemptions similar to Article 101(3) TFEU. A safe harbour for Article 7 LGC violators are offered when infringements “*contribute to improving the production or distribution of goods, to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.*”

It is worth mentioning that the English translation of the Article published on the official Legislative Herald of Georgia³⁸³ formulates Article 9(1) according to the wording of TFEU Article 101(3), while the original Georgian text states that the offered incentives should ensure an increase in consumer welfare. That is a significant difference, considering that 9(1) LGC is the only provision of the law where consumer welfare is mentioned, a circumstance that demonstrates that Georgian law has adopted this previously unknown concept from EU law. In addition to Article 6, 7 and 9 Article 11(3) LGC also refers to consumers. It forbids

³⁸² Ehlermann and Laudati (n 222) 51.

³⁸³ Matsne.gov.ge

unfair actions from economic agents.³⁸⁴ Unfair actions are defined as contrary to business ethics and the interests of competitors and consumers.³⁸⁵ Considering that the TFEU wording strongly influences the text of the LGC, the subliminal and indirect presence of consumer interests and welfare is noticeable. There is sufficient evidence to argue that the LGC is concerned about interests, benefits and harm of consumers, and every decision applying and enforcing this law should always clearly demonstrate how each of these factors will be affected.

7. Conclusion

Competition law has a history longer than a century. In this period of time it has evolved significantly and has spread globally. In this process, many scholars and schools of thought have analysed competition law and its objectives. There are multiple and sometimes contradictory theories, but if there is one issue on which everyone agrees is that competition policy should always make economic sense. Therefore, certain competition law related actions, solely motivated by noble social purposes or driven by populist or geo-political concerns will never realize itself into effective market regulation. However, once its economic philosophy is meaningful, competition policy can incorporate other ancillary objectives in itself. The Ordoliberals and Freiburg School also support this idea, by keeping the social element in economic regulations and suggesting social market economy model.

³⁸⁴ Georgian law uses term *economic agent* in the same meaning as term *undertaking* is used in EU Law. See: LGC (n 370) Art. 3(a).

³⁸⁵ The Article offers non-exhaustive list of unfair actions, among which is false advertising or any other type of communication, which aims to give consumers wrong impressions. Another provision forbids bribing a supplier, a purchaser or their employer, in order to act against the interests of the contractor, or consumers. See: LGC (n 370) Art. 11³.

As this chapter has demonstrated, EU competition law is directed to achieve consumer welfare. This is not its sole goal, but it prevails over the other goals in a way that any step and decision toward other targets can be allowed only as far as it generates certain benefits and shares them with consumers. Consumer welfare itself remains an obscure concept, more an abstract value rather than a clear guideline for the authorities and the courts. It would be helpful for a more effective enforcement to have consumer welfare defined further, with a clear, specific meaning.

Georgian law aims to liberate the market and foster free trade and competition. Yet, it is clear that consumers' benefit is, or at least should be, the precondition for every decision to be made. Moreover, competition law in Georgia has a certain political context and contributes to the process of integration with the EU. The latter factor puts a stronger emphasis on a role of consumers, as better protection of consumer rights is part of Europeanisation process within which Georgian competition law was adopted.

Examining the EU system, the model of Georgian reform of market regulations demonstrates how competition and consumer laws develop hand in hand and work harmoniously. The current situation, where competition law has been introduced but an effective consumer protection law is still absent from the national legal framework, makes little economic sense, and eventually questions every objective directly or indirectly stated in the Georgian LC.

Chapter II. The Notion of Consumer and the Rationale of Consumer Law

1. Introduction

The previous chapter demonstrated that consumer welfare holds a high rank in the hierarchy of competition law goals, which makes consumer interests, their harm or benefits noteworthy factors that every competition law decision should take into consideration.³⁸⁶ Consumer welfare had been a target value, long before it emerged as a separate primary objective of EU competition law. As explained above,³⁸⁷ consumer welfare can be considered to have originated from general economic welfare purposes,³⁸⁸ which Europe's economic integration had to achieve.³⁸⁹ Similarly, consumer protection was not clearly and directly present in the first treaties of European Communities. However, it was possible to find objectives such as the continuous improvement of the standard of living, which included care for consumers as well.³⁹⁰

In addition, to having many other shared features, EU competition and consumer laws they have developed out of the same context. On the one hand, they have supported efficiently the integration and functioning of the European market; on the other hand, the single market allowed competition and consumer laws to generate and deliver more valuable benefits.³⁹¹

Karl Cox emphasizes the benefits of the single market for consumers by asking how EU citizens would live without it. He answers by portraying a dramatic picture of Europe:

³⁸⁶ See: Chapter I, Section 4.4 *Consumer Welfare*

³⁸⁷ See: Chapter I, Section 4.2 *Market Integration*

³⁸⁸ ASCOLA Workshop on Comparative Competition, *The Goals of Competition Law* (Edward Elgar Publishing 2012) 62, 75.

³⁸⁹ Parret (n 143) 342.

³⁹⁰ 'Treaty Establishing the European Community' s Preamble. Paul P Craig and Gráinne De Búrca, *The Evolution of EU Law* (Oxford University Press 2011) 837.

³⁹¹ Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2013) 64.

*“Queues at borders, weaker consumer protection, higher prices, fewer opportunities for career advancement, time-consuming customs procedures or delays for a package to travel from one country to another.”*³⁹² In agreement with this vision, Cseres argues that the integrated EU market boosts competition, which realizes itself into better quality of goods and services, a wider selection, and cheaper prices.³⁹³

The positive impact of the single market for consumers is indisputable; however, the historical bond that EU consumer law has with EU economic integration has some downsides.³⁹⁴ The latter is an economic process, having strong economic reasoning behind it. However, there is a political aspect as well, which sometimes dominates the decision-making process. Eventually, politically motivated decisions can be translated into economically unjustified policies. One of the issues that can be an example of the conflict between political and economic motives underlying EU policies is the topic of this chapter.

The rationale of consumer protection is economical, and this chapter is dedicated to proving this point. Consumer as well, before it appeared in the legal sphere, was an economic concept. However, since law transplanted this economic construct into a legal realm, there was a necessity to create its legal definition. One of the primary questions of this analysis is to determine how the consumer is defined and how satisfactory this definition is. EU consumer law offers a rather narrow notion of consumer, limiting down the concept to a smaller group of customers.

³⁹² Patrice Muller and others (eds), ‘The EU Single Market: Impact on Member States’ 5.

³⁹³ Cseres, *Competition Law and Consumer Protection* (n 5) 206.

³⁹⁴ Iris Benohr, *EU Consumer Law and Human Rights* (OUP Oxford 2013) XIVIII.

As argued by Schuler,³⁹⁵ there were political motives behind this definition, which does not correspond to the economic rationale of competition law. Reducing the consumer notion exclusively to natural persons aimed to connect EU citizens with the European project and give them a feeling of engagement. Consumer law was believed to be a suitable tool to provide such a clear and visible link.³⁹⁶ This vision positively affected the development of consumer law in the EU, but political implications impacted its substance, at a certain level. Eventually, EU law has a notion of consumer which is not entirely consistent with the economic rationale of consumer law, as well as with the definition given to the same concept by competition law.

We know that consumers are the ultimate beneficiaries of competition law, at least indirectly.³⁹⁷ Consumers get special care and protection under consumer protection as well. These assumptions might lead to deduct that both legal bodies have the same target group of beneficiaries.³⁹⁸ However, before jumping to any quick conclusions, it is necessary to take a closer look and examine how each of the legal bodies defines the consumer and how similar or different these definitions are. Knowing whether competition and consumer laws aim to contribute and satisfy the needs of the same group of beneficiaries gives a better understanding of the goals of the two legal bodies and better demonstrates their connection and interdependence. However, even if the two laws take a divergent approach to the

³⁹⁵ James Devenney, Mel Kenny and Bastian Schüller (eds), 'The Definition of Consumers in EU Consumer Law', *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 123–142.

³⁹⁶ *ibid.*

³⁹⁷ Micklitz, Stuyck and Terryn (n 29). Chapter I, Section: IB; Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 131) 195; Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century — the Experience of the European Commission and DG Competition' *Competition Policy Newsletter*, N. 3 (2008) 3.

³⁹⁸ For example, Ottow states that competition law and consumer protection are enforced with the purpose to directly or indirectly further consumer interests and consumer welfare. See: Ottow (n 216) 137.

definition of consumer, this does not necessarily reject the idea of their interdependence. It might be an indication that one of them uses a problematic approach, challenging their common economic rationale. This might stand as a barrier for their effective enforcement, and therefore, a new consumer notion might be necessary.

To understand whether competition law can accomplish its tasks in the absence of consumer law, it is necessary to assess the extent to which the two legal bodies are interconnected. Having the same group of beneficiaries can demonstrate how competition and consumer laws overlap each other and serve to the shared objectives. The topic is even more interesting considering the current trend of gradual integration of competition and consumer laws in many ways, often regulated by the same legal acts, enforced by the same authorities.³⁹⁹ Under such circumstances, a certain level of coherence between the fundamental concepts might be essential.

The following sections will analyse and define the notion of consumer in competition and consumer laws within the chosen jurisdictions. Continuing the discussion started in the first chapter, the analysis will initially address the question in competition law. With regard to consumer law, there are more controversies and a more profound analysis will be provided. The two notions will then be tested against the rationale of their respective legal field.

Being familiar with the economic philosophy behind consumer protection is crucial, in order to understand who is or should be considered as consumer. In this point of view, historic analysis is also critical, as it demonstrates what circumstances created the necessity to develop a specific field of law to protect consumers, and how this body emerged and

³⁹⁹ This topic will be further discussed in chapter V: *Institutional design of enforcement authorities*

developed throughout decades. The chapter will review this path and the transformation of consumer protection, from the first regulations up to date, in EU and Georgia. The review will also cover recent trends and developments, in order to examine whether there are any signs that the mainstream notion of consumer is changing and keeps evolving.

2. The notion of consumer in competition law

2.1 Defining consumer in EU competition law

Chapter I has illustrated why and how consumer welfare is among the primary objectives of competition law.⁴⁰⁰ As often stated, consumers are the ultimate beneficiaries of competition law.⁴⁰¹ Therefore, it is safe to say that the legal body serves to the interests of consumers. However, who stands behind this term is not self-evident and requires further clarification. As it is argued by Daskalova, the meaning of consumer in the concept of consumer welfare is a major source of confusion for lawyers, courts and academics.⁴⁰² This section is dedicated to answer this question and determine who can be qualified as a consumer, from a competition law perspective.

There are usually two major features used to classify consumers, one according to their legal status or nature (legal entities and natural persons), and the other defining their position in the distribution-consumption chain (intermediate or final consumer). Competition law does not distinguish between natural and legal persons. On the production/supply side, it uses the term

⁴⁰⁰ See: Chapter I, Section 4.4, *Consumer Welfare*

⁴⁰¹ Micklitz, Stuyck and Terryn (n 29). Chapter one, Section: IB; Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 131). 195; Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century — the Experience of the European Commission and DG Competition' *Competition Policy Newsletter*, N. 3 (2008) 3.

⁴⁰² Daskalova (n 238)., 2015 138

“undertaking,” which according to the *Höfner* case is defined as “every entity engaged in an economic activity regardless of the legal status [...] and the way in which it is financed.”⁴⁰³

A similar approach is used on the consumption side of the market. It is the act of purchasing that makes a legal or natural person, a consumer: no further classification is relevant for competition law.⁴⁰⁴ What is more interesting is the division of consumers between intermediary and final ones. The Commission has a straightforward approach to the question, avoiding this distinction and adopting a broad notion. Its guidelines on the application of Article 81(3) [now Article 101(3) TFEU] state that “the concept of ‘consumers’ encompasses all direct or indirect users [...], including producers that use the products as an input, wholesalers, retailers and final consumers.”⁴⁰⁵ The rationale for this approach can be explained by the Commission’s belief that “harm to intermediate consumers is generally presumed to create harm to final consumers”⁴⁰⁶ therefore, there is no need for further differentiation.⁴⁰⁷

The same presumption has also been indirectly included in the Commission Guidance on Article 82 [now Article 102 TFEU], which states that “the Commission will address [...] anti-competitive foreclosure either at the intermediate level or at the level of final consumers,

⁴⁰³ *Case C-41/90 Höfner and Elser* [1991] ECR -1979 [21]; *Joined Cases 17/61 & 20/61 Klöckner-Werke AG and Hoesch AG v High Authority of the ECSC* [1962] [341]; *Case 19/61 Mannesman AG v High Authority of the ECSC* [1962] ECR 357 [371].

⁴⁰⁴ (n 223) [84].

⁴⁰⁵ *Ibid.* See also: European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements’ [49]; EU Council, ‘Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings’ Art. 2 (1)(b).

⁴⁰⁶ EU Commission, DG Competition (n 187) [55].

⁴⁰⁷ According to Cseres, The EU Commission promotes intermediate buyers to “honorary” consumers. See: Katalin J Cseres, ‘Competition and Consumer Policies: Starting Points for Better Convergence’.

or at both levels.”⁴⁰⁸ The provision is further explained in the note, declaring that in case of actual or potential competition, among intermediate users and a dominant undertaking, “*the assessment focuses on the effects of the conduct on users further downstream.*”⁴⁰⁹ Akman argues that an interpretation of this note as a clear demonstration of the Commission’s particular interest toward end users is incorrect.⁴¹⁰ The Guidance does not directly mention the final or end users, but only refers to the “*users further downstream*” that, according to Akman, might be another intermediary level between the “*competitor of the dominant*” and the consumer. Eventually, it remains unclear whether the impact on the final consumer is assessed and in case of an affirmative answer, how it is conducted.⁴¹¹

Consumer welfare is the benchmark of consumer protection policy in competition law,⁴¹² and EU courts have discussed the meaning of consumer mostly through the context of consumer welfare. Reviewing the case-law demonstrates a lack of consistency between the GC and the ECJ. The *GSK* case⁴¹³ is particularly interesting in this perspective. The case, involving one of the world’s biggest producers of pharmaceutical products, discussed a clause, outlined in contracts with Spanish wholesalers, to limit parallel trade with the other Member States, in particular with the UK. The problem was that Spain is a low-cost country for drugs, as the national health authorities fix prices for medicines at various levels, and *GSK* was trying to avoid distribution of these cheap drugs from Spain to the other Member States. The condition

⁴⁰⁸ European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (n 271) [19].

⁴⁰⁹ *ibid* note. 15

⁴¹⁰ *ibid* 4, 5, 7.

⁴¹¹ For example, referring to the Commission Guidance on Art. 82, Pinmar states that it is unclear, how anticompetitive foreclosure can be assessed at the final consumers’ level, while the later cannot be foreclosed as they are not in competition with the dominant undertaking. see: *ibid*.

⁴¹² Cseres, ‘Competition and Consumer Policies’ (n 401) 5.

⁴¹³ *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157)

was forbidden by the Commission as it constituted an agreement having the object of restricting competition.⁴¹⁴ GSK appealed the decision before the GC,⁴¹⁵ which ruled that in order Article 81(1) [now Article 101(1) TFEU] to be applied, evidence that the agreement in question intended to limit parallel trade in medicines and therefore affected trade between the Member States is not sufficient. The Court further required “*an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer.*”⁴¹⁶

The GC attempted to distinguish between intermediate and final consumers, and put particular emphasis on the latter one. It disagreed with the presumption of the Commission about the automatic pass-on of economic impacts from the intermediate to the final consumer.⁴¹⁷ Instead, it declared that “*the legitimacy of that transfer of wealth from producer to intermediary is not in itself of interest to competition law, which is concerned only with its impact on the welfare of the final consumer.*”⁴¹⁸ The decision was appealed to the ECJ. On June 30, 2009, AG Trstenjak gave her opinion and criticized the novel approach suggested by the GC. The AG considered that the question of whether or not a restriction of competition is detrimental to the final consumers is not relevant and it is not the criterion established by Article 101(1) TFEU.⁴¹⁹ The ECJ upheld the AG’s opinion and overruled the GC’s judgment, re-establishing the previous case law, declaring a restriction of parallel trade *per se*

⁴¹⁴ *Decision relating to a proceeding pursuant to Article 81 of the EC Treaty Cases: IV/36957/F3 Glaxo Wellcome (notification), IV/36997/F3 Aseprofar and Fedifar (complaint), IV/37121/F3 Spain Pharma (complaint), IV/37138/F3 BAI (complaint), IV/37380/F3 EAEPIC (complaint) (notified under document number C (2001) 1202) [2001] OJ 302 17112001 P 1–43 (European Commission).*

⁴¹⁵ *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [1–21].

⁴¹⁶ *ibid* 117, 119.

⁴¹⁷ *Parret* (n 143) 342.

⁴¹⁸ *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [1–21].

⁴¹⁹ *Opinion of Advocate General Trstenjak on the Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009].

infringement of Article 101(1) TFEU as a restriction of competition by object, and rejecting the need to pay particular attention to the impact on final consumers. It also ruled that in order to determine whether an agreement has an anti-competitive object, “*it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.*”⁴²⁰

In the period between the two judgments, another significant decision was made in 2008, also referenced by the ECJ in GKS.⁴²¹ In *T-mobile*, the ECJ stated that there is no basis to conclude that the prohibitions established by Article 101(1) TFEU are limited only to the “*concerted practices which have a direct effect on the prices paid by end users.*”⁴²² Similar to *GKS*, in *T-mobile* the Court rejected the argument of the Dutch Court and the defendant that there was no violation of Article 101(1) TFEU until the agreement of fixing remunerations affected the final consumers.⁴²³ Although the EU courts have never discussed the concept of consumer in itself and the limitations of its definition, the judgements regarding consumer welfare standard and the rejection of the idea of the final consumers having a particular role, indicate that the EU courts share the position of the Commission, and interpret the notion of consumers broadly.

Overall, it can be concluded that the consumer in EU competition law is an umbrella term, a

⁴²⁰ *Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P* [2009] ECLI:EU:C:2009:610 63.

⁴²¹ *Ibid* [55, 63, 91]

⁴²² *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181) [36]. Interestingly, in the same decision the court declared that defending consumers is not the only goal of competition-related rules of the treaty, but the latter “*is designed ...to protect the structure of the market and thus competition as such*”. See, *ibid* [38, 39]

⁴²³ *Opinion of Advocate General Kokott on the Case C-8/08, T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] Eur Court Rep 2009 -04529 [55].

synonym for the customer.⁴²⁴ This is not merely an interpretation generated by the Commission or EU courts. In fact, the TFEU itself reads consumer broadly.⁴²⁵ The translations of the Treaty in several European languages use term “customer” instead of “consumer.”⁴²⁶ The *travaux préparatoires* of the Treaty also shows the same usage of the lexeme⁴²⁷

The broad notion of consumer in competition law is also proven by the existence of a special term, “final consumer.” In the Commission’s definition, final consumers are “*natural persons who are acting for purposes which can be regarded as outside their trade or profession [...] as for instance [...] buyers of impulse ice-cream.*”⁴²⁸ The definition indirectly demonstrates that the general meaning of consumer includes purchasers at any level of the distribution-consumption line, and in order to limit down its scope there is the need to add a special adjective.⁴²⁹ EU competition law has a distinctive term for final consumers, in light of their

⁴²⁴ Pinar Akman, “‘Consumer’ versus ‘Customer’: The Devil in the Detail” (2010) 37 *Journal of Law and Society* 315, 8.1. Katalin J Cseres, ‘Contraversies of the Consumer Welfare Standard’ (2007) 4 *Competition Law Review* 121, 131; Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 131) 24.

⁴²⁵ Akman, “‘Consumer’ versus ‘Customer’” (n 417) 8.

⁴²⁶ *ibid.*

⁴²⁷ Pinar Akman, ‘Searching for the Long-Lost Soul of Article 82EC’ (2009) 29 *Oxford Journal of Legal Studies* 267, 300–303.

⁴²⁸ (n 223). [84]; See also: European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (n 271) [19] Note. 15; European Commission, ‘EU Consumer Policy Strategy 2007-2013. Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. COM (2007) 99 Final, 13 March 2007’ n 2 <<http://aei.pitt.edu/42562/>> accessed 29 August 2017.

⁴²⁹ In a similar manner, consumer welfare has a broad definition and includes welfare of all the consumers, intermediate or final ones. For the sake of clarity, to avoid any confusion, Werden suggested to use term end-user welfare, regarding competition policies that exclusively aim to benefit final consumers. Ioannidou also comments on the issue and names the same concept as “narrow consumer welfare”. Akman does the opposite, by using term consumer welfare only in narrow meaning and introduces term customer welfare for its wider interpretation. He then proceeds to question whether consumer welfare is a genuine objective of EU competition law. He argues consumer welfare is an illusionary goal and compares it to “Chicago trap”, referencing to the Chicago School practice of confusing ‘consumer welfare’ with ‘total welfare’. A separate question, regarding this issue, is how economically reasonable might be to regulate the market solely for the benefit of the final

particular nature and vulnerability. The GC has also stressed in *Österreichische*⁴³⁰ that “competition law and competition policy ... have an undeniable impact on the specific economic interests of final customers who purchase goods or services”,⁴³¹ recognizing that the discipline has a shared group of beneficiaries. However, it is not quite clear how competition law can directly impact on the interests of final consumers, while it does not distinguish between final and intermediate ones. The only explanation of how the given broad definition of the consumer can still benefit final consumers is that these benefits are indirect, and pass through intermediaries. As explained by the Commission, it is presumed that harm to intermediate consumers creates harm to final consumers.⁴³² In a similar way, benefits to intermediate consumers might be passable to final ones.⁴³³

In conclusion, EU competition law uses the broadest notion of consumer, including intermediaries, as well as final consumers, as synonymous to term customer. Eventually, when referring to consumers and their interests or harm, competition law enforcers do not distinguish between end-users and intermediary purchasers. Therefore, it can be argued that

consumers that frequently might mean detriment to the producers and supplies. According to Cseres, it is neither realistic nor feasible to demand from competition law to be always concerned with the interests of the final consumers. See: Akman, ““Consumer” versus “Customer”” (n 417). Cseres, ‘The Controversies of the Consumer Welfare Standard’ (n 289) 133. Daskalova (n 238) 137. Ioannidou, *Consumer Involvement in Private Eu Competition Law Enforcement* (n 131) 24-25.

⁴³⁰ *Joined Cases T-213 & 214/01, Österreichische Postsparkasse* (n 183).

⁴³¹ *ibid* 115.

⁴³² EU Commission, DG Competition (n 187) [55].

⁴³³ The presumption, given in the Commission’s discussion paper is questions by Akman. He is generally sceptical about a wide interpretation of term consumer and argues that the notion used in competition law contradicts to the understanding of the term in consumer law, in economics and is even against its usual, everyday meaning. He states there is no any economic basis to support the presumption and such economically irrational confronts the claim that EU competition law uses economic and effects-based approach. Akman questions rationality of the presumption that harm is passed from intermediary consumers to final ones. He indicates that the presumption creates uncertainty, making it harder to correctly assess damaging effects on final consumers. Eventually the question - who has legal standing to claim damages, becomes unclear, in case of private enforcement. See: Akman, ““Consumer” versus “Customer”” (n 417) 1–8. See also: Cseres, ‘The Controversies of the Consumer Welfare Standard’ (n 289) 131, 132. Cseres, ‘Competition and Consumer Policies’ (n 401) 7.

competition law is not specifically designed to protect or deliver direct benefits exclusively for end-users, but the Commission's approach is that the produced benefits will automatically pass down and, albeit indirectly, will still contribute to end-user interests. EU courts' decisions also demonstrate that the particular nature and vulnerability of final consumers is known and can be taken into consideration in individual cases. At a general level, this gap is partially filled by current consumer protection regulations, which usually focus exactly on protecting and empowering those to which competition law refers as end-users.⁴³⁴

2.2 Defining consumer in Georgian competition law

Before proceeding to define the notion of consumer in consumer law, the concept will be examined in Georgian competition law as well. A challenging point regarding Georgia is that competition law is still an emerging discipline, less developed, with not much tradition, less number of decisions and soft law instruments. This point applies to every question that will be discussed in this dissertation when examining various legal concepts in Georgian competition law.

The LGC does not provide any definition of the term consumer. However, provisions of the law create a general context that might hint indirect evidence. As noted, Georgian competition law is based on the EU model and uses the same or similar provisions and concepts.⁴³⁵ Articles 6, 7 and 9 LGC establish rules akin to those set by Article 101 and 102

⁴³⁴ However, this concept is even further limited down by competition law, when making human nature a necessary feature for consumer. See: Chapter II, Section 2. *The notion of consumer in competition law*

⁴³⁵ See: Chapter I, Section 6.5, *Seeking for consumer welfare in Georgian competition law*

TFEU.⁴³⁶ Moreover, the law transplants from EU law a concept – that of consumer welfare - that was formerly unknown to Georgian law.⁴³⁷ While the LGC does not offer any specific definitions or interpretations, it can be presumed that the law uses term consumer in the same manner as it is employed in EU competition law, the source of the transplant; therefore in Georgian competition law consumer includes the intermediate and the final consumers.

This presumption is further strengthened by the fact that the law uses the term final consumer in order to limit down its scope, which indirectly indicates that the general definition of the term is broad.⁴³⁸ The theory was confirmed by a decision of the Agency on the investigation of the jet fuel commodity market.⁴³⁹ The agency determined that Georgian jet fuel commodity market can be divided into the following markets/levels: 1) import commodity market; 2) wholesale selling commodity market; 3) delivery market to the Aircraft at the Airport territory. The Agency also defined that on the market the final consumer is the Civil Aviation Agency, which operates at the airports and which conducts consumption of jet fuel. The decision demonstrates that the term final consumer is the one that refers to end users and the general term consumer has a wider meaning. Moreover, it also proves that in competition law the final consumer is not necessarily a natural person, but it can also be a legal entity.

⁴³⁶ Article 6 prohibits abuse of dominant position on the market. It contains an exemplary list of abuses that along with other conducts include: “*limiting production, markets or technical development to the prejudice of consumers.*” Article 7 prohibits anticompetitive agreements, decisions and concerted practices. It also has an inexhaustive list of hardcore infringements including: “*share markets or sources of supply by consumers, location or other characteristics.*” Article 9 is similar to TFEU article 101(3) and offers exceptions from Article 7 violations in certain cases, when the projected benefits “*contribute to improving the production or distribution of goods, to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*”.

⁴³⁷ For additional information, see: Chapter I, Section 4, *Objectives of EU competition law*

⁴³⁸ Law of Georgia on Competition (n 18) Art. 3(i) defines dominant position as the ability of an economic agent to act independently of its competitor agents, providers, clients and final consumers.

⁴³⁹ Georgian Competition Agency, ‘Order N. 131 on the Investigation of Jet Fuel Commodity Market.’ <<http://competition.ge/en/page4.php?b=302>> accessed 28 August 2017.

The Agency uses the same approach in its decision on the car fuel commodity market.⁴⁴⁰ In the information paper about the market investigation, it employs the term end consumer to refer to customers of the infringer economic agents that operated on various levels of the car fuel market, ranging from importing the goods from abroad to selling it to final consumers.⁴⁴¹ In a nutshell, it can be concluded that consumer in Georgian competition law is an umbrella term, similar to the one used in the European model. How compatible is such broad definition with the notion of consumer in consumer law, will be discussed in the following sections.

3. The notion of consumer in EU consumer law

Consumer law revolves around consumers. The latter is the central figure of the legal body and its primary connecting link to competition law, as a shared beneficiary. According to Bourgoigne, consumer law pays more attention to the consumer rather than to the act of consuming, meaning that the primary factors determining the content of consumer law are consumers' interests and needs.⁴⁴² Such a strong emphasis over consumer creates expectations that consumer law should have an equally high level of clarity regarding consumer's nature, notion and characteristics. However, the reality is a bit more complicated. There is no uniform definition of a consumer at EU law, and eventually, it is hard to find a consequently applied consumer notion.⁴⁴³

⁴⁴⁰ Georgian Competition Agency, 'Order N. 81, July 14, 2015' <<http://competition.ge/en/page4.php?b=302>> accessed 28 August 2017.

⁴⁴¹ Georgian Competition Authority, 'Investigation Results of Car Fuel (Petrol, Diesel) Commodity Market' [13(b)] <<http://competition.ge/images/upload/Annotation%20in%20English.pdf>> accessed 28 August 2017.

⁴⁴² T Bourgoigne, 'Characteristics of Consumer Law' (1991) 14 *Journal of Consumer Policy* 298; Cseres, 'The Controversies of the Consumer Welfare Standard' (n 289) 129.

⁴⁴³ Cseres, 'Competition and Consumer Policies' (n 401) 7; Cseres, 'The Controversies of the Consumer Welfare Standard' (n 289) 10, 131.

The lack of uniformity does not mean that the concept is ignored and not discussed in various sources of EU law. In order to determine the circle of persons who or which are entitled to the care and protection offered by EU consumer law it is necessary to analyse various EU directives, judicial decisions and scholarly works that give some explanation regarding the question. During this analysis functional approach will also be used, as it can be a useful tool to illustrate a motivation and practical need behind having diverse notions of consumer, according to the scope and goals of certain directives.⁴⁴⁴ The definition of the notion of consumer will be examined against the rationale of consumer law, in order to analyse how well-defined it is and whether it might be in conflict with the rationale itself.

Currently, the corpus of EU consumer law includes around 90 directives that makes this field quite complex and sometimes inconsistent.⁴⁴⁵ Not every consumer law directives, but only a few of them offer a definition of the notion of consumer. Among the most notable acts doing so, one can mention the Doorstep Selling Directive, the Distance Contracts Directive;⁴⁴⁶ the Package Travel Directive,⁴⁴⁷ the Unfair Contract Terms Directive;⁴⁴⁸ the Consumer Sales Directive;⁴⁴⁹ the E-Commerce Directive;⁴⁵⁰ the Price Indication Directive;⁴⁵¹ the Distance

⁴⁴⁴ Vanessa Mak, 'The Consumer in European Regulatory Private Law' 4, 5.

⁴⁴⁵ Jana Valant, 'Consumer Protection in the EU Policy Overview'.

⁴⁴⁶ EU Council, 'Directive 85/577/EEC to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises' Art. 2; European Parliament and EU Council, 'Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts' Art. 2. (both directives got replaced by Directive 2011/83/EU, as of 13 June 2014).

⁴⁴⁷ EU Council, 'Directive 90/314/EEC on Package Travel, Package Holidays and Package Tours' Art. 2(4) .

⁴⁴⁸ EU Council, 'Directive 93/13/EEC on Unfair Terms in Consumer Contracts'.

⁴⁴⁹ European Parliament and European Council, 'Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees' Art. 1(2)(a).

⁴⁵⁰ European Parliament and European Council, 'Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market' Art. 2(e) .

⁴⁵¹ European Parliament and European Council, 'Directive 98/6/EC on Consumer Protection in the Indication of the Prices of Products Offered to Consumers' Art. 2(e).

Marketing of Consumer Financial Services Directive;⁴⁵² the Unfair Commercial Practices Directive;⁴⁵³ the Payment Services Directive;⁴⁵⁴ the Timeshare Directive;⁴⁵⁵ the Consumer Credit Directive.⁴⁵⁶ In the area of procedural law, consumer is defined in Brussels I⁴⁵⁷ and Rome I.⁴⁵⁸ Considering a high number of the legal acts, there is a multitude of definitions, which have certain differences and specificities, as each EU directive defines the notion of consumer separately for its purposes.⁴⁵⁹

Moreover, different definitions exist within Member States, which is a result of the two-level regulation system of the field in the EU. In accordance with Articles 4(2) (f), 144 and 169 TFEU, the EU shares the competence regarding consumer law with Member States. Article 2(2) TFEU states that “*the Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their*

⁴⁵² European Parliament and European Council, ‘Directive 2002/65/EC Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC’ Art. 2(d).

⁴⁵³ European Parliament and European Council, ‘Directive 2005/29/EC Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”)’ Art. 2(a).

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, Art. 2(a)

⁴⁵⁴ European Parliament and European Council, ‘Directive 2007/64/EC on Payment Services in the Internal Market Amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and Repealing Directive 97/5/EC’ Art. 4(11).

⁴⁵⁵ European Parliament and European Council, ‘Directive 2008/122/EC on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts’ Art. 2(1)(f).

⁴⁵⁶ European Parliament and European Council, ‘Directive 2008/48/EC on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC’ Art. 3(a).

⁴⁵⁷ European Council, ‘Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’ Art. 15(1).

⁴⁵⁸ European Parliament and European Council, ‘Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations’ Art. 6(1).

⁴⁵⁹ Jana Valant (n 438). 4.

competence to the extent that the Union has decided to cease exercising its competence.”⁴⁶⁰

While there are few directives of full harmonization, still their number is limited and the mainstream approach for EU directives remains that of minimum harmonization, allowing Member States to co-regulate and provide higher protection at national level.⁴⁶¹ The same practice is used regarding consumer definition as well, as it is narrowly defined at the EU level, but gives freedom to Member States to widen the notion. Some states have used this opportunity, and some have not, with no consistency among national definitions.

As underlined above, there are multiple consumer law directives which offer a definition of the notion of consumer. Albeit not always identical, it is possible to identify four principal features, shared by the absolute majority of the legal sources.⁴⁶² Most of the directives adopt a negative approach and define consumers as natural persons, who are acting for purposes outside their trade, business or profession.⁴⁶³ With a somewhat different wording, the same definition is shared by Brussels I and Rome I regulations.⁴⁶⁴

⁴⁶⁰ This special feature of EU consumer law should always be taken into consideration when a non-member state, such as Georgia, chooses EU law as a model and decides to transplant its regulations. The directives of minimum harmonization establish the rules with consideration that Member States will regulate the issue further. Thus mere transplantation of the regulations used at EU level might not be satisfactory in many cases, as most of EU directives in the field are of minimum harmonization.

⁴⁶¹ Vanessa Mak, ‘The Myth of the “Empowered Consumer” - Lessons from Financial Literacy Studies’ 8; Vanessa Mak, ‘Private Actors as Norm-Setters. On New Legal Pluralism in European Regulatory Private Law and How to Manage It’ 15.

⁴⁶² Cseres, ‘Competition and Consumer Policies’ (n 401) 7. Cseres, ‘The Controversies of the Consumer Welfare Standard’ (n 289). 10, 131. Jana Valant (n 438). 4. Hans-W Micklitz, Jules Stuyck and Evelyn Terry, *Cases, Materials and Text on Consumer Law* (Bloomsbury Publishing 2010) 31;

R Manko, ‘The Notion of “Consumer” in EU Law’ 1
<[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI\(2013\)130477_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf)> accessed 28 August 2017.

⁴⁶³ In addition to distinct wordings, there are some substantial differences among the definitions, e.g. the definition of economic activity sometimes includes “craft” and in other cases it does not.

⁴⁶⁴ Hesselink expressed his critical opinion toward EU policy papers in Consumer law, claiming that they generally establish rules or give definitions without discussing the rationale behind. See: Martijn W Hesselink, ‘SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and

While the EU has been a key driving force of promoting and harmonizing consumer law,⁴⁶⁵ the notion dominating the EU regulations is not universally shared by its Member States. Considering that the Member States enjoy the freedom and possess competence to co-regulate consumer law, it is not very surprising that their rules are not always in line with the EU regulations. Departing from the EU model, national regulations often refuse to limit consumer protection exclusively to natural persons. This contradictory rationale is to defend the weaker party in contracting, despite its nature.⁴⁶⁶ Eventually, a number of its Member States treat legal entities as consumers under special provisions or grant their national courts discretion to decide whether someone or something can qualify as a consumer.⁴⁶⁷

In this perspective, especially well developed is German law, which created the notion of honest business,⁴⁶⁸ usually a small size undertaking, which must be protected from less honest competitors and professional contractual parties.⁴⁶⁹ In addition to Germany, a number of other Member States uses a broader notion and allows the following to qualify as a consumer, under various circumstances: legal entities, when they are outside business; non-

Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis' 13, 14.

⁴⁶⁵ Ewoud Hondius, 'The notion of "consumer": European Union versus Member States' [2006] 28 Sydney Law Review 90-93; Pieter Brulez, *A Consumer Law for Professionals: Radical Innovation or Consolidation of Existing Practices?* (Intersentia 2013).

⁴⁶⁶ Ewoud Hondius (n 533) 83.

⁴⁶⁷ For example: Spain, Belgium, Slovakia, Denmark, Greece, and Austria. See: Research Group on the Existing EC Private Law, *Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services* (sellier european law publ 2009) 59; Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in the Member States* (Walter de Gruyter 2008) 461; Manko (n 530) 1.

⁴⁶⁸ Jules Stuyck, 'Do We Need "Consumer Protection" for Small Businesses at the EU Level?', *Varieties of European Economic Law and Regulation* (Springer, Cham 2014) 3360–363; Alexander J Belohlávek, *Rome Convention - Rome I Regulation* (Juris Publishing, Inc 2011) 1130, 1131.

⁴⁶⁹ *ibid.*

profit organizations; persons establishing a business but not exercising it yet; private investors; non-professionals and so forth.⁴⁷⁰

One could have hoped that despite the definition chosen by the majority of the directives, the CJEU could share the experience of some Member States and offer a more extensive interpretation. Unfortunately, the Court dealt with the notion of consumer only in rare cases. In *Cape v. Ideal Service* (2001),⁴⁷¹ the ECJ had to determine whether the notion of consumer enshrined in the Unfair Contract Terms Directive could also cover a company. In answer negatively, the Court shared the opinion of AG Mischo⁴⁷² and ruled that “*It is thus clear from the wording of Article 2 of the Directive (93/13) that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision. Accordingly, [...] as defined in Article 2(b) of the Directive, must be interpreted as referring solely to natural persons*”.⁴⁷³ The judgment is already almost 15 years old, but the ECJ has not reviewed its position, nor has it suggested any radically different interpretation of the notion after that.

The ECJ has also delivered a judgment regarding mixed contracts, which are partially related to professional and partially to private activities. In *Gruber v. Bay Wa AG*,⁴⁷⁴ a farmer purchased roof materials for a building which was used both for business and for residential purposes. The Court stated that the farmer could not rely on Article 6 of Brussels I

⁴⁷⁰ Micklitz, Stuyck and Terryn (n 455) 29.

⁴⁷¹ *Joined cases C-541/99 and C-542/99 - Cape Snc v Ideal service Srl and Ideal service MN RE Sas v OMAL Srl* [2001] ECR I-9049.

⁴⁷² *Opinion of Mr Advocate General Mischo delivered regarding the joined Cases C-541/99 and C-542/99 Joined Cases C-541/99 and C-542/99 Cape Snc v Idealservice Srl Ideal Service MN RE Sas v OLAI Srl* [2001] Eur Court Rep 2001 -09049.

⁴⁷³ *Joined cases C-541/99 and C-542/99 - Cape Snc v Idealservice Srl and Idelaservice MN RE Sas v OMAL Srl* [2001] ECR I-9049 [16, 17]. See also: *Case C-361/89 France v Di Pinto* [1991] ECR -1189 19.

⁴⁷⁴ *Case C-464/01: Gruber v Bay wa* [2005] ECR -439 01.

Regulation, as the contract was related to his trade and profession. In this sense, it considered that it was irrelevant which purpose - business or personal usage - dominated the purchase, as the Court could tolerate only slight links with trade and profession. However, Directive 2011/83/EU did not share such a strict interpretation and somehow relaxed the established standards for recognizing as a consumer also to party of a mixed contract. If the *Gruber* decision ruled that customer could have been considered as such only when the “*link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context*”,⁴⁷⁵ the Consumer Rights Directive broadens the notion of consumer to cover also cases where the trade purpose is present but not “*predominant in the overall context.*”⁴⁷⁶

Overall, the mainstream definition offered by EU sources is narrow and makes the human nature of a customer an essential feature to qualify her as a consumer. Such an approach leaves a wide range of asymmetric economic relationships out of the regulation and allows certain B2B-related market failures to occur. However, before jumping to any final conclusions, it would be helpful to analyse the history of consumer law, in order to see how and under what circumstances the discipline emerged and how it developed to get to the current point. The historical analysis will illustrate that consumer law has an economic rationale and it is a critical tool to avoid and correct market failures. Once knowing the underlying justification of consumer law, it will be possible to examine how effectively the

⁴⁷⁵ *ibid*; *Project XJ220 Ltd v Comte D’Uzes and Comte De Dampierre*, 19th November 1993 (*Boyd QC*); and *the Giuliano and Lagarde Report* [1980] OJ C282 39.

⁴⁷⁶ European Parliament and EU Council, ‘Directive 2011/83/EU on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council’ Recital 17 .

notion of consumer is defined in the EU, and what kind of definition would be more efficient.

4. The birth and evolution of consumer protection law

Consumers have always been an essential part of trade and commerce; however, they appeared on the legal scene only in the 20th century. Since the introduction of the concept, it has caused tremendous changes in various legal fields. A landmark event in this process was the creation of consumer protection law. The latter itself has grown tremendously and transformed legal systems. As argued by Hondius, within the EU the most successful catalyst of legal reforms has been precisely consumer protection.⁴⁷⁷ This section takes the discussion back to the roots of the subject to review a process of its birth and evolution. This historical review, studying the circumstances and reasons that caused the creation of consumer law, can help to better understand its rationale and logic, which will allow to scrutinize the mainstream notion of consumer and its consistency with the rationale of the law, and to determine how effective the current definition is or in which way it might be improved.

Consumer protection is widely assumed to be a product of the 20th century. However, depending on how one defines consumer law, its roots can be much older. Some scholars claim that the origins of consumer protection go back to the 18th century when early forms of market regulations appeared for the first time, prescribing food quality standards, weights, measures and so forth.⁴⁷⁸ However, in its modern understanding consumer protection was

⁴⁷⁷ Ewoud Hondius (n 459) 89.

⁴⁷⁸ Geraint G Howells, I Ramsay and Thomas Wilhelmsson, *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 4; Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury Publishing 2012) 1, 5.

introduced as a legal response to the challenges, created by the emergence of consumer society.⁴⁷⁹

From an economic and industrial point of view groundbreaking changes took place in the middle of the 20th century, particularly on the markets of Western Europe and the US.⁴⁸⁰

After the years of warfare, peace finally allowed European states to recover from the severe economic crisis and start a rapid development. The exceptional economic success in West Europe and the US enriched not only the countries but brought stability and welfare to their societies as well,⁴⁸¹ which Galbraith entitled as “*affluent*” societies.⁴⁸²

The secret of this prosperous transformation was not only long-awaited peace but a phenomenon named as “massification,” referring to a sudden and dramatic rise in production as well as in consumption.⁴⁸³ Such radical changes were fostered by a combination of various factors. Namely, the period was marked by rapid technological development, allowing production at lower costs and introduced a wide range of innovative products and services on the market.⁴⁸⁴ Technological developments were further stimulated by intensive research and development in military technologies during the WWII. As soon as the war was over, the military technological advances were transferred to civil and commercial sector,

⁴⁷⁹ Howells, Ramsay and Wilhelmsson (n 470) 1, 4.

⁴⁸⁰ Ramsay, *Consumer Law and Policy* (n 470) 2.

⁴⁸¹ By the beginning of XXI century Western Europe and North America got about three times richer, than they were in the middle of XX century. See: Avner Offer, *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain Since 1950* (OUP Oxford 2006) 1.

⁴⁸² John Kenneth Galbraith, cited in Cseres, ‘Contraversies of the Consumer Welfare Standard’ (n 417) 152.

⁴⁸³ Howells, Ramsay and Wilhelmsson (n 470) 5.

⁴⁸⁴ For example, from the 1970s until the mid-1990s, the US experienced a nearly tenfold increase in the number of annually introduced novel products and services. See: Celia Lury, *Consumer Culture* (Rutgers University Press 2011) 1, 2.

revolutionizing almost every aspect of consumers' life, ranging from civil aviation to processed food.⁴⁸⁵

The positive performance of the economies and the tendency of growth have enriched the private sector. Thanks to reduced production costs and novel technologies, private entities were allowed to produce goods in previously unimaginable quantities.⁴⁸⁶ Eventually, the massive production made formerly exclusive, durable goods affordable for wider society. An answer to massive production was massive consumption. Markets kept becoming more active and intense. As a consequence of the improved economic conditions and growth in real income, the middle class emerged. This sizable group of the society was no longer strictly limited in its financial possibilities and could afford to buy not only the goods strictly essential for existence but leisure products as well.⁴⁸⁷

The increased amount of available goods and services gave consumers for the first time a real possibility to choose from a wide range of interchangeable goods and services. Consequently, consumers' attitude to buying changed and their satisfaction increased.⁴⁸⁸ Consumption did not simply mirror production anymore, but on the contrary, the choices made by consumers started to dictate production. Gradually, the nature of consumption changed and from a routine, boring activity, it turned into a fun and leisure experience.⁴⁸⁹

⁴⁸⁵ Derek Braddon, "Commercial Applications of Military R&D: U.S. and EU Programs Compared" (1999) 1; Anastacia Marx de Salcedo, *Combat-Ready Kitchen: How the U.S. Military Shapes the Way You Eat* (Penguin 2015); Charles R Geisst, *Encyclopedia of American Business History* (Infobase Publishing 2014) 10.

⁴⁸⁶ Cseres, 'Contraversies of the Consumer Welfare Standard' (n 417) 152.

⁴⁸⁷ Ramsay, *Consumer Law and Policy* (n 470) 2.

⁴⁸⁸ Cseres, 'Contraversies of the Consumer Welfare Standard' (n 417) 152.

⁴⁸⁹ In US shopping is the second most common leisure activity, after watching TV. See: Lury (n 476) 1; 'Key Figures - IKEA' <<http://www.ikea.com/gb/en/this-is-ikea/about-the-ikea-group/key-figures/>> accessed 29 August 2017. (according to http://europa.eu/about-eu/facts-figures/living/index_en.htm EU population consists of 506 million)

Along with the positive developments in the market, negative side effects arose. Traditional marketing evolved into a sophisticated system that was not similar to the one, previously known for consumers. Formerly, the market was limited space, where only a few local traders operated. Consumers used to deal with the same sellers, allowing them to develop mutual awareness. They were familiar with the sellers, knew their goods and services and could easily make a choice within the limited options. After the introduction of mass production, hundreds of novel products appeared on the market. The role of small retailers declined, and they got gradually replaced by distribution and retail chains. The range of new goods and services was so overwhelming that consumers could not stay adequately informed anymore. They also lost the knowledge of the traders that used to facilitate the process of purchasing. An ever-growing number of goods and services limited consumers' ability to properly assess and compare the offers, available on the market, and reduced their chances of making optimal choices.⁴⁹⁰

The process of consumption was further complicated by a continuous flow of novel technologies. New gadgets became increasingly sophisticated, making it extremely hard or often even impossible to understand, effectively assess and compare their quality. In addition, they became more hazardous to use and exposed consumers to serious risks to health and life.⁴⁹¹ As a result of all the developments, the position of consumers drastically weakened. Lack of market knowledge, inability to compare and choose rationally or understand

As stated by Benson, in consumer societies, "*Choice and credit are readily available, in which social value is defined in terms of purchasing power and material possessions and in which there is a desire, above all, for that which is new, modern, exciting and fashionable.*" See: John Benson, *The Rise of Consumer Society in Britain, 1880-1980* (Longman 1994) 5.

⁴⁹⁰ Cseres, *Competition Law and Consumer Protection* (n 5) 152.

⁴⁹¹ Howells, Ramsay and Wilhelmsson (n 470) 5.

sophisticated goods and high technologies, made them vulnerable and easy prey for producers and sellers. Simultaneously, while consumers stayed on the same small operating scale as before and their bargaining power shrank, business started to grow in size, be better organized and concentrate more market power than ever.⁴⁹²

Such an asymmetry could not be effectively regulated by classical legal instruments anymore. Traditionally, market transactions were exclusively governed by contract law provisions. Freedom of contract became unsuitable to the new reality, as it was founded on a presumption of equality between contracting parties, while in reality there was a huge gap between their bargaining powers. Furthermore, as mass consumption emerged, the very nature of market transactions altered. If they used to be individually tailored in the past, the new reality required the repeated use of the same pattern of one-sided contracts.⁴⁹³ Consumers were no longer in the position to negotiate and were frequently obliged to simply accept the terms suggested by the counterparty on a “take it or leave it” basis.⁴⁹⁴ Even if the abuse of stronger position was evident, contracts were still considered to be freely negotiated and agreed between the parties, preventing any intervention from the state.⁴⁹⁵

It became apparent that there was a legal gap and innovative regulations were necessary to

⁴⁹² Cseres, *Competition Law and Consumer Protection* (n 5) 152.

⁴⁹³ Howells, Ramsay and Wilhelmsson (n 470) 5.

⁴⁹⁴ Origination of the term “take it or leave it” is related to the name of General Electric's former vice-president Lemuel Boulware, who notoriously employed this tactics during his negotiations with labour unions. Practically, the given strategy is an ultimatum when one party makes an offer that can be either accepted exactly as it is without further modification or rejected. This approach frequently leads to one sided contracts as the party designing contract terms has possibility to make them suited to one's own interests. See: Walter Rogers, *The Professionals Practice of Landscape Architecture: A Complete Guide to Starting and Running Your Own Firm* (John Wiley & Sons 1996). 322; Akhileshwar Pathak, *Legal Aspects of Business* (Tata McGraw-Hill Education 2013). 133; Mary Greenwood, *How to Negotiate Like a Pro: 41 Rules for Resolving Disputes* (iUniverse 2006). 30

⁴⁹⁵ N. Reich, H. Micklitz cited in Cseres, *Competition Law and Consumer Protection* (n 5) 152.

meet the challenges of the new market order and restore the distorted balance. The newly emerged challenges were first addressed by President Kennedy on March 15, 1962, when he delivered his historic speech before the Congress,⁴⁹⁶ which nowadays can be considered the birthday speech of consumer law.⁴⁹⁷ President Kennedy formulated four basic consumer rights, which were later named as the Consumer Bill of Rights, such as the right to safety, to be informed, to choose and to be heard. In 1985, the UN adopted the UN Guidelines on Consumer Protection, which were based on the Consumer Bill of Rights. This soft law instrument expanded the original four rights to eight, adding the right to the satisfaction of basic needs, to redress, to consumer education, and to a healthy environment. The Kennedy's principles became shared and transplanted all around the world, and they soon reached Europe as well.⁴⁹⁸

5. The history of consumer protection law in the EU

Bourgoignie and Trubek argue that consumer protection “*is probably the most central issue of European economic integration*”⁴⁹⁹ and the latter can only be fully understood by analyzing the “*problematic of consumer protection in the common market context*”.⁵⁰⁰ From the start, European market and EU consumer law have been inseparable. According to Ramsey, “*consumer law is part of the establishment of the ground rules of the EU internal*

⁴⁹⁶ Kennedy F John, *Public Papers of the Presidents of the United States: John F. Kennedy, 1962* (Best Books on 1963) 235–240.

⁴⁹⁷ Since 1983, March 15 is recognized as World Consumer Rights Day and is celebrated annually. See: ‘World Consumer Rights Day’ <<http://www.consumersinternational.org/our-work/wcrd/about-wcrd/>> accessed 10 November 2015.

⁴⁹⁸ Ramsay, *Consumer Law and Policy* (n 471) 31.

⁴⁹⁹ Thierry Bourgoignie and David Trubek, *Consumer Law, Common Markets, and Federalism in Europe and the United States* (Gruyter 1987) vi.

⁵⁰⁰ Ibid.

market.”⁵⁰¹ By the time of founding the first European Communities in the 1950s,⁵⁰² mass production has already been introduced to Western Europe and the processes of economic transformation, described in the previous section, had been already ongoing. In the region, the process was taken even further by the intensification of trade, as national markets opened up and the common market broadened consumer choice and access to a whole new range of goods and services.

While consumer role and position was radically shifting, the Treaty of Rome did not pay particular attention to consumers. Its preamble established the objective “*of constant improvement of the living and working conditions of (the) peoples.*”⁵⁰³ This was the initial, indirect approach to consumer welfare, based on the assumption that reducing trade barriers, establishing a common market and maintaining a high level of competition would inevitably increase living standard and bring significant benefits to consumers.⁵⁰⁴ Therefore, at the dawn of the European project, true consumer policies were still inexistent, and as argued by Weatherill, market integration regulations can be considered as the first, indirect consumer policy.⁵⁰⁵

As time passed, consumer societies emerged full-fledgedly in Europe,⁵⁰⁶ creating the necessity

⁵⁰¹ I. Ramsay, *Consumer Law and Policy. Text and Materials on Regulating Consumer Markets*, Hart Publishing, 2012, 1

⁵⁰² See: Chapter I, Section 2.2, *Transformation of the European approach throughout the twentieth century*

⁵⁰³ ‘Treaty Establishing the European Community’ (n 385) s Preamble; Craig and Búrca (n 385) 837.

However, according to Akman ‘raising the living standards’ did not necessarily include consumer welfare. Based on the *travaux préparatoires* he claims that ‘raising the living standards’ was the general post-war desire and referred to improving life conditions for the community population, without specifically targeting consumers. See: Pinar Akman (n 405) 41.

⁵⁰⁴ Ramsay, *Consumer Law and Policy* (n 471) 31..

⁵⁰⁵ Stephen Weatherill, *EC Consumer Law and Policy* (Longman 1997) 34.

⁵⁰⁶ Certain changes in consumption and first signs of consumer societies appeared in Europe already in the 18th century. The process intensified along with industrialisation in the 19th century, but emergence of modern type consumer societies happened only after the WWII. See: Emanuela Scarpellini, ‘Consumer Societies in Europe

to regulate status and rights of consumers legally. In 1975, as a consequence of preceding Paris Summit, held in 1972, the EC outlined its first preliminary consumer program.⁵⁰⁷ Echoing and widening the model of Kennedy's bill of rights⁵⁰⁸ the EC entitled consumers with rights to protection of health and safety, protection of economic interests, redress, information, education, and representation.⁵⁰⁹ Despite the program and a number of consumer protection directives and regulations, the EC still did not have competence in the field, by that time.⁵¹⁰ It was only the Treaty of Maastricht, establishing the EU in 1992, that elevated consumer protection to the status of the community common policy and declared consumer protection as one of its primary objectives.⁵¹¹ By 1995, a separate directorate general, responsible for consumer policy, was created within The EU Commission.⁵¹² In 1999, the Treaty of Amsterdam modified Article 153 [Now Article 169 TFEU] explicitly stating that the Union should ensure a high level of consumer protection, promote their interests and guarantee their right to information, education, and self-organization in safeguard of their interests. The introduction of this provision within the Treaty was a breakthrough, and until today it stands as a map of the modern landscape for EU consumer law.⁵¹³

after 1945' in Jan-Otmar Hesse and others (eds), *Perspectives on European Economic and Social History* (Nomos 2014) 159–180; Peter N Stearns, *Consumerism in World History: The Global Transformation of Desire* (Routledge 2001) 47–64.

⁵⁰⁷ Gunnar Trumbull, *Consumer Capitalism: Politics, Product Markets, and Firm Strategy in France and Germany* (Cornell University Press 2006) 176; Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart 2007) 6.

⁵⁰⁸ Geraint G Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate/Dartmouth 1997) 9; Hesselink (n 532) 13.

⁵⁰⁹ European Council, 'Resolution on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy' [6].

⁵¹⁰ Ewoud Hondius (n 460).

⁵¹¹ Weatherill, *EU Consumer Law and Policy* (n 386) 5.

⁵¹² Ramsay, *Consumer Law and Policy* (n 471) 31.

⁵¹³ Weatherill, *EC Consumer Law and Policy* (n 498). 15.

Currently, the EU consumer *acquis* is much more developed and sophisticated, including dozens of directives and soft law instruments, and is far from traditional, codified or systematized legal body of law.⁵¹⁴ Evaluating this extensive legal framework, some authors contend that the EU has legislated on almost every possible foreseeable aspect of consumer law,⁵¹⁵ but the process is still very much active, and EU consumer law continues evolving. Article 12 TFEU set forth that consumer protection requirements should be considered when defining the Union policies and activities. A similar provision is included in the CFREU, promising a high level of consumer protection via Union policies.⁵¹⁶ Still, it should be born in mind that the competence of the EU in consumer protection is limited and shared so that it does not substitute national regulations. EU law establishes minimum requirements regarding consumer rights protection that should be fully respected by all Member States, but they are also free to go beyond the limits of EU legal acts and provide more comprehensive protection, broader rights and better guarantees for consumers. This factor should always be considered when talking about transplanting EU consumer law and its standards in national systems.

EU consumer protection is still a young and growing body, which has evolved rapidly and developed significantly in the last thirty years, under the strong pressure of increasing market integration.⁵¹⁷ If in the beginning it was a mere instrument of harmonization, used for approximating Member States' laws, supporting the creation of an integrated EU market, later the role of consumers' role became more visible in the Union law. Consumer welfare

⁵¹⁴ Ibid 140

⁵¹⁵ Howells, Ramsay and Wilhelmsson (n 471) 9.

⁵¹⁶ 'Charter of Fundamental Rights of the European Union' Art. 38.

⁵¹⁷ Fabrizio Cafaggi and Hans-W Micklitz, *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia 2009); Benohr (n 389) 3.

has been declared as a general objective of the Union, and it keeps influencing every Union-wide policy.⁵¹⁸

The Commission's communication on the single market places consumer policy at the heart of the internal market.⁵¹⁹ The EU Consumer Policy Strategy upheld the same for 2007-2013,⁵²⁰ aiming at empowering EU consumers by putting them "in the driving seat [that] benefits citizens but also boosts competition significantly." It also planned to "enhance EU consumers' welfare in terms of price, choice, quality, diversity, affordability and safety" and to boost consumer confidence.⁵²¹ The issuance of the European Consumer Agenda in 2012 demonstrated the strategic vision of the Commission for the development of consumer policy, for the next 10 years.⁵²² It further intensified the role of consumers and established the goal to empower consumers, for bringing the EU out of crises⁵²³ and meeting the Europe 2020 objective of smart, inclusive and sustainable growth.⁵²⁴

As underlined, EU consumer protection has been developed within a framework of economic

⁵¹⁸ Fabrizio Cafaggi and Antonio Nicita, 'The Evolution of Consumer Protection in the EU' [2012] Research Handbook on the Economics of European Union Law 263, 264.

⁵¹⁹ European Commission, 'Communication: A Single Market for Citizens'.

⁵²⁰ European Commission, 'EU Consumer Policy Strategy 2007-2013. Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. COM (2007) 99 Final, 13 March 2007' (n 421) [1].

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, "EU Consumer Policy Strategy 2007-2013 Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them," [1]

⁵²¹ *ibid* [3].

⁵²² 'Policy Strategy - European Commission' <http://ec.europa.eu/consumers/eu_consumer_policy/our-strategy/index_en.htm> accessed 10 November 2015.

⁵²³ "Confident consumers create thriving markets. Building on this autumn's work, the next work programme will announce measures to strengthen consumer rights, including in electronic and cross border transactions and effectively address health and safety related matters, thus improving citizens' security, while underpinning demand in the Single Market." 'Letter by President Barroso to the President of the European Parliament, Jerzy Buzek', (28 September 2011) <http://europa.eu/rapid/press-release_MEMO-11-645_en.htm>.

⁵²⁴ European Commission, 'Communication: A European Consumer Agenda - Boosting Confidence and Growth' [1].

policies. Undoubtedly, the discipline has social and human rights perspectives, and is even guaranteed by the CFREU. However, it still has clear market and competition related economic purposes, until today. In order to better demonstrate how deeply rooted consumer law is in economics, this section will analyse its rationale.

Consumer protection has a broad perspective and can incorporate various public policy objectives. According to Honwell and Wilson the unique nature of consumer law goes even further, as it has elements of civil, criminal, contract, tort and other fields of law, while having close ties with economics.⁵²⁵ According to the authors, this makes it hard to establish consistent and comprehensive categories when attempting to define the rationale of the discipline. Eventually, there are a multiplicity of theories, ranging from social or individual justice and human rights to economic efficiency and correction of market failures.⁵²⁶ In light of the historic analysis developed in the previous sections, the rationale of consumer law will be identified from the perspective of its original role and purpose, of how this role has evolved, and of the connection it has with competition law.

6. The rationale of consumer protection and contradictory aspects of the notion of consumer

6.1 Market failures and a critical role of consumer law in addressing them

A long review of consumer law history has been presented in the previous sections in order to

⁵²⁵ Therese Wilson and Nicola Howell, 'The Limits of Competition: Reasserting a Role for Consumer Protection and Fair Trading Regulation in Competitive Markets' in Annette Nordhausen and Geraint Howells (eds), *The Yearbook of Consumer Law 2009* (Routledge 2016) 147.

⁵²⁶ Ibid. See also: Benohr (n 389); Iris Benohr and Hans-W Micklitz, 'EU Consumer Law and Human Rights' in Geraint Howells and others (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 18–47.

demonstrate the background and preconditions for the creation of consumer protection and the primary challenges it aimed to solve. Summarizing the historical analysis of consumer law, a few key conclusions can be drawn.⁵²⁷ There is an informational asymmetry on the market, and consumers suffer a lack of market knowledge and possibility to make an effective comparison of products and prices. Consumers also lack bargaining power and are often obliged to make agreements on a “take it or leave it” basis.⁵²⁸ The rise of behavioural economics in recent years⁵²⁹ has demonstrated additional challenges. It has proven that consumers’ weaknesses are not limited only to the above-mentioned asymmetries and, contrary to the general presumption of consumers’ rationality, they also suffer from bounded rationality and often make economically unjustified decisions.⁵³⁰ All these factors, related to consumers- inability to fully exercise their right to choose, to make rational selections, to demand and negotiate fair conditions, create market failures,⁵³¹ which can be defined as the *“inability of the market to deliver goods and services to consumers in an efficient manner, i.e. because unrestricted competition cannot be sustained in the industry in question.”*⁵³²

In order to better explain the connection between irrational consumer choices and market failures, it is first necessary to refer to the rational choice theory. The theory argues that consumers anticipate the results of the options available and choose the one which, after having assessed the alternative outcomes, related costs and benefits, is most likely to bring

⁵²⁷ Sutatip Yuthayotin, ‘Consumer Protection in B2C E-Commerce: Enhancing Consumer Confidence’, *Access to Justice in Transnational B2C E-Commerce* (Springer International Publishing 2015).

⁵²⁸ Howells, Ramsay and Wilhelmsson (n 471) 5.

⁵²⁹ More about behavioural economics and its relation to consumer law will be discussed below

⁵³⁰ Ramsay, *Consumer Law and Policy* (n 471) 54–56. Yuthayotin (n 520).

⁵³¹ Dr Christian Twigg-Flesner and others, *The Yearbook of Consumer Law 2009* (Ashgate Publishing, Ltd 2013) 150, 151.

⁵³² Paul Crampton, ‘Striking the Right Balance between Competition and Regulation: The Key Is Learning from Our Mistakes, APEC-OECD Co-Operative Initiative on Regulatory Reform: Third Workshop.’ [14].

the greatest satisfaction.⁵³³ A rational decision making is a goal/-oriented and purposeful activity, which requires the ability to know one's own needs and goals. It is based on a hierarchy of preferences and utilities, and should not be merely emotional; on the contrary, it should be based on facts and figures, taken from reliable sources.⁵³⁴

A rational choice of an individual consumer usually is not limited to benefit only the given purchaser, but creates a gain for all the consumers, as it was made in favour of the most competitive undertaking, which provides the best alternative.⁵³⁵ However, when the situation is reversed, and consumers' irrational choices become commonplace, then a competitive market ceases to operate efficiently.⁵³⁶ Under perfect competition consumers are supposed to promote efficient production and better satisfaction of consumer needs. However, this award does not come without taking any effort. Consumers need to make rational choices. Otherwise, the most efficient producers of the market suffer; they lose customers, while the undertakings poor at satisfying consumer needs unfairly benefit from the process.⁵³⁷

For example, one of the common market failures is information inefficiencies, when because of the lack of accurate, sufficient or effective information, consumers are prevented from making optimal choices.⁵³⁸ In an environment where consumers regularly make poor choices,

⁵³³ Rajagopal, *The Butterfly Effect in Competitive Markets: Driving Small Changes for Large Differences* (Springer 2015) 3–29.

⁵³⁴ Ramesh B Rudani, *Principles of Management* (Tata McGraw-Hill Education 2013) 228–232; RAW Rhodes and Paul 't Hart, *The Oxford Handbook of Political Leadership* (OUP Oxford 2014) 226–227; William R Sheate, *Tools, Techniques & Approaches for Sustainability: Collected Writings in Environmental Assessment Policy and Management* (World Scientific 2010) 201–202; Roger Frantz and others, *Routledge Handbook of Behavioral Economics* (Routledge 2016) 182–187.

⁵³⁵ Ibid.

⁵³⁶ Jamil Ammar, *Think Consumer: The Enforcement of the Trade Mark Quality Guarantee Revisited, A Legal and Economic Analysis* (Cambridge Scholars Publishing 2011) 96.

⁵³⁷ Ari Mwachofi and Assaf F Al-Assaf, 'Health Care Market Deviations from the Ideal Market' (2011) 11 Sultan Qaboos University Medical Journal 328, 331.

⁵³⁸ Twigg-Flesner and others (n 523) 150, 151.

it is not merely their interests that are damaged, but also competition is distorted. Market competition is a natural selection process which leads to production efficiency, allowing only the best producers and supplies to stay on the market, for the ultimate benefit of consumers. Each poorly made decision endorses less efficient, less competitive producers and disincentivise their superior competitors, which can better satisfy consumer needs. As this process keeps on, eventually effective producers are forced to leave the market. Less competitive undertakings, which managed to attract consumers due to their bounded rationality or by abusing their own market powers,⁵³⁹ start dominating the market, disturbing competition and harming consumers. This is exactly what economists refer as market failures when one of the conditions for the optimal operation of a competitive market collapses,⁵⁴⁰ the competition process is distorted, and consumer interests get harmed.⁵⁴¹

In order for the competition process to be maintained, market failures have to be prevented or corrected. The above-mentioned failures are caused by consumer vulnerability or irrationality, and these issues cannot be addressed with competition law.⁵⁴² In order to deal with the roots of the problem, it is necessary to have a body of law, tailor-made to empower consumers, enhance their abilities to make appropriate choices and protect their specific interests, giving them a voice and power, in order to exert more economic pressure over the

⁵³⁹ Less competitive undertakings can use various misleading techniques or abuse their positions if they possess significant market power. They can also hope for consumer misjudgement, but there are also certain fully legal ways to attract consumers and gain their loyalty, without actually becoming the best producer or supplier. For example, many classical economists believe that advertising can significantly distort competition, as a powerful instrument to shape consumer choices. See: William Leiss and others, *Social Communication in Advertising: Consumption in the Mediated Marketplace* (Routledge 2013) 278; David George, *The Rhetoric of the Right: Language Change and the Spread of the Market* (Routledge 2012) 78.

⁵⁴⁰ Iain Ramsay, *Rationales for Intervention in the Consumer Marketplace* (Office of Fair Trading 1984) 15.

⁵⁴¹ Ammar (n 529) 96.

⁵⁴² Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 184–193.

business. This is precisely the role consumer protection performs or should perform.⁵⁴³

6.2 The economic nature of consumer law and other secondary features

Unlike competition law, which economic nature is beyond doubt and is widely presumed to be an interdisciplinary field at the borderland of law and economics,⁵⁴⁴ consumer law is often presented from another perspective, as a part of human rights, striving for equality, social justice, and fairness.⁵⁴⁵ Even on the day when President Kennedy first introduced the Consumer Bill of Rights, these rights were named as fundamental ones.⁵⁴⁶ Since then there has been an ongoing discussion about the nature of consumer law. Nowadays a number of scholars claim that consumer rights belong to a new generation of human rights.⁵⁴⁷ This discussion was taken further in 2000, when Article 38 CFREU established guarantees that a

⁵⁴³ Amandine Garde, *EU Law and Obesity Prevention* (Kluwer Law International 2010) 111–113; Claudia Lima Marques and Dan Wei, *Consumer Law and Socioeconomic Development: National and International Dimensions* (Springer 2017) 20–21; Hans-W Micklitz and Takis Tridimas, *Risk and EU Law* (Edward Elgar Publishing 2015) 143; P Davies and J Quinn, *Ethics and Empowerment* (Springer 2016) 347.

⁵⁴⁴ Dabbah (n 12). 49, 50. Jürgen Basedow and Wolfgang Wurmnest, *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid* (Kluwer Law International 2011). 7. Kingston (n 218). 4. Michael Faure and Xinzhu Zhang, *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar Publishing 2011). 3. ASCOLA Workshop on Comparative Competition (n 383). 100. See also: Roger van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia nv 2001).; Cseres, *Competition Law and Consumer Protection* (n 5). Kokkoris (n 226).

⁵⁴⁵ Benohr (n 389). 99-103. Chris Field, ‘Competition, Consumer Protection and Social Justice- Providing a Consumer’s Voice’ (2005) 33(1) Australian Business Law Review. James Devenney and Mel Kenny, *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012). 336-354. Erika M Szyszczak, *Research Handbook on European State Aid Law* (Edward Elgar 2011). 43-44. Thomas Wilhelmsson and Geraint G Howells (eds), ‘Contract Law: The Challenge for the Critical Consumer Lawyer’, *Perspectives of critical contract law* (Dartmouth 1993) 327, 331.

⁵⁴⁶ Although, as Kingisepp states, declaration of certain consumer rights as “fundamental rights” does not in itself have any specific value from a Constitutional point of view. See: Margus Kingisepp, ‘The Constitutional Approach to Basic Consumer Rights’. 49.

⁵⁴⁷ There is an ongoing discussion whether consumer rights can be viewed as human rights or human rights should stay out of private/commercial relations. Adding so called new generations of social and economic rights to the list of human rights might even damage the value and validity of already existing rights. See: Sinai Deutch, ‘Are Consumer Rights Human Rights?’ (1994) 32 Osgoode Hall Law Journal 537, 537–578.

high level of consumer protection will be ensured through the union policies.⁵⁴⁸

However, even under the assumption that respect to human rights, social justice, fairness, and equality are an essential part of consumer law and these are elements that should be considered at the stage of enforcement, the economic rationale of the discipline should not be overshadowed. Presenting consumer protection as a part of human rights system, standing guard of citizens' interests, ensuring certain care despite the economic reasoning, can be strategically and even politically⁵⁴⁹ justified as a shorter way to win the heart of society and demonstrate the law as more desirable.⁵⁵⁰

This is even truer, considering that similarly to consumers politicians are believed to suffer from behavioural biases, and most notably hyperbolic discounting, which means that they tend to adopt popular laws, even when long-term outcomes are not expected to be positive.⁵⁵¹

They might also try to wrap certain economic policies as more social and oriented on public interests. The same applies to authorities as well, as they seek the approval of all their stakeholders, including wider society, politicians and sometimes even those that they

⁵⁴⁸ 'Charter of Fundamental Rights of the European Union' (n 509) Art. 38.

For the analysis whether the given article is an evidence that consumer rights are finally recognized as human rights, see: Margus Kingisepp (n 539). 52-53.

⁵⁴⁹ As it has been mentioned in the previous chapter, political bargaining is not an unusual component for competition law either. According to Cseres, objectives of competition law are always part of political bargain and therefore the stated goals might not exactly correspond to the realities of enforcement. Some authors even consider the goal of consumer welfare is cited so frequently because it is politically appealing. Possibility of similar phenomenon is not excluded in consumer law either. See: Cseres, 'Competition and Consumer Policies' (n 402) 5.

⁵⁵⁰ "There is something deeply attractive in the idea that every person anywhere in the world, irrespective of citizenship or territorial legislation, has some basic rights, which others should respect." Amartya Sen, 'Elements of a Theory of Human Rights'. 315.

⁵⁵¹ William Kovacic and James Cooper, 'Behavioral Economics: Implications for Regulatory Behavior' [2012] GW Law Faculty Publications & Other Works 2; William Kovacic and James Cooper, 'Behavioral Economics and Its Meaning for Antitrust Agency Decision Making' [2012] GW Law Faculty Publications & Other Works 782, 783.

regulate.⁵⁵² However, a number of prominent scholars share the idea that despite various theories behind the purposes of consumer protection, the starting point for all of them is the same, to neutralize market failures and provide assistance to the weaker party, in their transactions, as a necessary action for effective functioning of the market.⁵⁵³

Economic factors not only create the necessity for consumer law, but they also define its path of development and indicate the directions it should evolve to. The Commission's staff working paper on consumer empowerment supports this argument and confirms that "*consumers increasingly need to be empowered, in the light of products and markets becoming increasingly complex, an ageing population, the lessons from the economic crisis, increasing information overload and new demands on consumers in making the best choices in liberalised markets.*"⁵⁵⁴ It is in this context that we witness a process of widening the scope of consumer protection. The further it evolves, the more evident it is that consumer law is reconnecting to its economic rationale, broadening the definition of consumer and providing certain rights to legal entities, which are not related to a human rights agenda.

The economic foundation for consumer law and its close ties with market's efficient functioning purposes is well demonstrated by the EU experience.⁵⁵⁵ Despite its concerns about social justice, the harmonization of national consumer laws was primarily motivated

⁵⁵² Ibid. Paul O'Shea, Karen Fairweather and Ross Grantham, *Credit, Consumers and the Law: After the Global Storm* (Routledge 2016) 3–17.

⁵⁵³ Richard A Posner, *Economic Analysis of Law* (Aspen Law & Business 1998) ch 13. Cseres, 'The Controversies of the Consumer Welfare Standard' (n 289) 130; Ramsay, *Consumer Law and Policy* (n 471) 42; Howells, Ramsay and Wilhelmsson (n 471) 10; Micklitz, Stuyck and Terryn (n 456) 3.

⁵⁵⁴ 'Commission Staff Working Paper: Consumer Empowerment in the EU, SEC(2011) 469 Final' [1].

⁵⁵⁵ EU Parliament created overview of consumer protection in the EU, starts with the following statement emphasising economic context of consumer law: "*The final consumption expenditure of households currently accounts for 57% of EU gross domestic product. A single market that serves consumers well is therefore an important element to stimulating Europe's economic growth.*" Jana Valant (n 453) 1.

with an objective of removing trade barriers and supporting the single market completion.⁵⁵⁶ Currently, the EU is actively striving to achieve a vibrant “Digital Single Market” that again has an obvious economic reasoning. Encouraging active participation of consumers in cross-border e-commerce, by increasing their awareness and confidence, is a necessary step to achieve a more complete single market. In the long-run, the process has a potential to raise the level of EU GDP by at least 4.0 percent or around 520 billion euro at current prices.⁵⁵⁷

6.3 Market evolution and the emergence of active and confident consumers

The strong emphasis on boosting consumer confidence⁵⁵⁸ is directly related to the goal of continuous and progressive integration of the EU’s market. Consumers’ confidence is a vital element to transform them from passive recipients of the benefits generated by market competition to active contributors of the market integration process.⁵⁵⁹ Weatherill shares the position that EU consumer law is multidimensional, but its primary objective is to integrate

⁵⁵⁶ Martijn W Hesselink, *CFR & Social Justice* (Walter de Gruyter 2008). 15.

⁵⁵⁷ European Parliament, ‘Mapping the Cost of Non-Europe, 2014 -19 - Third Edition (April 2015) - Think Tank’ s 1

<http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU%282015%29536364>

accessed 29 August 2017; Mariusz Maciejewski, Nina Isabel Caroline Fischer and Yana Roginska, ‘Streaming and Online Access to Content and Services’

<<http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/492435/IPOL->

IMCO_ET(2014)492435_EN.pdf> accessed 29 August 2017. ‘Digital Single Market - European Commission’

<<http://ec.europa.eu/priorities/digital-single-market/>> accessed 12 October 2015. ‘The Ubiquitous Digital Single

Market’ <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.9.4.html> accessed 12 October 2017.

⁵⁵⁸ U Consumer Policy strategy 2007-2013 - Empowering consumers, enhancing their welfare, effectively protecting them 2007 ({SEC(2007) 321 } {SEC(2007) 322 } {SEC(2007) 323 }) [3].

⁵⁵⁹ Weatherill, *EU Consumer Law and Policy* (n 385) 10; Tomas Dvorak and Richard Podpiera, ‘European Union Enlargement and Equity Markets in Accession Countries’ (European Central Bank 2005) Working Paper Series 552 4.

markets.⁵⁶⁰ For a full integration and the successful operation of the single market, it is essential to engage consumers in transactions that take place beyond their national markets borders. Consumers' active cross-border shopping makes the European market truly "single" for every market participant and not only for producers and suppliers.⁵⁶¹

The increasing demand for consumers' active participation in market processes is not strictly the EU phenomenon, but is rather a global trend, related to the emergence of new technologies and the introduction of easily accessible new tools and platforms, which reshape a role of consumers.⁵⁶² The long-standing strict distinction between providers and recipients of goods and services is blurring, creating a new type of actors on the market, often referred as prosumers.⁵⁶³ For example in modern social media, broadcasters and audiences are getting increasingly assimilated. Readers get involved in content production more actively through commenting, adding personal introductions when reposting or writing blogs themselves.⁵⁶⁴

Another bright example is fan fiction, where consumers get inspiration from various forms of art and develop their own variations of the original material, commonly without any commercial interest.⁵⁶⁵ As markets evolve, business entities create new avenues to encourage

⁵⁶⁰ Stephen Weatherill, 'Consumer Protection' in Anna Södersten (ed), *A Companion to European Union Law and International Law* (John Wiley & Sons 2016) 293.

⁵⁶¹ Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Routledge 2016) ch 3.

⁵⁶² Patrick G Coy, *Research in Social Movements, Conflicts and Change* (Emerald Group Publishing 2013) 7; Edmilson Rampazzo Klen, 'Co-Creation and Co-Innovation in a Collaborative Networked Environment' in Luis M Camarinha-Matos, Iraklis Paraskakis and Hamideh Afsarmanesh (eds), *Leveraging Knowledge for Innovation in Collaborative Networks* (Springer, Berlin, Heidelberg 2009) 37.

⁵⁶³ Alvin Toffler, *The Third Wave* (Morrow 1980); Angela Daly, 'Energy Prosumers and Infrastructure Regulation: Some Initial Observations from Australia' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2800162; Konomi Shin'ichi and Roussos George, *Enriching Urban Spaces with Ambient Computing, the Internet of Things, and Smart City Design* (IGI Global 2016) 30.

⁵⁶⁴ Coy (n 555) 7.

⁵⁶⁵ Maria Lindgren Leavenworth and Malin Isaksson, *Fanged Fan Fiction: Variations on Twilight, True Blood and The Vampire Diaries* (McFarland 2013) 44; Elena Polyudova, 'Once Upon a Time in the Contemporary

active consumer engagement. For example, Lego invited some of its prominent prosumers, in order to involve them in the design process.⁵⁶⁶ These dramatic changes raise new legal questions and challenges. They demonstrate how quickly the market changes, and how consumer law needs to at least react to these changes, if not being pro-active. Market developments determine a path of development of consumer law because the latter's primary function is to ensure effective functioning of a market. It is for this purpose that consumers are constantly protected and empowered and any social or humanitarian purpose is secondary.

Due to the heavy emphasis on the economic objectives achievable through consumer law, it has been even suggested by the Study Group on Social Justice in European Private Law that EU consumer law is designed in order to allow intervention in the private transactions, preventing competition distortion rather than actually helping the weak parties.⁵⁶⁷ Despite the above stated scepticism correcting market failures and protecting the weak parties are not antagonistic objectives at all. The market failures which consumer law should correct are exactly the shortcomings caused by the weakness of consumers and when addressing these issues, consumer law benefits to the competition process and to consumer interests simultaneously.⁵⁶⁸

Consumer rationality is a concept borrowed from economy. It presumes that individuals

World Modern Vision of Old Stories' 93. See also: Kristina Busse, *Fan Fiction and Fan Communities in the Age of the Internet: New Essays* (McFarland 2006).

⁵⁶⁶ Coy (n 555) 7.

⁵⁶⁷ Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' 660, 661, 673.

⁵⁶⁸ Cseres, *Competition Law and Consumer Protection* (n 535) 1.

always make logical and prudent decisions maximizing their happiness or utility.⁵⁶⁹ This theory also supports the idea that individuals are best aware of their own interests⁵⁷⁰ and can look after themselves. Therefore, there is no need for state paternalism, and individuals should be free to make decisions as they consider right.⁵⁷¹ While maximizing happiness and acting in one's own interest may have different interpretation, usually what is meant behind rational decisions is economic rationality. Its ultimate model is based on the concept of *homo-economicus*, a self-interested individual who makes constantly rational decisions in terms of price and quality, maximizing her own benefits.

One of the market failures that bars consumers from making rational choices is information inefficiencies. Consumer law attempts to avoid or correct it by prohibiting misleading and deceptive conduct, and imposing obligations over the producers, suppliers and distributors to pro-actively disclose certain information in a particular manner. Some authorities may employ various additional practices and techniques, launch information campaigns and work to raise consumers' awareness, demand extra precautionary measures from providers of goods and services and strive to ensure the maximum reduction of risks related to consumers' misinformation and misunderstanding.⁵⁷²

In order for these measures to be effective, they should be correctly addressed to a relevant group. As consumer law is supposed to protect the weak party from the powerful one, it is essential to define the scope of its application accurately and allow every weak party of an asymmetric relationship to benefit from it, without any discrimination. Otherwise, the risk of

⁵⁶⁹ Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2012) 47.

⁵⁷⁰ Mak, 'The Consumer in European Regulatory Private Law' (n 438) 7.

⁵⁷¹ De Hoon, Machteld W and Vanessa Mak, 'Consumer Empowerment Strategies - A Rights-Oriented Approach Versus a Needs-Oriented Approach' 5.

⁵⁷² Twigg-Flesner and others (n 524). 150-152.

market failures and distorting competition is not neutralized. Originally, the group of beneficiaries of consumer protection has been defined according to the contemporary market failures and also by taking into consideration expected political gains.⁵⁷³ However, since its creation decades has passed and the market has gone through significant changes.

As mentioned above, consumer law is supposed to reflect the market developments and adjust itself to newly emerging market failures.⁵⁷⁴ It has also been indicated that the narrow definition of consumer in EU consumer law was mostly motivated by political purposes. It aimed to link the concept with citizenship and create a strong feeling of connection for EU citizens toward the European project.⁵⁷⁵ Eventually, the current notion of consumer still remains incompatible with the rationale of consumer law, and this reduces its effectiveness as a tool to support market competition.

6.5 Vulnerability of legal entities and a crucial role of consumer law in addressing the problem

6.5.1 The rise of SMEs and challenging traditional views regarding business decision-making

Consumer law traditionally divides market actors in two general groups: the weak party, usually natural persons purchasing goods and services for personal consumption,⁵⁷⁶ and the strong party, which traditionally refers to all business entities. Such division is a deep-rooted

⁵⁷³ Introducing the Bill of Rights in 1962 had a strong political context, as it was one of the political promises given during the presidential elections campaign by Kennedy before being elected in 1961. See: Robert N Mayer, *The Consumer Movement: Guardians of the Marketplace* (Twayne Publishers 1989) 27.

⁵⁷⁴ 'Commission Staff Working Paper: Consumer Empowerment in the EU, SEC(2011) 469 Final' (n 547). [1].

⁵⁷⁵ Devenney, Kenny and Schüller (n 390) 123–142.

⁵⁷⁶ Cseres, 'The Controversies of the Consumer Welfare Standard' (n 289) 133.

tradition and its rationale is more relevant to the early days of consumer society rather than to the current reality. At the birth phase of consumer markets, after dramatic transformations, natural persons were the most visible victims of the new order.⁵⁷⁷ However, since that time the market has changed in many ways. As noted, in recent years even the traditional understanding of producers and consumers has been challenged, as prosumers are rising in a number of industries.⁵⁷⁸

Another remarkable change was the colossal increase in the role and number of SMEs since the 1980s and 1990s.⁵⁷⁹ Easiness to access financing has allowed lower classes to be involved in the process.⁵⁸⁰ Previously R&D processes were monopolized by large corporations. Since entrepreneurship became more and more accessible, anyone with bright idea can set up a company.⁵⁸¹ In this perspective, entrepreneurship was liberalized from rich and large scale entities and became a massive phenomenon.⁵⁸² Such dramatic changes altered the nature of entrepreneurship itself. Features of vulnerability, such as lack of information, expertise, time and resources, that used to be seen as exclusive characteristics of natural persons, became commonplace for certain business entities as well.⁵⁸³

⁵⁷⁷ See: Chapter II, Section 4. *Birth and evolution of consumer protection law*

⁵⁷⁸ See: Chapter II, Section 6.3, *Market evolution and the emergence of active and confident consumers*

⁵⁷⁹ Farhad Analoui and Azhdar Karami, *Strategic Management in Small and Medium Enterprises* (Cengage Learning EMEA 2003) 30; Peter J Buckley, Jaime Campos and Eduardo White, *International Technology Transfer by Small and Medium-Sized Enterprises: Country Studies* (Springer 2016) 115; T Tambunan, *SMEs in Asian Developing Countries* (Springer 2009) 196; Léo-Paul Dana and Veland Ramadani, *Family Businesses in Transition Economies: Management, Succession and Internationalization* (Springer 2015) 159.

⁵⁸⁰ Esteban R Brenes and Jerry Haar, *The Future of Entrepreneurship in Latin America* (Palgrave Macmillan 2012) 192.

⁵⁸¹ Georg Weiers, *Innovation Through Cooperation: The Emergence of an Idea Economy* (Springer Science & Business Media 2013) 35, 36.

⁵⁸² *ibid.*

⁵⁸³ Jan Devos, Hendrik van Landeghem and Dirk Deschoolmeester, *Information Systems for Small and Medium-Sized Enterprises: State of Art of IS Research in SMEs* (Springer Science & Business Media 2013) ix; Information Resources Management Association International Conference, *Innovations Through Information*

There is a major difference between SMEs and big undertakings, and it is unreasonable to generalize the image of a powerful business over all of them.⁵⁸⁴ Decisions and choices are made in different ways in large corporations and SMEs.⁵⁸⁵ Rich companies and large scale corporations can easily hire teams of experts, conduct market studies and base their decisions on the findings, which will definitely make them much more reasonable. Moreover, corporate structure allows a distribution of responsibilities between different managers.⁵⁸⁶ Sometimes, the decision making process should pass through multiple stages to be finally implemented.⁵⁸⁷ While this makes corporate operations slower, more formal, hierarchical and bureaucratic, it also ensures a lower risk for its decisions and actions.⁵⁸⁸

In case of SMEs, decisions are generally made individually by a manager,⁵⁸⁹ who can also be an owner and not necessarily an expert in the field.⁵⁹⁰ With limited resources, small enterprises cannot afford high research costs or to hire groups of experts, therefore the

Technology: 2004 Information Resources Management Association International Conference, New Orleans, Louisiana, USA, May 23-26, 2004 (Idea Group Inc (IGI) 2004) 277; Steve Furnell, Bhavani Thuraisingham and X Sean Wang, *Security Management, Integrity, and Internal Control in Information Systems: IFIP TC-11 WG 11.1 & WG 11.5 Joint Working Conference* (Springer 2006) 268; Hamid Jahankhani and others, *Global Security, Safety, and Sustainability: 7th International and 4th e-Democracy Joint Conferences, ICGS3/e-Democracy 2011, Thessaloniki, Greece, August 24-26, 2011, Revised Selected Papers* (Springer 2012) 222.

⁵⁸⁴ In the resolution of 2006, EU parliament “reminds the Commission that the term “business” covers more than just large corporations and includes small - even one-person - undertakings which will often require contracts that are specially tailored to their needs and that take account of their relative vulnerability when contracting with large corporations;” See: ‘European Parliament Resolution on European Contract Law and the Revision of the Acquis: The Way Forward’ <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0109+0+DOC+XML+V0//EN>> accessed 29 August 2017.

⁵⁸⁵ B Oyelaran-Oyeyinka and K Lal, *SMEs and New Technologies: Learning E-Business and Development* (Palgrave Macmillan UK 2006) 98.

⁵⁸⁶ Marc J Epstein, *Making Sustainability Work: Best Practices in Managing and Measuring Corporate Social, Environmental, and Economic Impacts* (Berrett-Koehler Publishers 2014) 99.

⁶⁶⁴ Jordi Canals, *Managing Corporate Growth* (OUP Oxford 1999) 138; Wayne Visser and others, *The A to Z of Corporate Social Responsibility* (John Wiley & Sons 2010) 171.

⁵⁸⁸ Wim Vanhaverbeke, *Managing Open Innovation in SMEs* (Cambridge University Press 2017) 131.

⁵⁸⁹ Oyelaran-Oyeyinka and Lal (n 578) 98.

⁵⁹⁰ Martijn W Hesselink, ‘SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis’; Information Resources Management Association, *Small and Medium Enterprises: Concepts, Methodologies, Tools, and Applications* (Idea Group Inc (IGI) 2013) 902.

effectiveness of their decision making process strongly depends on the qualifications and skills of their managers or owners.⁵⁹¹ Other than limited resources and number of employees, SMEs' owners are characterized by limited willingness to delegate any important functions and competences that makes decision making rather fast, but often quite risky.⁵⁹²

In addition to limited resources and access to information or expertise, there might be another similarity between natural persons and SMEs when making decisions as consumers. Based on the view of neoclassical economics, consumers used to be seen as rational and good economic thinkers. However, the presumption of rational choices changed⁵⁹³ as the theory of bounded rationality questioned the "high expectations" put on consumers.⁵⁹⁴ Behavioural studies of consumer actions turned the *homo economicus* into *Homer economicus*⁵⁹⁵ - a joke that "Simpsonized" law and economics.⁵⁹⁶ In brief, centered on one person and vastly depended on her intellectual abilities and qualifications,⁵⁹⁷ the SMEs' decision making process is similar to that of natural persons.

Behavioural economics, which is becoming an increasingly relevant and influential source for policymaking in EU consumer law,⁵⁹⁸ considers that humans are unable to make economically rational decisions constantly. Certain cognitive errors, forgetting things over time, miscalculation, laziness, over-optimism, hyperbolic discounting and so forth causes

⁵⁹¹ Oyelaran-Oyeyinka and Lal (n 578) 98.

⁵⁹² Association (n 583) 572.

⁵⁹³ Edward J O'Boyle, 'Requiem for Homo Economicus' (2007) 10 Journal of Markets & Morality 329–331.

⁵⁹⁴ Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124, 1124–1131.

⁵⁹⁵ The reference is made to a fictional character of Homer Simpson, from a famous American cartoon series Simpsons. Homer is used as an example of a naïve consumer, with poor judgement and decision making skills.

⁵⁹⁶ Sabine Frerichs, 'False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics' (2011) 34 Journal of Consumer Policy 289, 289–314.

⁵⁹⁷ Henrik Holt Larsen and Wolfgang Mayrhofer, *Managing Human Resources in Europe: A Thematic Approach* (Taylor & Francis 2006) 117.

⁵⁹⁸ Ramsay, *Consumer Law and Policy* (n 562) 56.

consumers' bounded rationality.⁵⁹⁹ Individuals act under the influence of emotions; they look for fairness and make morally correct decisions.⁶⁰⁰ Therefore, natural persons as consumers often make inconsistent and economically unjustified choices.⁶⁰¹

The abovementioned bounded rationality is a specific feature of human reasoning.⁶⁰² Apparently, business is managed by individuals, and their irrationality might affect business judgement as well, but the risks of making similar mistakes as individuals differ, as we saw before, according to the type of undertakings.⁶⁰³

⁵⁹⁹ Cseres, *Competition Law and Consumer Protection* (n 535) 182, 183. Ramsay, *Consumer Law and Policy* (n 471) 54–56.

⁶⁰⁰ Ramsay, *Consumer Law and Policy* (n 471) 58–60.

⁶⁰¹ The theory of bounded rationality does not view contractual information duties as a panacea. On the contrary, in certain cases, oversupply of information can be even counterproductive. Such attitude justifies further-reaching intervention from a state's side into a market. A state can be paternalistic, using mere nudges soft/liberal paternalism from state's side, which is presented as a choice architect, using subtle tricks and less intrusive techniques to help consumers make better choices). or stronger measures (An example of a radically paternalistic state can be Tajikistan, where in 2008 was banned gold teeth, the use of mobile telephones in universities, large birthday parties and other money spending activities, in order to save impoverished society from conspicuous spending. For more information, see: Farangis Najibullah, 'Authorities Exclude Miniskirt, Hejab On Campuses' (*Radio Free Europe /Radio Liberty*, 12 April 2007) <<https://www.rferl.org/a/1075841.html>> accessed 29 August 2017. Cass Sunstein and Richard Thaler, 'Libertarian Paternalism Is Not an Oxymoron' (2003) 48 Conference Series ; [Proceedings] 175–179, 1159–1202. Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin 2009); Chris Mills, 'The Heteronomy of Choice Architecture' 31 March 2015 Review of Philosophy and Psychology 495; Cass R Sunstein, 'Fifty Shades of Manipulation' [2015] 1 J. Marketing Behav. 213 (2016). See also: Frerichs (n 589) 289–314; Cseres, *Competition Law and Consumer Protection* (n 535) 183; Geraint G Howells, I Ramsay and Thomas Wilhelmsson, *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 11.

⁶⁰² Gabriel Rubin, *Freedom and Order: How Democratic Governments Restrict Civil Liberties After Terrorist Attacks--and Why Sometimes They Don't* (Lexington Books 2011) 38; Gerd Gigerenzer and Reinhard Selten, *Bounded Rationality: The Adaptive Toolbox* (MIT Press 2002) 4–37; MW Lau, *The Economic Structure of Trusts: Towards a Property-Based Approach* (Oxford University Press 2011) 84; Herbert Alexander Simon, *Models of Bounded Rationality: Empirically Grounded Economic Reason* (MIT Press 1982) 294; The late Herbert A Simon and others, *Economics, Bounded Rationality and the Cognitive Revolution* (Edward Elgar Publishing 1992) 4; Stephan Alexander Rompf, *Trust and Rationality: An Integrative Framework for Trust Research* (Springer 2014) 164.

⁶⁰³ Oyelaran-Oyeyinka and Lal (n 578) 98; Epstein (n 579) 99; Canals (n 580) 138; Visser and others (n 580) 171; Vanhaverbeke (n 581) 131. Hesselink, 'SMEs in European Contract Law' (n 583) 14; Association (n 583) 902; Management Association Resources Information, *Curriculum Design and Classroom Management: Concepts, Methodologies, Tools, and Applications: Concepts, Methodologies, Tools, and Applications* (IGI Global 2015) 572; Oyelaran-Oyeyinka and Lal (n 578) 98.

6.5.2 Behavioural biases in a decision-making process of SMEs

How SMEs exactly act and to what extent their behaviour is similar to humans is a challenging question. First of all, the decisional behaviour of SMEs is not an exhaustively studied topic, and little is known about its characteristics.⁶⁰⁴ Moreover, SMEs is a large group, as various size and types of undertakings fall under this definition. Here, the focus is on small size businesses. It is a widely shared position that the rationality of small businesses' decision-making is specific.⁶⁰⁵ Their decisions are more dictated by non-economic reasons, such as community and family life issues, personal goals and relationship,⁶⁰⁶ which makes their behaviour similar to those of individuals.⁶⁰⁷ Busenitz and Barney shared the opinion that SMEs do not have time and resources to go through a thorough, rational decision-making process. Their decisions are often biased, heuristics and finally, significantly less rational than large companies.⁶⁰⁸ Overall, SMEs frequently act less rationally than it is generally expected from a business.

6.5.3 Outdated stereotypes of the powerful business and the weak consumer

Making decisions always entails certain risks in business, which should be borne by the decision-maker. Consumer law does not aim at eliminating those risks. However, if its goal is

⁶⁰⁴ Christian Dienes, *On the Behaviour and Attitudes of Firms and Individuals Towards Resource Efficiency and Climate Change Mitigation* (BoD – Books on Demand 2016) 5; E Jones and C Haven, *Tourism SMEs, Service Quality, and Destination Competitiveness* (CABI 2005) 144.

⁶⁰⁵ Radu Ogarcă, 'Features of the Decision Making in SMEs' (2010) 3 *Annals of the University of Craiova, Economic Sciences Series 2, 3*; Petra Gibcus, Patrick AM Vermeulen and Jeroen PJ De Jong, 'Strategic Decision Making in Small Firms: A Taxonomy of Small Business Owners' (2008) 7 *International Journal of Entrepreneurship and Small Business* 74, 4, 7.

⁶⁰⁶ Ogarcă (n 599) 33, 46.

⁶⁰⁷ Tim Mazzarol and Sophie Reboud, 'The Strategic Decision Making of Entrepreneurs within Small High Innovator Firms' (2006) 2 *International Entrepreneurship and Management Journal* 261, 1, 2.

⁶⁰⁸ Ogarcă (n 599) 8; Gibcus, Vermeulen and De Jong (n 599) 7.

to ensure the smooth functioning of the market, by avoiding buyers' irrational decisions and restoring the balance between weaker and more powerful parties,⁶⁰⁹ then it should not matter who the buyer is - an individual or a legal entity. Undesirable conducts from any of them can lead to market failures and distort competition.

In B2C relations, the consumer is usually presumed to be the weaker party. However, it would be wrong to presume that B2B transactions are always well-balanced and equal.⁶¹⁰ In frequent cases, small enterprises can be placed in a similarly weak position⁶¹¹ when they make business with LE.⁶¹² However, such views are not shared by EU consumer law yet. The latter remains limited to natural persons,⁶¹³ with – as we saw – no economic justification. As already discussed, the political implications of linking consumer protection with the EU citizenship,⁶¹⁴ turning consumer protection into a part of human rights system⁶¹⁵ and emphasising the secondary social objectives, leads to disregarding economic rationale of consumer law. However, this traditional narrow approach has already been challenged, and

⁶⁰⁹ See: Chapter II, Section, 5.2, *The economic nature of consumer law and other secondary features*

⁶¹⁰ “In B2B relationships unequal bargaining is commonplace. In fact, sole traders and small businesses are often far more vulnerable than consumers. Precisely because their contracts do not target consumption, the stakes tend to be far higher.” See: Martijn W Hesselink, ‘Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive’ 33 <<http://papers.ssrn.com/abstract=1416126>> accessed 7 December 2015.

⁶¹¹ It will be a poor judgement to presume that SMEs are equally weak buyers as natural persons. Such assumption might lead to a regulation, when consumer contracts between SMEs and natural persons will be out of consumer law, as agreements among equally weak parties, where none of them can exercise/abuse any superior power. It is interesting that such dramatic change motivated with a goal of broadening the scope of application for consumer law, might lead to the opposite and shrink its application sphere.

⁶¹² Richard Stone and James Devenney, *The Modern Law of Contract* (Routledge 2015) 15.

⁶¹³ Esther D Reed, *The Ethics of Human Rights: Contested Doctrinal and Moral Issues* (Baylor University Press 2007) 142.

⁶¹⁴ Devenney, Kenny and Schüller (n 390) 123–142.

⁶¹⁵ Deutch (n 540) 537–578; Margus Kingisepp (n 539) 52, 53.

there is a tendency towards expanding the application of human rights over non-humans as well.⁶¹⁶

As it has been repeatedly argued, consumer law is created with a clear economic reasoning and objective. Market failures are the primary justification for intervening private transactions and protecting one of the parties.⁶¹⁷ However, limiting the circle of beneficiaries only to natural persons is an artificial restriction and contradicts the goal of preventing market failures. Non-human market actors are equally exposed to consumers' shortcomings and are capable to create similar failures, by constantly making non-optimal choices.⁶¹⁸ If such regulation was relatively admissible in the past, the current situation on the market is much different.

It was noted⁶¹⁹ that during the last few decades there has been a tremendous increase in the number of SMEs. Moreover, this is not only a quantitative increase, but SMEs emerged as contestable business actors, gaining a significant role in national and global markets.⁶²⁰ At the same time, global trade and globalization⁶²¹ has led to the emergence of giant transnational

⁶¹⁶ See: Thom Hartmann, *Unequal Protection: How Corporations Became "People" -- and How You Can Fight Back* (Berrett-Koehler Publishers 2010).; Helena Paul, 'Corporations Are Not Human, so Why Should They Have Human Rights?' (September 2011).; Rebecca Spencer, 'Corporate Law and Structures; Exposing the Roots of the Problem' 9–13.

⁶¹⁷ See: Chapter II, Section 6.1 *Market failures and a critical role of consumer law in addressing them*

⁶¹⁸ See: Chapter II, Section 6.4 *Challenging the narrow notion of consumer*

⁶¹⁹ See: Chapter II, Section 6.5.1 *The rise of SMEs and challenging traditional views regarding business decision-making*

⁶²⁰ Helena Lenihan, Bernadette Andreosso-O'Callaghan and Mark Hart, *SMEs in a Globalised World: Survival and Growth Strategies on Europe's Geographical Periphery* (Edward Elgar Publishing 2010) 5, 6.

⁶²¹ Global markets benefit to large scale enterprises and reduce power of SMEs. Despite the active role of SMEs on national markets they are under-presented on the global arena, as they cannot compete with the large corporations. See: Lester Lloyd-Reason and Leigh Sear, *Trading Places--SMEs in the Global Economy: A Critical Research Handbook* (Edward Elgar Publishing 2007) 11–39. Debra Johnson and Colin Turner, *International Business: Themes and Issues in the Modern Global Economy* (Routledge 2010) 262.

corporations, whose richness and market power are pushing all the previously set limits.⁶²² Eventually, all these small, medium and large enterprises operate on the same market, with equal rights and obligations.

It is common to believe that there is a level playing field between small and big businesses,⁶²³ but in reality they can hardly be considered as equal peers.⁶²⁴ Contemporary markets require further intervention, which might need to widen the scope of consumer protection and the group of its beneficiaries. A simple division between weak natural persons and powerful businesses is not very realistic anymore, and it would be helpful if consumer law could create new categories, qualifying new groups as weak parties and continue preventing new forms of market failures. Until this happens, the law determined to prevent consumption side of the market from failures will fail to properly address the problem.

6.5.4 Redefining consumer in EU law

This problem affects EU consumer law as well, which protects not generally weak parties but

⁶²² For demonstration, it is enough to indicate that already since 2015, Apple alone has been worth more than the whole Russian stock market. ‘Apple Now Bigger than Russia’s Stock Market - Telegraph’ <<http://www.telegraph.co.uk/technology/apple/11232749/Apple-now-bigger-than-Russias-stock-market.html>> accessed 30 October 2015.

⁶²³ S Ann Becker, *Electronic Commerce: Concepts, Methodologies, Tools and Applications* (Information Science Reference 2008) 865; Thilo Rensmann, *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 33.

⁶²⁴ Louise Gullifer, ‘Should Clauses Prohibiting Assignment Be Overridden by Statute?’ in Louise Gullifer and N Orkun Akseli (eds), *Secured transactions law reform: principles, policies and practice* (Hart Publishing 2016) ch 14; By Bloomsbury Professional, *Networks as Connected Contracts* (Hart Publishing 2011) 25–30 <<https://www.bloomsburyprofessional.com/uk/networks-as-connected-contracts-9781847316615/>> accessed 28 August 2017; Stone and Devenney (n 606) 13.

Referring to SMEs, as a weaker party, does not necessarily apply to all the undertakings, covered by the definition of the term “SME” in EU law, which is extremely wide and includes 99% of all European business. Surely, consumer protection cannot be granted generally to all the SMEs regardless of their sizes (medium, small, micro).

artificially limits down the circle of its beneficiaries exclusively to natural persons. Devenney and Kenny state that "*consumers are the weaker party not because they are natural persons, but because consumers do not have the resources to analyse and overcome their biases.*"⁶²⁵

While the mainstream definition of consumer in EU law refuses this approach, it should be underlined that there are exceptional cases when consumer law might apply to B2B transactions as well. Such a diverging definition can be found, for example, in the Package Travel Directive, which uses a wider interpretation of consumer, including companies and business travellers.⁶²⁶ Its Article 2 (4) defines consumer as "*the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee').*"

Although it is not common, there are certain EU legal instruments that recognize the vulnerability of businesses and grant them some protection.⁶²⁷ Since the 2000s, several consumer law directives cover undertakings. An example is the Services Directive,⁶²⁸ which strengthens consumer rights in their capacity as service users, and gives a definition of a recipient of services as "*any natural person [...], or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service.*" Thus, the Directive enables equally natural persons and undertakings to have greater choice and better access of services, and

⁶²⁵ Devenney and Kenny (n 538) 141.

⁶²⁶ EU Council, 'Directive 90/314/EEC' (n 441) 314; Manko (n 456) 1.

⁶²⁷ Brulez underlines that the developments of the recent years regarding recognizing SMEs as weaker parties constitutes mostly general and not detailed rules. See: Pieter Brulez (n 628) 5.

⁶²⁸ European Parliament and European Council, 'Directive 2006/123/EC on Services in the Internal Market'.

protects them from any discrimination.⁶²⁹ Part of the same tendency is the Misleading Advertising Directive,⁶³⁰ which after the implementation of the Unfair Commercial Practices Directive is actually dedicated to B2B relations,⁶³¹ with the purpose to protect traders⁶³² from misleading advertising and its consequences. Other directives which apply to every customer irrespective of their nature, which can therefore be used also in B2B cases, are the Product Liability Directive,⁶³³ the E-commerce Directive,⁶³⁴ the Insurance directive and the Credit Transfer Directive.⁶³⁵

It is also possible to find interventions specifically targeting and protecting vulnerable business entities.⁶³⁶ Already in 1986 the Commercial Agency Directive⁶³⁷ recognized

⁶²⁹ Stuyck, 'Do We Need "Consumer Protection" for Small Businesses at the EU Level?' (n 462) 360.

⁶³⁰ European Parliament and European Council, 'Directive 2006/114/EC Concerning Misleading and Comparative Advertising'.

⁶³¹ 'Misleading Advertising - European Commission' <http://ec.europa.eu/consumers/consumer_rights/unfair-trade/false-advertising/index_en.htm> accessed 3 December 2015.

⁶³² European Parliament and European Council, 'Directive 2006/114/EC Concerning Misleading and Comparative Advertising' (n 623). Art. 2(d) defines "Trader" as "*any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader*"

⁶³³ European Council, 'Directive 85/374/EEC on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products'.

⁶³⁴ European Parliament and European Council, 'Directive on Electronic Commerce' (n 444) n 318.

⁶³⁵ See: Pieter Brulez, 'Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices?'

⁶³⁶ Over the years, the EU has adopted a number of policies specifically tailored for SMES. For example: In 2000 the "General Affairs" Council adopted the European Charter for Small Enterprises which recommended governments of the Member States to take steps in certain directions to stimulate small businesses and contribute to their development. (see: 'European Charter for Small Enterprises' <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:n26002>> accessed 6 December 2015.; In 2005 EU adopted Modern SME Policy for Growth and Employment that aimed to strengthen dialogue and consultation with SME stakeholders and involve them in policy making and improve SME growth potential. (European Commission, 'Communication: Implementing the Community Lisbon Programme: Fostering Entrepreneurial Mindsets through Education and Learning' <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52006DC0033>> accessed 28 August 2017.); In 2007 EU launched International Portal for SME: <https://webgate.ec.europa.eu/smeip/>; In 2008 was adopted the Small Business Act (SBA 'The Small Business Act for Europe - Growth - European Commission' (Growth) <http://growth.smes/business-friendly-environment/small-business-act_en> accessed 31 August 2017.) that aimed to the regulatory and policy environment for SMEs, and remove barriers to their development. (European Commission, 'Communication: "Think Small First" - A "Small Business Act" for Europe'.);

commercial agents involved in distribution of goods as weaker party, and granted them protection from any harm from the principal during the contractual relationship, as well as upon termination. In 2000 the EU Parliament and the Council adopted the Directive on Late Payment,⁶³⁸ which recognized the particular vulnerability of SMEs. More precisely, Recital 7 stated that “*heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones.*” In the Green Paper issued in 2007 on the review of consumer acquis,⁶³⁹ the EU Commission states that “*some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they buy certain goods or services.*”⁶⁴⁰

Another significant process was launched in 2003, when the EU started to work on harmonizing contract laws of its Member States. The Commission published an action plan, *A More Coherent European Contract Law*,⁶⁴¹ in which it announced the plan to adopt a non-binding document, called „Common Frame of Reference”, which would establish common principles and terminology. The action plan included the concern of the Danish government that SMEs are particularly vulnerable to the challenges of cross-border transactions, such as differences in the contract laws of the Member States.⁶⁴² SMEs were placed along with consumers as the ones with limited knowledge and weaker negotiating power, which are

⁶³⁷ European Council, ‘Directive 86/653/EEC on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents’.

⁶³⁸ European Parliament and European Council, ‘Directive 2000/35/EC on Combating Late Payment in Commercial Transactions’.

⁶³⁹ European Parliament, ‘Green Paper on the Review of the Consumer Acquis’.

⁶⁴⁰ Ibid [4(1)]

⁶⁴¹ European Commission, ‘Communication: A More Coherent European Contract Law - An Action Plan OJ. 063, 15/03/2003 1-44’.

⁶⁴² Ibid [3(1)(1); 4(2)(1)]

regularly obliged „to accept their co-contractor's standard terms and the law of the latter as the applicable law.”⁶⁴³

The Draft Common Frame of references was published in 2008.⁶⁴⁴ It defines consumer as "any natural person who is acting primarily for the purposes which are not related to his or her trade, business or profession." The definition allows some limited, but never primary connections with trade, business or profession for customers to be recognized as consumers.⁶⁴⁵ The DCFR also includes certain general rules applicable to B2B contractual relationship.⁶⁴⁶ However, despite the “blessing” from the EU Parliament and funding from the EU, the DCFR still remains as an academic text, lacking any political or legal binding power.⁶⁴⁷

In 2011, the EU Commission published a proposal on a Common European Sales Law,⁶⁴⁸ with the aim to create an optional contract law regime that parties can agree to use instead of national laws in case of cross-border transactions. CESL is expected to “to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers.”⁶⁴⁹ It “is also consistent with the Union policy of helping SME benefit more from the opportunities offered

⁶⁴³ Ibid.

⁶⁴⁴ The DCFR has been developed by a large international research network, where the best European scholars were presented from all the Member States. Eventually the generated text is strictly academic text without any politically or legally binding power, despite the fact that it was created under the blessing and funding of the EU. The interim outline edition was published in 2008 by the Study Group on a European Civil Code (SGECC) and the Research Group on EC Private Law (Acquis Group).

⁶⁴⁵ Study Group on a European Civil Code, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (sellier european law publ 2009) 1241–1243.

⁶⁴⁶ *ibid* 6, 7, 8.

⁶⁴⁷ Ibid.

⁶⁴⁸ European Commission, ‘Proposal for a Regulation on a Common European Sales Law’.

⁶⁴⁹ Ibid. Note 1, *Context of the proposal*

by the internal market.”⁶⁵⁰ The CESL applies to B2C transactions; however, it can also cover B2B cases, when at least one of the parties is an SME.⁶⁵¹

Such a particular attention to SMEs is explained in the preamble of the proposal with the well-demonstrated difficulties SMEs regularly deal with in case of cross-border transactions. The text underlines that while the cost of negotiating and dealing with foreign laws is generally high, they „are burdensome particularly for SMEs”,⁶⁵² which are often put in the position to forcibly accept the law of their business partner as a governing law, and face extra costs to find out about its content. Eventually, additional transaction costs for SMEs can be so high that „these may even be disproportionate to the value of the transaction.”⁶⁵³ Although the CESL does not explicitly establish the protection of SMEs from stronger counterparties, its principles indirectly offer some protection to the weaker undertaking in a contractual relationship.⁶⁵⁴ Part of the same tendency is also the Green Paper on Unfair Trading Practices,⁶⁵⁵ which forbids unfair trading practices not only in B2C, but also in B2B relationships.⁶⁵⁶ Building on these steps, there is an ongoing discussion on whether EU law should introduce certain level of protection for SMEs in B2B relations, and where the threshold should be set.⁶⁵⁷

⁶⁵⁰ Ibid.

⁶⁵¹ Ibid. Art. 7

⁶⁵² Ibid. Note 1, *Context of the proposal*

⁶⁵³ Ibid.

⁶⁵⁴ Pieter Brulez (n 628) 2, 3.

⁶⁵⁵ European Commission, ‘Green Paper on Unfair Trading Practices in the Business to Business Food and NonFood Supply Chain in Europe’.

⁶⁵⁶ Ibid. See also: Jules Stuyck, ‘Consumer Concepts in EU Secondary Law’ (Universitat Bochum, 2014) 6.

⁶⁵⁷ While the idea to taking SMEs under consumer protection is a novelty for the EU, it has been known to some of its Member States for long. This allows the EU to rely on its Member States’ experiences, use their practice and learn some lessons from them. See: *ibid* 359–370.

6.5.5 Classifying SME-involved market transactions

The EU Commission uses an extremely broad definition for SMEs and eventually 99 % of all the businesses in the EU fall under this category.⁶⁵⁸ Due to this statistics SMEs are often referred as the “backbone” and the “engine” of EU economy.⁶⁵⁹ SMEs are defined as “enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.”⁶⁶⁰ According to this definition, an SME might be an individual entrepreneur or a company with 249 employees and 50 million annual turnover. Hence, the group is extremely diverse, and labelling an entity with such title does not give any precise information about its powers or weaknesses. As much as criticized the general perception of business’ powerfulness can be criticized,⁶⁶¹ similarly, the generalization of SMEs’ vulnerability can be questioned. In fact, the difference between two SMEs might be as radical as between a SME and a LE.

EU law itself distinguishes among SMEs according to their sizes, grouping them as MiE, having up to 10 employees, SE, between 10 to 50 employees and MeE, where employees go from 50 to 250. One may doubt the reasonability of the idea to extend the notion of consumer over SMEs, because along with micro and small enterprises which might be more vulnerable, medium enterprises will also automatically get unnecessary protection. Contrary to this

⁶⁵⁸ ‘Entrepreneurship and Small and Medium-Sized Enterprises (SMEs) - European Commission’ <http://ec.europa.eu/growth/smes/index_en.htm?utm_campaign=engagor&utm_content=engagor_MzgzNDg5NA%3D%3D&utm_medium=social&utm_source=twitter> accessed 6 December 2015.

⁶⁵⁹ Hesselink, ‘SMEs in European Contract Law’ (n 583) 4. See also: ‘Home: SME ENGINE’ <<http://www.engine-sme.eu/>> accessed 6 December 2015.

⁶⁶⁰ European Commission, ‘Recommendation Concerning the Definition of Micro, Small and Medium-Sized Enterprises’ Art. 2(1).

⁶⁶¹ See: Chapter II, Section 6.5.3 *Outdated stereotypes of the powerful business and the weak consumer*

argument, it should be underlined that within the EU nine out of ten SMEs are micro enterprises.⁶⁶² Still even if 99% of all enterprises are SMEs and then their absolute majority are weak micro enterprises, spreading consumer protection over all of them actually means that eventually the majority of contracts in the EU will fall under the scope of consumer law.⁶⁶³ A solution to this problem can be limiting down this vast circle by selecting the contracts that might be subject to consumer law.

Along these lines, Hesselink divides every contract involving SMEs between consumer contracts and commercial contracts. In case of SME2C contracts, obviously the consumer remains the weaker party and SMEs are usually the stronger one, therefore there is no ground to demand any special protection for them.⁶⁶⁴ With regard to B2B contracts, they can be further divided according to the party types, when an SME makes contract with another SME or with a LE . SME2SME contracts can be further distinguished according to the nature of the participating SMEs, whether they are micro, small or medium, and whether their counterparties are from the same size group (MiE2SE, MiE2MeE, SE2SE, SE2MeE, and MeE2MeE).⁶⁶⁵ This categorization will allow extending consumer protection over the contracts involving smaller and weaker type of undertakings as a customer (MiE; SE) against a more powerful LE or MeE.

In case consumer law extends its protection over SMEs or other particular group of legal entities, the granted protection regime will be different from the one applied in B2C

⁶⁶² European Parliament, ‘Small and Medium-Sized Enterprises | EU Fact Sheets’ <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.9.2.html> accessed 28 August 2017.

⁶⁶³ Ibid [16]

⁶⁶⁴ Hesselink, ‘SMEs in European Contract Law’ (n 583) 21.

⁶⁶⁵ *ibid* 4.

contracts. In the latter case consumer law aims to ensure a certain level of fairness throughout the negotiation process and the substantive fairness as well, so that the actual result eventually reached through the negotiations is balanced and just.⁶⁶⁶ With regard to B2B transactions, consumer law should be limited only to procedural fairness, however what will be the result of the negotiations should stay out of the legal regulation. It is not the function of consumer law to ensure a 100% equally balanced and fair business choices. As Brulez states “*business life is about taking ad assessing risks*”⁶⁶⁷ and it should be kept this way. Undertakings will not get perfectly equal benefits from every transaction, and more efficient actors should be given an opportunity to take advantage of their effectiveness and be more competitive than poorly performing ones.

Extending consumer protection over SMEs will have two beneficial results for the EU. First of all, it will allow the law to deal with market failures more effectively and restore symmetry on the market. Moreover, it will encourage cross-border transactions, as the confidence of SMEs will raise and eventually will benefit the EU market integration process. If the idea might sound revolutionary, it actually is not that innovative. It will be more a consolidation of already existing national practices at the Union level.⁶⁶⁸ Being a SME does not necessarily makes a party weaker one, in the same way as being an undertaking does not necessarily translate as being powerful. Not all SMEs are alike⁶⁶⁹ and along with weaknesses,

⁶⁶⁶ OO Cherednychenko, ‘Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions’ 10, 11, 344. Pieter Brulez (n 628) 9, 10.

⁶⁶⁷ Pieter Brulez (n 628) 9, 10.

⁶⁶⁸ See: Pieter Brulez (n 628).

⁶⁶⁹ OECD, ‘Small and Medium-Sized Enterprises: Local Strength, Global Reach’.

they have their strength and advantages as well.⁶⁷⁰ As demonstrated, the notion of SMEs adopted in the EU is heterogeneous and cannot be used as the only indicator to extend the notion of consumer. There will be the need to use additional classifications to identify the truly weak parties.

In a nutshell, EU consumer law primarily defines consumer as a natural person acting outside trade, business or profession.⁶⁷¹ However, the Member States often use broader definitions at national level⁶⁷² and the idea that undertakings might also be equally disadvantaged as natural persons is becoming more accepted at the EU level as well. There is a tendency of providing certain consumer-like protection to SMEs or other parties of B2B transactions, and this process is justified by the economic rationale of consumer law. A broader definition of consumer allows a more effective regulation of the market and the correction of market failures, and in this way it supports an even stronger market competition, as the smooth enforcement of the latter is highly dependent on the number of rational choices made by consumers.

After analysing consumer notion in EU law, it is time to take a look at the Georgian law. However, due to the particular characteristics of Georgian consumer rights protection, it will be helpful to take a historical overview of the development of the discipline. This analysis will show the political context under which recent market-related reforms have been

⁶⁷⁰ *ibid* 1; Moha Asri Hj Abdullah and Mohd Isa Haji Bakar, *Small and Medium Enterprises in Asian Pacific Countries: Roles and Issues* (Nova Science Publishers 2000) 199; Moha Asri Hj Abdullah, *Small and Medium Enterprises in Asian Pacific Countries: Roles and Issues* (Nova Publishers 2000) 199; Dimitrios Salampasis and Anne-Laure Mention, *Open Innovation: Unveiling the Power of the Human Element* (World Scientific 2017) 138, 139; Cruz-Cunha Manuela Maria, *E-Business Issues, Challenges and Opportunities for SMEs: Driving Competitiveness: Driving Competitiveness* (IGI Global 2010) 83; J Harris, *Fuzzy Logic Applications in Engineering Science* (Springer Science & Business Media 2005) 197.

⁶⁷¹ See: Chapter II, Section 3. *The notion of consumer in EU consumer law*

⁶⁷² Manko (n 456) 1.

undertaken, thus providing the background to understand the particularities of Georgian consumer law and consumer protection culture and the current challenges they face.

7. The history of consumer rights protection in Georgia

Unlike Western nations, the emergence of a consumer society and subsequent introduction of consumer protection did not take place in Georgia during the mid-20th century. It would be more correct to say that the social-economic developments that created consumer societies in Western Europe and the US have never fully taken place in Georgia. However, after gaining independence Georgia joined the worldwide tendency, and introduced consumer law into national legislation. Since 1995, the protection of consumer rights has been guaranteed by the Constitution.⁶⁷³

7.1. 1918 Constitution of the Democratic Republic of Georgia

The Constitution is the main hereditary link to unite modern Georgia to the first republic, existing before the Soviet annexation.⁶⁷⁴ The short-lived Democratic Republic of Georgia was established in 1918, after the revolution of 1917⁶⁷⁵ dismantled the Russian Empire. Although the Constitution was adopted in a rush, under the state of emergency, as the Red Army was already approaching the capital, it still “*stood out among the post World War-I*

⁶⁷³ Art. 30(2) states that “*consumer rights shall be protected by law.*” See: Constitution of Georgia (n 328).)

⁶⁷⁴ Preamble of the modern Georgian Constitution states: “... *drawing inspiration from centuries-old traditions of statehood of the Georgian nation and the historical-legal legacy of the Constitution of Georgia of 1921, proclaim the present Constitution before God and the nation.*” See: *ibid.*)

⁶⁷⁵ See: Wade (n 301); Walter Moss, *A History of Russia Volume 2: Since 1855* (Anthem Press 2004); Kaiser (n 301); Frankel and Frankel (n 301). Turley and Luke (n 301) 18.

*constitutions in terms of its uniqueness and consistency.*⁶⁷⁶ The authors of the Constitution worked on the text for more than two and a half years, and as Papuashvili bolsters they have successfully managed to create “*unquestionably one of the most progressive legislative acts in the world for its time.*”⁶⁷⁷

The reason why we pay particular attention to the Constitution of 1921 is to check the relevant legal heritage before 1991 and examine whether the national consumer law had any roots in the past. In the current Constitution of Georgia Article 30, which provides guarantees for consumer rights protection, is part of Chapter II, entitled “*Citizenship of Georgia; Fundamental Human Rights and Freedoms*”. Articles 30-37 of the Constitution constitute a group of social and economic rights.⁶⁷⁸ A comparative analysis of texts of 1921 and 1995 Constitutions demonstrates that certain social-economic rights were formulated better and more effectively in the former one.⁶⁷⁹ Futkaradze and Papuashvili share the opinion that the Constitution of 1921 was one of the first democratic constitutions, which guaranteed socialist and economic rights.⁶⁸⁰ It dedicated special chapter to social-economic rights, which imposed a number of positive obligations on the state.

Overall, the Constitution stood for the values of equality and for the protection of the weak such were: woman and child labour forces,⁶⁸¹ small entrepreneurs,⁶⁸² ethnic minorities⁶⁸³ and so forth. There were no special provisions dedicated to consumers, but this is quite

⁶⁷⁶ Giorgi Papuashvili, ‘The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years’ [2012] *European Public Law* 323, 324.

⁶⁷⁷ *Ibid.* 324

⁶⁷⁸ Futkaradze (n 309).

⁶⁷⁹ *Ibid.*

⁶⁸⁰ *Ibid.* Papuashvili (n 672) 338.

⁶⁸¹ Art. 124, 126

⁶⁸² Art. 116

⁶⁸³ Chapter IV

understandable as by this period consumer law did not exist as a distinct body anywhere in the world. Otherwise, as Papuashvili summarizes, the Constitution reflected “*the most progressive legal and political discourse and tendencies underway or yet in theoretical stage in the Western European countries or the US at that time.*”⁶⁸⁴ However, the high standards of social guarantees imposed on the state had more declarative than practical nature, and considering the poor economic conditions of the state, they were hard or even impossible to be implemented.⁶⁸⁵

Eventually it was never enacted, as after four days from its adoption the Democratic Republic of Georgia lost independence⁶⁸⁶ and the Constitution was suspended. However, it has played a tremendous role, not only for building a foundation for the independence of Georgia,⁶⁸⁷ but also inheriting to modern Georgia the values of equality, fairness, the need to protect the weak, high social-economic standards and necessity for state’s active involvement in order to ensure equality and fairness in every field, including the market. Although the Constitution of Georgia of 1921 did not include guarantees for consumer protection, it laid down the grounds and included the same principles which in later decades gave birth to consumer protection in Western Europe and the US.⁶⁸⁸ Therefore it can be argued that including constitutional

⁶⁸⁴ Papuashvili (n 672) 324.

⁶⁸⁵ As Tsnobiladze evaluates, the Constitution was not well suited to the given moment of development of the country and actual possibilities of the government and probably was too progressive that made many of its provisions merely declaratory, and non-enforceable one, see: Paata Tsnobiladze, *Constitutional Law of Georgia* (2002) 54.

⁶⁸⁶ See: Books LLC and General Books LLC, *Conflicts In 1921: Red Army Invasion of Georgia, Kronstadt Rebellion, Charles I of Austria’s Attempts to Retake the Throne of Hungary* (General Books LLC 2010). Stephen F Jones, *The Making of Modern Georgia, 1918-2012: The First Georgian Republic and Its Successors* (Routledge 2014).

⁶⁸⁷ Note 758. See also: Papuashvili (n 672) 324.

⁶⁸⁸ Alexander J Belohlávek, *B2C Arbitration: Consumer Protection in Arbitration* (Juris Publishing, Inc 2012) 190; Verica Trstenjak and Petra Weingerl, *The Influence of Human Rights and Basic Rights in Private Law* (Springer 2015) 544.

guarantees for consumer protection in the Constitution of Georgia in 1995 was a logical continuation of a path started in 1921. However, the question is a subject of further academic research from constitutional law perspective.

7.2 Georgia in the period of the Soviet Union

From 1921 to 1991, for 70 years Georgia lived under the regime of the Soviet Union.⁶⁸⁹ During this period in Georgia, similar to other Soviet republics, consumer protection did not exist. Despite the Union's military, political and economic success in the middle of the 20th century,⁶⁹⁰ due to the specific political-economic model consumer societies never developed in the Soviet Union states. Therefore despite the declared socialist nature of the union the question of adopting consumer protection law has never been arisen.⁶⁹¹ The Soviet Union was a strong centralised system, as the state had total control over production and supply. Its model was build around producer welfare system and not consumer welfare.⁶⁹² The central government controlled prices, quality, variety of goods and consumers had no say in this process.⁶⁹³

⁶⁸⁹ After the Red Army invasion in 1921, Georgia became a part of the Trans-caucasian Socialist Federative Soviet Republic in 1922. Georgian Soviet Socialist Republic was formed 1936, which existed until 1991. See: James Stuart Olson, Lee Brigance Pappas and Nicholas Charles Pappas, *An Ethnohistorical Dictionary of the Russian and Soviet Empires* (Greenwood Publishing Group 1994). 244. Merle Wesley Shoemaker, *Russia, Eurasian States and Eastern Europe* (Stryker-Post Publications 1994) 144.

⁶⁹⁰ Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishing Group 2012) 150–151; Popalya Ahmad Popalyar and Delores Bell, *Ahmad Popalyar and Ahmad Popalyar and Delores Bell, The Destruction of Invasion and Its Side Effects* (AuthorHouse 2008) 212; Robert William Davies, Mark Harrison and SG Wheatcroft, *The Economic Transformation of the Soviet Union, 1913-1945* (Cambridge University Press 1994) 33–34.

⁶⁹¹ A Cherstobitov, 'Problems of Consumer Protection in Russia' [2001] *Juridica International* 53, 53.

⁶⁹² Malinauskaite (n 87) 173.

⁶⁹³ *Ibid.* Peder Inge Furseth and Richard Cuthbertson, *Innovation in an Advanced Consumer Society* (Oxford University Press 2016) 22; Matthew Eagleton-Pierce, *Neoliberalism: The Key Concepts* (Routledge 2016) 22.

In Brezhnev⁶⁹⁴ era, under so called "mature socialism,"⁶⁹⁵ some improvements took place for consumers.⁶⁹⁶ In the same period, Soviet consumers developed more activist type relationship with the state. Therefore, in case of consumer dissatisfaction, common way to seek for "justice" was through writing to a newspaper or petitioning to various state authorities, at any level of governance and despite their competences.⁶⁹⁷ It is worth to mention that in 1991, at the dusk of the Soviet Union the Soviet Consumer Protection Act was adopted. It was an attempt to avoid the visible collapse and modernize the Union, but the same year the Soviet Union ended and the act has never come into force.⁶⁹⁸

Fazekas identifies certain economic, ideological and legal reasons, responsible for the absence of consumer law in the Soviet Union.⁶⁹⁹ The economic reasoning was deeply rooted in the idea of centralised planned economy. Amount and variety of goods that was to be produced was pre-determined by the government.⁷⁰⁰ Unlike Western Europe and the US, Soviet markets constantly suffered from shortages. Therefore, consumers could only buy what was available, and did not have an opportunity to choose.⁷⁰¹ Consumer choice, which is a cornerstone of consumer society,⁷⁰² was limited in another way as well. While demand is

⁶⁹⁴ Leonid Ilyich Brezhnev was the leader of the Soviet Union, from 1964 to 1982. To his name is related the era of economic and social stagnation. See: Dina Fainberg and Artemy M Kalinovsky, *Reconsidering Stagnation in the Brezhnev Era: Ideology and Exchange* (Lexington Books 2016); William J Tompson, *The Soviet Union Under Brezhnev* (Routledge 2014).

⁶⁹⁵ "Mature" (developed) socialism was a concept raised by Nikita Khrushchev in 1961. It was an absurd idea that once socialist, classless society is created they can upgrade to mature socialism. Khrushchev predicted that materialization of the idea would need 15 to 20 years. As Brezhnev came to power, "mature socialism" became a dominant doctrine. See: Ilya Zemtsov, *Encyclopedia of Soviet Life* (Transaction Publishers) 88.

⁶⁹⁶ Natalya Chernyshova, *Soviet Consumer Culture in the Brezhnev Era* (Routledge 2013) 203.

⁶⁹⁷ Ibid.

⁶⁹⁸ Cherstobitov (n 687) 53.

⁶⁹⁹ (Fazekas cited in 121)

⁷⁰⁰ Malinauskaite (n 87) 173.

⁷⁰¹ Furseth and Cuthbertson (n 689) 22; Eagleton-Pierce (n 689) 22.

⁷⁰² François Gauthier, *Religion in Consumer Society: Brands, Consumers and Markets* (Routledge 2016) 69.

the primary mechanism for consumers to dictate the market it never influenced supply in the Soviet Union. Production was set by five year plans and targets according to pre-approved centralized plans and they were rarely in compliance with the consumer needs and desires.⁷⁰³

Soviet markets were oversupplied with the goods which were less popular and the highly desirable ones were hardly available, which on the other hand encouraged the development of shadow economy and underground, illegal trading.⁷⁰⁴ As indicated by a number of authors, shadow economy and shortage of consumer goods were two major characteristics of the Soviet economy.⁷⁰⁵ As the state was the sole producer and supplier of all the goods and had absolute monopoly over all the industries, it lacked motivation to care about the quality of the goods and services or innovation.⁷⁰⁶ Production was not oriented on profit, the state enterprises had only political goals to meet and not economic ones. Prices were mostly nominal, mere administrative units of measurements without any economic meaning.⁷⁰⁷

The model allowed the state to keep investing huge resources in unprofitable industries that were seen to have strategic importance.⁷⁰⁸ Eventually, such model was to the detriment of consumers, and allegedly the US even attempted to use it for strategic purposes and nudge Soviet consumers to pressure their government. An example of this was the American

⁷⁰³ (Fazekas cited in 121) Richard CM Mole, *The Baltic States from the Soviet Union to the European Union: Identity, Discourse and Power in the Post-Communist Transition of Estonia, Latvia and Lithuania* (Routledge 2012). 105.

⁷⁰⁴ Martin Mccauley, *The Rise and Fall of the Soviet Union* (Routledge 2014) 442.

⁷⁰⁵ Byung Yeon Kim and Yoshisada Shida Shida, 'Shortages and the Informal Economy in the Soviet Republics: 1965-1989' 2; Gregory Grossman, 'The "Second Economy" of the USSR' (1977) 26 (5) *Problems of Communism* 25, 25; M Alexeev and V Treml, 'The Growth of the Second Economy in the Soviet Union and Its Impact on the System' in Robert Wellington Campbell (ed), *The postcommunist economic transformation : essays in honor of Gregory Grossman* (Boulder, Colo : Westview Press 1994) 224; Byung-Yeon Kim, 'The Income, Savings, and Monetary Overhang of Soviet Households' (1999) 27 *Journal of Comparative Economics* 644, 644, 645.

⁷⁰⁶ Kornai cited in Cseres, *Competition Law and Consumer Protection* (n 535) 167.

⁷⁰⁷ Mole (n 699). 105.

⁷⁰⁸ *Ibid.*

National Exhibition held in Moscow in 1959, exposing latest models of consumer goods with a latent idea to inspire Soviet people and encourage the Soviet Union to spend more money on consumer goods production that would eventually decrease spending on military goods.⁷⁰⁹ Apparently the plan failed,⁷¹⁰ as in the 1970s, defence related spending amounted to 40% of the Soviet budget, which in absence of private sector was not boosting economy in any way and was pure drain of resources.⁷¹¹ This evidently impacted lives of consumers, who were obliged to keep their expectation very low.⁷¹²

Another reason for the absence of consumer protection in the Soviet Union was its ideology, which was against free market principles, considering competition as an evil, not recognising private property and rejecting consumerism as an expression of individual selfishness and materialism that was not desired in the society with idealistic interests and values.⁷¹³ As to the legal reasons that excluded the development of consumer law, the Soviet law did not recognize any inequality and asymmetry between consumers and the supplier.⁷¹⁴ On the contrary, the role of the state as sole producer was seen positively, as economically efficient.

⁷⁰⁹ Yale Richmond, 'The 1959 Kitchen Debate'.

⁷¹⁰ The event was not a total failure. It gave Soviet citizens an opportunity to see and develop taste for Western goods. As a result, Western goods became highly demanded that bred development of a new type of black market. So called "fartsovshchiki" bought all types of western goods and traded them illegally for profit. Such activity was related to serious risks, as so called "speculation" was considered to be a crime and was punishable with a long term prison sentence. See: Smorodinskaya, *Encyclopedia of Contemporary Russian Culture* (Routledge 2013).

⁷¹¹ Mart Laar and Marko Mihkelson, *The Power of Freedom: Central and Eastern Europe After 1945* (Centre for European Studies 2010) 118.

⁷¹² Paul Dibb, *The Soviet Union: The Incomplete Superpower* (Springer 1988) 97.

⁷¹³ Fazekas cited in Cseres, *Competition Law and Consumer Protection* (n 5) 167. Michele R Rivkin-Fish, *Women's Health in Post-Soviet Russia: The Politics of Intervention* (Indiana University Press 2005). 215. Timur Dadabaev, *Identity and Memory in Post-Soviet Central Asia: Uzbekistan's Soviet Past* (Routledge 2015). 32. Prychitko (n 307).

⁷¹⁴ Fazekas cited in Cseres, *Competition Law and Consumer Protection* (n 5) 167.

Overall, after the dissolution of the Soviet Union its member states - including Georgia - have not inherited any legal culture or experience regarding consumer protection, simply because it has never existed in the Soviet system.⁷¹⁵ Eventually, as Georgia gained independence, it needed to reconnect with the legal heritage of the first republic of 1918 and embrace the European legal systems, as it was starting a process of transition.

7.3 Development of Georgian consumer law after 1991

The dissolution of the Soviet Union was one of the biggest geo-political events of the 20th century. Not only did it drastically change the lives of the citizens of its former member states, but it had a worldwide impact. Its failure led to the global rejection of its ideology, economic and legal model, and popularised the opposing democracy and free market economy.⁷¹⁶ Former Soviet states also switched their directions and underwent a period of transition to democracies and market economies. Georgia, similarly to other former Soviet republics, went through significant transformations during the last two and a half decades. A part of this transition was the introduction of market related legal body in the national legislation, including consumer protection.

As it was analysed in the previous chapter, Georgia introduced its competition and consumer regulations in the early 1990s.⁷¹⁷ Theoretically, departing from failed Soviet ideology and regulations should have improved consumer conditions and the protection of their rights.

⁷¹⁵ *Nordic-Baltic Conference on Consumer Education in School: September 11-13, 2000, Riga, Latvia* (Nordic Council of Ministers 1993) 83.

⁷¹⁶ Dabbah (n 12) 8.

⁷¹⁷ See: Chapter I, Section 6.2, *The rise and fall of the first antimonopoly legislation of Georgia*

However, the legal reforms could not overcome the impact of the dramatic deterioration of the national economy. The dissolution of the Soviet Union happened so rapidly⁷¹⁸ and aback that it left no time for a smooth transition.

Even under such circumstances, Georgia started this process exceptionally poorly. As a consequence of natural disasters, military conflicts, rampant criminality, inefficient governance and lost traditional trade and economic ties, Georgia's economy declined dramatically.⁷¹⁹ Obviously the process had a negative impact on consumers and weakened their position even further. Poverty is already considered to be a major factor for consumer vulnerability.⁷²⁰ On the top of that, there was a severe shortage of supply, including food,⁷²¹ which practically eliminated consumer choice. Because of constant bread shortages, the government even introduced ration cards.⁷²²

In the middle of the 1990s, Georgia already had a Law on the Protection of Consumers' Rights and the Antimonopoly Service, responsible for its enforcement.⁷²³ However, the rampant corruption did not allow its effective application.⁷²⁴ State regulatory and controlling

⁷¹⁸ Beissinger (n 316). 2. Thomas M Leonard, *Encyclopedia of the Developing World* (Psychology Press 2005). 2. Steven Rosefielde and Stefan Hedlund, *Russia Since 1980* (Cambridge University Press 2009). 106. Susanne Michele Birgeron, *After the Breakup of a Multi-Ethnic Empire: Russia, Successor States, and Eurasian Security* (Greenwood Publishing Group 2002). IX.

⁷¹⁹ Saakashvili and Bendukidze (n 325); Shoemaker (n 685) 236; King and Khubua (n 325); Burduli (n 325).

⁷²⁰ CJ Cobb and WD Hoyer, 'Direct Observation of Search Behaviour' (1985) 2 *Psychology and marketing* 161, 161–179; Elspeth Reid and Daniel Visser (eds), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh University Press 2013) 352, note. 96; John Holmwood and others, *Constructing the New Consumer Society* (Springer 1997) 204; Kai Purnhagen and Peter Rott, *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014) 678.

⁷²¹ Max Spoor, *The Political Economy of Rural Livelihoods in Transition Economies: Land, Peasants and Rural Poverty in Transition* (Routledge 2008) 25.

⁷²² Suny (n 294) 204.

⁷²³ See: Chapter I, Section 6.2 *The rise and fall of the first antimonopoly legislation of Georgia*

⁷²⁴ In 2003 Transparency International's Corruption Perception Index rated Georgia in the 124th place, among 133 states. See: 'Corruption Perceptions Index 2003' (*Transparency International*) <https://www.transparency.org/research/cpi/cpi_2003> accessed 28 August 2017; Gia Nodia and Álvaro Pinto

bodies were usually dysfunctional or abused their authority, and acted as sources for corruption. In particular, often they were involved in corruption schemes with business, and remained loyal to their illegal activities.⁷²⁵ In addition, the control of food production and placement on the market was left without control.⁷²⁶ Meanwhile, significant economic developments took place on the market, which were placing Georgian consumers in an even more vulnerable position. The dissolution of the Iron Curtain and the intensified trade with the rest of the world came as a shock therapy.⁷²⁷ After the first years of extreme shortage, the market was soon flooded with previously inaccessible and unknown goods, which easily tempted consumers⁷²⁸ to purchase them despite their poor quality.⁷²⁹

After significant political developments by the end of 2003,⁷³⁰ the Georgian market became

Scholtbach, *The Political Landscape of Georgia: Political Parties: Achievements, Challenges and Prospects* (Eburon Uitgeverij BV 2006) 16.

⁷²⁵ I Lekvianidze, 'What an Effective Competition Policy Should Be Like?' *Forbes Georgia* (Tbilisi, 13 February 2014).

⁷²⁶ Lia Todua, 'Who Is Protected by the Georgian Government – Entrepreneur or the Consumer? - Democracy & Freedom Watch | Opinion | Democracy & Freedom Watch' <<http://dfwatch.net/who-is-protected-by-the-georgian-government-%e2%80%93-entrepreneur-or-the-consumer-16054-2575>> accessed 28 August 2017.

⁷²⁷ Burduli (n 325) 10–14; Liberal Academy Tbilisi, 'The Economic Transformation of Georgia: 20 Years of Independence', 8 <http://www.ei-lat.ge/images/stories/The_Economic_Transformation_of_Georgia_-_20_Years_of_Independence_Interim_Report_geo.pdf> accessed 28 August 2017.

⁷²⁸ As an analogue it is interesting to see how Cseres describes conditions of consumers in Hungary during the transitional years of 1990s: "[...]the process of transition made consumers an easy prey for abusers. A whole range of attractive "Western" goods suddenly displayed to consumers, who often could not resist the temptation." However, they were often provided with low quality, defective or even dangerous products. Moreover, hundreds of phantom companies took advantage of the situation, by engaging in so-called "hit and run" type selling methods." Cseres, *Competition Law and Consumer Protection* (n 5), 352, 353.

⁷²⁹ As Zhao states, in early 1990s Chinese imports to the region of the Commonwealth of Independent States (in the 1990s, majority of the former Soviet republics were members of the CIS, including Georgia, until it left the organisation in 2008) were of inferior quality that created a need to change and improve the image and a low reputation of Chinese goods in the region. Eugene B Rumer, Dmitrii Trenin and Huasheng Zhao, *Central Asia: Views from Washington, Moscow, and Beijing* (ME Sharpe 2007). 206.

⁷³⁰ For more information, visit: 'How the Rose Revolution Happened' (10 May 2005)

<<http://news.bbc.co.uk/1/hi/4532539.stm>> accessed 28 August 2017; Giorgi Kandelaki, 'Georgia's Rose Revolution' (United States Institute of Peace) Special Report 167

<<https://www.usip.org/sites/default/files/sr167.pdf>> accessed 28 August 2017; Lincoln A Mitchell, *Uncertain Democracy: U.S. Foreign Policy and Georgia's Rose Revolution* (University of Pennsylvania Press 2013) 115; Chuck Sudetic, *The Philanthropy of George Soros: Building Open Societies* (PublicAffairs 2011) 33–35;

more attractive and interesting for foreign investors. However, even this economically positive development was detrimental to Georgian consumers. The new government undertook radical measures to deregulate the market, which meant relaxing any kind of state control, including consumer protection.⁷³¹ Consumer law became practically ineffective. Since then the poor standards of consumer protection have been widely disputed and criticized. Concerns were expressed about the legislation itself, its compliance with EU and international instruments, and its ineffective enforcement or non-enforcement at all. The need for improving consumer protection standards have been continuously emphasized by academic works,⁷³² the national Ombudsmen's office,⁷³³ non-governmental sector⁷³⁴ press,⁷³⁵ and finally by the EU.

The Association Agreement signed between Georgia and the EU in June 2014⁷³⁶ dedicates a special chapter to consumer policy, imposing on parties the obligation to ensure a high level of consumer protection and demanding Georgia to approximate its legislation to EU acts and

Shoemaker (n 685) 238, 239; Svante E Cornell and S Frederick Starr, *The Guns of August 2008: Russia's War in Georgia* (Routledge 2015) 85–104.

⁷³¹ Neil Emerick and Gia Jandieri, 'Rose Revolution Shows the Results of Freeing Markets' (Business day, 13 November 2013) <<https://www.businesslive.co.za/bd/opinion/2013-11-13-rose-revolution-shows-the-results-of-freeing-markets/>> accessed 29 August 2017; Bedianashvili, Gogiashvili and Pavliashvili (n 326); Natalia Morari, 'Kakha Bendukidze: There Is Only One Way – Building a Free Economy' (Ekho Kavkaza, 7 December 2009) <<http://www.esiweb.org/pdf/georgia%20-%20Ekho%20Kavkaza%20Interview%202009.pdf>> accessed 29 August 2017; 'Georgia Reformer, Businessman Bendukidze Dies in London at 58' Bloomberg.com <<https://www.bloomberg.com/news/articles/2014-11-14/georgia-reformer-businessman-bendukidze-dies-in-london-at-58>> accessed 29 August 2017; 'A Different Sort of Oligarch' [2004] *The Economist* <<http://www.economist.com/node/2963216>> accessed 29 August 2017.

⁷³² K Giorgishvili, 'Georgian Consumer Law'.

⁷³³ The Public Defender, 'The Report Regarding the Protection of Human Rights and Freedoms in Georgia' (2010) 395, 396 <<http://www.ombudsman.ge/ge/reports/saqmianobis-angarishebi>> accessed 29 August 2017.

⁷³⁴ (154,169,170)

⁷³⁵ Salome Gogokhia, 'Are Georgian Consumers Protected from Counterfeit Goods? - GeorgianJournal' <<https://www.georgianjournal.ge/business/29792-are-georgian-consumers-protected-from-counterfeit-goods.html>> accessed 29 August 2017.

⁷³⁶ 'Press Release - The EU's Association Agreements with Georgia, the Republic of Moldova and Ukraine' (23 June 2014) <http://europa.eu/rapid/press-release_MEMO-14-430_en.htm> accessed 29 August 2017.

other international instruments.⁷³⁷ In contrast to the international and constitutional obligations that Georgia should satisfy, there has not been a relevant law since 2012, when the Law of Consumer Rights' Protection was abolished. Paradoxically the act was repealed within the context of the reform that, following the EU recommendations, was supposed to improve consumer health and safety regulations.⁷³⁸

After the change of government in 2012 the gap in the legislation was recognized. In the beginning of 2013 the Parliamentary Committee for European Integration formed a working group including non-governmental organizations and watchdogs, and created a new draft for consumer protection law. The process has been delayed, the draft has been initiated and later revoked and finally, the Committee reinitiated the prepared version of the law in July 17, 2016.⁷³⁹ It has been explained at the Committee meeting that the goal of adopting the law was to bring Georgian legislation in compliance with the obligations arisen under the Association Agreement with the EU.⁷⁴⁰ The same is repeated in the explanatory note of the draft law.⁷⁴¹

⁷³⁷ 'Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part' ch 13.

⁷³⁸ In 2008, when the EU mission evaluated the country's readiness for the DCFTA, together with the need for improving competition policy, it also indicated several other priority areas, such as the fields of product standardization and food safety. As a response to the assessment, Georgian government prepared action plans regarding product safety and standardization and food safety. Pursuant to these strategies, two new codes have been adopted by the parliament in 2012: the Product Safety and Free Movement Code and the Food Safety, Veterinary and Plant Protection Code. The new laws abolished several legal acts, including the law on the Protection of Consumers' Rights. Eventually, regulations regarding consumer rights protection have been vastly reduced and the field was left unregulated, except the rules of food safety. For more information, see: Todua (n 722).

⁷³⁹ 'The Parliamentary Committee for European Integration Meeting Minute'.

⁷⁴⁰ Ibid 2.

⁷⁴¹ The explanatory note indicates that reasonability of adopting the draft law is caused by the obligations determined by the Association Agreement signed between Georgia and EU, according to which Georgia should approximate its legislation to EU law, including in the sphere of consumer rights protection. The note also indicates that the following EU directives have been taken into consideration when developing the draft law: EU Council, 'The Directive on Unfair Terms' (n 442); European Parliament and European Council, 'Directive 2006/114/EC Concerning Misleading and Comparative Advertising' (n 623); European Parliament and European Council, 'Directive 98/6/EC' (n 445); European Parliament and EU Council (n 440); EU Council,

The draft law remained at the draft phase. Its hearing at the Parliament was barred by the Parliamentary Committee, under the pretence of its dangerousness for national businesses. The draft law has been revoked, and no further developments have taken place. Despite the long-declared goal of harmonization with EU law, Georgia still significantly lags behind in the consumer protection sphere and awaits reformation.⁷⁴² However, it seems that the only catalyst in this process can again be the external pressure from the EU.

There is a clear objection from business sector, which is successfully lobbying to delay adoption of the law.⁷⁴³ However, Georgia is not a unique case. The same path has already been followed by a number of Central and Eastern European as well as Balkan states.⁷⁴⁴ Their experience shows that the EU pressure was the most effective trigger to consumer law reform, mostly because the progressive adoption of the EU *acquis* is an unavoidable obligation in the process of integrating with the EU. As argued by Svetiev, when the key

‘Directive 85/577/EEC’ (n 440). See: The Parliamentary Committee for European Integration, ‘Explanatory Note on the Draft Law of Georgia on Consumer Rights Protection.’

⁷⁴² ‘348 Fines in 3 Years - How Food Premises Meet Hygiene Standards’ (Commersant.ge) <<http://commersant.ge/?view=post&id=117305>> accessed 29 August 2017; Business PressNews, ‘Are Consumer Rights Protected in Georgia?’ (BPN, 20 March 2017) <<https://bpn.ge/finansebi/32387-daculia-thuara-saqarthveloshi-momkhmarebeltha-uflebebi.html?lang=ka-GE>> accessed 29 August 2017.

⁷⁴³ Business PressNews (n 739).

⁷⁴⁴ The given countries have a lot of similarities with Georgia and they can be used as a good comparative analogue for it. There is definitely a lot of shared history and similarities in the evolutionary path, passed by Eastern European and Balkan countries and Georgia, despite numerous vital differences. The states that joined the EU during the last expansion waves, as well as the ones currently being in the process of accession process have lived through socialist regimes, moreover they underwent the process of integrating with the EU, while being under dramatic economic, political and social transformation. Georgia is not currently in the process of accession but is taking wide steps to integrate closer with the EU, so far signing association, free trade and visa-liberalisation agreements. This processes is accompanied by legal harmonization of Georgian legislation with EU law, what has also taken place in case of competition law. See: Yane Svetiev, ‘How Consumer Law Travels’ (2013) 36 *Journal of Consumer Policy* 209, 210; Mauro Cappelletti, Monica Seccombe and Joseph Weiler, *Integration through Law: Europe and the American Federal Experience* (W de Gruyter 1986); Joseph Weiler, ‘The Community System: The Dual Character of Supranationalism’ (1981) 1 *Yearbook of European Law* 267, 1, 267–306; Cseres, ‘Accession to the EU’s Competition Law Regime: A Law and Governance Approach’ (n 13) 35.

pressure towards reform is external,⁷⁴⁵ “*domestic ownership of reform should be expected to be low.*” However, it should be noted for fairness that⁷⁴⁶ Georgia started regulating the market through antimonopoly and consumer laws far before it even had any actual relation or any expectation of close economic integration with the EU. In this sense, it would be untrue to say that there has never been any domestic drive towards market regulation.

8. Consumer-related legal provisions in Georgian legislation

Since Georgia abolished its law on consumer rights protection and never adopted a new law to substitute it, it created a legal gap that needs to be filled in order to ensure the effective regulation of the national market, meet international obligations and fulfil the obligations imposed by Article 30 of the Constitution of Georgia, which states that “*consumer rights shall be protected by law.*” The Constitution is not the only piece of legislation that includes provisions about consumer rights protection. While Georgia lacks a specific law dedicated to consumer rights, there are various non-unified norms scattered in various legal acts that deal with consumer issues.

⁷⁴⁵ Legal transplantation and adoption of new laws in accordance with recommendations of international bodies or treaties is a complex issue and cannot be generalized as a strictly positive or negative phenomenon. There is a widespread practice of pure formalistic attitude to the recommendations and reformation only for the sake of advancing in negotiations, or being accepted at certain organization. Much criticism have been shared by various authors about such box-ticking approach, when a reform is only conducted to formally satisfy set requirements and move forward in the in the process of integration. Indeed such approach is not alien for the process of exporting EU law. In fact, adopting a new law does not create any guarantee that the field will actually be effectively regulated and the problems related with it will be solved. Chances are high that “*transplanted consumer rules can either lie dormant, or they can operate only incidentally without tangible outcomes, or they can even be dysfunctional.*”

“*Based on this synthesis of experiences, we might argue that legal change is neither necessary nor sufficient to achieve desired economic and social objectives. But neither are legal transplants an impossible tool for fostering change. They can act as irritants and catalysts that provoke change*” and they can lead to actual economic and social developments. See: Svetiev (n 741) 211. See also: G Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ (1998) 61 *Modern law Review* 11.

⁷⁴⁶ Svetiev (n 741) 218.

The Civil Code of Georgia contains certain provisions, demanding the disclosure of contract-related information and the delivery of the object of the contract without defects and in the agreed conditions. However, these rules are part of general contract law and not specifically tailored for consumers. The only way to enforce them is through litigation, while consumer protection mechanisms should be offering simple and prompt legal tools to protect consumer interests.⁷⁴⁷

Moreover, Georgia regulates several fields of the economy. Currently, there are three national regulatory bodies which overlook different sectors of Georgian market. The GNCC is a standing independent state agency, responsible for the fields of electronic communications and broadcasting.⁷⁴⁸ The GNERC is also an independent state agency and its regulatory scope includes electricity, natural gas and water supply.⁷⁴⁹ The National Bank of Georgia is the Central Bank of Georgia, exercising supervision over the financial sector for the purposes of facilitating financial stability and transparency of the financial system.⁷⁵⁰ All the three regulatory bodies are also responsible for consumer rights protection within their sectors.⁷⁵¹ There is even a Consumer Interest Public Defender's office at the GNCC, while at the GNERC operates Consumer Complaints Department and the National Bank also contains a structural unit dedicated to consumer rights protection. These regulatory bodies are independent and not subordinated to any other authority. They are also out of the scope of the

⁷⁴⁷ Tamar Lakerbaia, 'European Standard for Informed Consumer' 1 Journal of Law, Ivane Javakhishvili Tbilisi State University 2015, 152.

⁷⁴⁸ See: <https://www.gncc.ge/en/the-commission/about-commission>

⁷⁴⁹ See: <http://gnerc.org/en/about/komisia>

⁷⁵⁰ See: <https://www.nbg.gov.ge/index.php?m=130>

⁷⁵¹ Law of Georgia on National Regulatory Bodies 2002 (1666) ch III.

Competition Agency, which might only have cooperative and advisory functions with the regulatory bodies.⁷⁵²

9. Defining consumer in Georgian consumer law

Before Georgia adopts a new law on consumer rights protection, the notion of consumer can only be defined analysing the current scattered regulations. As it was demonstrated in the historic review, similarly to competition law, the development of consumer law in Georgia has also been fragmented, illogical and predominantly nominal.⁷⁵³ Eventually, the current level of development is far behind the EU. Therefore, a number of issues active and disputed in EU law do not have much relevance to Georgia. As already discussed in the previous section, Article 30 of the Constitution offers guarantees for protection of consumer rights. Obviously constitutional guarantees are very general, and do not offer definitions. The judicial body in charge of ensuring the supremacy of the Constitution and has the authority to interpret it is the Constitutional Court of Georgia.⁷⁵⁴

With regard to Article 30 (2) of the Constitution, the CCG has issued an interesting judgement in 2007, stating that it is a positive obligation of the state to protect consumers from unfairness, and every legal act dedicated to consumer protection should be based on the doctrine of protecting the weaker party from the strong one, to ensure their equal and peaceful cohabitation.⁷⁵⁵ The CCG does not explicitly answers to the question whether Article 30 (2) of the Constitution protects only natural persons or business entities as well,

⁷⁵² LC (n 371).

⁷⁵³ See: Chapter II, Section 6.3, *Development of Georgian consumer law after 1991*

⁷⁵⁴ Organic Law of Georgia on the Constitutional Court of Georgia 1996 (95) Art. 1.

⁷⁵⁵ *Decision N 1/1/374, 379* (Constitutional Court of Georgia) II.

but it stresses the spirit of the law, which is to protect weaker parties generally. Eventually, the state's inability to ensure a balanced and “*equal and peaceful cohabitation*” between the parties will be considered as a passive violation from the state's side.⁷⁵⁶

Article 2 of the draft law⁷⁵⁷ presented in 2015 identifies as subjects of its provisions natural persons entering into contractual relationship with traders, with regard to the goods or services they acquire for the purpose of personal consumption. This means that the law applies exclusively to B2C transactions. This is a narrow definition of consumer, with clear strict borders, leaving no room for any broader interpretation. The suggested notion is very similar to the mainstream consumer definition in EU consumer law. The draft law states that it aims to implement the best international and European states' practice within the sphere of consumer rights protection. Yet, as previously mentioned, the EU only establishes minimum standards for consumer rights protection, while Member States' national laws often offer higher level of protection, including broader definitions of a consumer.⁷⁵⁸

Contrary to this approach, the law on the protection of rights of consumers abolished in 2012⁷⁵⁹ used a broader definition of a consumer. Its preamble defined the consumer as a citizen who is a user, purchaser, and customer of a good (work, service) for personal consumption, or an individual having such an intention. Using the term “*citizen*” within the definition was supposed to underline the human nature of the consumer, however, as correctly suggested by Zaalishvili,⁷⁶⁰ the presence of the term “*user*” in the same sentence

⁷⁵⁶ Ibid 376.

⁷⁵⁷ Draft Law of Georgia on Consumer Rights Protection 2015.

⁷⁵⁸ Jana Valant (n 453). 4.

⁷⁵⁹ Law of Georgia on the protection of rights of consumers 1996 (151).

⁷⁶⁰ V Zaalishvili, ‘Systematic Features of the Regulation of Private Law Consumer Relations in Georgian Legislation’ (2010) 1–2 Journal of Law, Ivane Javakhishvili Tbilisi State University, 58–81.

indicated that while the beneficiary of the contract should have been a natural person, the actual party of the contract could have been a legal entity as well. For example, a football club ordered from another company some services for its football players; both contractor parties were legal entities but, since the services were destined to natural persons - the football players - they could qualify as users of services who fell under the notion of consumer.⁷⁶¹ Zaalishvili concluded that such definition was progressive and in line with the national laws of several EU Member States. In this sense, the 2015 draft law shrinks the previously existing wider notion of consumer and by doing so, departs from the targeted best practices of European states.⁷⁶²

As seen before, the GCC also includes some provisions on consumer contracts. It dedicates a special chapter to tourist service contracts,⁷⁶³ which offers protection for clients of travel services.⁷⁶⁴ Article 657 GCC states that “*under a tourism contract, a travel organiser (travel agency) shall render the agreed services to a tourist (traveller).*” Zaalishvili analyses the terms “tourist” and “traveller” and concludes that lawmakers used them not as synonyms, but to indicate two different categories of customers. In both cases the user of the services is a

⁷⁶¹ Ibid 69-70.

⁷⁶² The current trend of consumer law development in Georgia seems to be in line with Zaalishvili’s opinion regarding consumer notion. He considered that broad notion of a consumer was unsuitable for Georgia, in contrast to the EU Member States. His main argument is lower level of economic development of Georgia. According to the author, it should be preferable to limit consumer protection only for natural persons as higher protection standard might have been an unnecessary burden and barrier for business. See: Zaalishvili (n 757) 58–81.

⁷⁶³ Civil Code of Georgia 1997 (786) ch 11.

⁷⁶⁴ Articles 657-667 set the following regulations: Prohibition of misrepresentation; Necessity to provide detailed information; Rules for changing and calculating the original contract price and the travel organiser’s obligations; Transfer of a travel contract; Shortcomings in travel; Reduction of price; Termination of a contract on a traveller’s initiative because of shortcomings; Reimbursement of damages caused by shortcomings in travel; Travel organiser’s obligation to respond promptly to a traveller’s complaint; Travel organiser’s obligation to present guarantees to a traveller; Limitation period for claims arising out of travel contracts; Limitation of liability; Repudiation of a contract before the commencement of travel; Force majeure; Agreements prejudicial to travellers not allowed.

natural person; however, the nature and purpose of the services can be different. The term “tourist” refers to a natural person using tourist services for recreational and leisure purposes; the term “traveller” refers to a person who travels without specifying the nature or purpose of such activity, thus opening also to trips related to his profession, work of business.⁷⁶⁵

In fact, these norms cover a much broader group of weaker parties than the 2015 draft law on consumer protection, similarly to the EU Package Travel Directive.⁷⁶⁶ It is to be verified whether the narrower definition of the draft law would prevail, if approved, on the definition offered by the GCC. According to Article 2 (2) GCC, “*if legal norms of the same rank are in conflict, the special law shall apply.*” In this case, tourist services have been recognized by the legislator as having a special nature, and that is why they have been separated from general contract rules and regulated specifically. As the 2015 draft law does not include any clause dedicated to tourist services, the special and thus prevailing rules would remain those provided by the GCC, which would have the same rank as the law on consumer rights.”⁷⁶⁷

Looking at other regulated sectors, it is possible to examine the Edict of the National Communication Commission of Georgia, which offers a definition of consumer similar to the notion of consumer offered in the abolished Law on Consumer Rights Protection. It defines consumer as a user of services not for resale, but its nature is not limited, so that it can be an individual or a legal entity.⁷⁶⁸ Even the application form to apply to the Ombudsman office of

⁷⁶⁵ Zaalishvili (n 757) 74–76.

⁷⁶⁶ EU Council, ‘Directive 90/314/EEC’ (n 441).

⁷⁶⁷ Regarding the types of legal acts and their hierarchy in Georgian law, see: Law of Georgia on Normative Acts 2009 (1876) Art. 7.

⁷⁶⁸ Edict on adopting the regalement about providing services and protecting consumer rights within the sphere of electronic communications 2006 Art. 3.

the regulatory body recognizes both individuals and companies as consumers.⁷⁶⁹ In this case, the term consumer is used as a synonym of subscriber, who can be both an individual using utility services for a household and a legal entity, which also uses the same utilities in its facility. Although such regulation may give the impression that Georgia uses a wide interpretation of consumer notion, the acts are strictly limited in their scopes and apply only to regulated sectors.

Overall, the current Georgian legislation does not offer a general definition of consumer.⁷⁷⁰ If the absence of consumer law could have a positive side, this is the possibility and perspective to draft a new law, based on the best practices and the most modern tendencies in the field. The notion of consumer offered by the 2015 draft law does not follow this track. It defines consumer in a narrow manner, which is not in full compliance with the economic rationale of consumer law, nor does it help the law fulfil its function and avoid market failures. Although this is the mainstream notion in the EU, it represents a minimum standard that is often overcome by Member States, which are broadening their notion of consumer to cover legal entities in specific instances.⁷⁷¹

10. Conclusion

Out of the multitude of reasons, the need to have both competition and consumer laws can be reduced to a single factor: the impossibility for a market to function perfectly, the presence of market failures, and the need to correct them. While performing this role, the two disciplines

⁷⁶⁹ For the form, visit: http://momkhmarebeli.gncc.ge/?page_id=10

⁷⁷⁰ E Bzekalava, 'Consumer Rights According to Georgian Civil Code', *Lado Chanturia 50, the Ubilee Publication* (Davit batonishvili Law Institute 2013) 68.

⁷⁷¹ See: Chapter II, Section 5.5.4, *Redefining consumer in EU law*

also benefit to the same group of subjects - consumers.

This chapter aimed at defining the notion of consumer used in competition and consumer laws, upon the assumption that it is impossible to answer the question of how significant and essential is support of consumer law for competition law, without identifying the group whose interests they serve. Knowing who qualifies as consumer under consumer law is essential to successfully analyse how the protection of these beneficiaries actually impact competition law.

The first part of the chapter showed how competition law defines consumer broadly, using this term as a synonym for customer. This simplistic approach sheds doubts on how dedicated competition law is to the welfare of final consumers, since looking at the wide range of customers through the same prism does not allow a clear identification of the different groups of customers and their interests. This entails the risk that the voice of final consumers is not always well heard against more powerful intermediate consumers.

The second part of the chapter focused on consumer law. It underlined that considering its major role, economic rationale and objectives, the discipline should serve the interests of weak parties generally. However, the practice is different. EU consumer law artificially casts away certain vulnerable groups and leave them without protection due to their nature and position in the distribution-consumption chain. However, national laws use broader definitions, effectively expanding the scope of consumer law. Moreover, there is a notable tendency of widening the scope of protection and allowing certain B2B transaction within consumer law regulations. In brief, currently competition law and consumer law defines consumer differently, but there is an ongoing process of approximation. Obviously there is

neither the expectation nor the need to make the two definitions homogeneous, but approximation of the respective notions of consumer at certain level can allow a better performance and easier achievement of the shared goals.

The same cannot be said about Georgia, where it is even challenging to define consumer, due to the lack consumer related provisions in the national legislation. Based on non-systematised rules, scattered among different legal acts, it can be defined that as a general standard consumer is defined narrowly. It does not seem either that Georgia aims to follow the European trend and widen the notion, as the draft law only takes a step back, compared to its predecessor and leaves no room for legal entities to be qualified as consumers, under any circumstances.

Chapter III. The image of the consumer

1. Introduction

Chapter II was dedicated to the notion of consumer - a legal definition, which is used to determine the circle of persons eligible to benefit from the protection offered by consumer law. In this sense, the notion of consumer is a legal instrument to regulate to what extent the law should be applied.⁷⁷² The chapter emphasized how both in EU and Georgian laws, consumers are predominantly defined as natural persons, acting outside the scope of economic activity, which includes trade, craft, business and liberal professions.⁷⁷³ Eventually, all nonhuman market actors, as well as intermediary customers, do not qualify as consumers and are not covered by consumer protection.

Who is not a consumer is a critical question in consumer law,⁷⁷⁴ and it should be answered by taking into consideration the nature of the consumer. Lawmakers should be well aware of consumers' characteristics, in order to adjust the legal notion accordingly and establish an effective legal regime for their protection.⁷⁷⁵ Consumer image is a concept, which is supposed to describe the actual nature and characteristics of the average consumer.⁷⁷⁶

Knowing these features has a vital practical utility. Consumer law is built around consumers,

⁷⁷² Arroyo Aparicio, 'Who Is a "Consumer" on Food Law: Some Reflections on the notion of "consumer" and the EU Food Law', *The ethics of consumption* (Wageningen Academic Publishers, Wageningen 2013). 465.

⁷⁷³ Manko (n 456).

⁷⁷⁴ Clarisse Girot, *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kluwer Law International 2001) 54.

⁷⁷⁵ Devenney and Kenny (n 538) 139.

⁷⁷⁶ Charles Glenn Walters, *Consumer Behavior: Theory and Practice* (R D Irwin 1978) 182; Joseph M Sirgy, Don R Rahtz and Laura Portolese, *Consumer Behavior Today, v. 1.0* (FlatWorld 2014); Oren Bar-Gill, 'Seduction by Contract: Law, Economics and Psychology in Consumer Markets - Introduction' 2. For an opposing view, see: Mak, 'The Consumer in European Regulatory Private Law' (n 438).

and in order to give some “flesh and blood” to this abstract notion, there is the need to create a specific model, which mirrors certain perception of reality.⁷⁷⁷ Consumer image is the concept that studies the nature of average consumer and depicts her most common features.

Exploration of the consumer’s nature is directed to justify the assumption of consumer vulnerability made by consumer law. In fact, the whole idea of consumer protection is justified by consumer weakness.⁷⁷⁸ Therefore, it is immensely significant to be familiar with these weaknesses and identify correctly where their boundaries lie.⁷⁷⁹ It is for the same reason and purpose that this dissertation is interested in inquiring into consumer image, exploring what makes consumers in need for special legal care, and assess whether the established image of a vulnerable consumer is justified.

The necessity of consumer protection for competition law, argued by this dissertation, is founded on two beliefs. First, consumer actions are often detrimental to market competition due to their weaker position and bounded rationality. Second, the only way of allowing consumers to foster market competition is to educate, empower and equip them with extended legal protection. This chapter analyses the nature of consumers, their limitations and weaknesses. After having so defined the consumer image, it will illustrate how consumer law addresses such shortcomings. Throughout the previous chapters, it has been assumed that consumer law empowers consumers, protects their interests and avoids or corrects market failures. However, these matters have never been appropriately analysed. The following pages will thus examine the negative consequences of specific consumer features, and link

⁷⁷⁷ Geraint G Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate/Dartmouth 2017) 350.

⁷⁷⁸ Purnhagen and Rott (n 716) 4.

⁷⁷⁹ Mary Conway Dato-on, *The Sustainable Global Marketplace: Proceedings of the 2011 Academy of Marketing Science (AMS) Annual Conference* (Springer 2014) 40. Arch G Woodside, Jagdish N Sheth and Peter D Bennett, *Consumer and Industrial Buying Behavior* (North-Holland 1977) 318.

them with the legal measures that are supposed to remedy them. The discussion will review how effectively consumer law deals with the major types of consumer-related market failures, and whether it can have any positive impact to change consumers' behaviours.

Moreover, through critical analysis, this chapter will examine the consumer image against the notion of consumer. Since the latter limits down the circle of beneficiaries of consumer protection, we will assess how well-determined it is and how successfully it reflects the critical features of consumer nature. Therefore, this chapter continues the discussion regarding the narrowness of the notion of consumer and the artificial delimitation of consumer law beneficiaries, contrary to the economic rationale of the law.⁷⁸⁰ Eventually, while examining the various images of a consumer, particular attention will be devoted to natural persons; however, legal entities and their rationality boundaries will also be examined. This will be in line with the claim, argued in this paper, that consumer notion is a dynamic, changing concept and we currently witness the process of its broadening, spreading protection over non-human market actors.⁷⁸¹ In support of this tendency, the dissertation aims to demonstrate that a wider scope of consumer law would turn it into a more useful tool, and would consequently allow its more efficient cooperation and contribution to competition law.⁷⁸²

⁷⁸⁰ See: Chapter II, Section 6, *The rationale of consumer protection and contradictory aspects of the notion of consumer*

⁷⁸¹ See: Chapter II, Section 3. *The notion of consumer in EU consumer law*

⁷⁸² For the opposing view see: Christopher Hodges, 'The Consumer as Regulator' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016) 7, 43–93. As the authors claim, enlargement of the notion of consumer is a dangerous phenomenon, as instead of protecting only the final consumers it will include intermediaries that will lead to generalization of the protection, moving away target from the most vulnerable subgroups. However, overall efficiency for the whole group will improve. Buyers definitely differ according to their vulnerability level, therefore, it would not be fair to provide the same protection for all of them. Authors, like Bussani and Werro claim that EU consumer law does not sufficiently diversity consumers, despite the fact that it offers a number of consumer images. Eventually, such approach

2. Consumer images

The image of the consumer embodies the legal system's perception of the analytical and intellectual skills and qualities of a consumer, her physiology, and behaviors, abilities to properly evaluate, compare available options on the market and make rational decisions.⁷⁸³

How legislators view consumers defines the extent of consumer policies. Apparently, the weaker and more vulnerable consumers are assumed to be, the more active and paternalistic should be the role of the state.⁷⁸⁴ For example, the widely spread concept of the vulnerable consumer is an example of consumer image. Vulnerability creates the need for protection, and the law cannot empower consumers without correctly identifying the issues where they need support. The margins of state intervention in private commercial relations can be determined only after having identified the weak points of a consumer's nature, her characteristics and features.⁷⁸⁵ If the state's intervention on the market with instruments of consumer law is not justified by actual consumers' needs, this will question the legality of such measures. For example, Mak argues that the concept of weak consumer is fictional,

harms the most vulnerable consumers. However, in defence of EU law, it can be underlined that when a particular group is intentionally targeted, their specific weaknesses are taken into consideration. Although, further diversification can be possible. See: Mauro Bussani and Franz Werro, *European Private Law: A Handbook* (Stämpfli Publishers 2009).

⁷⁸³ Walters (n 773) 182; Sirgy, Rahtz and Portolese (n 773); Bar-Gill (n 773) 2.

⁷⁸⁴ Fernando Gómez Pomar, 'EC Consumer Protection Law and EC Competition Law: How Related Are They? A Law and Economics Perspective' [2003] *InDret*. 1, 11 . See also: Kate Tokeley, 'Consumer Law and Paternalism: A Framework for Policy Decision-Making' in Susy Frankel and Deborah Ryder (eds), *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis NZ Limited 2013) 265–304; MJ Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1993) 147.

⁷⁸⁵ Hodges (n 780) 7, 43–93.

created for the purpose of regulatory intervention in private relations of the market.⁷⁸⁶ She indicates that EU law heavily focuses on consumer vulnerability, while totally ignores the concept of “autonomous consumer” that is widely spread among the national laws of EU Member States.⁷⁸⁷ While this position might not be shared in this paper, it well demonstrates that there are distinct opinions regarding the nature of the consumer and the topic remains disputed.

2.1 The average consumer benchmark

The debate about the nature of consumers and their characteristics is everlasting. Arguably, consumers differ in their abilities, level of education, knowledge of specific fields or products, and in their readiness to demand respect and fight for her rights. Consumer vulnerability is person-specific and has an individualistic nature.⁷⁸⁸ However, legal regulation cannot afford to evaluate individual possibilities of each customer, in order to determine the optimal level of protection. Law always requires classification and categorization at certain level. This might not be an ideal method of reflecting the reality in every single case, but it is the most efficient way to regulate.⁷⁸⁹ Therefore, while each consumer might be different in

⁷⁸⁶ Dorota Leczykiewicz, Stephen Weatherill and Vanessa Mak (eds), ‘The Consumer in European Regulatory Private Law’, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 381–401.

⁷⁸⁷ *ibid.*

⁷⁸⁸ Bang Nguyen, Lyndon Simkin and Ana Isabel Canhoto, *The Dark Side of CRM: Customers, Relationships and Management* (Routledge 2015) 137; Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015) 199.

⁷⁸⁹ Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press 2013) 55.

one way or another, the goal is to define one or several images of the average consumer, which can represent the whole group.⁷⁹⁰

Similar to the notion of consumer, EU law does not have a single unanimously recognized consumer image, but instead it employs various models. For example, only the Unfair Commercial Practices Directive⁷⁹¹ offers three different consumer types that vary according to a degree of vulnerability. As a benchmark, the directive takes the concept of “*the average consumer, who is reasonably well informed and reasonably observant and circumspect.*”⁷⁹² This image is the most widely shared concept of the average consumer within EU legal acts and it has been adopted by EU courts as well. In addition to the average consumer benchmark, the directive also considers “*consumers whose characteristics make them particularly vulnerable to unfair commercial practices [...] taking into account social, cultural and linguistic factors.*”⁷⁹³

Furthermore, it includes other exceptions when the average consumer concept is irrelevant. More specifically “*where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.*”⁷⁹⁴ The same article states that the average consumer should not be defined in simple statistical terms and “*national courts and authorities will have to exercise their own faculty of judgement, having*

⁷⁹⁰ Duivenvoorde (n 787) 64–67.

⁷⁹¹ European Parliament and European Council, ‘The Directive on Unfair Commercial Practices’ (n 447).

⁷⁹² Ibid. Art. 18

⁷⁹³ Ibid

⁷⁹⁴ For comparison, see Bussani and Werro (n 780) 6–8.

regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.”⁷⁹⁵

2.2 The average consumer standard discussed in EU case law

With regard to the nature of the average consumer itself, it is not quite clear whether the law defines the consumer image by considering actual behaviour of the majority of consumers, or merely refers to a desired one, in an attempt to stimulate certain types of behaviours.⁷⁹⁶

Initially, the attitude of EU courts toward consumers has been strongly influenced and shaped by the reasons underlying the courts’ intervention, which was protection of free movement of goods. As it has been discussed in Chapter I,⁷⁹⁷ market integration has been the primary economic objective of the European Communities since their creation. This objective dominated over every other goal. Consumer well-being and protection was also viewed as a logical consequence of market integration.⁷⁹⁸

The origin of the notion of so-called alert consumer can be traced in the well-known *Cassis de Dijon* case.⁷⁹⁹ The alert consumer is a powerful image of a buyer, who can be trusted with her decisions and does not require state authorities to paternalize and dictate ingredients for certain goods. It is evident that the *Cassis de Dijon* ruling promotes a powerful image of the consumer, the one it finds to be necessary for the market integration purposes and disregards

⁷⁹⁵ European Parliament and European Council, ‘The Directive on Unfair Commercial Practices’ (n 447). Art. 18

⁷⁹⁶ Duivenvoorde (n 787) 64–67.

⁷⁹⁷ See: Chapter I, Section 4.2, *Market Integration*

⁷⁹⁸ Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2005) 4. See also: Chapter II, Section 5 *The history of consumer protection law in the EU*

⁷⁹⁹ *Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] Eur Court Rep 1979 - 00649 [13].

actual consumer features.⁸⁰⁰ Eventually, the ECJ stated that it is enough to inform consumers about the product content and let them exercise their right to choose. The ability to choose allows consumers to enjoy benefits of the wider choice offered by the internal market, and paternalism of Member States will not be tolerated.⁸⁰¹ In later years the concept of the alert consumer was transformed into that of the average consumer, discussed a number of times by EU courts, which established an image of a "*reasonably informed, observant and circumspect*" consumer. According to Howells this is a rather idealized version that has little in common with the actual behavior of the real average consumer.⁸⁰² Trzaskowski shares this position and argues that the real average consumer is far less informed, observant or circumspect. However, EU courts chose to raise the benchmark above the actual consumer, creating a superior model to aspire to, which is in line with the EU policy agenda and goals,⁸⁰³ despite being well aware of the actual consumer's vulnerabilities, also emphasized in exceptional cases.

After touching the issue in previous cases during the first half of the 1990s,⁸⁰⁴ the landmark ECJ judgment in the field is *Gut Springenheide*.⁸⁰⁵ The Court was asked to decide whether it was misleading to market eggs in Germany under the slogan "*six-grain - ten fresh eggs*". The controversial slogan was also used as trademark to promote the eggs, by indicating that the

⁸⁰⁰ Weatherill, *EU Consumer Law and Policy* (n 797) 310.

⁸⁰¹ *Ibid.*

⁸⁰² G Hogwells, 'The Scope of European Consumer Law' [2005] *European review of contract law*, 366. See also: Jan Trzaskowski, 'The Unfair Commercial Practices Directive and Vulnerable Consumers - Research@CBS' (2013) 9.

⁸⁰³ *Ibid.* See also: Jan Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive' (2015) 34 *Journal of Consumer Policy*.

⁸⁰⁴ For example: *Case C-470/93 Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] CLI Identifier ECLIEUC1995224 93.

⁸⁰⁵ *Case C-210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt — Amt für Lebensmittelüberwachung* 96.

chickens which laid them were fed with six particular types of grain. In fact, the given types of grain were actually fed to the hens, but they were not the only food given to them. The six types of grain roughly accounted for 60% of the feed.⁸⁰⁶ The ECJ stressed that the national court⁸⁰⁷ was supposed to take into consideration the presumed expectations that the average consumer might have had. In his opinion, AG Mischo underlined that there are casual consumers, who get to know product information “*only casually and uncritically, without checking more closely the message put over by the information.*”⁸⁰⁸ However, the Court stated that the average consumer is not the casual one, but “*is reasonably well-informed and reasonably observant and circumspect, without ordering an expert's report or commissioning*

⁸⁰⁶ Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Bloomsbury Publishing 2016) 24; Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Routledge 2016) 35.

⁸⁰⁷ Similar to the Unfair Commercial Practices Directive, the ECJ consistently underlined the decisive role of national courts in interpreting and establishing the average consumer image. For example, in the *Estée Lauder* case the ECJ stressed out the need to consider various factors and specific features to define the image of the average consumer. Referring to the question whether the term “lifting” could have misled the average consumer, when it was used to promote cosmetics, the Court ruled that “*it must be determined whether social, cultural or linguistic factors may justify the term “lifting”, used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting'.*” It was later upheld in *Douwe Egberts*, where the ECJ confirmed that “*it is for the national courts, in all doubtful situations, to form a view, taking into account the presumed expectations of the average consumer who is reasonably well informed and reasonably observant and circumspect.*” See: C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [29]. C-239/02, *Douwe Egberts NV v Westrom Pharma NV and Christophe Souranis, Carrying on Business Under the Commercial Name of 'Etablissements FICS' and Douwe Egberts NV v FICS-World BVBA* [2004] ECLI:EU:C:2004:445 02. See also: Annette Nordhausen and Geraint Howells, *The Yearbook of Consumer Law 2009* (Routledge 2016) 66.

Significance of national courts is particularly vital in order to check certain national specific issues. In the *Fratelli Graffione* Case the ECJ recognized that *linguistic, cultural and social differences matter and because of the given factors, an action that might not be misleading in one member state might be the opposite in another. However, in the Clinique case the Court refused to accept the argument that marketing cosmetic products in Germany, while using the name Clinique could mislead consumers that the goods were of medical properties, even if the same marketing strategy was not misleading consumers in other Member States.*

See: *Case C-313/94 Fratelli Graffione SNC v Fransa* [1996] 21.

⁸⁰⁸ *Opinion of Mr Advocate General Mischo, regarding Case C-210/96 Gut Springenheide GmbH and Rudolf Tuský v Oberkreisdirektor des Kreises Steinfurt* [1998] ECLI Identifier ECLIEUC1998102 [56].

a consumer research poll.”⁸⁰⁹

Trzaskowski argues that it seems the Court has its position on how the average consumer⁸¹⁰ is supposed to behave and it does not check whether this vision is realistic.⁸¹¹ For example, in *Douwe Egberts NV*,⁸¹² AG Geelhoed assumed that the average consumer will always take note of the information on the label and will also be able to assess the value of that information.⁸¹³ Later, in the famous *Mars* case,⁸¹⁴ the ECJ argued that the marking “+10%” on the chocolate bar wrapper, occupying approximately 30% of it, was not misleading consumers, as the reasonably circumspect consumer is “*deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase.*”⁸¹⁵

The approach of EU courts has not always been consistent. While clearly choosing the reasonable consumer as the average consumer benchmark, it is possible to find decisions where the ECJ explores consumer nature deeper, pays more attention to consumer

⁸⁰⁹ *Case C-210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt — Amt für Lebensmittelüberwachung* (n 806) [31]. See also: *C-465/98, Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG* [2000] ECLI:EU:C:2000:184 98.

⁸¹⁰ Methodology of the average consumer test is very interesting and relevant. In the past, it used to be a theoretical assessment of a question whether “*a significant number of consumers*” would be misled or affected in a similar manner. (see: *C-373/90 Nissan Criminal proceedings against X Reference for a preliminary ruling: Tribunal de grande instance de Bergerac - France Motor vehicles - Misleading advertising* [1992] ECLI:EU:C:1992:17 15.) Later this method was replaced by a quantitative assessment. The latter method was used in *Lidl* case, and in order to identify whether the advertising was misleading, and whether a significant number of consumers would hesitate from purchasing the goods, considering that they knew its true condition. (See: *Case C-356/04 Lidl Belgium GmbH & Co KG v Etablissements Franz Colruyt NV* ECLI:EU:C:2006:585 [78–82].) It is worth mentioning, that qualitative test is also normative and does not require empirical evidence. (See: *Leczykiewicz, Weatherill and Mak* (n 785) 390.) Trzaskowski, calls it oxymorone that average consumer test, is not a statistical test. (See: *Trzaskowski* (n 801) 9.)

⁸¹¹ *Trzaskowski* (n 801) 9.

⁸¹² *C-239/02, Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, Carrying on Business Under the Commercial Name of 'Etablissements FICS' and Douwe Egberts NV v. FICS- World BVBA* (n 808).

⁸¹³ *Opinion of Advocate General Geelhoed on Case C-239/02 Douwe Egberts NV v Westrom Pharma NV and Others* [2003] ECLI:EU:C:2003:668 [54].

⁸¹⁴ *Case C-470/93 Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* (n 805).

⁸¹⁵ *ibid* 24.

weaknesses and demands higher level of protection.⁸¹⁶ For example, in *Buet v Ministère re Public*,⁸¹⁷ to which Leczykiewicz and Weatherill refer as “*the first and transformative identification of the ‘vulnerable’ consumer as an image recognised by EU law,*”⁸¹⁸ the Court approved the French rules prohibiting doorstep selling of educational materials. While the restriction was a practical obstacle to free movement of goods, the court still upheld the national law, aiming to protect less educated consumers, who would be otherwise harmed in an unregulated market.⁸¹⁹

In *El Corte Inglés* (2004)⁸²⁰ the GC confirmed the same average consumer benchmark but, interestingly, stated that the average consumer generally perceives a trademark as a whole and not necessarily analyses its specific details.”⁸²¹ In addition, the Court argued that “*account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to place his trust in the imperfect image of them that he has retained in his mind.*”⁸²² Moreover, the level of attention of the average consumer varies according to goods and services.⁸²³ For example, in *Koipe v OHIM*,⁸²⁴ the GC ruled that as olive oil is a widely spread consumer product in Spain, “*the*

⁸¹⁶ Benohr (n 389) 17.

⁸¹⁷ *Case 382/87 R Buët and Educational Business Services (EBS) v Minist è re public* [1989] ECLI Identifier ECLIEUC1989198 87.

⁸¹⁸ Dorota Leczykiewicz and Stephen Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 4.

⁸¹⁹ Benohr (n 389) 17.

⁸²⁰ *Joined cases of T-183/02 and T184/02 El Corte Inglés v Office for Harmonisation in the Internal Market* [2004] ECLI:EU:T:2004:79.

⁸²¹ *Ibid* [68]

⁸²² *Ibid*.

⁸²³ *Ibid*.

⁸²⁴ *Case T-363/04 Koipe v OHIM – Aceites del Sur* [2007] ECLI:EU:T:2007:264.

*level of attention of the average consumer with respect to its external appearance is low”.*⁸²⁵

Overall, the analysis of the case law of EU courts demonstrates that the accepted standard for the consumer image is that of the average consumer, who is a reasonable decision-maker, informed, observant and circumspect.⁸²⁶ However, as already emphasized in this section, this benchmark is more a programmatic model of the consumer than the actual one. In support of this theory Duivenvoorde argued that even usage of the term, such as "reasonably" instead of "normally" is an indication that the described consumer is rather theoretical.⁸²⁷

If we share the position of EU courts that consumers are well informed, circumspect, attentive to the details and able to take economically justified choices after conducting a thorough assessment, then claims about their vulnerability seem not very well-grounded. According to Shultz and Holbrook,⁸²⁸ there are two types of consumer vulnerability, an economic and a cultural one. If economic vulnerability corresponds to objective lack of access to resources and a limitation in skills and abilities, cultural vulnerability refers to the consumers' ignorance and lack of knowledge, which makes them at risk of manipulation by the business.⁸²⁹

Under the average consumer benchmark, established by EU law, consumers' economic difficulties are recognized and taken into account, but their cultural vulnerability seems vastly invisible. Such approach might question the vital need for special protection and care for consumers, at least from a competition law perspective. Consumers seem to meet the

⁸²⁵ Ibid 107, 108

⁸²⁶ Duivenvoorde (n 787) 236.

⁸²⁷ ibid 65.

⁸²⁸ Clifford J Shultz and Morris B Holbrook, 'The Paradoxical Relationships Between Marketing and Vulnerability' (2009) 28 *Journal of Public Policy & Marketing* 124.

⁸²⁹ Ibid. 124-127; See also: Nguyen, Simkin and Canhoto (n 787) 137.

expectations established by competition law. A consumer who is confident, collects sufficient information and after analyzing it, makes the most optimal choice for herself, is close to the concept of *homo economicus*.⁸³⁰ Rational decisions made by this type of consumers benefit market competition. Therefore, following the advice of free market economists, who support the idea that governmental interventions on the market should be limited only to what is absolutely necessary,⁸³¹ it seems that once the average consumer is provided with sufficient information, the state should not worry about her actions anymore and should not intervene any further.⁸³² How close such argument is to reality will be addressed in the following section, which will challenge the average consumer benchmark, in light of the discoveries of behavioral studies.

3. Challenging the average consumer benchmark

As highlighted by Drexl⁸³³ and Mak,⁸³⁴ the consumer image is not a model depicting the actual consumer, based on empirical studies but, similarly to the notion of consumer, it is a normative legal concept. Eventually, the image of the consumer is an oversimplification of reality, which is modelled according to policy objectives. As different countries have different goals, the image of a consumer also differs among jurisdictions.⁸³⁵ This argument seems even more appealing, taking into consideration that there is a multitude of consumer

⁸³⁰ O'Boyle (n 586) 329–331.

⁸³¹ Neva Goodwin and others, *Macroeconomics in Context* (Routledge 2015) 115.

⁸³² Ioannidou (n 27) 13.

⁸³³ Josef Drexl, 'Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-Binding Measures - Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?' (2002) 13 *European business law review* 557.

⁸³⁴ Leczykiewicz, Weatherill and Mak (n 785) 381–401.

⁸³⁵ Girot (n 771) 54.

images offered by EU law. According to their policy objectives, each EU directive or decision seems to develop its own version of the mainstream consumer image, by adding a new layer or characteristic. In addition to the average consumer benchmark, we can find other consumer categories in the EU *consumer acquis*, such as “the hasty consumer”, “children”, “the consumer with a lower level of knowledge than the business”, “the ignorant consumer”, “the negligent consumer”, “casual consumer” and so forth.⁸³⁶

According to Stuyck, a wide variety of different concepts can be partially justified by the vast scope of consumer activities and the different situations they might encounter. While these images might be justified with EU policy objectives, they fail to meet the rationale of consumer law itself.⁸³⁷ Building legislation around a false consumer image leads to the above-discussed problem of defining consumer narrowly, delimiting the circle of consumer protection beneficiaries, and eventually leaving a range of market failures out of state intervention, thus threatening the well-functioning and competitiveness of the market.⁸³⁸ As concluded in the previous section, the average consumer benchmark is exactly such a problematic concept. It is losing its relevance and ability to reflect the reality, and lawmakers are gradually getting more engaged with emerging disciplines, such as behavioral economics, cognitive sciences, and psychology.⁸³⁹ That is why this chapter takes a look at the discoveries of these fields and challenges the legal concept of the average consumer from their perspective.

⁸³⁶ Stuyck, ‘Consumer Concepts in EU Secondary Law’ (n 650) 2.

⁸³⁷ See: Chapter II, section 6, *The rationale of consumer protection and contradictory aspects of the notion of consumer*

⁸³⁸ Ibid

⁸³⁹ Stuyck, ‘Consumer Concepts in EU Secondary Law’ (n 650) 2; Duivenvoorde (n 787) 236.

3.1 Behavioral analysis of consumer

3.1.1 Relevance of behavioral analysis for the subject matter of this dissertation

During the last decade, there has been an unprecedented growth of interest and attention toward behavioral economics. The new theories questioned accuracy of many concepts introduced by classical or neoclassical economics and challenged their dominance.⁸⁴⁰ Using a new, more down to earth and less theoretical perspective, allowed behavioral law and economics to make significant discoveries and to raise critical questions, suggesting that it might be a high time to revise certain traditional approaches, in order to make laws more functional and efficient.

This dissertation would not be complete without taking a closer look at the new challenges and analyzing the raised questions. This is particularly true, considering that these issues are directly related to the research question, redefining the image of the consumer, studying features and nature of the real-life consumer, her vulnerabilities, and limitations of rationality. In this sense, it is essential to examine how these new developments change the interplay between consumer and competition laws, and whether they support or contradict the main argument of this dissertation, that effective functioning and enforcement of competition law system is unachievable without active support of consumer protection law.

EU consumer law establishes a reasonably well-informed, observant and circumspect customer as the average consumer benchmark.⁸⁴¹ As it has been discussed in the previous sections, the approach is based on the concept of *homo economicus*, developed by the neo-

⁸⁴⁰ Simon Kemp and Gabrielle Wall, *Economic Psychology and Experimental Economics* (Routledge 2013) 5; Stefan Heidl, *Philosophical Problems of Behavioural Economics* (Routledge 2016) 1; Peter Diamond and Hannu Vartiainen, *Behavioral Economics and Its Applications* (Princeton University Press 2012) 7; Klaus Mathis, *European Perspectives on Behavioural Law and Economics* (Springer 2015) viii.

⁸⁴¹ See: Chapter III, Section 2, *Consumer images*

classical economic school. The cornerstone of this theory is that consumer is an information processing machine,⁸⁴² therefore the only instance where a legislative intervention is justified to remedy market failures is for informational purposes. If relevant information is provided, there is nothing else consumers might need to maximize their utility and make the most optimal and satisfactory choices. “*Each individual in the market is assumed to be the best judge of his own interests and to act rationally*” and no state authority can be assigned to fulfil this function better.⁸⁴³

These idealistic views can be helpful for conducting theoretical economic analysis, but they fail to describe actual market functioning and the real consumer capacities correctly. The classical and neoclassical economics viewed consumers as rational and good economic thinkers. However, this presumption is now challenged⁸⁴⁴ by the theory of bounded rationality, which questions the previously assumed “high expectations” toward consumers.⁸⁴⁵ Behavioural studies of consumers’ actions eliminate the mystical *homo economicus* image from them and introduce regular, biased human beings, with their bounded rationality.⁸⁴⁶

Economics is often credited for ensuring objectivity and neutrality of the market-related fields of law, while the laws themselves are more fluid and open for broad interpretations.⁸⁴⁷

⁸⁴² Michael R Solomon, *Consumer Behaviour: A European Perspective* (Pearson Education 1999) 337.

⁸⁴³ Ramsay, *Consumer Law and Policy* (n 562) 47. See also: Leczykiewicz, Weatherill and Mak (n 785) 382.

⁸⁴⁴ O’Boyle (n 586) 329–331.

⁸⁴⁵ Tversky and Kahneman (n 587) 1124–1131.

⁸⁴⁶ Frerichs (n 589) 289–314.

⁸⁴⁷ Dana L Gold, *Law & Economics: Toward Social Justice* (Emerald Group Publishing 2009) 11; Robin Paul Malloy, *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (Cambridge University Press 2004) 11. Perception of economics as a source of objective knowledge is not universally shared and some authors question the concept. See: Andrej Fatur, *EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare* (Bloomsbury Publishing 2012) 10; Kokkoris (n 226) 190.

That is why it is essential for competition and consumer laws to make economic sense always.⁸⁴⁸ At the same time, well-established economic theories also need to be re-examined against the real world situations.⁸⁴⁹ As argued by Mahta, there is a big gap between the world of classical economics and the real world, and this void is filled with behavioral economics.⁸⁵⁰ Behavioral studies employ a physiologic approach in order to explain the effects of cognitive reactions on consumer behavior and eventual market outcomes.⁸⁵¹

In conclusion, behavioral economics is relevant to this chapter and deserves a detailed study, as it questions the previously dominant image of the consumer, which, as demonstrated by the analysis of EU directives and case-law,⁸⁵² still remains mainstream in EU law. The novelty introduced by the discipline was to review a number of implicit or explicit assumptions about consumers' preferences, cognitive ability and rationality, which was commonly accepted as facts in traditional economic theories. The most relevant discovery from the perspective of this dissertation, however, is to prove that consumers are far from idealistic *homo oeconomicus* model, for they are not well informed, reasonably observant and circumspect. On the contrary, consumers are market actors characterized by numerous biases and bounded rationality. Consequently, their weaknesses cannot be tackled only with informational remedies. Consumers definitely need information to make rational choices, but

⁸⁴⁸ Thomas Piraino, 'Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century' (2007) 82 *Indiana Law Journal* 345 (2007) 346, Art. 4; Brunt (n 134) 47; 'Speech by Peter Freeman on Significance of Economic Evidence in Competition Cases' (n 135).

⁸⁴⁹ Daniel R Kazmer and Michele Konrad, *Economic Lessons from the Transition: The Basic Theory Re-Examined: The Basic Theory Re-Examined* (Routledge 2016) ch 3.

⁸⁵⁰ J Mehta, 'Behavioural Economics in Competition and Consumer Policy.'

⁸⁵¹ Michelle Baddeley, *Behavioural Economics and Finance* (Routledge 2013) 45; Piet Keizer, *Multidisciplinary Economics: A Methodological Account* (Oxford University Press 2015) 497; Serena Sandri, *Reflexivity in Economics: An Experimental Examination on the Self-Referentiality of Economic Theories* (Springer Science & Business Media 2008) 58; Paul W Glimcher and Ernst Fehr, *Neuroeconomics: Decision Making and the Brain* (Academic Press 2013) xxii.

⁸⁵² See: Chapter III, Section 1.2, *The average consumer standard discussed in EU case law*

there are still numerous other factors, or as behavioral economics name them, “biases,” which lead consumers to irrational judgments and therefore the role consumer law is much bigger than simply regulating information provision.⁸⁵³

3.1.2 *Origins of behavioral economics*

Despite its recent popularity, the discipline is not very young, and the method of analyzing economic life from a physiological perspective is an even older phenomenon.⁸⁵⁴ Already in the 18th and the 19th centuries, scholars were interested in having physiological insight into economic processes.⁸⁵⁵ Heukelom goes even earlier and argues that modern behavioral economics is connected with a clear line to the seventeenth century studies of rational behaviour, in mathematical terms.⁸⁵⁶ At the dawn of the 20th century, when the neoclassical school of thought was at its rise, physiology was considered to be “unscientific,” and economists tried to avoid any research within this controversial discipline.⁸⁵⁷ Eventually, the birth of the modern behavioral economics was delayed and it occurred only in the 1950s,⁸⁵⁸ when Herbert Simon introduced the theory of bounded rationality. He later continued

⁸⁵³ Ioannidou (n 27) 13.

⁸⁵⁴ The Netherlands Authority for Consumers and Markets (ACM), ‘Behavioural Economics and Its Impact on Competition Policy’ (Oxera 2013) 7; Alain Samson, ‘An Introduction to Behavioral Economics’ <<https://www.behavioraleconomics.com/introduction-behavioral-economics/>> accessed 29 August 2017.

⁸⁵⁵ Simon (n 595). See also: Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’ (2003) 93 *The American Economic Review* 1449, 1449–1475; Michiru Nagatsu, ‘Behavioral Economics, History Of,’ *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier 2015) 443–445.

⁸⁵⁶ Floris Heukelom, ‘Kahneman and Tversky the Origin of Behavioral Economics’.

⁸⁵⁷ Alain Samson (ed), *The Behavioral Economics Guide 2016* (Behavioral Science Solutions Ltd 2016);

Elisabeth Costa and Katy King, ‘Applying Behavioural Insights to Regulated Markets’

<<http://www.behaviouralinsights.co.uk/consumer-affairs/applying-behavioural-insights-to-regulated-markets/>> accessed 29 August 2017.

⁸⁵⁸ Simon (n 595). See also: Kahneman (n 864) 1449–1475.

researching and developing the concept and argued that human minds should be examined in the context of the environment they evolve. Our brain does not always generate rational decisions, as there are limitations of knowledge and human capacities to conduct assessment and calculations properly.⁸⁵⁹

Behavioral economics emerged as an independent field of science by the end of the 1970s and the beginning of the 1980s, with the works of two psychologists, Daniel Kahneman and Amos Tversky, and an economist Richard Thaler.⁸⁶⁰ The recent revival of the discipline is connected to relatively new studies regarding nudges and remedies for bounded rationality, as well as the works of Kahneman, for which he was even awarded the Nobel Prize in Economics.⁸⁶¹

3.1.3 Consumer behavior

When making a purchasing decision, a consumer is influenced by a number of distinct factors, including her mood, time pressure, other people's behavior, habits, positive self-expectation and over optimism, cognitive errors, the habit of forgetting things over time, hyperbolic discounting, laziness and tendency to ignore complicated issues. Consumers are bad at calculations, they have limited access to the information, and they do not assess it

⁸⁵⁹ Simon (n 595). See also: Kahneman (n 864) 1449–1475.

⁸⁶⁰ Daniel Kahneman and Amos Tversky, 'Subjective Probability: A Judgment of Representativeness', *The Concept of Probability in Psychological Experiments* (Springer, Dordrecht 1972) 430–454; Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47 *Econometrica* 263, 263–291; Daniel Kahneman and Amos Tversky, 'The Psychology of Preferences.' (1982) 246 *Scientific American* 160, 160–173; Daniel Kahneman, *Choices, Values, and Frames* (National Emergency Training Center 1984) 341–350; Richard Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) 1 *Journal of Economic Behavior & Organization* 39, 39–60; Richard Thaler, 'Mental Accounting and Consumer Choice' (1985) 4 *Marketing Science* 199, 199–214.

⁸⁶¹ The Netherlands Authority for Consumers and Markets (ACM) (n 863); Thaler and Sunstein (n 594); Kahneman (n 864).

thoroughly, even when they access them.⁸⁶² Individually discussing each of these factors would take much time, and it is not a subject of specific interest for this dissertation to analyse how exactly and under what conditions consumers might make irrational choices. What is important is that all these cognitive biases represent flaws or characteristics of human thinking or behavior, making it impossible for consumers to act as perfectly calculating profit-oriented machines.⁸⁶³

Moreover, on the top of all that, consumers suffer from bounded rationality.⁸⁶⁴ Even when consumers are provided with all the necessary information and have time to analyse, compare and choose the most optimal product, there is no guarantee that they will take an economically rational decision. They might be unaware of their own goals and needs, or despite the provided information, they might be unable to process it and make rational decisions.⁸⁶⁵ In a nutshell, natural persons as consumers do not act as *homo economicus*, but they often make inconsistent and economically unjustified choices.⁸⁶⁶ Moreover, it is

⁸⁶² Steffen Huck and Jidong Zhou, ‘Consumer Behavioural Biases in Competition: A Survey’ (New York University, Leonard N Stern School of Business, Department of Economics 2011) Working Paper; Shinsuke Ikeda, *The Economics of Self-Destructive Choices* (Springer 2016). See also: Samson (n 866); Christoph H Loch and Yaozhong Wu, *Behavioral Operations Management* (Now Publishers Inc 2007) 28; Anastassios Gentzoglani and Anders Henten, *Regulation and the Evolution of the Global Telecommunications Industry* (Edward Elgar Publishing 2010) 101–104; Gerard Emilien, Rolf Weitkunat and Frank Lüdicke, *Consumer Perception of Product Risks and Benefits* (Springer 2017) 261.

⁸⁶³ O’Shea, Fairweather and Grantham (n 545) 35.

⁸⁶⁴ Ariel Rubinstein, *Modeling Bounded Rationality* (MIT Press 1998) 98; Torben Hansen and Hans Stubbe Solgaard, *New Perspectives on Retailing and Store Patronage Behavior: A Study of the Interface between Retailers and Consumers* (Springer Science & Business Media 2004) 112. See also: Ran Spiegler, *Bounded Rationality and Industrial Organization* (Oxford University Press 2011).

⁸⁶⁵ Ibid.

⁸⁶⁶ Consumer behaviour and consumerism is not an appealing topic to study only for academia. Depiction of a vulnerable, easily manipulateable and irrational consumer can often be found in various forms of art, which can offer a very comprehensive description of consumer struggles and challenges. A Time to Buy by Katie Melua (released in 2016, album: In Winter), dedicated to Christmas time shopping is a brilliant example (for the lyrics of the song, see: <https://www.azlyrics.com/lyrics/katiemelua/atimetobuy.html>). In an interview, the author talked more about the song, stating “I found shopping really stressful [...] I found decision making really tough. [...]

virtually impossible to carefully identify every existing alternative before making a choice, due to the lack of resources, and mainly of time. As a consequence, a consumer will often settle for a solution that is just good enough.⁸⁶⁷

This economic irrationality is further bolstered by the fact that consumers do not always make decisions only by considering price, quality and income correlation, but they might make economically unjustified choices intentionally.⁸⁶⁸ For example, consumers try to establish and maintain a certain status in the society. To this end, they are ready to take significant expenses and sacrifice their economic interests to some extent. Moreover, consumers are not solely driven by self-interests, but they also bear certain ethical principles and moral values.⁸⁶⁹ Because of that, consumers are often capable of refusing economically attractive deals, boycott certain producers and support the others.⁸⁷⁰ However, if such motives

and the way shops are laid out, I mean it's a machine how they play on you as a customer, it is spectacular, it is fantastic and you just get catapulted in these great alternative dreams and realities.”

The song can be listened at: <https://www.youtube.com/watch?v=hPvJRZveIF0>;

The interview can be viewed at:

<https://www.facebook.com/katiemeluamusic/videos/vb.34952850088/10158049447655089/?type=3&theater>

⁸⁶⁷ Cobb and Hoyer (n 716) 161–179.

⁸⁶⁸ Stavros A Drakopoulos, *Comparisons in Economic Thought: Economic Interdependency Reconsidered* (Routledge 2016) 78.

⁸⁶⁹ Ramsay, *Consumer Law and Policy* (n 562) 58–60; Naomi Mandel and others, ‘The Compensatory Consumer Behavior Model: How Self-Discrepancies Drive Consumer Behavior’ (2017) 27 *Journal of Consumer Psychology* 133–146.

⁸⁷⁰ It is possible to find various forms of consumer protests, around the globe. There are numerous examples of boycotting certain brands due to their questionable actions and business strategies. Famous examples are global campaigns against Nestle, Coca-Cola, Nike, McDonalds, which are among the most boycotted brands in the world. Sometimes, boycott can be directed against certain countries, due to their aggressive politics or grave violations of fundamental human rights or international law principles. Such boycotts usually extend to all the goods produced and exported from the given country, in order to weaken the state economy. For example, “Don’t buy Russian” campaign in Ukraine, or boycotting North Korean restaurants abroad. In other cases, consumer protest can be directed against certain industries, raw materials or goods, due to the way they are mined or produced.

See: Franziska Bieri, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Global Diamond Industry* (Ashgate Publishing, Ltd 2010) 177; Arthur V Levy, *Diamonds and Conflict: Problems and Solutions* (Nova Publishers 2003) 11; Gurnek Bains, *Meaning Inc: The Blueprint for Business Success in the 21st Century* (Profile Books 2011) 26; John M Kline, *Ethics for International Business: Decision Making in a Global Political Economy* (Routledge 2005) 237; Birgit Beumers and others, *Cultural Forms of Protest in Russia* (Routledge 2017) 148; Ian Johnston, ‘Nestlé: The World’s Biggest Food Company and One of the “Most

determine the consumer's buying behaviour, the latter does not necessarily qualify as an irrational decision.

For example, a consumer has a choice between two pairs of shoes, among which a cheaper version has been produced in a third world country, using child labour and a more expensive one was produced at a regular factory, where skilled workers are hired and paid properly. In this case, the consumer's choice for a more expensive item does not make her irrational. On the contrary, concerns related to the respect of human rights, social justice or environmental protection are entirely rational. Modern economists consider ethical consumption as a rational approach, as consumer satisfaction is not only a result of optimal combination of quality and price, but also the quality of the experience a consumer will have with the purchased goods.⁸⁷¹ In fact, the consumer's attraction toward low-cost products is an impulsive action based on a cognitive bias, while buying products that meet moral standards is a thoughtful and cautious choice.

Overall, consumers might make economically unjustified decision in three different ways. They can intentionally let down a cheaper product for certain moral values or principles, which is not considered as a problematic issue and does not require state intervention. Consumers can also make mistakes, due to their biases or bounded rationality. Finally, the most severe case is when consumers make irrational decisions because they have been tricked

Boycotted” (27 September 2009)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/6235566/Nestl-the-worlds-biggest-food-company-and-one-of-the-most-boycotted.html>> accessed 1 September 2017; Stan Cox, 'War, Murder, Rape... All for Your Cell Phone' [2006] AlterNet
<http://www.alternet.org/story/41477/war%2C_murder%2C_rape..._all_for_your_cell_phone> accessed 1 September 2017.

⁸⁷¹ T Stenn, *The Cultural and Political Intersection of Fair Trade and Justice: Managing a Global Industry* (Springer 2013) 41.

and misled to do so. Even if we exclude the first case, the two remaining issues still require legal regulation and state intervention.

3.2 Lessons from behavioral studies

3.2.1 Calimero consumers

Behavioral economics prove that consumers are much more vulnerable market players than what neo-classical economics portrayed. In her paper, Mak suggests a new consumer image, named Calimero consumer.⁸⁷² The title is a reference to a popular Italian cartoon character Calimero, which is a tiny, weak chicken, continuously comparing its small body size to others and complaining and how unfair that is.⁸⁷³

This image of the vulnerable consumer is radically different from the average consumer, which is reasonably informed, circumspect and observant.⁸⁷⁴ If we assume that behavioral economics depicts the real image of consumers, as we meet them in real life, then the confident, well-informed and reasonable consumer is an idealistic and only a theoretical image.⁸⁷⁵ This definitely makes it challenging to fit these two distinct images together. Therefore, only one of them should be accepted and another one be rejected. However, the

⁸⁷² Leczykiewicz, Weatherill and Mak (n 785) 381–401.

⁸⁷³ *ibid.*

⁸⁷⁴ See: Chapter III, Section 2, *Consumer images*

⁸⁷⁵ Anne-Lise Sibony and Genevieve Helleringer, ‘EU Consumer Protection and Behavioural Sciences: Revolution or Reform?’ in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury Publishing 2015) 209–233.

might not be such necessity and law can accept both models and use them for policy purposes.⁸⁷⁶

First of all, the same consumer can sometimes be closer to the average consumer image, while the other times she will be the Calimero consumer. Consumers may resemble the idealised average consumer model regarding particular goods and services,⁸⁷⁷ for example the ones that are of special interest or importance. The same consumers will remain vulnerable regarding all other goods and services, available on the market.⁸⁷⁸ Moreover, accepting and keeping both distinct images allows legislation to use for different purposes. Vulnerable consumer image could describe the actual consumer, in the current state of market development, who should be kept in mind when the law and new consumer protection policies are designed.⁸⁷⁹ As for the average consumer benchmark, it can be employed as the target model, pursued by consumer law. In this sense, the average consumer concept can be compared to the notion of perfect competition, which is used as a theoretical reference and a guide, while the actual market competition is not even close to it.

As there is an evident gap between these two images, law should aim to transform irrational and biased consumer into reasonable, well-informed and confident ones. In this context, it is interesting whether behavioral economics has any evidence that consumer nature is changing, evolving and consumers are getting smarter and more rational. If such is the reality, corresponding amendments should be reflected in the regulations and they can be gradually

⁸⁷⁶ Ibid.

⁸⁷⁷ Nguyen, Simkin and Canhoto (n 787) 137.

⁸⁷⁸ For the EU perspective, see the infographics: European Commission study, *Consumer vulnerability in the EUA*, available from: <http://ec.europa.eu/justice/newsroom/consumer-marketing/infographs/consumer-vulnerability/index.html>

⁸⁷⁹ Duivenvoorde (n 787) 64–67.

relaxed. However, what the past experience demonstrates is that consumer law is continuously growing and expanding its scope, bringing increasingly more subjects under its protection.⁸⁸⁰ However, this is not an argument strong enough to prove that consumers do not learn and evolve. Consumer law expansion can be explained as a reactional development of the law to new discoveries regarding the nature of consumers and how market actually operates.⁸⁸¹ The law always adjusts itself as market develops, and the economic rationale underlying it evolves, offering new methods to deal with traditional challenges.

Despite the low probability of meeting *homo economicus* in real life, achieving the standard of a confident and well/informed consumer is not an unimaginable goal or unfit to be a genuine objective. In fact, EU courts have always pointed out that the average consumer is not absolutely perfect in every way, but she is reasonably circumspect, observant and informed.⁸⁸² In this context, it can be argued that a reasonable consumer is the one who endorses the famous Socratic paradox "*I know that I know nothing.*" The average consumer is aware of her bounded rationality and lack of knowledge, thus she takes decisions bearing in mind her vulnerable position and the potential errors she might make.⁸⁸³

This attitude makes consumers able to abandon the role of passive beneficiaries of the legislative protection, and to effectively use the tools offered by consumer law. Instead of waiting for a well-functioning and competitive market, consumers should engage and actively participate in the development of the market in the way they choose to. In this sense, it is

⁸⁸⁰ Weatherill, *EC Consumer Law and Policy* (n 498). 66. Christian Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 225; August Horvath, John Villafranco and Stephen Calkins, *Consumer Protection Law Developments* (American Bar Association 2009) 717.

⁸⁸¹ See also: Chapter II, Section 5.5.4, *Redefining consumer in EU law*

⁸⁸² See: Chapter III, Section 2.2, *The average consumer standard discussed in EU case law*

⁸⁸³ Bar-Gill (n 773).

reasonable to state that the objective of protecting consumers can be effectively achieved only by empowering and educating them, and encouraging their active participation, eventually turning them from passive recipients of benefits into confident and active contributors to the well-functioning of the market.⁸⁸⁴ This goal requires consumers' engagement with self-education and information gathering activities, and the provision of legal tools for self-defense, instead of directly guaranteeing positive results.⁸⁸⁵

In conclusion, behavioral economics establishes a new image of the vulnerable and biased consumer, and highlights the fact that the weaknesses of various consumers might extremely differ. Some consumers might be more subject to certain biases, while other can deal with them successfully. That is why Ramsay claims that too much reliance on the findings of behavioral economics is rather dangerous, as it might lead to the inability of having more generalized rules. According to him, behavioral law offers an “*explanation of vulnerability to individualistic explanations which assume that the problem lies with the person' and imply policies to change the consumer rather than the institutional framework.*”⁸⁸⁶ While Ramsay's claim might be debated, the argument that according to behavioral law and economics the level of vulnerability differs and is not standard for everyone is quite convincing. This is not a specific feature only for consumers, but can be applied to legal entities as well, which consumer law treats with a similarly generalized approach.

⁸⁸⁴ Devenney and Kenny (n 538) 369; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Taylor & Francis Group 2017) 21.

⁸⁸⁵ Dale Southerton, *Encyclopedia of Consumer Culture* (SAGE 2011) 264; Geoffrey Paul Lantos, *Consumer Behavior in Action: Real-Life Applications for Marketing Managers* (Routledge 2015) 478; Marla R Stafford and Ronald J Faber, *Advertising, Promotion, and New Media* (Routledge 2015) 177.

⁸⁸⁶ Leczykiewicz, Weatherill and Mak (n 785) 27, 31.

3.2.2 *Calimero legal entities*

In support to the argument developed in chapter II⁸⁸⁷ on the consumerlike vulnerability of business entities, it is worth mentioning that bounded rationality is not a problem limited only to natural persons. Legal entities might also suffer the same biases. The rationale of excluding businesses from consumer protection is that they are not amateurs, but are supposed to know what they are doing, and they mostly deal with issues on which they have deep knowledge and long term experience.⁸⁸⁸ Moreover, their financial and human resources allow them to conduct proper research before making any significant decision.⁸⁸⁹ While these statements are partially true, they are not absolute. Companies often deal with matters outside their expertise, and not all of them have enough resources to perform the same level of pre-decisional research. Smaller companies where all the major decisions are usually made by an owner, without the possibility to delegate the tasks to others, are obviously more vulnerable and similar to consumers.⁸⁹⁰

Gigerenzer argues that not only micro and small undertakings, but even large scale corporation might also suffer from biases, as no size of a company or amount of available

⁸⁸⁷ See: Chapter II, Section 6.5, *Vulnerability of legal entities and a crucial role of consumer law in addressing the problem*

⁸⁸⁸ Epstein (n 579) 99; Canals (n 580) 138; Visser and others (n 580) 171; ‘Managing Open Innovation in SMEs by Wim Vanhaverbeke’ (*Cambridge Core*) 131.

⁸⁸⁹ See: Chapter II, Section 6.5.1, *The rise of SMEs and challenging traditional views regarding business decision-making*

⁸⁹⁰ Mark Casson, *Economics of International Business: A New Research Agenda* (Edward Elgar Publishing 2000) 94; Association (n 583) 34; Belkhamza Zakariya, *Measuring Organizational Information Systems Success: New Technologies and Practices: New Technologies and Practices* (IGI Global 2012) 88; Marion Festing and Susanne Royer (Herausgeber), *Current Issues in International Human Resource Management and Strategy Research* (Rainer Hampp Verlag 2008) 59; Hamid Etemad, *The Process of Internationalization in Emerging SMEs and Emerging Economies* (Edward Elgar Publishing 2013) 94; Killian J McCarthy and Wilfred Dolfsma, *Understanding Mergers and Acquisitions in the 21st Century: A Multidisciplinary Approach* (Palgrave Macmillan 2012) 93.

resources can make business immune to human errors.⁸⁹¹ The logic behind Gigerenzer's statement is that corporations, even the ones with billions of annual turnover, are managed by individuals who are responsible for decision-making process.⁸⁹² As usual, managers assign to experts the task to study and analyse complex issues, before proceeding with the final decision.⁸⁹³ However, as argued by the author, even big company CEOs make the most risky decisions predominantly based on their own intuition and judgement. This generally happens before hearing any expert's opinion. Once the CEO has made up his mind, it is possible to directly or indirectly impose on the experts to deliver the results, which will justify already selected choice.⁸⁹⁴ A similar process is well described in Mason's book about the price-fixing scandal of the World's leading auction houses. The author describes in details how the then-Sotheby's CEO, Dede Brooks made the company experts work day and night, and refused accepting their report, until their recommendation matched with her own decision, already made a long time.⁸⁹⁵

Overall, there are companies to which this argument does not apply, but similarly, there are certain individuals, who act more rationally on the market than the majority of consumers. The problem is that the risk of making irrational decisions applies to natural persons and to legal entities as well. This argument supports the conclusion made in Chapter II⁸⁹⁶ that the

⁸⁹¹ Gerd Gigerenzer, 'Risk Savvy: How to Make Good Decisions' (SAGE Center for the Study of the Mind, UC Santa Barbara, 21 April 2014) <<https://vimeo.com/94440123>> accessed 1 September 2017.

⁸⁹² Specific features of decision making process in large scale corporations are discussed in further details in: Chapter II, Section 5.5.2, *Effects of behavioural biases in the decision making process of SMEs*

⁸⁹³ Gigerenzer (n 904).

⁸⁹⁴ Ibid.

⁸⁹⁵ Association (n 583).

⁸⁹⁶ As argued in Chapter II, economic rationale of consumer law is to avoid market failures, caused by irrational choices of buyers. Assuming that irrationality is not only limited to individuals, accordingly neither the regulations should be exclusively focused on them. Otherwise, irrational behaviour from legal entities will

permanent exclusion of legal entities from consumer protection is contrary to the economic rationale of consumer law. Moreover, it proves that consumer law makes vastly optimistic assumptions about the nature of market actors, not only regarding consumers, but about business entities as well. That makes it possible to raise questions regarding its arguments and challenge the established benchmark images.

4. Vulnerable Georgian Consumer

*Spending on feasting and wine is better than hoarding our substance
that which we give makes us richer, that which is hoarded is lost*

*Shota Rustaveli*⁸⁹⁷

According to Ramsay, the major problem of behavioral economics is that it is too individualistic. It views problems in the vulnerability of individual consumers and distracts from a much larger picture, such as the institutional framework.⁸⁹⁸ While Ramsay uses this argument to criticize the behavioral approach to consumer law, his point is still convincing. Consumer vulnerability is not at the same level everywhere. It is not only those individuals differ according to their rationality, but it is also possible to identify relatively more rational or irrational societies, in economic terms.⁸⁹⁹ There are communities which due to their long

continue to occur. Eventually, such half measures will not solve the problem and market competition will continuously suffer from failures.

See: Chapter II, Section 6.5, *Vulnerability of legal entities and a crucial role of consumer law in addressing the problem*

⁸⁹⁷ According to Goldstein, this popular quote from the 12th century Georgian epic poem, *Knight in the Panther's Skin* by Shota Rustaveli is still a relevant feature for Georgians until today. See: Darra Goldstein, *The Georgian Feast: The Vibrant Culture and Savory Food of the Republic of Georgia* (University of California Press 1999) 26.

⁸⁹⁸ Leczykiewicz and Weatherill (n 824) 27–31.

⁸⁹⁹ About national and cultural specific features of behaviour, see: Steven D Levitt and Stephen J Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (Harper Collins 2011) 181–209.

standing experience with trade and well-developed consumer culture or advanced economy have tendency to spend responsibly and be more careful and attentive in market decisions.⁹⁰⁰

This feature can also become a national characteristic due to the historic hardships that a country has lived through, or because of unfavourable geographical location and harsh natural conditions. Consumer societies might also develop in different way, depending on the system or the regime they have lived through.⁹⁰¹ For example, according to Keller, Soviet regime has distorted relationship of its population with consumer goods and eventually, made them particularly vulnerable at the times of transition.⁹⁰²

Arguably, Georgia is a country where consumers, and more generally the wider society, suffer from economic irrationality.⁹⁰³ On the one hand, this can be a consequence of its

National Research Council and others, *Minority Students in Special and Gifted Education* (National Academies Press 2002) 198.

⁹⁰⁰ Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change, and Democracy: The Human Development Sequence* (Cambridge University Press 2005) 57.

⁹⁰¹ Bar-Gill (n 773) 2; Erica Caple James, 'The Political Economy of "Trauma" in Haiti in the Democratic Era of Insecurity' (2004) 28 *Culture, Medicine and Psychiatry* 127, 127–149; Rodica Ianole, *Applied Behavioral Economics Research and Trends* (Business Science Reference 2016) 130.

Regarding how national pride and identity alters economic behaviour, see: Anke Müller-Peters, 'The Significance of National Pride and National Identity to the Attitude toward the Single European Currency: A Europe-Wide Comparison' (1998) 19 *Journal of Economic Psychology* 701, 701–719.

About correlations between nationalism, patriotism and taxations, see: Till Olaf Weber and Jonas Fooker Benedikt Herrmann, 'Behavioural Economics and Taxation' 20–21.

⁹⁰² Margit Keller, *Representations of Consumer Culture in Post-Soviet Estonia: Transformations and Tensions* (Tartu University Press 2004) 15.

⁹⁰³ The International School of Economics (ISET) of Ivane Javakhishvili Tbilisi State University (TSU) regularly publishes blogs and short analysis dedicated to Georgian consumers, market and generally Georgian society. There have been several interesting analyses, identifying behavioural biases common for Georgian consumers, such as: impatience, lack of culture for long-term planning and money saving, excessive optimism, conspicuous consumption and so force. See: Nino Doghonadze, Karine Torosyan and Norberto Pignatti, 'Patience, Genatsvale' <<http://cbw.ge/georgia/patience-genatsvale-iset-economist-blog/>> accessed 1 September 2017; Maka Chitanava, 'From Soviet to Post-Soviet Consumerism' <<http://iset-pi.ge/index.php/en/iset-economist-blog-2/entry/from-soviet-to-post-soviet-consumerism>> accessed 1 September 2017; Olga Azhgibetseva and Florian Biermann, 'The Economics of Boasting' <<http://www.iset-pi.ge/index.php/en/>>; Nino Doghonadze, 'Mass Family Gatherings in Georgia: Tradition of Waste or a Form of Insurance?' <<http://iset-pi.ge/index.php/en/iset-economist-blog-2/entry/mass-family-gatherings-in-georgia-tradition-of-waste-or-a-form-of-insurance>> accessed 1 September 2017; Yasya Babych, 'The Georgian Consumption Puzzle' <<http://iset-pi.ge/index.php/en/iset-economist-blog-2/entry/the-georgian-consumption-puzzle>> accessed 1 September 2017.

natural richness as an agricultural country,⁹⁰⁴ which encouraged a spending culture for ages. On the other hand, In line with Keller's argument,⁹⁰⁵ it can be stated that living under communist regime of the Soviet Union has left its negative mark on the economic thinking of the society. For example, Gulikashvili and Kalatozishvili argue⁹⁰⁶ that elder people who have lived some part of their lives during the Soviet Union are indifferent and more reluctant citizens. They see their role as passive actors and tend to believe that success or failure in life is less dependent on them and more on the fate, which as to be accepted as it is.⁹⁰⁷ This is reflected on the market, and makes it difficult to empower such individuals and turn them into confident and active consumers.

Moreover, as sustained by a number of authors, the Georgian society suffers from conspicuous consumptions, which is assumed to be another Soviet heritage.⁹⁰⁸ Standardized soviet production, lack of choice of goods and extremely limited access to imported products created the phenomenon of "deficit goods." These could have been as simple as a pack of cigarettes, but their possession was a sign of special social status.⁹⁰⁹ In later years, after the fall of the Soviet Union, when the main deficit resource was money, people could still not stop from the "hunger" for western products, which often led them to buying poor quality Chinese replicas with the credits taken from banks at very high interest rates.⁹¹⁰ Similar problems were notices in other former Soviet republics, in the transition period. For example,

⁹⁰⁴ Igor Bondyrev, Zurab Davitashvili and Vijay P Singh, *The Geography of Georgia: Problems and Perspectives* (Springer 2015) 163–166.

⁹⁰⁵ Keller (n 918) 15.

⁹⁰⁶ See: Giorgi Gulikashvili and Tatia Kalatozishvili, 'Values, Attitudes and Economic Behaviour in Georgian Society'.

⁹⁰⁷ Ibid.

⁹⁰⁸ Doghonadze, Torosyan and Pignatti (n 919); Chitanava (n 919); Azhgibetseva and Biermann (n 919); Doghonadze (n 919); Babych (n 919).

⁹⁰⁹ Ibid

⁹¹⁰ (137)

Lauristin states that in the post-communist transition, conspicuous consumption gained a value of symbolism, as it became a demonstration of the quick adaptation to the expectations of the new world.⁹¹¹ Carelessness and non-risk adverse attitude, coupled with confidence and excessive optimism, has been persisted in Georgia until today. A good demonstration can be the fact that for an economy as small as Georgian, a USD 310 million worth “Ponzi” scheme was successfully run in the construction sector for years, because of which about 6200 households (around 30 000 individuals) were left without the apartments, for which they had already paid.⁹¹² Despite such experience, financial pyramids still successfully operate in Georgia.⁹¹³ Another example is the banking, mortgages and credit industry, which were even named as national disaster due to the high number of defaulted mortgages and lost properties.⁹¹⁴ Unfortunately, these sectors are not exceptional.

In addition to that, Georgian consumers lack experience of living in a normally functioning market economy, lack consumer culture and any kind of effective economic education that could prepare them to navigate into complex terrains of modern markets and make optimal choices. While being part of the Soviet Union for seventy years, Georgians had to live within the environment of the state run centralized economy. Soviet economy was characterized by

⁹¹¹ Karl Erik Rosengren, Marju Lauristin and Peeter Vilhalemm, *Return to the Western World: Cultural and Political Perspectives on the Estonian Post-Communist Transition* (Tartu University Press 1997) 39.

⁹¹² For detailed information see: ‘Center Point Group - Georgia’s Biggest Construction Scandal’ (2012) <<http://www.transparency.ge/en/post/report/centre-point-group-georgia-s-biggest-construction-scandal>> accessed 9 January 2017.

⁹¹³ One of the latest examples is Qnet, a direct selling company, which successfully operates in a number of developing states, including Georgia and is widely criticised for its shady business practices. See: Vakhe Khrikuli, ‘Have Financial Pyramids Returned to Georgia?’ (*Banks and Finances*, 11 April 2016) <<https://bpn.ge/biznesi/22100-saqarthveloshi-finansuri-piramidebi-dabrundnen.html?lang=ka-GE>> accessed 1 September 2017.

⁹¹⁴ Vestnik Kavkaza, ‘Mortgage as National Disaster of Georgia’ (31 July 2014) <<http://vestnikkavkaza.net/articles/economy/58310.html>> accessed 24 December 2015.

the diktat of the sole producer, on which consumers had no saying⁹¹⁵ and the ideology rejected consumerism as an expression of individual selfishness. When the first consumer societies started to emerge in the USA and Western Europe, the Soviet ideology condemned materialism as unsuitable to a society with idealistic interests and values.⁹¹⁶ Soviet citizens never had an opportunity to exercise their trading skills as freedom of choice was kept at a minimum level and goods existed only in standard forms, effectively eliminating consumer's right to choose.⁹¹⁷

Malinauskaite argues that the Soviet experience left a long-standing spell on the nations living under the regime. Eventually, the former Soviet republics will need longer time to get used to and develop a competition culture.⁹¹⁸ Exactly the same can be said about consumer culture. In the Soviet Union consumers did not have the possibility to live in a consumer society.⁹¹⁹ The situation got even worse after the collapse of the Union, as the former Soviet republics were sunk into a long and troublesome transitional chaos.⁹²⁰ Georgia, which had one of the poorest starts in the 1990s due to its military and economic collapse, missed the opportunity to develop a consumer society and culture during the 1990s. Its economic decline was so dramatic that it quickly moved from one the richest Soviet nations to that of a country

⁹¹⁵ Slava Fetelava, 'Protection of Consumers' Rights, *New Economist*], N2 (37), 2015,' (2015) 37 *New Economist* 12.

⁹¹⁶ Cseres, *Competition Law and Consumer Protection* (n 5) 167. Rivkin-Fish (n 709). 215. Dadabaev (n 709). 32. Prychitko (n 307).

⁹¹⁷ Fetelava (n 930) 12–13.

⁹¹⁸ J. Malinauskaite, 'Private Enforcement of Competition Law in Lithuania: A Story of Underdevelopment' (2013) 3 *Global Competition Litigation Review* 123, 123–135.

⁹¹⁹ See: Chapter II, Section 7.2, *Georgia in the period of the Soviet Union*

⁹²⁰ Ibid. See also: Fetelava (n 930) 12–13.

living at the margin of poverty and starvation.⁹²¹ Obviously under such conditions consumerism and consumer culture could not properly develop.⁹²²

The economic development of a state has a direct connection with the vulnerability of its market consumers. It has been argued that, even in developed markets, the category of consumers that suffers the most is lower-income shoppers.⁹²³ Poverty or low income adds another dimension to consumer vulnerability.⁹²⁴ The lack of resources is directly related to the impossibility of gathering information to make a rational decision.⁹²⁵ Low income consumers can be equally vulnerable as other consumers suffering from numerous other factors, such as physical disability, underage infirmity or senior age, intellectual disability, living in remote areas and so forth.⁹²⁶ Poverty is particularly relevant in certain sectors, such as the financial market or food market, as poor consumers spend most of their income on such goods. In these cases, even a slight rise in prices has dramatic impact on the consumer's well-being. Todua demonstrated through empirical data that Georgian consumers pay particular attention to prices while taking a decision, while quality and other features are secondary.⁹²⁷ The author argues that consumers' market awareness is gradually increasing. For example, consumers who are internet users actively engage with virtual services and try to educate themselves regarding brands and their products through social media, get to know others' experiences and reviews before making their own choice. This is particularly true for

⁹²¹ Saakashvili and Bendukidze (n 325); M Wesley Shoemaker, *Russia and The Commonwealth of Independent States 2014* (Rowman & Littlefield 2014) 236; King and Khubua (n 325); Burduli (n 325).

⁹²² Poverty is argued to be one of the essential features of consumer vulnerability. See: Cobb and Hoyer (n 716) 161–179.

⁹²³ *ibid.*

⁹²⁴ Purnhagen and Rott (n 716) 678.

⁹²⁵ Cobb and Hoyer (n 716) 161–179.

⁹²⁶ Reid and Visser (n 716) 352; Holmwood and others (n 716) 204.

⁹²⁷ Nugzar Todua and Charita Jashi, 'Perceptions of Georgian Customer Loyalty Towards Foreign Brands, Dec. 2015. N 7.' (2015) 7 TSU Science 63, 63, 64.

the younger segment of the consumer society.⁹²⁸ However, consumers' purchasing abilities remains very low, therefore they cannot always take advantage of their knowledge and are obliged to purchase the cheapest options available.⁹²⁹

A recent blog⁹³⁰ ran by the ISET Policy Institute examines whether Georgian consumers are an easy prey for retail chains, or they can outsmart the supermarket managers and take advantage of their marketing techniques and strategies. After comparing prices of various supermarket chains, the authors conclude that the companies actively use so called "loss leader" strategies, meaning to sell certain goods at a below-cost price and advertise them, hoping that once consumers enter the shop, they will purchase other goods and not only compensate their loss but even bring profit to the companies.⁹³¹ Unfortunately, the blog does not answer to the main question, but taking into consideration the dynamic development of these chains,⁹³² it is unlikely that their marketing tricks fail and consumers take any significant advantage out of them.

Overall, Georgian consumers have been treated extremely unfavorably during the last 25 years. All the factors mentioned above, coupled with the absence of adequate legal

⁹²⁸ Nugzar Todua and Charita Jashi, 'Some Aspects of Social Media Marketing (Georgian Case)' (2015) 9 World Academy of Science, Engineering and Technology International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering 1204, 1204–1207.

⁹²⁹ According to the World Bank statistics, Georgia belongs to middle income level. See: <http://data.worldbank.org/country/georgia>; According to the official national statistics, people living under the poverty line constitutes 10% of the total population See: http://www.geostat.ge/?action=page&p_id=187&lang=geo, but the poverty rate has not changed much during the last few years and many experts find it suspiciously low, comparing to the actual reality in Georgia.

⁹³⁰ Salome Gelashvili and Eric Livny, 'Georgian Consumers Outsmarting Supermarket Managers?' <<http://iset-pi.ge/index.php/en/iset-economist-blog-2/entry/georgian-consumers-outsmarting-supermarket-managers>> accessed 10 September 2017.

⁹³¹ Ibid.

⁹³² Colliers International, 'Georgia, Retail Market Report', (2015). See also: 'Georgia: Top Performer in the Region's Retail Market' (agenda.ge, 6 March 2015) <<http://agenda.ge/news/36359/eng>> accessed 10 September 2017.

regulations, and weakened Georgian consumers further.⁹³³ Therefore, Georgian consumers are more vulnerable than their EU counterparts. European citizens have special rights as consumers and also have decades' long experience of exercising them. They are better educated about their rights, know how to behave at the stage of purchasing and how to react in case of violation. They are more confident and educated as well. Therefore, the benchmark of the average consumer might be different in these two cases, and eventually, the level of protection might also differ. If EU consumer law sees consumers as knowledgeable and reasonable purchasers, Georgia might need to take a more paternalistic approach, at least for the transitional period.

5. Primary directions of EU consumer law

As demonstrated, Georgian consumers can be considered to be even weaker and more vulnerable compared to the average consumer in the EU. Other than the shortcomings derived from historical experience, unhealthy market environment and lack of consumer culture, one of the major factors that makes Georgian consumers an easy prey for businesses is the absence of developed consumer protection regulations. To give to this statement more meaning, it is worth reviewing briefly what kind of protection does EU law provide for consumers.⁹³⁴ The identification of the main directions of EU consumer law will allow determining which areas of consumer law are least regulated or absolutely neglected in Georgia.

⁹³³ Chapter II, Section 8, *Consumer-related legal provisions in Georgian legislation*

⁹³⁴ See: Chapter II, Section 8, *Consumer-related legal provisions in Georgian legislation*

Despite the critiques moved in this chapter against EU consumer law and its average consumer benchmark,⁹³⁵ accused of being unrealistic in light of behavioral economics, and therefore incapable of offering enough protection to actual weaker consumers,⁹³⁶ the current frame of protection, is still critical in protecting educating and empowering them and boosting their confidence to become active players on the market.

Consumer protection is a multidimensional body of law with a broad scope. Its absence, poor regulation or ineffective enforcement has a dramatically negative impact on consumers. As it was mentioned in the historical analysis provided in the previous chapter,⁹³⁷ when the General Resolution was adopted in 1975, the document identified five basic consumer rights: health, safety, protection of economic interests, and compensation for damages, education, and representation.⁹³⁸ Since then consumer law has expanded, and nowadays it regulates and affects almost every aspect of commercial and consumer life.⁹³⁹

The CFREU ensures a high degree of consumer protection,⁹⁴⁰ and the TFEU⁹⁴¹ recognizes it as a general objective that should be taken into account when defining and implementing the union policies. EU consumer law is not codified under one legal act, but consists of dozens of various directives and other legal instruments created by the Commission, regulating a range of different topics and issues. While they cannot all be discussed in details, it is possible to

⁹³⁵ See: Chapter III, Section 2, *Consumer images*

⁹³⁶ See: Chapter III, Section 3, *Challenging the average consumer benchmark*

⁹³⁷ See: Chapter II, Section 5, *The history of consumer protection law in the EU*

⁹³⁸ Howells and Wilhelmsson (n 501). 9. Hesselink, 'SMEs in European Contract Law' (n 583) 13. See also: Jana Valant, 'Consumer Protection in the EU: Policy Overview'

<[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA\(2015\)565904](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2015)565904)> accessed 28 August 2017. Despina Mavromati, *The Law of Payment Services in the EU: The EC Directive on Payment Services in the Internal Market* (Kluwer Law International 2008) 198.

⁹³⁹ Horst M Rechelbacher and Douglas Childers, *Minding Your Business: Profits That Restore the Planet* (Insight Editions 2008); Life Squared, 'The Problem with Consumerism' 14.

⁹⁴⁰ Article 38, CFREU

⁹⁴¹ Article 12, TFEU

identify primary general directions. Consumer law ensures that buyers will be treated fairly, despite the nature and amount of the transaction - buying a loaf of bread daily, using sophisticated financial services, ordering expensive technology online, streaming films or downloading music.⁹⁴² The Unfair Contract Terms Directive⁹⁴³ provides protection for consumers against pre-determined, not individually negotiated contract terms, which are against good faith, to the detriment of consumers.⁹⁴⁴ The Directive aims to restore the balance between the parties, and it applies to all kinds of goods, including digital ones and covers online transactions as well. It also contains a non-exhaustive list of unfair standard terms.⁹⁴⁵

In order to further protect the economic interests of consumers, consumer law assists them in the pre-contractual period, to equip them with all the necessary details and information, before making decisions. Asymmetry of information is the basis on which EU law is based, that is why the topic will be further explored in the following section, to better demonstrate its vital role and significance, as well as the remedies provided by EU law.⁹⁴⁶ It is an accepted idea that consumers know less than sellers and therefore, they are in a vulnerable position. This is a critical point; modern information theory recognizes the role and value of information and the effects it has on market dynamics.⁹⁴⁷ Consumer law usually corrects

⁹⁴² European Commission, 'Consumer Rights and Law' (Europa.eu) <http://ec.europa.eu/consumers/consumer_rights/index_en.htm> accessed 10 September 2017.

⁹⁴³ EU Council, 'The Directive on Unfair Terms' (n 442).

⁹⁴⁴ 'Unfair Contract Terms' (*Europa.eu*, 9 April 2017) <http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-contract-terms/index_en.htm> accessed 10 September 2017.

⁹⁴⁵ European Commission, 'REFIT Fitness Check of Consumer Law' 3 <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf>.

⁹⁴⁶ Chapter III, Section 6, *Informational Remedies*

⁹⁴⁷ Cseres, *Competition Law and Consumer Protection* (n 5). 185, 186.

information asymmetries by imposing specific obligations to provide accurate data proactively and prohibits deceptive practices.⁹⁴⁸

It is particularly useful to get the information at pre-contractual stage to avoid irrational decisions and post-purchase regrets.⁹⁴⁹ For example, the Price Indication Directive⁹⁵⁰ demands the indication of selling price and the price per unit of measurement, so that consumers have an opportunity to compare prices easily.⁹⁵¹ Other than price sign, further consumer information remedies are established by the Unfair Commercial Practices Directive,⁹⁵² which were later expanded by the Consumer Rights Directive.⁹⁵³ The provision of information empowers weak party and allows consumers to exercise freedom of contract, by being fully informed before giving consent.⁹⁵⁴

Other than establishing general pre-contractual information duties, the Consumer Rights Directive also reaffirmed another important right for consumers, such as the possibility to withdraw from a contract. This is not a universal consumer right, but applies only to doorstep selling and distance selling contracts. Considering the specific nature of such contracts, consumers are granted fourteen-day long cooling off period,⁹⁵⁵ to change their mind and terminate the contracts.⁹⁵⁶

⁹⁴⁸ Howells, Ramsay and Wilhelmsson (n 594). 140.

⁹⁴⁹ Purnhagen and Rott (n 716) 116.

⁹⁵⁰ European Parliament and European Council, 'Directive 98/6/EC' (n 445).

⁹⁵¹ Howells, Ramsay and Wilhelmsson (n 949). Pp. 134 - 136

⁹⁵² European Parliament and European Council, 'The Directive on Unfair Commercial Practices' (n 447).

⁹⁵³ European Parliament and EU Council (n 469). See also: Purnhagen and Rott (n 716) 114.

⁹⁵⁴ Howells, Twigg-Flesner and Wilhelmsson (n 897) 110.

⁹⁵⁵ While cooling off period is undoubtedly consumer-oriented regulation, it might also have some undesired side-effects. It can actually encourage consumer carelessness and decrease the level of observance. Possibility to return the purchased goods makes consumers less attentive. It also decreases incentives for consumers to search for alternatives or switch producers. See: Mehta (n 859) 101.

⁹⁵⁶ Durovic (n 807) 182; Purnhagen and Rott (n 716) 116.

The EU law dedicates a special directive to unfair commercial practices.⁹⁵⁷ It prevents consumers from becoming victims of business' misleading and aggressive behavior, against professional diligence, which materially distorts the economic behaviour of the average consumer.⁹⁵⁸ It offers a blacklist of unfair commercial practices and establishes criteria to determine aggressive commercial practices, such as harassment, coercion and undue influence.⁹⁵⁹ EU law also dedicates a separate directive to misleading and comparative advertising,⁹⁶⁰ which aims to protect traders against misleading advertising and lays down the conditions under which comparative advertising is permitted.⁹⁶¹ Its application is limited to B2B relations,⁹⁶² but it indirectly benefits to consumers as well, as advertising affects the economic welfare of consumers.⁹⁶³

EU consumer law also aims to ensure that the products placed on the single market meet certain standard.⁹⁶⁴ For that purposed was adopted the General Product Safety Directive,⁹⁶⁵ which sets the rule that only safe products should be allowed on the market.⁹⁶⁶ The directive is of a general nature and applies whenever there are no specific law, national standards,

⁹⁵⁷ European Parliament and European Council, 'The Directive on Unfair Commercial Practices' (n 447). See also: 'Unfair Commercial Practices' (*Europa.eu*, 6 January 2017) <http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfair-commercial-practices/index_en.htm> accessed 10 September 2017.

⁹⁵⁸ European Parliament and European Council, 'The Directive on Unfair Commercial Practices' (n 447) Art. 5.2. European Commission, 'REFIT Fitness Check of Consumer Law' (n 969) 3, 4.

⁹⁵⁹ See: European Parliament, 'Consumer Protection Measures, EU Fact Sheets' <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.5.2.html> accessed 10 September 2017.

⁹⁶⁰ European Parliament and European Council, 'Directive 2006/114/EC Concerning Misleading and Comparative Advertising' (n 623).

⁹⁶¹ *Ibid.* Article 1

⁹⁶² See: 'Misleading Advertising - European Commission' (n 624).

⁹⁶³ European Parliament and European Council, 'Directive 2006/114/EC Concerning Misleading and Comparative Advertising' (n 623) recital 4. See also: Vrey (n 367) 61.

⁹⁶⁴ European Commission, 'Consumer Rights and Law' (n 966).

⁹⁶⁵ European Parliament and European Council, 'Directive 2001/95/EC on General Product Safety'; *ibid.*

⁹⁶⁶ *Ibid* Article 1.

Commission recommendations or codes of practice specifying safety requirements for particular products.⁹⁶⁷ In addition to satisfying the general public interest to protect health and safety of consumers, the regulations also level the playing field, by not allowing dishonest undertakings to reduce production costs and gain competitive advantages at the expenses of certain quality requirements. Other than the general directive, there are a number of specific rules regulating the safety of selected sectors and product groups,⁹⁶⁸ and preventing companies from targeting particularly vulnerable consumer groups in order to increase the sale of their relatively dangerous goods, for example selling beverages, cigarettes, arms and certain entertainment services to minors.⁹⁶⁹

Certain sectors, due to their specific nature or consumer related risks, require particular attention. For example, financial services⁹⁷⁰ are particularly complicated, due to the fact that their impact on consumer life can be dramatic.⁹⁷¹ Another specific sector can be digital services and e-commerce, which are particularly attractive and easily accessible for modern era consumers. That is why, to maintain this new realm of digital commerce civil and avoid its transformation into a lawless zone, along with speedy development of technologies, special regulations are offered for this sector as well.⁹⁷²

⁹⁶⁷ Ibid recital 16.

⁹⁶⁸ European Commission, 'Specific Products, Standards and Risks' <http://ec.europa.eu/consumers/consumers_safety/product_safety_legislation/standards/index_en.htm> accessed 10 September 2017.

⁹⁶⁹ Susan Grant, *Cambridge IGCSE Economics Workbook* (Cambridge University Press 2014).

⁹⁷⁰ Jana Valant (n 453) 9 Section. 2.3.

⁹⁷¹ Irrational decisions on financial market can lead to impoverishment of consumers that eventually makes consumers particularly vulnerable. See: Cobb and Hoyer (n 716) 161–179. (157 note. 96) Holmwood and others (n 716) 204. Purnhagen and Rott (n 716) 678.

⁹⁷² Jana Valant (n 453) 9 Section. 2.3.

On the top of all the rights and special regimes established for consumers, if something goes wrong, consumers have right to redress. EU consumer law offers various options, including informal, alternative or online dispute resolutions, formal legal actions and the possibility to take collective actions.⁹⁷³ EU consumer law ensures that consumer, wherever they live, travel or shop in the EU, have guaranteed “*a high common level of protection against risks and threats to their safety* and economic interests.”⁹⁷⁴ In a nutshell, consumers should always get goods and services of acceptable quality, which do not contain any life or health risks. Consumers will be treated fairly, contracts will be more balanced, and even when they contain unfavorable provisions for consumers, the latter are fully informed in advance about the contract terms. Under certain circumstances, consumers even enjoy a right of withdrawal from the contract, and whenever things go wrong, damaged consumers can take an action and seek redress.

This is obviously a very basic and narrowed down review of EU consumer law, to demonstrate the basic directions and standards of protection that consumers enjoy in the EU. It also shows how much weaker and more vulnerable Georgian consumers are by lacking most of these rights and guarantees. EU consumer law is much vaster, regulates numerous aspects of consumption, and strives to educate consumers and turn them into more confident,

⁹⁷³ See: European Parliament and European Council, ‘Directive 2014/104/EU on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union’; European Commission, ‘Consumer Rights and Law’ (n 966); ‘Consumer Dispute Resolution’ (Europa.eu) <http://europa.eu/youreurope/citizens/consumers/consumers-dispute-resolution/index_en.htm> accessed 10 September 2017; European Commission, ‘Judicial Redress - Collective Redress’ (<http://ec.europa.eu>) <http://ec.europa.eu/consumers/solving_consumer_disputes/judicial_redress/index_en.htm> accessed 10 September 2017.

⁹⁷⁴ European Parliament, ‘Consumer Protection Measures, EU Fact Sheets’ (n 984).

active market players. Georgian consumer law, as discussed in the previous chapter,⁹⁷⁵ only contains regulations regarding product safety, and more extended protection for certain regulated market sectors. Other than that, consumer protection is practically inexistent, and consumers pay a heavy price on a daily basis.

6. Informational remedies

6.1 Information as for the primary tool in the hands of consumers

It has been upheld numerous times in various parts of this dissertation that consumers can significantly benefit from the effective functioning of market competition.⁹⁷⁶ However, these benefits are not delivered ready-made for consumers, but they should participate in generating them. As consumers rarely or never have exhaustive information about all the available choices, they might not immediately know whether they have benefited from the choice they have made. Often, the outcome remains unknown to them and it might take some time before the consumer can actually know if the choice was rationale or there were better alternatives available.⁹⁷⁷ However, the picture is broader, and what matters is not an individual consumer choice, but the general trend. As explained in Chapter II, when consumers massively make irrational choices, this damages competition and allows inefficient producers to take over the market dominance.⁹⁷⁸

⁹⁷⁵ See: Chapter II, Section 7, *Consumer related legal provisions in Georgian legislation*

⁹⁷⁶ See: See: Chapter I, Section 4.4, *Consumer welfare*

⁹⁷⁷ Rajagopal (n 526) 33.

⁹⁷⁸ See: Chapter II, Section 5.1, *Market failures and a role of consumer law in addressing them*

Influenced by the Chicago School of economics, Competition law views consumers as rational thinkers and expects from them to make optimal choices.⁹⁷⁹ However, rational decision making is not a matter of luck, but a fruit of an intelligent assessment of market options, one's personal needs, and financial possibilities. In order to make such analysis possible and to evaluate and compare potential options, it is necessary, first of all, to possess the relevant information. Therefore, restricting consumers' access to information or misleading them is detrimental not only to the individual consumer, but to market competition as well,⁹⁸⁰ because "*informed consumers play as drivers of innovation, productivity and competition.*"⁹⁸¹ Exactly for the purpose to let them play this highly valuable role and "*to drive competition, consumers need objective, transparent and easily accessible and manageable information to make rational decisions that best respond to their needs and interests.*"⁹⁸²

The historic review of the creation of consumer societies⁹⁸³ demonstrated that the first side effect of the post-WWII market transformation was to deprive consumers of knowledge about market, producers, suppliers, goods, and services. Since then, consumers have been struggling with the challenges of information asymmetry that places them in a weaker position, compared to businesses.⁹⁸⁴ This struggle is ongoing, and the need to support

⁹⁷⁹ Dabbah (n 12) 254; Nazzini (n 138) 18; Cseres, *Competition Law and Consumer Protection* (n 5) 182. See also: Chapter I, Section 3.2, *The Chicago School*

⁹⁸⁰ Sampat Mukherjee, Mallinath Mukherjee and Amitava Ghose, *Microeconomics* (PHI Learning Pvt Ltd 2004) 219–220.

⁹⁸¹ United Nations Commission on International Trade, *United Nations Commission on International Trade Law, 2000* (United Nations Publications 2002). [38]

⁹⁸² *ibid.* [38]

⁹⁸³ See: Chapter II, section 3, *Birth and evolution of consumer protection*

⁹⁸⁴ Cseres, *Competition Law and Consumer Protection* (n 5) 185–191; Emilien, Weitkunat and Lüdicke (n 872) 164–173; Martin J D'Cruz and Ranjan B Kini, 'The Effect of Information Asymmetry on Consumer Driven

consumers with special regulations to ensure their easy access to information is even more vital in “today’s changing markets of new and complex products and services.”⁹⁸⁵ Information is an essential factor to select and purchase the best option that market can offer. In addition to helping in making rational choices, it is a necessary tool for the bargaining process as well. In this sense, it can be maintained that the effective regulation of information distribution is a crucial element of how well a consumer market works.⁹⁸⁶

Information is one of the most valuable and decisive factors and it affect tremendously over market dynamics.⁹⁸⁷ Consumer law usually corrects information asymmetries by imposing detailed obligations to provide accurate data in specific manners, and prohibits deceptive practices.⁹⁸⁸ As discussed in the previous sections,⁹⁸⁸ a number of EU directives address this issue.

6.2 The costs of informational remedies

Imposing information specific obligations over producers and suppliers is not costless, and keeping consumers better informed is related to extra charges.⁹⁸⁹ However, costs related to supplying information are not a good justification for rejecting such regulations. First of all

Health Plans’, *Integration and Innovation Orient to E-Society Volume 1* (Springer, Boston, MA 2007) <https://link.springer.com/chapter/10.1007/978-0-387-75466-6_40> accessed 10 September 2017.

⁹⁸⁵ United Nations Commission on International Trade Law, 2000 (n 1006). [38]

⁹⁸⁶ Cseres, *Competition Law and Consumer Protection* (n 5). 185, 186.

⁹⁸⁷ *ibid.* 185, 186.

⁹⁸⁸ Howells, Ramsay and Wilhelmsson (n 594). 140.

⁹⁸⁹ Cseres, *Competition Law and Consumer Protection* (n 5). *ibid.* 185, 186. Hossein Bidgoli, *The Handbook of Technology Management, Supply Chain Management, Marketing and Advertising, and Global Management* (John Wiley & Sons 2010) 383.

information has a strategic value and it is a public good.⁹⁹⁰ Moreover, from the perspective of efficiency information is always costly, but the marginal cost of providing it to one more consumer is vastly less comparing to the cost of initial production, since producers possess all the information regarding their products and do not need to conduct any specific research. On the contrary, consumers will need to spend much longer time and resources to collect the same information.⁹⁹¹

Even if producers would be forced to face substantial expenses to meet their information duties, these measures cannot be understood as an attempt to weaken producers. In fact, they may share the costs with consumers by internalizing them in the final price of the goods and services.⁹⁹² Information disclosure obligations can have numerous forms, and it should be always borne in mind not to impose them where the value of the provided information is outweighed by the added costs to the price. Such a poor regulation might not bring any actual benefit to consumers, but harm their economic interests. This is why the costs of consumer protective measures have to be measured against their benefits.⁹⁹³

The challenges related to consumer informational asymmetries are two-dimensional. Initially consumers need to access the information. Once information is accessed, consumers need to analyse it properly, in order to draw reasonable conclusions.⁹⁹⁴ Usually limiting the information given to consumer and making the complex market even more complicated is

⁹⁹⁰ Regina E Herzlinger, *Consumer-Driven Health Care: Implications for Providers, Payers, and Policy-Makers* (John Wiley & Sons 2004) 808; Francesco Parisi, *Law and Economics* (Oxford University Press 2017) 241; Steven Payson, *Public Economics in the United States: How the Federal Government Analyzes and Influences the Economy [3 Volumes]: How the Federal Government Analyzes and Influences the Economy* (ABC-CLIO 2014) 453.

⁹⁹¹ Cseres, *Competition Law and Consumer Protection* (n 5). 185, 186.

⁹⁹² Howells, Ramsay and Wilhelmsson (n 594). 140, 188.

⁹⁹³ *ibid.* 140, 188.

⁹⁹⁴ Mehta (n 859) 83.

assumed to be in the interests of business. Requirements to provide detailed information are not a problem for efficient producers. On the contrary, it allows giving details about higher quality of the goods to clearly indicate advantages and justify the prices.⁹⁹⁵ Generally, the necessity to hide information derives from the businesses' fear that knowing and understanding the terms of the transaction properly, the consumer would not opt for their goods or services. Therefore, knowing consumers' poor abilities to accurately understand products weight, height, shape, and other technical characteristics, and compare them correctly, business entities intentionally disclose information in a confusing manner.⁹⁹⁶

Even the fact that a company tries to avoid a comparison of the price or quality of its goods' prices or quality is a demonstration that it might not be the most efficient producer and is inferior to other competitors.⁹⁹⁷ Therefore, their marketing strategies to hide or complicate the relevant information are directed to divert consumers away from its superior competitors. Thus, the victims of such practices are not only consumers or market competition but the most efficient producers as well. Therefore, it is logical to believe that it is in the interest of such entities to educate consumers and deliver correct information to them. For example, a farm growing organic fruits and vegetables will do its best to explain to consumers the benefits of its goods, compared to the genetically modified ones or against those grown with pesticides.

⁹⁹⁵ Al-Hakim Latif, *Handbook of Research on Driving Competitive Advantage through Sustainable, Lean, and Disruptive Innovation* (IGI Global 2016) 192.

⁹⁹⁶ Dawn R Deeter-Schmelz, *Proceedings of the 2010 Academy of Marketing Science (AMS) Annual Conference* (Springer 2014) 3; Great Britain: Parliament: House of Commons: Committee of Public Accounts, *Ofcom: The Effectiveness of Converged Regulation, Twentieth Report of Session 2010-11, Report, Together with Formal Minutes, Oral and Written Evidence* (The Stationery Office 2011) 14; *Case C-470/93 Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* (n 805).

⁹⁹⁷ See: Ioana Chiovenanu and Jidong Zhou, 'Price Competition with Consumer Confusion'.

6.3 Motivating the private sector to provide information and educate consumers

Ippolito and Mathios compared consumption behaviours under two regimes. In the first case a government educates consumers regarding the existing connection between fats and disease risks. In the second, companies are given incentives to provide the information through advertising and labelling. As argued by the authors, the more effective campaign was the one where the information was provided by a business actor.⁹⁹⁸

Filling the informational gaps is often an attractive business idea. For example, comparison websites, which allow price comparison between dozens of companies on similar goods or services, can overcome the major information barriers established on the market.⁹⁹⁹ Under certain conditions, a market provides enough incentives for undertakings to share information with consumers, educate them, and limit their misperceptions, but this approach is not a panacea either and also has some limitations.¹⁰⁰⁰ Referring back to the previous example, if the comparison website is for airlines and does not include all the competitors, skips the cheapest options or manipulates with the search results, then it will be more harmful than beneficial for consumers. Companies might be very effective in providing their services but manipulate consumer perception, by presenting the requested information or data in a certain manner, or prioritizing their sequence in a specific way. A good example of that Google, which was fined by the Commission for abuse of dominant position, as it systematically

⁹⁹⁸ Mathis (n 849) 91–95.

⁹⁹⁹ Mehta (n 859) 85.

¹⁰⁰⁰ Oren Bar-Gill, 'Competition and Consumer Protection: A Behavioral Economics Account'. Xavier Gabaix and David Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets' (2006) 121 *The Quarterly Journal of Economics* 505, 120, 505–540.

favoured its own shopping product and demoted rivals in its search results.¹⁰⁰¹ Moreover, when companies educate consumers on the best features of their goods, there is no guarantee that they will share the information correctly and without exaggerations.

It is true that competition sometimes provides incentives for undertakings to take measures which are also in the public interest, such as educating consumers. However, competition mostly forces companies to make profit. Companies are well-aware of the behavioral limitations of their consumers and they obviously attempt to take advantage of it and exploit consumer biases and misperceptions.¹⁰⁰² Other than that, there is always a risk of free riding. When a company starts investing in educating consumers, acting in a totally innocent manner and without any misleading purposes, other producers of the same goods will naturally try to exploit it and attract as many consumers as possible as a result of the campaign. In this way company A will not be able to enjoy the financial returns of its investments, as the whole sector benefited from its campaign and took a share in the benefits. Consequently, despite its good will, company A might not only lose interest in educating consumers, but even give up producing better quality goods, if the products of lesser quality but of cheaper price are easier to sell, without any extra effort.¹⁰⁰³

In a nutshell, the engagement of companies in consumer education and information sharing process is very desirable, but this approach has its limitations, is not self-sufficient, and cannot substitute legal regulations. Consumers are truly in an unequal position against producers regarding information, and the disclosure of certain data should not be dependent

¹⁰⁰¹ See: 'European Commission - Press Release - Antitrust: Guidance on Commission Enforcement Priorities in Applying Article 82 to Exclusionary Conduct by Dominant Firms – Frequently Asked Questions' (n 274).

¹⁰⁰² Bar-Gill (n 1026) 2.

¹⁰⁰³ Ibid. 12

on the good will or business strategy of producers. Informational remedies should be legally guaranteed. However, even under such conditions, this cannot ensure that the balance between the parties will be restored.

6.4 Regarding the limitations of informational remedies and how to avoid them

Consumers do not always take advantage of the information provided by getting to know it attentively and making thoughtful choices only after that. It is not only a matter of costs, but also of lack of time to invest. In our modern, vibrant world, one cannot spend too much time to know details of every purchased consumer good and every daily transaction.¹⁰⁰⁴ Moreover, processing the accessed information requires certain qualification and skills.¹⁰⁰⁵ Depending on the consumer's individual development, the provided information will be understood differently by different consumers, eventually only some of them benefitting from it.¹⁰⁰⁶ As some authors also claim, consumers who benefit more from the informational remedies are those who are less weak, more affluent, well-educated, and who usually belong to the middle class, thus not the typical vulnerable consumers. In this sense, the informational approach partially fails to address the needs of the weakest market players.¹⁰⁰⁷

There are various suggestions on how informational remedies might be improved in order to make them more fruitful. Behavioral studies have demonstrated that when information is

¹⁰⁰⁴ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349, 356.

¹⁰⁰⁵ Mehta (n 859) 87.

¹⁰⁰⁶ Anne-Lise Sibony and Alberto Alemanno, 'The Emergence of Behavioural Policy-Making: A European Perspective' 13.

¹⁰⁰⁷ Howells, Ramsay and Wilhelmsson (n 594). 143, 144.

long,¹⁰⁰⁸ or complex, consumers might misunderstand it or simply ignore it. For this reason, the law should require the information to be written in a simple and easily understandable manner, for consumers to actually read it and take it into consideration.¹⁰⁰⁹ Bar-gill argues that in order for information disclosure to have an actual impact, its scope should be broadened. The current regimes require sharing product attribute information, but the author claims that particular attention should be paid to the disclosure of the information related to product usage.¹⁰¹⁰ According to the behavioral approach, the information should be disclosed smartly, avoiding merely technical data, even in short size, and privileging meaningful and useful information, adequate and relevant for consumers.¹⁰¹¹

6.5 Nudges, when informational remedies are not effective

Informational remedies can successfully deal with certain challenges that consumers face due to information asymmetry on the market. However, consumer vulnerability is not limited only to that. As discussed, consumers suffer from cognitive biases that make their behaviour often irrational.¹⁰¹² Consumers' bounded rationality is a complex issue and its treatment requires different, more creative forms of state intervention. One of such alternative solutions are nudges,¹⁰¹³ a form of soft paternalism, with predesigned choice architects that aim to

¹⁰⁰⁸ As Sibony and Alemanno argues, it is unexpected a person to read terms and conditions of dozens of pages, just to purchase a song online. See: Sibony and Alemanno (n 1032) 13.

¹⁰⁰⁹ See: Sunstein and Thaler (n 594) 175-179; 1159-1202; Thaler and Sunstein (n 594); Mills (n 594); Sunstein, 'Fifty Shades of Manipulation' (n 594). See also: Frerichs (n 589) 289-314; Cseres, *Competition Law and Consumer Protection* (n 5) 183; Howells, Ramsay and Wilhelmsson (n 594) 11.

¹⁰¹⁰ Bar-Gill (n 1026) 2.

¹⁰¹¹ Sibony and Alemanno (n 1032) 13.

¹⁰¹² See: Chapter III, Section 2.1, *Behavioral analysis of the image of the consumer*

¹⁰¹³ See: Thaler and Sunstein (n 594). Sherzod Abdukadirov, *Nudge Theory in Action: Behavioral Design in Policy and Markets* (Springer 2016); Cass R Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism*

change consumers' behaviors predictably and desirably, without taking away their right to choose. Nudges seem to be a smart and cheap alternative to traditional regulatory measures.¹⁰¹⁴ Famous examples of nudges include a more prominent display of healthy food, on easily reachable locations in supermarkets or cafeterias, against unhealthy ones.¹⁰¹⁵ Another example is partitioned grocery carts, where the area for fruits and vegetables is bigger compared to the one reserved to other food types.¹⁰¹⁶

Behavioral law and economics is a developing discipline¹⁰¹⁷ which cannot offer satisfying answer to all the questions. Most of its studies, tests and experiments have been conducted within university laboratories and can be rather distant from real life experiences.¹⁰¹⁸ It can be argued that behavioral economics is much better at discovering problems and challenging traditional views, rather than offering actual remedies. The same situation applies to nudges. Consumers' behaviors are extremely contextual and multidimensional; therefore it is

(Yale University Press 2014); Cass R Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* (Cambridge University Press 2016).

¹⁰¹⁴ Sibony and Alemanno (n 1032) 2.

¹⁰¹⁵ Anna Pegels, *Green Industrial Policy in Emerging Countries* (Routledge 2014) 43.

¹⁰¹⁶ Yaniv Hanoch, Andrew Barnes and Thomas Rice, *Behavioral Economics and Healthy Behaviors: Key Concepts and Current Research* (Routledge 2017) 217.

¹⁰¹⁷ While behavioural economics can explain a number of issues more effectively and demonstrate old problems from a new perspective, it does not necessarily revolutionize everything and makes classic economics useless. Some of the issues, on which behavioural studies are generally focused can also be explained by traditional economic models. As argued, competition law practitioners have always had some awareness of consumer biases, and past competition cases have sometimes taken these biases into account without any explicit reference to behavioural economics. See: The Netherlands Authority for Consumers and Markets (ACM) (n 863).

¹⁰¹⁸ Frances K McSweeney and Eric S Murphy, *The Wiley Blackwell Handbook of Operant and Classical Conditioning* (John Wiley & Sons 2014) 276; Vicky Arnold and B Douglas Clinton, *Advances in Accounting Behavioral Research* (Emerald Group Publishing 2008) 10; *Issues in Behavioral Psychology: 2012 Edition* (ScholarlyEditions 2013) 792; Paul Chance, *Learning and Behavior: Active Learning Edition* (Cengage Learning 2008) 49.

tremendously difficult to predict in advance what kind of effect nudges might have on consumers.¹⁰¹⁹

Moreover, bounded rationality is not a state secret, known only to governmental institutions. Business companies are well-aware of consumer biases and they also try to use their own choice architecture tricks, named as counter-nudges.¹⁰²⁰ Overall, the period of active and successful employment of nudges is still yet to come. After more studies their better usage can become possible, but still no formal or informal measures from states and no market initiated campaigns can fully substitute the need for state regulations. It is a fact that consumers are vulnerable, but their protection and empowerment can most successfully be achieved by the comprehensive framework offered by consumer law. In addition to preventive measures, it is vital that consumers have easy access to compensatory measures in case their rights are violated. More about consumer involvement and easiness to access public or private law enforcement will be discussed in the next chapter.

7. The inevitable failure of competition law in the absence of consumer law

Behavioral law and economics have demonstrated that consumers are weak, irrational and

¹⁰¹⁹ Above mentioned cooling-off period paradox (note 979) well demonstrates how good intentions from a regulator might lead to unexpected negative consequence. It is not a similar case, but Georgian consumers suffered from the national insurance market due to the government's ineffective intervention on the market. Georgian government was concerned about the poor conditions of the existing hospitals, most of which are heritage from the Soviet Union and have not been properly renovated and brought to modern standards. In 2010 insurance companies started constructing hospitals at various regions of Georgia. It was most likely that their commitment was neither economically profitable nor a social project, but was a result of the governmental pressure. Eventually, the insurers suffered serious losses, which they decided to restore from the consumers. Transparency International Georgia studied the case in 2012 and claimed that the result of the government pressure and intervention in the insurance market led to 45 000 unjustified rejections to the insured individuals' applications. See: Transparency International Georgia, 'Health Insurance in Georgia' (2012) 7.

¹⁰²⁰ Alberto Alemanno and Anne-Lise Sibony, *Nudge and the Law: A European Perspective* (Bloomsbury Publishing 2015) 263; Steven Van de Walle and Sandra Groeneveld, *Theory and Practice of Public Sector Reform* (Routledge 2016) 104.

biased.¹⁰²¹ EU consumer law also recognizes deficit of rationality for consumers, at least partially.¹⁰²² This image is radically different from the perception of consumers by European competition law, which still sees them as rational thinkers and utility maximizers.¹⁰²³ This might seem somehow illogical, when behavioral studies are booming and clearly demonstrating that such an image is idealistic and non-existent.¹⁰²⁴ It is not due to the fact that competition economists or lawyers lag behind academic developments and are unaware of the bounded rationality of consumers or their biases. The only reason to keep using the traditional consumer image by competition law is because it presumes that the issues related to consumer bounded rationality has already been addressed and successfully dealt by consumer law.¹⁰²⁵ Behavioral studies seem to have limited direct effect over competition law,¹⁰²⁶ and it might be this way because the problems caused by consumer biases and

¹⁰²¹ See: Chapter III, Section2, *Challenging the average consumer benchmark*

¹⁰²² Purnhagen and Rott (n 716) 443.

¹⁰²³ Cseres, *Competition Law and Consumer Protection* (n 5) 182. Purnhagen argues that while EU competition law still does not fully recognize consumer vulnerability, it tends to implicitly recognize rationality deficit on the part of consumers, contrary to the US antitrust system. See: Purnhagen and Rott (n 716) 439–457.

Interestingly, Akerman Thomas also believes that EU consumer law recognizes consumer irrationality (restriction of selective distribution, because building prestigious image misleads consumers and the court was not sure consumers can resist this temptation) See: Thomas Akerman, ‘Competition Law and Consumer Law: Why We Need a Common Consumer Model, Varieties of European Economic Law and Regulation’ (2014) 3 *Studies in European Economic Law and Regulation* 439, 439–458.

¹⁰²⁴ See: Chapter III, Section2, *Challenging the average consumer benchmark*

¹⁰²⁵ Hugh Collins, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008). 114, note 61. Kati Cseres, ‘The Interface between EC Competition Law and the Competition Laws of the New Member States: Implementation or Innovation?’ [2006] *Amsterdam Center for Law & Economics Working Paper No. 2006-06*. 15. Katalin J Cseres, ‘Multi-Jurisdictional Competition Law Enforcement: The Interface Between European Competition Law and the Competition Laws of the New Member States: *European Competition Journal: Vol 3, No 2*’ (2007) 3 *European Competition Journal* 465, 490. Catherine Barnard and Markus W Gehring, *Cambridge Yearbook of European Legal Studies, Vol 14 2011-2012* (Bloomsbury Publishing 2012). 305. Fabrizio Cafaggi, ‘Self-Regulation in European Contract Law’. 15, note. 43.

¹⁰²⁵ See: Cseres, *Competition Law and Consumer Protection* (n 5) 182; Ioannidou (n 27) 27.

¹⁰²⁶ “This is not to say that behavioural economics has, or should have, a radical impact on competition policy. Indeed, if one were to write, or update, a textbook on competition law and economics, most of the text would probably remain unaffected by behavioural economics. It is likely that in many competition cases the insights of behavioural economics will not play a significant role, either because the cases concern business-to-business disputes where consumer biases are of less importance, or because the traditional competition policy tools can

bounded rationality are best addressed by consumer law rather than competition law.¹⁰²⁷

Competition law can successfully build its system, based on the assumption that consumers will act rationally, as long as consumer law effectively addresses their weaknesses. However, if consumer law entirely fails to deal with this task or, as in the case of Georgia, there is no consumer law at all, then the whole economic philosophy behind competition law, founded on rational choice theory crumbles and makes competition policies rather pointless. In this sense, Lewis notes that in developing states the costs of non-intervention of the state on the market in many circumstances are going to be much higher than the potential costs of intervention.¹⁰²⁸

If challenges of consumer vulnerability and bounded rationality are not addressed, so that they get educated, empowered and protected, even the perfectly competitive market can fail. Consumer biases will lead them to make choices that go against the order of competition, to keep the most efficient undertakings on the market and make the poorly performing ones to leave. In the case of Georgia, there is exactly such problem nowadays. Competition law is designed in accordance with the EU model, based on the rational choice theory, while no adequate regulations exist to support consumers in making rational choices.

Bar-gill demonstrates even by formulas that in competitive markets irrational consumers will definitely make irrational choices.¹⁰²⁹ Other scholars share the position that in case of

account sufficiently for the effects of any consumer biases.” See: The Netherlands Authority for Consumers and Markets (ACM) (n 863) i.

¹⁰²⁷ Ibid.

¹⁰²⁸ David Lewis, *International Antitrust Law & Policy: Fordham Competition Law 2008* (Barry E Hawk ed, Juris Publishing, Inc 2009) 419–437. See also: Eleanor M Fox, ‘Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries’ in Josef Drexel and others (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

¹⁰²⁹ Bar-Gill (n 1026) 3–16.

consumer irrationality market competition actually delivers harm to them, as consumers necessarily start making mistakes after the number of undertakings on the market goes above a certain threshold.¹⁰³⁰ In brief, consumers need to be protected and empowered, because otherwise the competition system will fail. Meanwhile, consumers' bounded rationality and biases can be relatively effectively addressed only by consumer law. Overall, accepting these statements means that consumer protection is an essential element for the success of competition policy and its absence from legislation can be a serious barrier to maintain high level of competition on the national market.

8. Consumers Law and Competition Law Enforcement

In addition to supporting consumers' rationality at the stage of purchasing, and in this way contributing to effective functioning of market, consumer law also provides certain legal tools to facilitate access to justice and law enforcement for consumers in case of violation of their rights. Initially, consumer law empowers and educates consumers, make them more confident, knowledgeable, self-defensive and in this way more active participant of competition law enforcement process. In this perspective, consumer law indirectly prepares consumers to participate in public enforcement of competition law, as confident and empowered consumers are presumed to be more active participants and contributors to the system. However, public enforcement has its limitations. Enforcement authorities have limited resources, therefore they cannot root out all the violations. This is why public enforcement concentrates on the cases selected to be the most prioritized in the public

¹⁰³⁰ Weakening of consumers in the post WWII period was primarily caused by immediate and dramatic rise in the number of producers. See: chapter II, Section 3, *Birth and evolution of consumer protection*

interests.¹⁰³¹ Moreover, even an extremely well-functioning public enforcement cannot restore the damages to the actual victims of the infringements, which always includes consumers.¹⁰³² That is why private enforcement is particularly important.

While the EU is actively trying to encourage the development and active use of private enforcement, it still remains extremely challenging to take individual actions. In case of standalone cases, individual consumers might find it impossible to win any case. The EU legal system cannot be compared to the US model, which has a very effectively functioning private enforcement system.¹⁰³³ Although there are positive statistics in the EU, still the overall number of private cases remains too small to have any significant impact. As Hodge argues, regular private enforcement cases will always be disproportionate for consumers to take, considering the promised low amount of compensation.¹⁰³⁴

In order to facilitate consumer participation to the law enforcement process, “*the toolbox of a modern consumer protection contains procedural rules for cheap, fast and easy access to justice*¹⁰³⁵ and is concerned about effective enforcement methods.”¹⁰³⁶ For example, the Damages Directive establishes rebuttable presumption of consumer harm in case of cartel

¹⁰³¹ Maria Bergström and others (eds), ‘Private Enforcement of EU Competition Law: A Comparison with, and Lessons From’, *Harmonising EU Competition Litigation: The New Directive and Beyond* (Bloomsbury Publishing 2016) 15–43.

¹⁰³² EU public enforcement system will be discussed in details in: Chapter IV, Section 2, *Public Enforcement in the EU*

¹⁰³³ See: Bergström and others (n 1060) 15–43.

¹⁰³⁴ Christopher Hodges, *New Modes of Redress for Consumers: ADR and Regulation*, Oxford Legal Studies Research Paper No. 57/2012

¹⁰³⁵ For a comparison, while certain norms of the Civil Code of Georgia establishes general obligation to provide precontractual information and provide sold goods in the condition, as described and promised, still these rules cannot be considered to be a substitute for consumer rights protecting mechanism. Relying on the Civil Code norms, consumers can restore damages only through lengthy, complex and not very cheap litigation procedures. See: Lakerbaia (n 744) 152.

More about this issue will be discussed in the following chapter.

¹⁰³⁶ Cseres, ‘The Controversies of the Consumer Welfare Standard’ (n 289). 130.

cases, and releases litigators from the tremendous practical difficulties to gain sufficient evidence and prove damages.¹⁰³⁷

As individual consumer claims are particularly challenging, consumer law allows collective actions where the individual consumer's role is minimized, and by the help of consumer enforcement authority or consumer Ombudsmen, consumers can collectively seek compensation for the damages that they suffered because of competition law infringement.¹⁰³⁸ In addition to the traditional forms of seeking compensation, via individual or collective actions, new alternative forms of enforcement are increasingly used by various authorities effectively. These issues will be analysed in the following chapter, which is dedicated to the study of consumers- participation to public and private enforcement, alternative forms of dispute resolution, and their major challenges and potential.

9. Conclusion

EU consumer law defines the average consumer as a reasonably well-informed, observant and circumspect market player. This image is well established in EU directives and shared by EU courts as well. This puts certain obligations on consumers, as they are not expected to be absolutely passive and inattentive in the process of buying. Yet, they are still widely viewed as weak and vulnerable actors who need to be protected, but many of the remedies concentrate on information provision. There is criticism against such approach, as behavioral studies demonstrate that the average consumer benchmark is more a theoretical model, than a realistic portrayal of the actual consumer. Consumers evidently suffer from a number of

¹⁰³⁷ European Parliament and European Council (n 998). Recital 47, Art., 17(2)

¹⁰³⁸ This issue will be discussed in details in: Chapter IV, Section 4.5, *Collective actions*

cognitive biases, their rationality is bounded and in order to address these challenges, state might need to intervene much more intensively and in more creative and innovative ways. The chapter reaffirms that vulnerability and even behavioural errors are hardly an exclusive feature of humans and legal entities might also suffer from similar problems. Therefore, it might be necessary to extend consumer protection over certain types of transactions, involving legal entities.

As the EU Commission underlines, “*empowered consumers are a significant driver of growth, as they intensify competition and innovation. Better decision making by consumers can have a significant impact on the competitiveness of the economy.*”¹⁰³⁹ This chapter shares the passion of this statement and provides arguments to prove that in order for consumers to be an active and effective player of the market, they need to be empowered, educated and supported by consumer law; equipped with consumer protection, confidence and rationality of the consumer rises. Eventually, consumers become more active on the market, with their wise choices they contribute to well-functioning of the market and in case of infringements that damage their economic interests, empowered consumers will actively seek for compensation, especially if collective redress mechanisms are offered. In this way consumers unintentionally contribute to effective competition law enforcement, increase deterrence and support the establishment of fairer business practices. In addition to protecting consumer rights and granting them standing to take actions, what else should be done to ensure a better engagement of consumers in the enforcement process, and how to organize enforcement authorities in order to effectively perform their duties will be discussed in the following chapter.

¹⁰³⁹ ‘Commission Staff Working Paper: Consumer Empowerment in the EU, SEC(2011) 469 Final’ (n 547). [2]

Chapter IV. Consumers' Access and Participation in Competition Law

Enforcement

1. Introduction

After discussing the findings of behavioural studies, it became more evident that the consumer is vulnerable and is in need of legal support, in order to take advantage of the benefits offered by market competition. Unless consumers manage to seize the best and most optimal opportunities among the available options, a competitive market distorts itself. When consumers act irrationally, by purchasing poor quality or expensive goods and services, ignoring available superior alternatives, the most consumer-oriented undertakings lose customers; they lose their market power and eventually leave the market. The vacated places are quickly filled with inferior enterprises, which are not the most effective ones in satisfying consumer needs. Such development might seem irrational, but it is not impossible to occur.

Evidently, consumers, driven with self-interest, are not always able to act in their best interests and they can be misled or tricked with various marketing strategies that are specially designed for these purposes. However, such effort might not always be required, as consumers can simply misjudge, due to their bounded rationality, and wrongfully consider certain poor quality or expensive products as the best options on the market. Such market setting contradicts the logic of competition, and creates the need for state intervention. As it has been stressed out, consumer law is the best-suited legal instrument for this objective.

Well designed and enforced consumer law rewards to market competition, as it educates and empowers consumers, transforming them from vulnerable and weak buyers into confident

and knowledgeable market actors. Informed consumer choices contribute to healthier market environment and sustainable and resource-efficient growth.¹⁰⁴⁰ Such consumers are less willing to take risks and are more circumspect and observant, taking decisions that best satisfies their needs.

Competition law presumes that consumers make economically optimal choices, as certain level of consumer rationality can be attained with effective consumer law regulations.¹⁰⁴¹ The potential of consumer law is not limited to benefiting efficient market functioning and competition. Consumers who are empowered, educated and confident are not only more effective in exercising free choice on a marketplace, but are also better prepared for cases where infringements occur and their rights are violated. While competition authorities enforce the law, in order to achieve established public goals, consumer law empowers consumers to protect themselves, and enforce the law in quest of seeking redress.¹⁰⁴²

The role consumers can play in competition law enforcement is significant. Consumer participation can broaden the scope of enforcement beyond the cases prioritized by the authority, and bring more light to the issues that are the most relevant and troubling for consumers. Consumers can be a source of valuable information and act as a watchdog of the

¹⁰⁴⁰ European Commission, 'Communication: A European Consumer Agenda - Boosting Confidence and Growth' (n 517) s 1.

¹⁰⁴¹ Collins (n 1023) 114, note 61; Kati Cseres (n 1023) 15; Cseres, 'Multi-Jurisdictional Competition Law Enforcement: The Interface Between European Competition Law and the Competition Laws of the New Member States: European Competition Journal: Vol 3, No 2' (n 1023) 465–502. Barnard and Gehring (n 1023) 305; Fabrizio Cafaggi (n 1023) 15, note. 43

¹⁰⁴² Josef Drexler, Warren S Grimes and Clifford A Jones, *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 37; Mads Andenas and Iris HY Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (Routledge 2013) 262–267.

market.¹⁰⁴³ Moreover, consumer involvement in law enforcement can be the key factor to make private actions an effective law enforcement mechanism.

In order for the potential of consumers in competition law enforcement to be fully utilised, consumer law is not sufficient but should be supported by competition law regulations. Limiting consumers' vulnerability, empowering and making them self-defensive is vital, but cannot be enough, unless consumers are granted proper procedural rights to defend themselves. In order for empowered consumers to get involved in the enforcement process, they should be given easy access to both public and private enforcement systems. In this perspective, the EU experience is very interesting and relevant for Georgia. While there have been many discussions and certain significant developments, during the recent years, the EU enforcement system still remains partially inaccessible for European consumers.

A critical analysis of the current EU regulations, of their potential and challenges, will allow to identify good practices for Georgia, as well as to learn lessons from their mistakes. While Georgia will need to develop its consumer law, it will also need to simultaneously reform the transplanted competition law, in order to unlock the full potential of empowered and educated consumers. In this process, it is important to focus not only on turning consumers into a useful tool that can serve for competition law enforcement, but also to put emphasis on consumers themselves and protect their interests. Therefore, the enforcement process should be organized with keeping consumers in mind, how to make them useful for the enforcement system and how to make the enforcement system useful for them.

¹⁰⁴³ Cseres and Mendes (n 143) 1–40; Katalin J Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' in Csongor István Nagy (ed), *The Procedural Aspects of the Application of Competition Law; European Frameworks – Central European Perspectives* (Europa Law Publishing 2016) 82–110.

This chapter assumes that consumer interests are best protected and consumers can contribute to competition law enforcement most effectively, when they are allowed to participate in public as well as in private enforcement, are granted easy access to them, and no artificial procedural barriers keep them demotivated to act. In light of this, the primary element to assess is the accessibility of various forms of enforcement for consumers, as well as the weaknesses of the current enforcement system in ensuring the active engagement of consumers. Attention will also be paid to certain alternative methods of enforcement that are increasingly used by the authorities, some of them showing particular dedication to consumer interests.

2. Primary objectives and forms of competition law enforcement

Competition law enforcement can be divided in two systems: public and private enforcement. While they are both dedicated to the same objectives, they are still different, each having its own advantages and limitations. Therefore, certain goals can be better achieved with one form of enforcement, rather than - with another. This makes each enforcement system special and at the same time, incapable of attaining all the set objectives, for it solely relies on only one model of enforcement, fully ignoring others. Generally, competition law enforcement is believed to have three primary goals: deterrence, compensation and remediation.¹⁰⁴⁴

Deterrence can be further divided into two forms, specific and general. The former is directed toward the specific infringing party and aims at making sure that she will not violate the law

¹⁰⁴⁴ Andrew I Gavil and Harry First, *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century* (MIT Press 2014) 237–238; Stephan Nikpay A, ‘Leniency Decision-Making from a Corporate Perspective: Complex Realities’ in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Bloomsbury Publishing 2015) 274; Jones and Sufrin (n 164) 13–14.

again in the future; the latter wants to have a wider, general impact, discouraging any market actor from committing an infringement. Compensation aims at restoring the losses suffered by the victims of infringement. Remediation is a more complicated objective, as it is not limited to sanctioning certain entities and compensating the others, but to restore the competition on the market that was lost due to infringement.¹⁰⁴⁵

There is a stereotypical division of enforcement models, according to the goals they serve for. Deterrence is often believed to be the primary objective of public enforcement, which uses its sanctions and fines to induce any potential violators, in order not to infringe the law in the future.¹⁰⁴⁶ Private enforcement is believed to be more focused on compensating the victims of infringements, with its possibility to initiate damage claims. However, such a division is not absolute. In practice, private actions can have very strong deterring effect, as well as public enforcement can encourage or support the process of compensating the victims.¹⁰⁴⁷ A number of commentators agree that the goals of deterrence and compensation are actually interrelated and complementary.¹⁰⁴⁸ Therefore, the stated objectives can be most effectively achieved by using a combination of various forms of enforcements. The same applies to remediation, which requires a more holistic approach, rather than simple public and private instruments.

¹⁰⁴⁵ Gavil and First (n 1042) 237–238; Nikpay (n 1042) 274; Jones and Sufrin (n 164) 13–14.

¹⁰⁴⁶ Wouter PJ Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ 3–26. Andrea Renda and others, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios – Final Report’ (2007) DG COMP/2006/A3/012; Roger Van den Bergh, ‘Private Enforcement of European Competition Law and the Persisting Collective Action Problem’ (2013) 20 Maastricht Journal of European and Comparative Law 12, 13–15; Kai Hüschelrath and Sebastian Peyer, ‘Public and Private Enforcement of Competition Law: A Differentiated Approach’ 4, 6 <<https://www.econstor.eu/handle/10419/74538>> accessed 4 October 2017; Kent Roach and Michael J Trebilcock, ‘Private Enforcement of Competition Laws’ [1997] *Policy Options*, Vol. 17 13, 13–16.

¹⁰⁴⁷ *Ibid.*

¹⁰⁴⁸ *Ibid.* Alexander Italianer, ‘Speech at the 5th International Competition Conference, Public and Private Enforcement of Competition Law’ (Brussels, February 2012).

This can often mean to engage in alternative forms of enforcement, being more creative when dealing with the major competition distortions.¹⁰⁴⁹

Along the same lines, some authors classify enforcement systems according to the interests, they are called to protect. Public enforcement is widely viewed as a tool to pursue public interests, among which deterrence. As already underlines, compensating the victims entails public benefit, but the stress is still on the private interests of a victim in having her losses compensated.¹⁰⁵⁰ This superficial categorization might wrongfully lead to the conclusion that the interests of consumers as private parties can be fully accommodated and protected with private enforcement. However, when evaluating the systems, it should be borne in mind that consumers have a certain part and role in the both systems. Consumer interests cannot be properly protected with exclusively one form of enforcement. On the contrary, they will be best defended when the both enforcement systems care about and pay special attention to consumers.

Moreover, it should be stressed that consumers are not passive recipients of benefits. They participate in generating those benefits and promote effective functioning of a market. Individuals can act as agents of public interest and benefit consumer welfare and the effective functioning of a market.¹⁰⁵¹ When market competition is disturbed by infringing undertakings, consumers can react and have a significant and active role in enforcing competition law.¹⁰⁵² In order to let consumer take some initiative in their own hands and act in this beneficial manner, both enforcement systems should remain open and accessible.

¹⁰⁴⁹ Lachnit (n 210) 18.

¹⁰⁵⁰ Harding and Joshua (n 71) 239; Nina Bucan Gutta, *The Enforcement of EU Competition Rules by Civil Law, Maklu* (Maklu 2014) 24.

¹⁰⁵¹ Ioannidou (n 27). 65

¹⁰⁵² *ibid.* 15-25

Consumers need and deserve involvement in both forms of enforcement also because public enforcement remains the primary model of competition law enforcement in the EU¹⁰⁵³ and excluding them from this process would not be justified. As for private enforcement, albeit not widely used in most of the EU member states, it has been promoted and supported in the context of EU competition policies already for many years¹⁰⁵⁴ and is the best-suited mechanism for compensatory purposes,¹⁰⁵⁵ which is the main interest for consumers. In a nutshell, developing an effective competition law system does not mean picking one of the models of enforcement, but to create an effective and well-balanced combination of both of them.

EU law has long-standing experience of enforcing competition law, using both enforcement systems, while Georgia is only taking the first steps in this direction. However, there are already established mechanisms for both types of enforcement and a number of finished cases that allows conducting a comparative research between Georgia and the EU.

3. Public Enforcement in the EU

Public enforcement has always been and still remains the mainstream form of competition

¹⁰⁵³ Ibid. 1; Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Bloomsbury Publishing 2008) 15; Folkert Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Edward Elgar Publishing 2015) 220; Barbora Jedlickova, *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law* (Edward Elgar Publishing 2016) 231; Magnus Strand, *The Passing-On Problem in Damages and Restitution under EU Law* (Edward Elgar Publishing 2017). 291; Gutta (n 1048) 24; Lorenz (n 164) 362. 362

¹⁰⁵⁴ Ioannidou (n 27) 47

¹⁰⁵⁵ Jones and Sufrin (n 164). 1043; Van den Bergh (n 1044). 12-15; Wils (n 1044) 32, 3–26; Renda and others (n 1044). Roach and Trebilcock (n 1044) 492-501; Hüschelrath and Peyer (n 1044) 4, 6

law enforcement in the EU.¹⁰⁵⁶ Considering the tendency of ever-increasing fines¹⁰⁵⁷ for hard-core competition law infringements, public enforcement is supposed to be effective in deterring future infringements¹⁰⁵⁸ and in keeping effective competition on the market. High-level market competitiveness is already beneficial for consumers as “*effective competition brings benefits to consumers, such as low prices, high-quality products, a wide selection of goods and services, and innovation.*”¹⁰⁵⁹ The public enforcement institution for the EU is the Commission, which shares its authority together with the NCA. As demonstrated in Chapter I, there are multiple objectives established for EU competition law, determined through various legal acts, soft law instruments and the case law of the EU courts.¹⁰⁶⁰ Analysing them shows that the Commission is the leader in embracing consumer welfare standard.¹⁰⁶¹ Therefore, a successful performance of the Commission and the NCAs is important, and the way public enforcement develops in the EU, which cases it prioritizes, and then how it effectively deals with them greatly matters for European consumers.

¹⁰⁵⁶ Ioannidou (n 27). 1; Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (n 1051). 15; Wilman (n 1051). 220; Jedlickova (n 1051).231; Strand (n 1051). 291; Gutta (n 1048). 24; Lorenz (n 164). 362

¹⁰⁵⁷ The trend of increasing amount of monetary fines over competition law infringers is easily noticeable in the EU. A side effect of this tendency is that the higher the fines are, the higher are chances of challenging them. Eventually, it is now almost a norm for fined undertakings to go to a court and dispute legality or amount of the imposed fines. See: Barry J Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (Routledge 2008) 261. 261; See also: Ioannis Lianos and Damien Geradin, *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar Publishing 2013). 342; Kai Hüschelrath and Heike Schweitzer, *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives* (Springer 2014). 3, 20; European Commission, ‘Cartel Statistics’ <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>>.

¹⁰⁵⁸ Evidently, deterrence of future infringements is a relative term and no absolute deterrence is either expected or achievable. Colossal amounts of potential economic profits still tempt undertakings to engage with illegal anticompetitive practices. Moreover, limited resources of enforcement authorities can never allow detection and investigation of every single violation on a market. More about this issue will be discussed later in this chapter.

¹⁰⁵⁹ EU Commission, DG Competition (n 187). Art. 4

¹⁰⁶⁰ See: Chapter I, Section 4. *Objectives of EU Competition law*

¹⁰⁶¹ Athanassios Skourtis, ‘Is Consumer Welfare the (Only) Way Forward? A Re-Appreciation of Competition Law Objectives Ante Portas in Both US and EU’ <<http://competitionlawblog.kluwercompetitionlaw.com/2012/08/10/is-consumer-welfare-the-only-way-forward-a-re-appreciation-of-competition-law-objectives-ante-portas-in-both-us-and-eu/>> accessed 5 October 2017. Jones and Sufrin (n 164) 46

3.1 The need for engaging consumers in the process of public enforcement

The relationship between competition law and consumers is not limited to consumers benefiting from competition regulations, but consumers also actively contribute to the effective functioning of competition law system. The self-interested motivation of consumers is an asset that can be effectively used in order to satisfy public interests. Consumers protect themselves and their economic interests on the marketplace. They are determined to keep the market competitive, as it offers the best conditions for them to trade. They react against market infringements and seek redress that, even motivated by self-interest, is in full compliance with public objectives. However, consumers do more than recovering personal losses. As suggested by Ioannidou, their role is systematic, and with proper enforcement mechanism they can be instrumental in competition law enforcement, promoting not only their individual interests, but the objectives of the system as a whole.¹⁰⁶²

As already noted before, there are several equally valuable objectives of competition law that public enforcement system is supposed to attain.¹⁰⁶³ One of the primary objectives still remains consumer welfare. Moreover, the EU Commission is particularly known for recognizing consumer welfare as an objective for its activities,¹⁰⁶⁴ while EU courts have departed from recognizing consumer welfare as the ultimate goal.¹⁰⁶⁵

¹⁰⁶² Ioannidou (n 27). 3

¹⁰⁶³ See: Chapter I, Section 4. *Objectives of EU Competition law*

¹⁰⁶⁴ Skourtis (n 1059). Jones and Sufrin (n 164). 46

¹⁰⁶⁵ *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181) [38]

A major problem regarding the concept of consumer welfare, as often discussed in academia, is its obscurity, and the fact that it often fails to be translated into concrete policies, thus remaining an abstract concept.¹⁰⁶⁶ Authors point to the existing inconsistency between the rhetoric and the actual enforcement of the law. While consumer welfare is declared to be an objective, enforcement authorities often neglect consumer interests. Consumer harm is often presumed and so is consumer benefit without any actual economic evidence.¹⁰⁶⁷ The state intervention is presented as beneficial for consumers and it is often assumed that consumer interests are safeguarded, without an actual need to involve them in the process.¹⁰⁶⁸ However, limiting consumers' accessibility to public enforcement¹⁰⁶⁹ questions both the validity of consumer welfare as an actual objective, and the efficiency of enforcement system, as it cannot ensure the participation of the ultimate beneficiaries in the process.¹⁰⁷⁰ According to Heinemann and Möllers, regulations that aim to benefit consumers but limit their involvement in public enforcement, are paradoxical.¹⁰⁷¹

Some might find the argument based on consumer welfare objectives, irrelevant since the ECJ ruled in *T-Mobile* that competition rules are not directed to protect only the immediate interests of consumers but also the structure of the market and thus competition as such.¹⁰⁷²

¹⁰⁶⁶ Brodley (n 236). 1032, 1033; Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU C' Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' 16; Daskalova (n 238). 133; International Competition Network (ICN) (n 242).

¹⁰⁶⁷ Gormsen (n 31). 179-180; Mackenrodt, Gallego and Enchelmaier (n 269). 46

¹⁰⁶⁸ HW Micklitz, *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing 2011) 434

¹⁰⁶⁹ Katalin J Cseres, 'The Impact of Regulation 1/2003 in the New Member States' 6(2) *Competition Law Review* 77, 77-121. Cseres and Mendes (n 143). 1-40; Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 82-110

¹⁰⁷⁰ Micklitz (n 1066). 434

¹⁰⁷¹ Möllers and Heinemann (n 7). 559

¹⁰⁷² *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181) [38]

While some interpreted this decision as a rejection of the consumer welfare standard, and an elevation of the competition process to the rank of ultimate objective,¹⁰⁷³ the judgment does not give any explicit ranking of objectives, nor declares the competition process as the only goal. In contrast to the earlier judgment of the GC, which recognized the well-being of consumers as the “ultimate purpose”,¹⁰⁷⁴ *T-mobile* might seem a shift in the position; however, consumer interests are still mentioned in the same context as the competition process, as values that need to be protected by competition rules.¹⁰⁷⁵

Even if a major emphasis is made on competition process, still consumer interests cannot be neglected. Their harm or benefits are among the major factors that are considered before finding a competition law infringement.¹⁰⁷⁶ Furthermore, if competition process is the primary purpose, it should ensure economic efficiency. As widely acknowledged, the latter cannot be achieved and market competition deteriorates when prices increase, quality decreases and the output is reduced. Interestingly, exactly the same features are the main indicators of consumer injury. Eventually, protecting competition as such automatically includes safeguarding consumer interests as well.¹⁰⁷⁷

¹⁰⁷³ Nazzini (n 138). 142-143, Cseres and Mendes (n 143). 5, 6; Cseres, ‘The Procedural Aspects of the Application of Competition Law. Consumers’ Participation in Competition Law Procedures’ (n 1041). 83, 85

¹⁰⁷⁴ *Joined Cases T-213 & 214/01, Österreichische Postsparkasse* (n 183) [115]; See also: *Case T-168/01, GlaxoSmithKline Services Unlimited v. Commission* (n 157) [109].

¹⁰⁷⁵ *C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit* (n 181) [38]

¹⁰⁷⁶ Cseres, ‘Contraversies of the Consumer Welfare Standard’ (n 418). 121-173; Liza Lovdahl Gormsen, ‘The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC’ (2007) 3 *European Competition Journal* 329. 329.

¹⁰⁷⁷ Cseres, ‘The Procedural Aspects of the Application of Competition Law. Consumers’ Participation in Competition Law Procedures’ (n 1041) 86

Moreover, protecting consumer interests is more than merely an objective for competition law and it can never be irrelevant for any EU legal regulations.¹⁰⁷⁸ According to Article 12 TFEU, consumer protection is an objective that should be always taken into account when defining and implementing EU policies. Consumer interests are also among the public interests which the EU Commission is bound to pursue, as an administrative body,¹⁰⁷⁹ and it is the EU Commission that is responsible for enforcing EU competition law.

Involving consumers in competition law enforcement is not merely a necessity for the effectiveness of the system, but it is absolutely justified from the point of fairness. Competition deteriorates when consumers' conditions are worsened off, in terms of quality, prices and output, due to the raise of inefficient undertakings on the market.¹⁰⁸⁰ Enforcement of competition law has a direct effect over the lives of consumers and on their economic interests; hence it is not only logical, but also fair to actively engage them in the enforcement process.¹⁰⁸¹ Once consumers are given access to public enforcement, they can support the system in monitoring the market and contribute in their capacity as watchdogs. Their participation is beneficial for public purposes as well, as they possess a profound and specific knowledge of the market functioning, gained from their daily market transactions. In this sense, they can be a valuable source of information due to their first-hand knowledge of market developments.¹⁰⁸² While some might question the need for consumers' involvement in public enforcement, in light of the presence of private enforcement as specially tailored tool

¹⁰⁷⁸ Nazzini (n 138) 142-143

¹⁰⁷⁹ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041) 84

¹⁰⁸⁰ *Ibid.* 86. note. 21

¹⁰⁸¹ Cseres and Mendes (n 143). 1

¹⁰⁸² *ibid.* 2

to protect private interests, it should be borne in mind that certain enforcement-related goals are only achievable through public enforcement, or they are much harder to be attained by means of private enforcement. Public enforcement possesses more effective and powerful investigative means to detect competition law infringement and gain evidence to prove it.

Effective public enforcement supports private enforcement and is its strongest stimulator. There are a number of difficulties related to stand-alone cases¹⁰⁸³ that can make private enforcers reluctant to take action, while successful public enforcement can encourage private parties to take follow-on actions¹⁰⁸⁴ and claim damages. While the priorities and directions for public enforcement are determined by the enforcing institutions, consumers can only have some saying in shaping its scope and influencing its development toward certain direction only if they are granted access to it.

Considering this challenge, an increased consumer involvement in the enforcement process should contribute to identifying actual consumer problems, their harm and benefits better.¹⁰⁸⁵

Consumer involvement in competition law enforcement has yet another incentive: it educates consumers and raises awareness about market competition issues.¹⁰⁸⁶ This is particularly important, as new behavioural discoveries demonstrate that traditional forms of informing consumers often fail. Moreover, while a number of authors question the legitimacy of the

¹⁰⁸³ A standalone action is a claim when infringement has not been established by the Commission or a national competition authority, therefore the claimant has to prove that infringement has occurred and later must demonstrate that damages have been consequently suffered due to the infringement.

¹⁰⁸⁴ A follow-on action is a damage claim when infringement has already been found by the decision of the Commission or a national competition authority, which releases private enforcer from the obligation to prove the fact of violation and allows relying on the facts already established by the decision.

¹⁰⁸⁵ Ioannidou (n 27). 44

¹⁰⁸⁶ Ioannidou brings an example of a consumer organization that sues and wins a case against a cartel. In addition to delivering compensation to certain consumers, this signals consumers generally that they should be more alert and actively engage with price comparison on the market. See: *ibid.* 67-68

state's involvement in private transactions, consumers' participation in the enforcement process brings the beneficial element of involving interested stakeholders, which adds legitimacy to competition law measures.¹⁰⁸⁷ Overall, the active participation of consumers in competition law enforcement carries a number of advantages and generally makes competition law more consumer-oriented.

3.2 Lodging a complaint to the enforcement authority

As already mentioned, the EU Commission is the major enforcing body in the EU, which shares its authority with the NCAs. These bodies are entitled to open an investigation on their own initiatives, if there are signs of competition law infringements. In addition to the actions taken on their own initiatives, the primary role of competition authorities is to review the complaints lodged by interested parties. The NCAs might open an investigation based on a complaint when it is submitted according to the established procedural rules. Moreover, for a complaint to be admissible, the complainant can be an enterprise or an individual who has “*legitimate interest*”.¹⁰⁸⁸ If a complaint is anonymous, it might be a useful source for some information, but it does not impose an obligation, over an authority to launch an investigation.¹⁰⁸⁹

The Commission uses a broad interpretation of the concept of legitimate interest, considering that “*persons who claim a legitimate interest ... [can be] any person who could plausibly*

¹⁰⁸⁷ Ibid. 70-72

¹⁰⁸⁸ European Commission, ‘Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty’ 05. [33-40]

¹⁰⁸⁹ The only obligation is to maintain anonymity of the information provider. See: *Case 145/83, Stanley George Adams v Commission of the European Communities* [1985] Eur Court Rep 1985 -03539. European Commission, ‘2004/C 101/05’ (n 1086). recital 81

claim to have suffered as the result of an infringement.”¹⁰⁹⁰ The claimant can also be an association of undertakings, a trade union,¹⁰⁹¹ or a trade association. In order for an undertaking to claim a legitimate interest, it should be operating on the relevant market, or the complained conduct should be liable to directly and adversely affect its interests. According to the established practice, the claimant can be an undertaking which is a party of an agreement that is the subject of the complaint. It can also be a competitor, which interests have allegedly been damaged by the potentially anticompetitive behaviour, or which has been excluded from a distribution system.¹⁰⁹² Consumers, as well as bodies representing them, such as consumer associations, can also lodge a complaint.¹⁰⁹³ However, in order for an individual consumer to file a complaint, her interests should have been directly and adversely affected by the contested behaviour, meaning that a person should be a buyer of goods or services that are the object of an infringement.¹⁰⁹⁴

The right to lodge a complaint is a significant legal tool empowering consumers. It gives them a voice in the law-enforcement process and an ability to influence in what direction this process should develop. As mentioned above, consumers have first-hand knowledge of markets that makes them effective watchdogs. Markets they have particularly good knowledge of, are the ones of mass-market consumer goods.¹⁰⁹⁵ They can detect illegal irregularities, notice relaxed competition among certain undertakings on the market and

¹⁰⁹⁰ European Commission, ‘Dealing with the Commission: Notifications, Complaints, Inspections and Fact-Finding Powers Under Articles 85 and 86 of the EEC Treaty’ recital 2.2.

¹⁰⁹¹ Ivo Van Bael, *Due Process in EU Competition Proceedings* (Wolters Kluwer Law & Business 2011). 117

¹⁰⁹² European Commission, ‘2004/C 101/05’ (n 1086) 05 [36]

¹⁰⁹³ *Ibid.* [37], European Commission, ‘Dealing with the Commission: Notifications, Complaints, Inspections and Fact-Finding Powers Under Articles 85 and 86 of the EEC Treaty’ (n 1088. recital 2.2

¹⁰⁹⁴ European Commission, ‘2004/C 101/05’ (n 1086) 05 [37]

¹⁰⁹⁵ Cseres, ‘The Procedural Aspects of the Application of Competition Law. Consumers’ Participation in Competition Law Procedures’ (n 1041) 84, 92; Cseres and Mendes (n 143). 1-40

notice sudden drop or raise of prices without any sound economic justification. All these might be a good indication of anticompetitive practices on the market. However, consumers have optimal access to information only in certain types of infringements, such as vertical restraints or unilateral conduct.¹⁰⁹⁶

Horizontal agreements are more harmful than vertical restraints,¹⁰⁹⁷ and are extremely hard to detect, due to their secretive nature. Being often indirect purchasers and not in direct contact with law infringing undertakings makes it harder for consumers even to notice that an infringement takes place.¹⁰⁹⁸ Even after detection, consumers cannot have sufficient initial information to take actions. Investigating cartels and collecting convincing evidence against them is an extremely complicated task and requires investigative powers and tools possessed by public authorities, such as leniency program, dawn raids and so forth.¹⁰⁹⁹

In addition to the practical difficulties that discourage consumers from taking action, they might remain rationally apathetic and lack motivation to invest an unproportionally high amount of time and personal financial resources for the potential, limited amount of compensation.¹¹⁰⁰ This is when public enforcement is particularly handy, allowing consumers

¹⁰⁹⁶ Ibid. Van den Bergh (n 1044) 32

¹⁰⁹⁷ European Commission, 'Guidelines on Vertical Restraints' (n 161) [6].

¹⁰⁹⁸ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041) 84, 92;

¹⁰⁹⁹ Ibid. See also: European Commission, 'Notice on Immunity from Fines and Reduction of Fines in Cartel Cases', [3]; Hawk (n 269). 48; For a critical analysis of a leniency program effectiveness (however, less applicable to the EU), see: Nikpay (n 1042); Johannes Paha, *Competition Law Compliance Programmes: An Interdisciplinary Approach* (Springer 2016) 196; KJ Cseres and others, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing 2006) 190–191.

¹¹⁰⁰ Rational apathy comes in two distinct forms. A consumer might find it unjustified to bear high costs of litigation, considering limited potential amount of compensation and low possibility to actually get it. This phenomenon deters private actions from the victims of a law infringement. Another form of rational apathy discourages consumers to even invest any time and effort in monitoring prices or other market developments that eventually leads to impossibility even to detect on-going competition law infringements. See: Mel Marquis

to share the results of their monitoring and file claims about alleged infringements with relevant state institutions, which are supposed to have a much deeper knowledge of the market, pool of expertise, resources and legal ability to investigate filed cases further. In light of this, granting a legal right to lodge a complaint should be empowering for consumers and a strong tool in their hand to protect their rights through public enforcement. However, there are a number of factors that fades its attractiveness, making it challenging for consumers to exercise their rights effectively

3.3 Limited resources of enforcement authorities and practice of priority setting

Enforcement institutions, similar to individuals or organizations, have limited resources. There is an obvious difference in the possibilities of an authority, specially designed to enforce a certain field of law, and a regular consumer, yet limits of resources and abilities are unavoidable even for them.¹¹⁰¹ One of the primary objectives of the modernisation of competition law enforcement system in 2003 was to deal with the increasing caseload of the EU Commission and the NCAs, by directing the excessive flow of cases toward the national

and Roberto Cisotta, *Litigation and Arbitration in EU Competition Law* (Edward Elgar 2015). 52; Murali Prasad Panta, *Business, Consumer and the Government: An Economic and Legal Perspectives* (India and Germany) (Mittal Publications 2001). 60-61; Franziska Weber, *The Law and Economics of Enforcing European Consumer Law: A Comparative Analysis of Package Travel and Misleading Advertising* (Routledge 2016). 35-36; Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014). 125; Marcus Lutter, *Legal Capital in Europe* (Walter de Gruyter 2006).; Ioannidou (n 27) 399-400

Even if potential gain can be significant, consumers are often barred with so called *Hyperbolic Discounting* that discourages them to make an effort or refuse the comfort of a given moment for potential future gains. See: Gordon Foxall, *Addiction as Consumer Choice: Exploring the Cognitive Dimension* (Routledge 2016). 46; Tina Harrison and Hooman Estelami, *The Routledge Companion to Financial Services Marketing* (Routledge 2014). 244; Michal Skorepa, *Decision Making: A Behavioral Economic Approach* (Palgrave Macmillan 2010). 339

¹¹⁰¹ John Sanghyun Lee, *Strategies to Achieve a Binding International Agreement On* (Springer 2016) 77, 53, 184.; OECD, 'Consumer Policy Toolkit'. 104; Richard Macrory, *Regulation, Enforcement and Governance of Environmental Law* (Cameron May 2008) 730; Einar Hope, *Competition Policy Analysis* (Taylor & Francis 2002) 8. Malinauskaite (n 87). 169

courts.¹¹⁰² Considering limitations in the capacity of enforcement authorities, the solution was found in the development of a private enforcement system that allows victims of infringements to claim damages through litigation, while competition authorities can focus on cases of particular significance.¹¹⁰³

As a matter of convenience, it would be desirable to direct any complaint to a single body that could deal with them professionally, without requiring much effort from complainants. However, as stated by Lowe, “*rules must be shaped in a way that they can be implemented within the real world constraints to which the organization is subject – such as limited resources.*”¹¹⁰⁴ More precisely, public enforcement authorities, as administrative bodies, are meant to serve public interests. As their capabilities have clear boundaries, they need to rationalize the allocation of resources and deal with the tasks, lying ahead of them, optimally. A reasonable way to ensure effectiveness and credibility of state institutions is prioritization – a process of strategic planning to determine operational priorities, in order to successfully attain the desired objectives.¹¹⁰⁵

Based on these principles, enforcement authorities were granted discretion to set priorities according to the public goals they pursue. Priority setting is not an easy task, and requires taking into consideration a number of factors. The Commission’s current policy is based on

¹¹⁰² Janet Laible and Henri J Barkey, *European Responses to Globalization: Resistance, Adaptation and Alternatives* (Emerald Group Publishing 2006) 80; ‘European Commission - PRESS RELEASES - Press Release - Commission Finalises Modernisation of the EU Antitrust Enforcement Rules’ <http://europa.eu/rapid/press-release_IP-04-411_en.htm?locale=en> accessed 5 October 2017.

¹¹⁰³ Wouter PJ Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (2003) 26 *World Competition* 473.

¹¹⁰⁴ Lowe (n 392) 1

¹¹⁰⁵ Cseres, ‘The Procedural Aspects of the Application of Competition Law. Consumers’ Participation in Competition Law Procedures’ (n 1041). 87; International Competition Network, ‘Agency Effectiveness Handbook’ 29–46.

the principle of subsidiarity, and driven by the intention to utilize its limited resources in the most efficient manner.¹¹⁰⁶ Moreover, the Commission's policy has developed out of the EU courts' case law.¹¹⁰⁷

The main principles regarding the Commission's discretion, when reviewing a complaint, have been determined in *Automec II*.¹¹⁰⁸ It established that lodging a complaint, to the Commission, does not automatically give a right to get a decision.¹¹⁰⁹ The Commission is entitled to give different degrees of priority to the complaints, considering the Union's interests¹¹¹⁰ and accordingly decide whether to launch an investigation. While reviewing the complaint, the Commission is also required to carefully examine the factual and legal elements brought to its attention.¹¹¹¹ The ECJ also stressed that the Commission is not a civil court, safeguarding the individual rights of private persons in their relations inter se, but it is an administrative authority and must act in the public interest.¹¹¹² *Automec II* also introduced the possibility to reject a case if it has already been referred to the national court.¹¹¹³ This concept was further developed in subsequent decisions¹¹¹⁴ and currently the Commission's

¹¹⁰⁶ Benedict PB Francis, 'Subsidiarity and Antritrust: The Enforcement of European Competition Law in the National Courts of Member States' (1995) 27 *Law and Policy in International Business* 196.

¹¹⁰⁷ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 88

¹¹⁰⁸ *Case T-24/90, Automec Srl v Commission of the European Communities* [1992] Eur Court Rep 1992 II-02223 90.

¹¹⁰⁹ *Ibid.* [74-76]

¹¹¹⁰ *Ibid.* [83-84]; See also: *Joined Cases T-213 & 214/01, Österreichische Postsparkasse* (n 183). [115]

¹¹¹¹ *Ibid.* [79]

¹¹¹² *Ibid.* [85]

¹¹¹³ *Ibid.* [87]

¹¹¹⁴ See: *Case T-114/92, Bureau Européen des Médias de l'Industrie Musicale v Commission of the European Communities* Eur Court Rep 1995 II-00147 [5]. *Case T-5/93, Roger Tremblay and François Lucazeau and Harry Kestenberg v Commission of the European Communities* [1995] Eur Court Rep 1995 II-00185 [60-62]. *Case T-575/93, Casper Koelman v Commission of the European Communities* [1996] Eur Court Rep 1996 II-00001 [427]. *Case T-427/08, Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission* [2010] Eur Court Rep 2010 II-05865 08. *Case T-458/04, Au Lys de France SA v Commission of the European Communities* [2007] Eur Court Rep 2007 II-00071 [83]. See also: *Case T-24/90* (n

notice on handling complaints states that the commission is entitled to reject a complaint on the ground that it is possible to bring an action before national courts.¹¹¹⁵

The Commission's notice also allows rejecting certain complaints without justification, by merely indicating the pursuing of different priorities or lack of resources.¹¹¹⁶ Based on the case law, it is also granted the right to reject a case for lack of EU interest.¹¹¹⁷ However, the decisive and challenging factor is presenting public enforcement as an alternative for private enforcement; therefore one's right to access public enforcement can be barred on the grounds of her ability to take the case to a national court. The critical question is how effectively national courts actually protect the right of victims and if one can truly turn to them, without significant legal and practical barriers.¹¹¹⁸

It should be stressed that priority setting is not a choice, but a common-sense measure to deal with an endless number of potential complaints. Enforcement authorities should not be required to intervene in every possible case, but - "*at the right time, in the right markets, in relation to the right problems and with correct remedies.*"¹¹¹⁹ However, the problem is when rejecting a complaint and directing it to the national courts occurs, without examining the complainant's actual abilities to revert to litigation. If legal regulations and practical barriers make private actions extremely hard to take, then using this argument does not mean

1106). [89-96]. Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 89; Ioannidou (n 27). 159-160

¹¹¹⁵ European Commission, '2004/C 101/05' (n 1086) 05. [44]

¹¹¹⁶ European Commission, '2004/C 101/05' (n 1086). recital 8

¹¹¹⁸ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 89

¹¹¹⁹ Lowe (n 392). 2

suggesting an alternative mechanism for protecting rights, but totally barring one's access to enforcement and justice

In addition to that, often the priorities set by enforcement authorities can also be disputable. If they do not match with the interests of a complainant, then her complaints will be easily rejected. This turns the complaint mechanism into an information notification system, where the victims of non-priority types of violations simply provide information to the authorities, but cannot trigger an investigation. The application of this criterion is particularly sensitive regarding consumer interest cases, where the rejection should be well-grounded and not automatic. That was demonstrated by *BEUC v. Commission*,¹¹²⁰ when the General Court annulled the Commission's decision not to investigate the complaint, submitted by a consumer organization. The Court's decision was based on the ground that the Commission did not conduct a proper factual and legal analysis of the complaint.

While the given case was viewed as a victory for consumer advocates,¹¹²¹ the policy still remains unchanged, as the Commission has full discretion to set its own priorities, provided that it justifies them with adequate reasoning.¹¹²² In order to make this approach more tolerable, the established priorities should be known, justified and understood not only by the authority personnel, but by the wider society as well. Any enforcement institution should be able to explain to the public, how the choices it made benefit consumers, contribute to other

¹¹²⁰ *Case T-37/92, Bureau Européen des Unions de Consommateurs and National Consumer Council v Commission of the European Communities* [1994] ECR II-285 92.

¹¹²¹ M Goyens, 'A Key Ruling from the ECJ'.

¹¹²² Ioannidou (n 27). 161-162

competition law objectives and the wider public good, and how does it support business and market development.¹¹²³

3.4 Rejecting a complaint, due to the complainant's ability to litigate

As explained above, in order to protect public enforcers from excessive backlog and ensure their effective performance with tight resources, the case law of the EU courts has established and the Commission has adopted the practice of rejecting complaints, on the ground of a complainant's possibility to protect its rights adequately before a national court.¹¹²⁴ Following this approach, a number of Member States, such as the UK, the Netherlands, Hungary, Sweden, and the Czech Republic established various criteria to justify the NCA's dismissal of the complaint.¹¹²⁵

Public and private enforcement are not equal alternative for each other.¹¹²⁶ It might be extremely challenging or - even impossible for a stand-alone claimant to prove the fact of the infringement, as private enforcers, unlike enforcement authorities, do not have any equal rights to access documents, conduct investigation and dawn raid the suspected infringer companies or use leniency for collecting the evidence.¹¹²⁷ For consumer damage claims, in

¹¹²³ Lowe (n 392). 2

¹¹²⁴ *Case T-114/92, Bureau Européen des Médias de l'Industrie Musicale v Commission of the European Communities* (n 1112) [86]; *Case T-5/93, Roger Tremblay and François Lucazeau and Harry Kestenberg v Commission of the European Communities* (n 1112) [60–62]; *Case T-427/08, Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission* (n 1112) [173]; *Case T-458/04, Au Lys de France SA v Commission of the European Communities* (n 1112) [83].

¹¹²⁵ Cseres and Mendes (n 143). 2, 3

¹¹²⁶ Van den Bergh (n 1044). 15; Jürgen Basedow, *Private Enforcement of EC Competition Law* (Kluwer Law International 2007). 24

¹¹²⁷ Hüschelrath and Schweitzer (n 1055). 170; Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 84, 92European

case of anticompetitive agreements, claimants will have hard time even to quantify damages, as due to the very nature of the infringement the relevant evidence remains with the infringer.¹¹²⁸ Basedow even calls it the key difficulty of private actions.¹¹²⁹ Investigative powers of enforcement institutions are vitally needed to uncover and prove horizontal agreements.¹¹³⁰ Therefore, when a claimant is rejected, on the basis of the possibility to apply directly to a national court, the claimant is automatically deprived of the possibility to access these effective tools of public enforcement and is left with the unclear perspective of establishing the infringement of her own.

Hardcore anticompetitive practices are usually of a secretive nature, which makes their detection and evidentiary support extremely challenging.¹¹³¹ Consumers can face tremendous difficulties in gathering information and proving the existence of the cartel. This might become a significant barrier for a consumer to take action, not to mention other serious demotivating factors, such as the need to invest much time, energy and resources for private actions, while expected compensation can be disproportionately low.¹¹³² Therefore, considering the outcome, when a claim is rejected indicating that the claimant can apply to a

Commission, 'Notice on Immunity from Fines and Reduction of Fines in Cartel Cases', (n 1097). [3]; Hawk (n 269). 48

¹¹²⁸ Ioannidou (n 27). P. 93;

¹¹²⁹ Basedow (n 1124). 281

¹¹³⁰ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 84, 92;

¹¹³¹ Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press 2014) 265; Robert C Marshall and Leslie M Marx, *The Economics of Collusion: Cartels and Bidding Rings* (MIT Press 2012) 8–9; Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford University Press 2014) 63.

¹¹³² Marquis and Cisotta (n 1098). 52; Panta (n 1098). 60-61; Weber (n 1098). 35-36; Wrbka (n 1098). 125; Lutter (n 1098).; Ioannidou (n 27). 399-400

national court, the decision requires strong justification.¹¹³³ However, the reality is that such assessments are usually based on rather theoretical and legal possibilities to take action, disregarding the actual chances of the claimant to exercise them or what her chances might be to succeed at a national court on her own.¹¹³⁴

Some of the challenges and problems related to private actions will be discussed in details later. However, some issues are more relevant to be analysed within the context of public enforcement. As already noted competition law does not distinguish between final and intermediary customers. According to the Commission, the term consumer covers all the direct and indirect users of the product subject to agreement. It might be an undertaking buying industrial machinery, or an individual buying an ice cream.¹¹³⁵ Therefore, when the Commission presumes the possibilities for an average consumer, it considers undertakings and final users under the same category. This approach is obviously not beneficial for final customers, whose special nature is ignored and their possibilities are presumed to be much broader than they can actually be. In reality, final consumers and undertakings that act as intermediary customers, are distinct groups with their abilities, economic resources and should be treated differently with regard to the possibility to participate in a public or private

¹¹³³ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 95

¹¹³⁴ Cseres and Mendes (n 143). 10

¹¹³⁵ European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (n 271) recital 19, footnote 15; European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements' (n 400) [49]; European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' 139 recital 84; EU Council, 'EC Merger Regulation' (n 400) Article 2 (1)(b).

enforcement.¹¹³⁶

In other words, the Commission may reject a consumer's complaint, claiming that there is an alternative private enforcement mechanism at her disposal. However, the Commission disregards the fact that a final consumer, unlike a business entity, has much limited financial resources, while one's individual damage might be too small to justify a risk of investing a significant amount of money to launch a judicial action. In essence, the assumed alternative might not be a realistic alternative at all. The soundness of this argument is proven by the empirical evidence of no significant rise in consumer litigation, despite the fact that the Commission has massively directed consumers' complaints to national courts.¹¹³⁷

3.5 Settlements and informal procedures of the enforcement authorities

After filing a claim, if the authority starts an investigation, it does not necessarily guarantee that the formal decision will be issued. Not every investigation and opened case ends up in a formal decision, for they are largely outnumbered by informal settlements. Due to the growing caseload, increased expectations toward the enforcement institutions and limited resources, informal settlement became a favourite practice of a number of competition authorities. It is an efficient and quicker alternative for formal procedures, giving more possibility for creative and innovative approach to cases.¹¹³⁸

¹¹³⁶ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 83

¹¹³⁷ Cseres and Mendes (n 143). 13, 14

¹¹³⁸ Lachnit (n 210). See also: Van Bael (n 1089).114, 290; Christopher Decker, *Economics and the Enforcement of European Competition Law* (Edward Elgar Publishing 2009). 131

As noted above, a number of authors support the idea that in order to achieve the objectives of enforcement of competition law and ensure deterrence, compensation and remediation, the traditional instruments of private and public enforcement are not sufficient. The growing number of market challenges and their complexity often requires alternative approaches, rather than traditional sanctioning.¹¹³⁹ While competition authorities are famous for imposing enormous fines and their amount has only increased through the years,¹¹⁴⁰ there is a growing trend of actively using informal and preventative forms of enforcement, along with formal procedures. A number of authorities manage to engage with new methods of enforcement creatively and successfully, in order to deal with the new challenges posed by the market. While formal procedures and sanctioning is viewed to be deterrence-based, punitive, reactive, case-specific and based on a vertical relationship between companies and competition

¹¹³⁹ Lachnit demonstrates that there are no universal methods to deal with certain type of cases and the approaches used by different NCAs might differ significantly, even regarding similar cases. The author compares three different NCAs and how they deal with relatively similar cases, such as: anticompetitive behaviour in pharmaceutical market. Sanofi-Aventis case from France (*Décision n° 13-D-11 relative à des pratiques mises en œuvre dans le secteur pharmaceutique* (Autorite de la Concurrence). *decision no 2013/12370 Le dénigrement des génériques du Plavix® constitue bien un abus de position dominante* (Cour d'Appel de Paris) is an example of abusing dominant position, which ended by imposing a fine, in the amount of EUR 40.6 mil. and ordering the infringer to stop its abusive behaviour.

However, fining is not the first choice for every authority. A similar abuse of a dominant position, took place in the UK, when Reckitt Benckiser manipulated to get away with its expiring patent and keep dominance on the market. The UK CMA was about to fine the infringer, but a quick resolution was found by the help of informal meeting between the parties, which lead to signing a settlement, the company admitted its wrongdoing and received 15% fine reduction (*Case CE/8931/08, Abuse of a dominant position by Reckitt Benckiser Healthcare (UK) Limited and Reckitt Benckiser Group plc* (The Office of Fair Trading:)).

While the above-given examples seem quite effective examples of law enforcement, a totally different approach has been chosen by the Dutch ACM, which has gained sound knowledge of the specificity of pharmaceutical market from its previous cases and realised that competition law alone cannot deal with the existing problems on the given sector. It issued a whole report about functioning of the market, including practical but non-binding recommendations about prescription system, price regulations and so forth. This example demonstrates that means and methods might differ according to jurisdiction and might be chosen according to a given situation. However, it is important to keep consumers always in consideration when choosing suitable means and methods of market regulation, especially when the case is about a sensitive industry for consumers, such as pharmaceuticals.

See: Lachnit (n 210). 3-6

¹¹⁴⁰ Rodger and MacCulloch, *Competition Law and Policy in the EC and UK* (n 1055) 261. 261; See also: Lianos and Geradin (n 1055) 342; Hüschelrath and Schweitzer (n 1055). 3, 20; European Commission, 'Cartel Statistics' (n 1055).

authorities, alternative enforcement embraces a more informal, horizontal, compliance-based, restorative, preventative or efficient approach, or a combination of one or more of the above.¹¹⁴¹

Lachnit identifies three major catalysts for the development of alternative methods of enforcement. First, on a procedural level, she identifies the decentralization and abolition of exemption procedure. Second, she mentions the discussion over the goals of competition and the ways how achieve them. These objectives are not merely economical, and authorities consider various other interests, which cannot be fully satisfied by traditional enforcement instruments. There is also increased demand toward the authorities not to focus only on one objective and attain certain economic goals, while considering social and public policy objectives as well.¹¹⁴² Overall, when traditional forms of enforcement are not enough, this creates a room for new informal and proactive measures. Lastly, Lachnit mentions the pressure over the agencies to achieve effective results on a smaller budget

Engaging with alternative enforcement methods is becoming increasingly popular among the NCAs in the EU.¹¹⁴³ It was noticed that in certain countries the change of rhetoric was related with the process of redesigning enforcement authorities. For example, the President of Competition of the National Authority for Markets and Competition in Spain has publicly supported to maintain dialogues with undertakings under investigation. He has even stated

¹¹⁴¹ Lachnit (n 210) 2-5

¹¹⁴² However, there are a number of prominent economists claiming that nothing should be regulated by competition law, unless it is an economic issue. The reasoning behind this approach is that competition law is not the best suited instrument for achieving public policy goals. See: Motta (n 226) 26.

¹¹⁴³ On June 5, 2015, at the conference *Procedural Aspects of the Application of Competition Law: European Frameworks – Central European Perspectives*, Daniel Stankov (head of the International and External Relations Unit, Office for the Protection of Competition of the Czech Republic) talked about a practice of Czech Republic competition authority to actively use informal settlements mechanism as an efficient method to deal with the caseload.

that investigations, ending with fines, are a failure of the system. This statement was contrary to the position of the former senior officials, who always declared fines to be the “natural” outcome of investigations.¹¹⁴⁴

The sanctioning process is lengthy, expensive, occupies much of resources of enforcement institutions and distracts them from other ongoing infringements. Sanctioning has strong deterring effect due to its punitive nature (even when fines are not punitive, like in the EU). However, while it discourages entities from law infringement, it fails to reward and encourage certain type of behaviour.¹¹⁴⁵ One of the reasons why informal settlement might be more useful than traditional sanctions, is the possibility to reflect consumer interests better and even make compensation of their losses as a condition for a settlement, while in case of fining, consumer still benefits indirectly, but her damages are not recovered.

Informal negotiations create public compensation mechanism, allowing enforcement authority to raise the issue of voluntary compensation for consumers, in the form of commitments, while reserving the possibility to sanction, if the infringing party rejects the offer. Voluntary compensation has an advantage of being a subject of agreement and is not expected to be appealed, unlike the fines.¹¹⁴⁶ Making consumer oriented commitments a condition for settlements has already been used by various authorities. The benefits might come in different forms and a few examples will be given below.

The Commission started using the above-mentioned practices as early as in 1975, in *General Motors*. GM was abusing its dominant position and was imposing excessive prices. The

¹¹⁴⁴ Andrew Ward, ‘Spain’s CNMC: The Story So Far | Competition Policy International’ <<https://www.competitionpolicyinternational.com/spain-s-cnmc-the-story-so-far/>> accessed 5 October 2017.

¹¹⁴⁵ Lachnit (n 210) 21, 22

¹¹⁴⁶ Ioannidou (n 27) 177-178

Commission fined GM, but took into consideration the fact that the company has reimbursed the excessive amount of the prices.¹¹⁴⁷ Fines were reduced in case of Pre-Insulated Pipe Cartel and in the *Nintendo* case, which was restricting intra-brand competition, as the infringing parties delivered significant compensation.¹¹⁴⁸ The same approach was used, for the first time, as a part of the commitments, in *Deutsche Bahn*, when the Commission accepted commitments which included 4% discount on the traction current, supplied to railways companies not belonging to DB.¹¹⁴⁹ In *Rover Group*, commitments included compensating its dealers and donating 1 million GBP to a consumer association, to be spent on consumer information services.¹¹⁵⁰

A similar approach has been introduced by a few NCAs in the EU. One of the most interesting and well known cases was *UK Independent Schools*, which investigated the information exchange agreement on future prices between fifty independent schools with tuition. Due to the cooperation of the schools with the enforcement authority, they finally received only nominal fines. They voluntarily approached the authority and offered to provide compensation, as well as donating 3 millions GBP to an education charitable trust, for the benefit of the students attending the schools in that period.¹¹⁵¹

In the Netherlands, when eight banks established Interpay, as a single provider of network services for PIN payment, with allegedly charging excessive tariffs, the authority initially started an investigation, but dropped it due to its complexity, while compensatory scheme has

¹¹⁴⁷ 75/75/EEC, *Decision relating to a proceeding under Article 86 of the EEC Treaty* [8–11].

¹¹⁴⁸ Ioannidou (n 27). 172-173

¹¹⁴⁹ *Deutsche Bahn I (Case COMP/AT39678)* (European Commission); *Deutsche Bahn II (Case COMP/AT39731)* (European Commission).

¹¹⁵⁰ Ioannidou (n 27). 173

¹¹⁵¹ *ibid.* 174. *Decision No CA98/05/2006 (UK Independent Schools)* (The office of fair trading) [1, 2, 6, 36].

been established by the banks, offering PIN payments to consumers.¹¹⁵² The examples well demonstrate the potential informal settlements might have for the benefit of consumers. This is particularly demanded due to limited accessibility of consumers to public enforcement mechanism. However, unlike formal procedures, in case of informal settlements, the discretion of enforcement institutions is much higher and their concerns about consumer interests, as well as devotion for competition law objectives, depend on their goodwill and is beyond effective public control.

Lack of transparency and negotiations behind closed doors remains a challenge. A problem with informal settlements is that information regarding them is scarcely disclosed.¹¹⁵³ They take place when, instead of adopting a formal decision, the enforcement authority arranges the case through informal negotiations and makes an agreement.¹¹⁵⁴ It is claimed that such solutions are found in more than 90% of the infringements, therefore its importance and impact is huge, while only limited information is publicized on the topics of negotiation and what really happens behind the doors.¹¹⁵⁵ There are some concerns regarding the transparency of informal settlement procedures, while often even criteria used by authority for reaching settlement remains unclear.¹¹⁵⁶ This does not necessarily mean that informal settlements are automatically against consumer interests, but definitely the risks are higher. It is not always clear how precisely the authority follows the established goals when making an agreement. Consumer interests might not be thoroughly considered or they can even be

¹¹⁵² Ibid. 174.

¹¹⁵³ Informal settlements are mostly published in a form of a press release. See: Decker (n 1136). 131

¹¹⁵⁴ Van Bael (n 1089). 290

¹¹⁵⁵ Ibid. p.291

¹¹⁵⁶ Ibid. P. 114; Barry J Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (Routledge 2014). Chapter 2, *Administrative Enforcement in UK*, subsection: *Settlement*

sacrificed for other objectives. Eventually, after that consumer decides to take a private action there might be a problem of accessing the data, due to the limited disclosure of information, regarding the settlement.

In order to minimize the risks, public compensatory mechanisms can be institutionalized and placed within formal regulations. That will increase legal certainty and also help to start using the mechanism more actively. So far, they have been applied very sporadically and in different types of cases. One might argue that there is no need for their institutionalization, as their attractiveness is exactly flexibility and ability to act out of formal procedures. Ioannidou suggests that formal and informal forms of public compensation mechanisms can coexist. They will serve to distributive justice and bring benefits back to the affected parties.¹¹⁵⁷

In case of institutionalization, public compensation can function as a behavioural remedy. It can be incorporated in existing enforcement mechanism and can be used along with fining or fully substitute it. Moreover, formal or informal public compensation should have a harmonious relation with private enforcement and are not supposed to replace it. More public enforcement does not mean less private actions and vice versa.¹¹⁵⁸ Therefore, even after using the mechanism, injured consumers should not be deprived of their rights to take actions and claim damages. In this case if any losses have already been restored it should be deducted.¹¹⁵⁹

The potential of alternative enforcement mechanism is not limited to public compensation. There are many ways in which enforcement authorities can find creative ways to do their job

¹¹⁵⁷ Ioannidou (n 27). 175-176

¹¹⁵⁸ Mackenrodt, Gallego and Enchelmaier (n 269). 140

¹¹⁵⁹ Ibid. 175-179

better and in this process support consumers and their interests. Obviously, it might also require certain legal changes, but the proper utilization of its potential might turn already existing mechanisms into something much more beneficial and useful for consumers. For example, market studies are a common practice used by a number of NCAs in the EU, when the authority does not investigate a concrete undertaking, but studies the general situation regarding competition in a selected sector. In the UK there is a procedure called Super Complaint, which is similar to normal complaints, but it is initiated by a designated consumer organization. Such organizations are best designed to spot the features that are most detrimental to consumers.

In case of Super Complaint, consumer organizations can apply to the enforcement body and indicate the practices which they find to particularly harmful for consumers. After submitting a complaint, the CMA has a tight schedule of 90 days to issue a response on how it intends to proceed. The short deadline is important, as super complaint is a fast track system for consumers to avoid formal barriers and access public enforcement easily. So far 14 Super Complaints has been launched, out of which four market studies and three market investigations has been conducted, covering a wide variety of sectors: banking in Northern Ireland, care homes, doorstep selling, beer supply to pubs and so forth.¹¹⁶⁰

Overall, public enforcement is a vital part of a successful competition policy. It contributes to the effective functioning of market, deterring future infringements and delivering indirect benefits for consumers. In addition, it has the potential to contribute to consumers' interests in more direct ways, even ensuring compensation for the injured parties. Still, this potential is

¹¹⁶⁰ Rodger and MacCulloch, *Competition Law and Policy in the EC and UK* (n 1055) 261, 156; Ioannidou (n 27). 166-167; Colino (n 109) 140.

not fully utilized yet, as consumers still have limited access to it under traditional enforcement systems. Therefore, there is still much room for modernization and improvements in public enforcement system to make it more consumer-oriented.

4. Public enforcement of competition law in Georgia

Before moving to discussing private enforcement of competition law, it is relevant to see and compare how Georgia regulates public enforcement. This analysis is primarily based on the interpretation of statutory provisions, taking into consideration the limited case law developed so far by the Georgian competition authority. After analysing how Georgia transplanted and developed its public enforcement system, it will be possible to assess whether the EU experience may offer useful lessons. Georgia should look at this experience as an opportunity to learn and also avoid the shortcomings suffered by the EU. It does not need to follow the same path as the EU, but can be even more bold and innovative in its regulations.

4.1 Initiating an investigation

Similar to EU law, Georgian law entrusts the Competition Agency to start an investigation on its own initiative or after receiving an application or a complaint.¹¹⁶¹ Georgian law distinguishes an applicant from a complainant. The former is a natural person¹¹⁶² who

¹¹⁶¹ LC (n 371) Art. 18 (1)(a).

¹¹⁶² The Law on Competition uses term “*person*” without indication to whom/what it applies, only to natural or legal persons or to both. However, considering the approved application form, it is obvious applicant can only be a natural person.

possesses information or evidence that a competition law infringement has taken place, but her economic interests have not been directly affected.¹¹⁶³ Therefore, she cannot be considered a party of the case.¹¹⁶⁴ The complainant can be either a natural person or an enterprise,¹¹⁶⁵ considering that there has been a competition law infringement on a market which has damaged her economic interests.¹¹⁶⁶ Unlike applicants, complainants are considered party of the case they initiated and bear the burden of proof,¹¹⁶⁷ thus being required to support the complaint with evidence.

4.2 Non-existence of priority setting mechanism

After lodging an application/complaint, the Agency, as an administrative body, is required to take some action.¹¹⁶⁸ Within 30 days¹¹⁶⁹ it should make a decision on commencement or dismissal of an investigation.¹¹⁷⁰ Not making any decision within the timeframe is considered as a refusal, and can be appealed in front of a city court.¹¹⁷¹ The rejection can be justified on

The application form can be downloaded from the following link:

<http://competition.ge/en/page2.php?p=6&m=146>

¹¹⁶³ LC (n 371). Art. 3 (m)

¹¹⁶⁴ Ibid. Art. 22 (1)

¹¹⁶⁵ There used to be an issue about a complainant's nature, caused by the initial complaint form that was suited only for legal entities. It was creating illogical situation, where natural persons were allowed to access public enforcement only when they do not experience any losses. If their economic interests were damaged by the infringement they had to file a complaint, but the complaint form existed only for companies. Apparently the problem was noticed and the complaint was for changed, making it suitable for both – natural persons, as well as for legal entities. The complaint form can be accessed at: <http://competition.ge/en/page2.php?p=6&m=146>

¹¹⁶⁶ LC (n 371). Art. 3 (n)

¹¹⁶⁷ Ibid. Art. 22 (2)

¹¹⁶⁸ 'General Administrative Code of Georgia.' Art. 100;

¹¹⁶⁹ Depending on a complexity level of a case, the set time can be extended by the Agency for no more than 15 days.

¹¹⁷⁰ The Chairman of Competition Agency of Georgia, 'Order № 30/09-130, on Approval of the Forms of Applications and Complaints, Rules for Their Submission and Procedures and Deadlines Related to the Admissibility of the Application and Complaint' Art. 7 (1).

¹¹⁷¹ 'General Administrative Code of Georgia.' (n 1166). Art. 177 (2)

the following grounds: there is no legal basis provided for the claim by the law; the agency requested additional information and/or evidences, which has not been provided within the established term; insolvency procedures were brought up against the respondent economic agent; the complaint was not submitted by the authorized person.¹¹⁷² Unauthorized person means an economic agent that does not meet the legal requirements established for a complainant that is being directly affected by the alleged competition law infringement.

Since the list is deemed exhaustive, Georgian law does not grant the Competition Agency any discretion in prioritizing and cherry-picking the complaints. It has already been discussed above that no authority is capable to investigate every potential violation of rules. Limitation of resources, that is a burning issue for almost any enforcement authority, is particularly relevant for developing states,¹¹⁷³ such as Georgia. Some kind of mechanism, allowing to select and focus on the most significant infringements, is absolutely necessary. Such mechanism should also give the Authority a margin of discretion, since going through the full formal procedure for each and every submitted complaint might become a heavy burden and slow down its effective functioning.

This does not mean that the Agency should be able to ignore the cases it is not particularly interested in. Every rejection should be well grounded. The need to clearly explain the reasons for rejection is particularly relevant for complaints filed by consumers or consumer organizations. An example of this was an application submitted on December 29, 2015 by the

¹¹⁷² LC (n 371). Art. 24

¹¹⁷³ Dabbah (n 12). 77, 53, 184; *Strategies to Achieve a Binding International Agreement on* / John Sanghyun Lee / Springer (n 1099). 160

Center for Competition Law and Consumer Protection,¹¹⁷⁴ regarding the violations of Article 7 of the law¹¹⁷⁵ on the national pharmaceutical market. The Agency refused to start the investigation for it judged the claim time-barred and not supported by sufficient evidence. In the decision¹¹⁷⁶ it used as paradigm the EU Commission, which is not obliged to start investigation regarding every complaint it received, and requires the satisfaction of a high standard of proof for the complainant. The authority also stressed that the public interest underlying the case, as indicated by the applicant, was not enough to justify the investment of public resources, absent adequate supportive evidence.

The Agency's refusal was grounded on the fact that all the evidences presented by the applicant were mostly media articles and studies conducted regarding the pharmaceutical sector by two different NGOs.¹¹⁷⁷ Their indirect nature made them, for the Agency, too weak to justify an investigation. This well demonstrates the difficulties a regular consumer might have to initiate a proceeding, despite the absence of procedural barriers such as the prioritization mechanism in the EU. A regular consumer does not possess the necessary tools and resources to conduct an independent investigation and gain strong evidences, while available materials already known to the Agency, does not seem to be strong enough. This might lead to setting the threshold of providing supporting evidence for complaints too high, allowing the Agency to reject any complaint, which it is not particularly interested in.

¹¹⁷⁴ For more information regarding the Center, see: http://www.yars.wz.uw.edu.pl/yars2016_9_13/246.pdf

¹¹⁷⁵ Article 7 determines: “Any Agreement, decision or concerted practice of economic agents which have as their object or effect the prevention, restriction and/or distortion of competition within the relevant market shall be prohibited”

¹¹⁷⁶ Georgian text of the decision can be found at: <http://competition.ge/ge/page5.php?sb=368>

¹¹⁷⁷ The organizations which had previously studied and published reports about the pharmaceutical market, were Transparency International Georgia and the Association of Young Financiers and Businessmen

4.3 The need for innovative and informal forms of enforcement

In the previous sections much has been written about the benefits of informal negotiations with the alleged infringing undertaking. Switching from complex formal procedures to informal ones can lead to beneficial outcomes. As proven by the EU experience, informal settlement procedures can be effectively used to smoothly achieve competition law objectives and support consumers without going through the whole, lengthy formal procedure. As new, more complex market challenges are showing up, the use of new and creative approaches is highly recommended for any authority.¹¹⁷⁸ This is particularly true for young NCA, like the one in Georgia, for they lack long-established traditions, procedural rules with long history, and strong precedents, allowing them to be more flexible in their actions.¹¹⁷⁹ This potential is particularly visible in Georgia, as it already has recent experience of conducting successful and very innovative reforms in its public sector.¹¹⁸⁰

In spite of that, there are certain factors that hinder the Georgian Competition Agency from engaging actively in informal settlements. Lachnit argues that while it is true that in certain situations you can achieve more through a good talk than by imposing fines, for that enforcement authorities are required already to have a certain reputation, credibility and trust from the side of business.¹¹⁸¹ The Agency in Georgia is doing some work in this direction, organizing meetings and regularly emphasizing in its announcements and interviews that it should not be viewed as a hostile institution by the business entities. However, so far there is no precedence of successful settlement with infringing undertakings. Informal negotiations

¹¹⁷⁸ Lachnit (n 210). 3-5

¹¹⁷⁹ Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission' (n 28). 24

¹¹⁸⁰ Faruk Gursoy, 'Changing of the Investment Climate of Georgia after the War' (2012) 62 *Procedia - Social and Behavioral Sciences* 1303, 1303–1307.

¹¹⁸¹ Lachnit (n 210). 3-5

can be successful only if the alleged infringers are also willing to contribute to this process. Such will does not seem to be strongly present in Georgia yet. For example, during the most famous and important antitrust case, regarding the cartel on the oil commodity market,¹¹⁸² none of the involved undertakings admitted even a partial violation of law and their position remained unchanged, even after the court upheld the Agency's decision.¹¹⁸³

Desire to have amicable relations with the Agency might exist among Georgian businesses, but the lack of culture and traditions in this direction manifests itself in a rather unusual behaviours. A good demonstration is an interesting case of Rompetrol – a large scale oil company operating in the Georgian market, and one of the undertakings found to be an oil cartel member, and fined by the Agency with 11 millions GEL (EUR. 4.412.177). After almost a year from this decision, while Rompetrol still claimed its innocence and the dispute was still ongoing in court, the company financed and organized international conference regarding competition law. As argued by the Research Center for Competition Law & Corporate Compliance at Grigol Robakidze University,¹¹⁸⁴ this was a clear attempt to establish amicable relations with the Agency and the courts. It was held in a popular resort, at a five-star hotel and among the invited guests were employees of the Agency, including those personally involved in the oil cartel case and judges from the appellate court, where the company was planning to take the case. As international experts were invited lawyers from

¹¹⁸² *Order No 81 on the Car Fuel Commodity Market* (Georgian Competition Agency).

¹¹⁸³ Ema Tukhiashvili, 'The Cartel-Ificent Five - Determining Real Owners of the "Big Five" Is Harder than Catching a Black Cat in a Dark Room,' *Georgian Journal* (24 July 2015) <<http://www.georgianjournal.ge/business/31083-the-cartel-ificent-five-determining-real-owners-of-the-big-five-is-harder-than-catching-a-black-cat-in-a-dark-room.html>>.

¹¹⁸⁴ The short analysis was published on a facebook page of the center: <https://www.facebook.com/researchcenterforcompetitionlaw/posts/1056876701015744>

law firms, who usually defend the interests of private entities against the state institutions. The company even attempted to disguise the event as an academic conference.

The Agency should be active in identifying readiness of alleged infringing undertakings to accept commitments and encourage them via settlement procedures, to participate in the process of remediating the distorted market competition and compensating the damaged parties, with particular attention to consumers.

4.4 Summary

The EU experience on public enforcement of competition law well demonstrates its advantages, and the reasons why it has been the mainstream form of enforcement until today. Private enforcement significantly relies on the public one, and in case of hardcore infringements, public enforcement is almost the only practical way to prove the existence of collusion, calculate damages and show the casual link between anticompetitive practices and suffered losses. This is particularly true for final consumers, whose special position makes them particularly ineffective in enforcing law on their own. They need access to public enforcement not only to use evidence collected therein in a private action, but also because public enforcement is often the only system they tend to, due to rational hesitations to start a litigation.

The established practice grants enforcement authorities discretion in rejecting any complaint that does not match their pre-selected priorities, showing the theoretical possibility of taking an action before a national court. As explained before, this suggested alternative often is not

an alternative at all, since a number of legal and practical barriers make litigation unattractive for the absolute majority of consumers. If they are left for the sake of impractical private enforcement, they are effectively barred in their access to justice. It is beyond argument that priority setting is a necessary system, in order to allow the correct functioning of enforcement authorities, but the current indifferent approach and automatic assumption of one's ability to take a private action, without any actual evidence, is a bad practice that needs to be changed.

In the case of Georgia, there is no regulation of priority setting, despite the key role of such mechanism in ensuring an adequate allocation of resources. Regulating this issue by law is essential, in order to ensure that the selection of the cases happens under certain rules. Otherwise, it will still occur in practice, but more chaotically. Consumers can easily be the victims of such informal priority setting, as proved by the discussed case on the national pharmaceutical market. At the same time, the introduction of such filters is not a panacea solution, and the regulations should stress the absolute necessity for a strong justification in support of every rejection.

The existing best practices demonstrate that public enforcement can offer much more help and protection for consumers and their interest through informal procedures and settlements. The Georgian Competition Agency should work harder in this direction and attempt to provide a high level of protection for consumers through informal procedures, particularly since the state and national law has almost totally forsaken consumers and their interests.

These are the main lessons for Georgia that can be extracted from studying the EU regulations of public enforcement. Georgia has the advantage of being an emerging competition jurisdiction, where the introduction of new practices and the modernization of

the enforcement system can still be done in a relatively painless manner. Georgia needs to use this opportunity to keep developing its market supervision and regulation mechanisms on its own initiative, even without any outer pressure. Consumer interests should be accommodated in the public enforcement system, while special care should also be paid to the development of effective private enforcement mechanisms.

5. Private enforcement of competition law in the EU

State institutions are granted the authority to enforce competition law, as distortion of competition and effective functioning of a market is against public interests. However, public interests do not exist in isolated form, fully separated from private interests. Competition violations, in addition to distorting the market and harming the economy, also damage private rights of consumers and interests of other undertakings.¹¹⁸⁵ A successful public enforcement already benefits consumers by ensuring a competitive and free market. Public enforcement changes the behaviour of an infringer (special deterrence) and discourages others to commit violations (general deterrence).¹¹⁸⁶ This phenomenon has preventive effect, avoiding infringements from potential violators, which would engage in anticompetitive practices, in the absence of risks to be caught by enforcing authority.

Since consumers suffer the most from competition law infringements,¹¹⁸⁷ it is logical to think that they are also the main beneficiaries from violations preventions. However, this would be

¹¹⁸⁵ Luis A Velasco San Pedro and others, *Private Enforcement of Competition Law* (Lex Nova 2011). 51

¹¹⁸⁶ Gutta (n 1048). 26; Rodger and MacCulloch, *Competition Law and Policy in the EC and UK* (n 1154). Chapter 2, *Administrative Enforcement in UK*, subsection: *Settlement*

¹¹⁸⁷ Erling Hjelmeng and Nordic Council of Ministers, *Consumers' Right of Action in Antitrust Cases: Current Problems and Future Solutions* (Nordic Council of Ministers 2006). 9; Paha (n 1097) 118; Nuno Pires de

an extremely generalization. It is true that consumers indirectly benefit from public enforcement,¹¹⁸⁸ and that these benefits are not abstract but their monetary value can be estimated. In fact, some authorities actually employ such practices and calculate value of benefits that they have delivered for consumers.¹¹⁸⁹ However, these estimated benefits, no matter how impressive their numbers are, demonstrate potential losses that were prevented, as a result of effective public enforcement. With regard to the damages, already suffered by consumers, public enforcement cannot ensure their restoration.¹¹⁹⁰ In this manner, private enforcement of competition law is the only existing, institutionalized mechanism that can attain the goals of corrective justice, by allowing compensation.¹¹⁹¹

Moreover, as already stressed several times, any enforcement authority is limited in its resources and lacks the ability to trace all the infringement on the market.¹¹⁹² Therefore, a whole range of violations occurs without any attention and intervention from public

Carvalho, *The TRIPS Regime of Patent Rights* (Kluwer Law International 2010) 505. Pedro and others (n 1183). 294

¹¹⁸⁸ Micklitz, Stuyck and Terry (n 29). Chapter one, Section: IB; Ioannidou (n 131). P. 195; Lowe (n 392). 3

¹¹⁸⁹ For example, Hungarian competition Authority - GVH issued a press-release in 2014, estimating direct consumer gains from its activities. As stated, over the period between 2008 and 2012, Hungarian consumers (a population of roughly 10 million) saved at least 58 billion HUF (in 2013 value, approx. 200 million EUR according to the 2013 exchange rate). Benefits are calculated from the prevented harmful effects, which were supposed to occur without the GVH involvement. For more information, see: 'Direct Consumer Gains from GVH's Activities: A Lucrative Investment for Tax-Payers' (20 May 2014)

<http://www.gvh.hu/en/press_room/press_releases/press_releases_2014/direct_consumer_gains_from_gvh_activities_a_luc.html?query=58+billion+HUF> accessed 5 October 2017. See also: National Audit Office, 'The Office of Fair Trading: Enforcing Competition in Markets' 30.

¹¹⁹⁰ Exception to this general rule can be inclusion of provisions regarding compensating damaged consumers, as a necessary condition for a settlement. See: Chapter IV. Section 2.5 *Settlements and informal procedures of the enforcement authorities*

¹¹⁹¹ *Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] Eur Court Rep 2001 -06297 [26]; *Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA* [2006] Eur Court Rep 2006 -06619; *Case C 199/11, Europese Gemeenschap v Otis NV and Others* [2012].

¹¹⁹² See: Chapter IV, section 2.3 *Limited resources of enforcement authorities and priority setting*

enforcers.¹¹⁹³ For victims of such violations, private enforcement is the only system to rely on. That is why it is wrong to reduce competition law enforcement only to a single body, and it is necessary for a healthy and effectively functioning system to let private parties take actions as well.¹¹⁹⁴ Private enforcement is not an alternative for public enforcement and vice versa. It is complementary to public enforcement, and both of them together can create a harmoniously and effectively functioning enforcement system.¹¹⁹⁵

5.1 A brief history of private enforcement in the EU

Public enforcement is a mechanism to achieve public policy goals.¹¹⁹⁶ This is a universal principle and the same applies to the EU. Already for more than a decade, the Commission has adopted the policy to concentrate resources on cases that fall within the EU interest.¹¹⁹⁷ In every other case, victims are encouraged to bring actions before national courts.¹¹⁹⁸ Regulation 1/2003 has played a vital role in this process, decentralizing competition law enforcement and allowing national courts to hear the cases.¹¹⁹⁹ However, the possibility for damage claims was first created by the CJEU.

¹¹⁹³ Lowe (n 392). 2, 6, 7

¹¹⁹⁴ Basedow (n 1124). 8

¹¹⁹⁵ PP Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 Oxford Journal of Legal Studies 453, 453–455.

¹¹⁹⁶ Mackenrodt, Gallego and Enchelmaier (n 269). 140

¹¹⁹⁷ *Case T-24/90* (n 1106). [83-87]

¹¹⁹⁸ see: Chapter IV, Section 2.3 *Limited resources of enforcement authorities and practice of priority setting*

¹¹⁹⁹ Mark R Joelson, *An International Antitrust Primer: A Guide to the Operation of United States, European Union, and Other Key Competition Laws in the Global Economy* (Kluwer Law International 2006) 278. Hawk (n 269). 199-202; Basedow (n 1124). 279-280; Rodger and MacCulloch, *Competition Law and Policy in the EC and UK* (n 1154).

Initially, the Commission was the only institution monitoring the enforcement of EU law. In case any Member State was in breach of Treaty obligations, the Commission was the only body entitled to bring an action. However, this enforcement model was quite limited and not very flexible or successful, as it allowed disobedient states to meet the required obligations by minimalistic, formal compliance.¹²⁰⁰ In *Francovich* (1991)¹²⁰¹ the ECJ first required Member States to compensate the damages suffered by private parties due to their infringement of EU law. The case established the important principle of state liability for breach of EU law, and after that it was not long before this liability was extended over private parties.

After *Courage*,¹²⁰² the possibility to claim damages has been recognized not only for the third parties and damaged consumers, but even for members of the anticompetitive agreements, unless the claimant bore significant responsibility for the breach. This approach was further developed in *Manfredi*, where the ECJ determined that “*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.*”¹²⁰³ In brief, for the purpose of restoring damages, not only the infringement should be established and damages demonstrated, but the claimant should also be able to prove the causal link between them.¹²⁰⁴

In *Kone* (2014),¹²⁰⁵ the ECJ ruled that victims can bring claims not only against the members of cartels, but even against non-cartel members for umbrella pricing, a consequence of cartel,

¹²⁰⁰ *The Case of State Liability - 20 Years after Francovich* | Michael Haba | Springer, pp 6, 7 <<http://www.springer.com/gp/book/9783658080792>> accessed 5 October 2017.

¹²⁰¹ *Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] Eur Court Rep 1991 -05357.

¹²⁰² *Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.* (n 1189).

¹²⁰³ *Manfredi* (n 1189) [61]; *Case C 199/11, Europese Gemeenschap v Otis NV and Others* (n 1189) [43].

¹²⁰⁴ Cosmo Graham, *EU and UK Competition Law* (Pearson 2010) 289, 290.

¹²⁰⁵ *C-557/12, Kone AG and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317.

which happens when an undertaking, non-member of the cartel, sets higher prices than those it would have offered in the absence of the cartel. This is an exploitation of consumers, and therefore contrary to competition rules.¹²⁰⁶

Private enforcement has been one of the topical questions dominating the past decade of competition law development in the EU, and this tendency is only expected to continue in the future. Ioannidou argues that EU competition law has been modernized in two major ways during the last two decades. The first was the substantive modernization of EU competition law enforcement, with a switch towards a more economic-based approach, and a rethinking of its objectives, with greater emphasis on consumer welfare. The second trend was a procedural modernization, resulting in the decentralization of the enforcement system, which admitted more institutions (NCAs, national courts), as well as private parties in the enforcement process. Considering these tendencies, the author views as next logical step the further improvement of private enforcement.¹²⁰⁷

Currently private enforcement is facing a growth in the EU, being actively encouraged by the EU Commission and the NCAs.¹²⁰⁸ EU courts also recognize private enforcers' rights to claim damages and compensate their losses.¹²⁰⁹ However, private enforcement still remains a challenging road for every claimant. There are a number of difficulties that litigators need to overcome, before they could finally recover the losses. This concern is particularly relevant

¹²⁰⁶ See: Opinion of Advocate General Kokott, regarding the Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* [2014]; Ronald J Baker, *Implementing Value Pricing: A Radical Business Model for Professional Firms* (John Wiley & Sons 2010) 72; Whish and Bailey (n 163) 316; Monti (n 31) 246. Kaczorowska-Ireland (n 200) 1033.

¹²⁰⁷ Ioannidou (n 27). 47

¹²⁰⁸ See: Chapter IV, section 2.3 *Limited resources of enforcement authorities and practice of priority setting*

¹²⁰⁹ *Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.* (n 1189) [26]; *Manfredi* (n 1189) [60]; *Case C-421/05, City Motors Groep NV v Citroën Belux NV European Court Reports 2007 I-00653 18 January 2007* (2007) European Court Reports 2007 I-00653 [33].

for consumers.

5.2 Ex-ante deterrence with private actions

As it has been discussed, competition law enforcement aims to ensure deterrence, compensation and remediation.¹²¹⁰ Section 2.5 of this chapter, about informal negotiations and settlement procedures of enforcement authorities, discussed the possibility of institutionalizing public compensation and allowing redress through public enforcement mechanisms. While this might be a relief for a number of victims of competition law infringements, public enforcement will mostly remain a supportive mechanism with regard to compensation, due to the limitations of its capabilities and its emphasis on public interests, rather than on individual losses. Still, the best way to ensure that those harmed by the infringement will be compensated is to empower the victims and offer effective and easily accessible tools to fight for their rights on their own.

Unlike public enforcement, private enforcement is driven by the self-interest of private enforcers, disregarding public policy objectives and general competition law goals. When taking an action, litigators are motivated by the possibility of personal economic gain and neglect the policies and objectives of the EU. This makes them better enforcers, as they have greater incentives.¹²¹¹ However, similarly to the invisible hand mechanism,¹²¹² when pursuing

¹²¹⁰ See: Chapter IV, Section 2. *Objectives and forms of competition law enforcement*

¹²¹¹ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 91

¹²¹² *Invisible Hand* ensures that market players acting for their individual goals serve to general public good as well. As Smith states: "Every individual... neither intends to promote the public interest, nor knows how much he is promoting it... he intends only his own security; and by directing that industry in such a manner as its

personal goals private enforcers contributes to public good, as they act as agents of the public interest.¹²¹³

The Commission declared that private enforcement is not only an instrument to protect individual rights, but also to secure the observance of competition law rules.¹²¹⁴ According to the former EU Competition Commissioner Monti, “*the threat of such litigation has a strong deterrent effect and would lead to a higher level of compliance with the competition rules.*”¹²¹⁵ The Commission has constantly emphasised on the role of damage actions for the effective enforcement of EU competition law, and in its Green Paper on Damages Action (2008) it reiterated *Courage* and recognized that compensation and deterrence are both as equally important goals of private enforcement.¹²¹⁶ However, at later stages the Commission has demonstrated some inconsistency in its positions.

In the White Paper on Damages Actions,¹²¹⁷ following the approach of several national laws, it identified compensation as the first and most important guiding principle for the proposed new measures, to improve damage actions. The same line was followed in the proposal for a Directive on Damages Actions,¹²¹⁸ which was withdrawn, but it demonstrates that the Commission has changed its position, giving more emphasis to the compensation goal of

produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.” See: Smith (n 1) 456.

¹²¹³ Ioannidou (n 27). 65

¹²¹⁴ *ibid.* P. 52-54

¹²¹⁵ Mario Monti, ‘Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation’ (Speech at IBA-8th Annual Competition Conference, 17 September 2004) <http://europa.eu/rapid/press-release_SPEECH-04-403_en.doc>.

¹²¹⁶ Ioannidou (n 27). 60-61

¹²¹⁷ European Commission, ‘Staff Working Document - Executive Summary of the Impact Assessment - White Paper on Damages Actions for Breach of the EC Antitrust Rules’ [1, 2]; European Commission, ‘Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules’ [14, 15].

¹²¹⁸ Commission Proposal for a Council Directive Governing Actions for Damages for Infringements of Article 81 and 82 of the Treaty (documents withdrawn before publication) sited at: Ioannidou (n 27). 61 note 94.

private enforcement, rather than to its deterring effect. Eventually this creates inconsistencies between the judicial approach and the aims identified by the Commission for private actions.¹²¹⁹

The position of EU courts has been more coherent. After recognising the right of individuals to claim damages, in *Courage* the ECJ stated that the right “*strengthens the working of the community competition rules and discourage agreements of practices which [...] restrict or distort competition from that point of view, actions for damages before national courts can make significant contribution to the maintenance of effective competition in the community*”¹²²⁰ This principle was followed by the Court in *Manfredi*,¹²²¹ where it underlined significant role of private actions in maintaining an effective competition in the community and ensure deterrence. In *Donau Chemie*, the ECJ stated “*the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union*”,¹²²² and took a similar approach in *CDC*,¹²²³ where it emphasised once more the beneficial nature of damage claims for maintaining effective competition.¹²²⁴

As¹²²⁵ argued by Gutta, regardless of the emphasis put on the objective of deterrence or compensation, it is beyond doubt that damage actions will have a certain deterring effect.¹²²⁶

Undertakings on the market are less likely to infringe competition law, when they face the

¹²¹⁹ Ioannidou (n 27). 60-61

¹²²⁰ *Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.* (n 1189). [26-27]

¹²²¹ *Manfredi* (n 1189).

¹²²² *Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] [46].

¹²²³ *Case T-437/08, CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission* [2011] Eur Court Rep 2011 II-08251. [77]

¹²²⁴ *C-5c*(n 1203). [17]

¹²²⁵ *Case T-437/08, CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission.* (n 1221).

¹²²⁶ Gutta (n 1048). 27

risk of paying a high amount of damages to their competitors and consumers, on top of administrative fines. Gutta argues that eventually this should lead to the development of a competition culture and a raise in the awareness of competition rules. Furthermore, the impact of private actions spread beyond one's personal economic interests in another way, as courts often take into account what effect their judgement will have on the market, considering the public interests.¹²²⁷

From the point of view of deterrence, the effects of stand-alone and follow-on cases are different, but they both contain significant potential.¹²²⁸ In follow-on cases, private enforcers take actions after the infringement has already been discovered and sanctioned by the public enforcer. As the Commission's or the NCA's decision on infringements under Articles 101 and 102 TFEU are binding and must be adopted by national courts,¹²²⁹ claimants have the possibility to take advantage of already established facts. Since follow-on cases do not disclose any previously unknown infringements, they can be viewed as less beneficial for deterrence.¹²³⁰ Yet, they still have certain deterring effect. The possibility of a follow-on case is problematic for infringers, as even after paying fines, they might still face significant

¹²²⁷ Therefore some authors claim that division of enforcement systems according to the interest they protect is fictional and does not reflect the reality. See: Thomas Eger and Hans-Bernd Schfer, *Research Handbook on the Economics of European Union Law* (Edward Elgar Publishing 2012) 302.

¹²²⁸ It is also worth noting that there is not always a strict distinction between stand alone and follow on cases. Frequently there are hybrid cases when there might not be a decision issued by the authority yet, but the alleged infringement is already known to it and there is an ongoing investigation (e.g *Nokia Corporation v AU Optronics Corporation and others* (2012) 245 UK Compet Law Rep (the High Court); *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2011]; *ibid.* See also: Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective* (Maklu 2013) 137. Ioannidou (n 27). 62-64

¹²²⁹ Van Bael (n 1089). 404

¹²³⁰ Michael Harker and Morten Hviid, 'Competition Law Enforcement: The "Free-Riding" Plaintiff and Incentives for the Revelation of Private Information' (2008) 31 *World Competition* 297; Thomas Eilmansberger, 'The Green Paper on Damages Actions for Breach Of The EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action' (2007) 44 *Common Market Law Review* 431, 431, 478.

financial charges.¹²³¹ The Spanish Telefónica case is a perfect demonstration of this argument. After the Commission fined Telefónica España with 151 million EUR for over five years of abuse of dominant position and the ECJ upheld the decision,¹²³² the consumer advocacy group AUSBANC filed a follow-on claim for damages in the amount of 458 million EUR.¹²³³ Another similar case is the *Hydrogen Peroxide cartel*,¹²³⁴ which was fined by the Commission with 388 million EUR. Soon a company, purchasing claims from victims of the cartel in Germany and Finland, took an action, demanding EUR 553 million.¹²³⁵ Unlike administrative fines, there is no limit for the damage award;¹²³⁶ that is why follow-on cases have monetary consequences that can significantly exceed the fines paid by an infringer.

Stand-alone cases are far more complicated and demanding. They impose the burden of proving the infringement on private parties, who do not possess any special investigative power. For how much they are challenging and hardly achievable, their benefits to

¹²³¹ Ioannidou (n 27). 62

¹²³² Between 2001-2006, Telefónica España abused its dominant position on Spanish broadband market. Its wholesale prices for the competitors and the retail prices for its own customers forced competitors to face losses in order to catch up with Telefónica's retail prices. Its margin-squeezing practices had established barriers to entry the growing broadband market and imposed considerable accompanying harm to consumers. In July 2007 the Commission fined Telefónica with EUR 151 million (*Case COMP/38784, Wanadoo España v Telefónica*; *ibid.*). In March 2012 the General Court (*Case T-336/07, Telefónica, SA and Telefónica de España, SA v European Commission* [2012] 07; *Case T-398/07, Kingdom of Spain v European Commission* [2012].) upheld the Commission's decision and so did the ECJ in July 2014 (*Case C-295/12 P, Telefónica SA and Telefónica de España SAU v European Commission* [2014].).

¹²³³ See: Charlotte Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. The Opt-Out Model' 18, 19. Ioannidou (n 27). P. 135; 'ICLG - International Comparative Legal Guides - Competition Litigation 2016 - Spain' (*ICLG - International Comparative Legal Guides - Competition Litigation 2016 - Spain*) <<http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2016/spain>> accessed 19 December 2015.

¹²³⁴ *Case T-437/08, CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*. (n 1221).

¹²³⁵ Ioannidou (n 27). 64-65

¹²³⁶ Regarding fines, for breaking EU competition law and their respective limits, see: European Commission, 'Fines for Breaking EU Competition Law' <http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf>.

competition enforcement are higher, and their deterrence effect is stronger.¹²³⁷ Stand-alone cases prove competition law infringement even before an NCA does so. This is a notable achievement for any consumer. However, this action poses a number of challenges, which will be discussed in the following sections.

5.3 Consumers as private enforcers

Private litigators of competition law cases can be divided into three groups: competitors, customers and consumers.¹²³⁸ According to this division, consumers are the most harmed by anticompetitive activities and they are also in the weakest position to take private actions against infringements.¹²³⁹ Their weaknesses are caused by the facts that individual damage for a consumer is usually small and not sizable enough to justify litigation costs. As already mentioned above, this leads to rational apathy, meaning that no reasonable consumer will take excessive costs for uncertain, small amount of compensation.¹²⁴⁰ Eventually, economically unjustified mechanisms will not be widely used, even if certain exceptions might occur.

Consumers cannot be expected to act on mere enthusiasm. Competition law lacks consistency, when it views consumers as rational actors¹²⁴¹ and at the same time - establishes barriers, demanding economically unjustified actions from them, in order to get compensation for their damages. The amount of expected compensation is directly related to

¹²³⁷ David McFadden, *The Private Enforcement of Competition Law in Ireland* (A&C Black 2014). 31-36

¹²³⁸ Graham (n 1202). 280

¹²³⁹ Ibid.

¹²⁴⁰ Cseres and Mendes (n 143). 12

¹²⁴¹ Marquis and Cisotta (n 1098). 52; Panta (n 1098). 60-61; Weber (n 1098). 35-36; Wrba (n 1098). 125; Lutter (n 1098).; Ioannidou (n 27). 399-400

the size of the losses, which in case of individual consumer usually is not high, even if the total damage to the whole market was severe.¹²⁴² In such case, existing private enforcement mechanism loses attractiveness for consumers and makes them hesitant to act. As long as private actions are not taken, no corrective justice goals will be achieved. Even if certain individuals take an action and even get compensation, their compensated loss is so minimal that it will not have any significant deterring effect.¹²⁴³ On top of that, as argued by Hjelmeng, costly litigation charges for recovering damages is against another objective of competition policy - efficient allocation of resources.¹²⁴⁴

In order to make consumers interested in taking an action, even for a not particularly high amount of compensation, the procedures for damage claims have to be simplified, otherwise consumers will endure competition law infringements even when they detect them.¹²⁴⁵ An environment where public enforcers neglect a number of infringements due to their different priorities, and consumers remain passive due to the barriers to enforcement, has no deterrence effect, and undertakings will feel encouraged to boost their profits with various anticompetitive practices. Another problem, related to consumers taking an individual action, is the phenomenon of free riding, which is particularly relevant when a multitude of victims suffered from the same infringement. Under such conditions, everyone can benefit if one victim takes an action, and the majority of the victims will find it efficient to wait until

¹²⁴² Marquis and Cisotta (n 1098). 8; George Cumming and Mirjam Freudenthal, *Civil Procedure in EU Competition Cases Before the English and Dutch Courts* (Kluwer Law International 2010). 88

¹²⁴³ Ibid.

¹²⁴⁴ Hjelmeng and Ministers (n 1185). 9;

¹²⁴⁵ There is empirical evidence that demonstrates that the number of cases brought by consumers before national courts is not high. See: Cseres and Mendes (n 143). 10, 28; Van den Bergh (n 1044). 23. Note. 24

someone else sues. In its extreme forms, free riding will lead to absolute passiveness of all the victims and no reaction to infringements.¹²⁴⁶

In addition to these discouraging factors, consumers will face the difficulty of detecting ongoing infringements on their own. As underlined above, consumers have first-hand knowledge of the market and they observe the behaviour of undertakings on a daily basis. However, certain types of infringements, which are secretive by nature, are often hardly noticeable for anyone not directly involved in them.¹²⁴⁷ Moreover, there is general consumer ignorance toward competition law matters that makes consumers far less effective watchdogs of market infringements.¹²⁴⁸

5.4 The most common challenges for private enforcers

Private enforcement takes the form of private actions before national courts, including damage claims, aiming to compensate the suffered damages, an injunction - to cease anticompetitive practices, and lawsuit - to abolish anti-competitive agreements.¹²⁴⁹ Private actions can be taken against state institutions as well, to challenge their acts that breach state aid rules and damage consumers' economic interests. The unique opportunity offered to private enforcers is the possibility to recover their suffered losses. Damage claims make private enforcement non-substitutable by the public one, as the former allows not only to cease anticompetitive practices or deter future violations but it also offers actual remedy for

¹²⁴⁶ Weber (n 1098). 35-36; Cseres and Mendes (n 143). 12, 13

¹²⁴⁷ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 89; Ioannidou (n 27). 76

¹²⁴⁸ Ioannidou (n 27). 76

¹²⁴⁹ Gutta (n 1048). 23

damaged parties. While the potential of private enforcement is huge and it is a useful tool for any victim of an infringement, including consumers, there are a number of difficulties that significantly fades its attractiveness.

5.4.1 Legal standing

Hardships in taking a private action are particularly applicable to consumers¹²⁵⁰ and they start from the first steps. The initial problem consumers usually face is legal standing, for they have not always been allowed to claim damages. A number of Member States had a restrictive approach,¹²⁵¹ such as the UK, where courts limited possibilities to take an action. Contractors were stripped from such rights and the position of consumers was equally unclear.¹²⁵²

With regard to continental Europe, countries following the French Civil Code model had a more liberal and clear approach, while a more restrictive approach was adopted by the states using German legal model.¹²⁵³ According to the *Schutznorm* doctrine¹²⁵⁴ it was possible to seek damages only if a claimant belonged to a predefined group of persons, which the

¹²⁵⁰ Graham (n 1202). 280

¹²⁵¹ Diversity among Member States regulations and lack of harmonization was another significant obstacle. Even in 2004 the study conducted by ASHURST started with the following statement: “*The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment.*” Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules’ [1].

¹²⁵² Ioannidou (n 27). 55

¹²⁵³ Assimakis P Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Pub 2008). 190, 191; Ioannidou (n 27). 83. Note 48.

¹²⁵⁴ According to *Schutznorm* doctrine (“Schutz” - to protect in German) subjective public right of the injured party is protected not only for the benefit of individuals generally but - for a specific group of persons. Therefore violation of a rule is possible only from a person who belongs to the group for whose protection the rule was determined for. See: Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education 2002). 395; Michael Faure and Marjan Peeters, *Climate Change Liability* (Edward Elgar Publishing 2011). 245

legislator intended to protect. In addition to Germany, the doctrine was followed by Austrian, Dutch, Italian and Greek laws. Under the German Act Against Restraints of Competition, consumers were left out of the protective scope of competition law and therefore were excluded from the possibility to take competition law claims. A similar approach was followed in Italy, Sweden and Finland.¹²⁵⁵

Article 101(3) TFEU, which demands benefits of anticompetitive agreements to be shared with consumers could have been interpreted in the way that competition law's protective scope includes consumers¹²⁵⁶ but the national practices has not been changed until the ECJ stated its position in *Courage* where, as we saw, it ruled that individuals who have suffered losses were legitimated to claim damages.¹²⁵⁷ In his Opinion, AG Mischo even specifically referred to consumer and competitors as third parties, whose interests have to be primarily protected.¹²⁵⁸ The general doctrine of *Courage* was further developed, as we saw, by *Manfredi*, where the Court stated "that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."¹²⁵⁹

5.4.2 Pass-on defence

Even after consumers were granted legal standing, various problems remained. A primary

¹²⁵⁵ Ioannidou (n 27). 83, note 48; Komninos (n 1251). 191, note 298

¹²⁵⁶ Komninos (n 1251). 193

¹²⁵⁷ *Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.* (n 1189).

[26]

¹²⁵⁸ *Opinion of AG Mischo on Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* 61.

¹²⁵⁹ *Manfredi* (n 1189). Para. 61; see also: *Case C 199/11, Europese Gemeenschap v Otis NV and Others* (n 1189) [61]. *Otis and Others* EU:C:2012:684, [61]

challenge consumers frequently faced were related to the so-called pass-on defence. Consumers rarely get goods directly from the producers. In most situations, they are indirect purchasers, meaning that there are one or more distribution stages between them and the competition law infringer.¹²⁶⁰ Those that are direct customers of an infringing undertaking usually pass on damages directly, or significantly reduce the overcharge by increasing the prices themselves. If despite the raised prices sales do not reduce, then they have not experienced any damage, and therefore cannot seek compensation. In this case, those to which the damage has been passed on are the actual victims who deserve the right to redress. If they are deprived from such abilities, then the actual victims stay unprotected and an infringer gets away with its violations.¹²⁶¹

It seems logical and fair to grant the right to damages to an entity which has suffered losses. However, this is not a universally shared position. Most famously, the US has another approach, established by the well-known case of *Hanover Shoe*.¹²⁶² During the proceedings, the defendant raised an issue that the claimant has not suffered damages, as it managed to pass them on. The court rejected this argument, stating that the claimant's right to damages should not be compromised by its own efforts to maintain a profit level.¹²⁶³ There was also a practical reason behind the decision, as the difficulties related to the passing on defence would make already complex antitrust proceedings even more complicated.¹²⁶⁴ The ultimate consumers were viewed to be reluctant to initiate damage claims.¹²⁶⁵ It was also believed that

¹²⁶⁰ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 92

¹²⁶¹ Ioannidou (n 27). 84-86

¹²⁶² *Hanover Shoe, Inc v United Shoe Machinery Corporation* [1968] US Supreme Court 392 U.S. 481.

¹²⁶³ *Ibid.* [489]

¹²⁶⁴ *Ibid.* [498]

¹²⁶⁵ *Ibid.* [494]

restricting passing on would save a right to take an action to the hands of those who most likely would have the greatest incentives to sue and would be in the most likely position to actually use it.¹²⁶⁶ This approach views direct purchasers as the "the most efficient enforcers" and "better detectors", and give them the leading role in private antitrust enforcement.¹²⁶⁷ *Illinois Brick*¹²⁶⁸ reaffirmed the judgement and refused to grant standing to indirect purchasers, eventually refusing many damaged parties' right to restore their losses.

The US approach is controversial and it is obvious even from the fact that many state laws went against the rulings, but the Supreme Court established that they are pre-empted by federal laws.¹²⁶⁹ The US approach has its arguments, but it is less applicable for the EU. First of all, it will be hard to justify a refusal of the right to damages for consumers, when EU law allows the participation of third parties to the enforcement process as complainants when they hold legitimate interest, and individual consumers directly and adversely affected in their economic interests, insofar as they are the buyers of goods or services that are the object of an infringement, qualify as such.¹²⁷⁰

Furthermore, as the majority of consumers are not in direct contact with the producers and get only indirectly affected by anticompetitive practices in a passing on manner,¹²⁷¹ a restriction of the passing-on defence for consumers will be hardly justifiable in the EU, where consumer welfare is among the primary competition law objectives, it is declared that consumers are

¹²⁶⁶ Ioannidou (n 27). 80-81; Howells, Ramsay and Wilhelmsson (n 594). 98

¹²⁶⁷ Hüsichelrath and Schweitzer (n 1055). 231; Renda and others (n 1044). [470].

¹²⁶⁸ *Illinois Brick Co v Illinois* [1977] US Supreme Court 431 U.S. 720.

¹²⁶⁹ Ioannidou (n 27). 80-83

¹²⁷⁰ European Commission, '2004/C 101/05' (n 1086) 05. recital 37

¹²⁷¹ Cseres, 'The Procedural Aspects of the Application of Competition Law. Consumers' Participation in Competition Law Procedures' (n 1041). 92; Parliament of the Great Britain, 'House of Commons. Welsh Affairs Committee -Globalisation and Its Impact on Wales: Report, Together with Formal Minutes' 46.

placed in the heart of EU competition policy,¹²⁷² and enforcement authorities constantly emphasise how much they care about and protect consumer interests.¹²⁷³ Moreover, the argument to place the rights in the hands of the group which is most likely to use them, is very thin, as such regulation encourages infringer to secure their first customers and eliminate all the possibility of private actions, reducing their deterring effect. As for compensatory purposes, obviously it is unsatisfactory, as it leaves the ultimate victims of competition law violation, such as consumers, without protection.¹²⁷⁴

The EU approach is different. It is in line with the principles established by *Courage* and *Manfredi*¹²⁷⁵ that anyone who suffers losses should be able to claim compensation as well. Many years of confusion and obscurity regarding pass on claims has finally been settled by the Damages Directive in 2014.¹²⁷⁶ Article 12 (1) of the directive states that “*compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer.*” This regulation is in full compliance with the ECJ’s case law.¹²⁷⁷

The Directive went even further, recognizing that pass-on damages usually travels down the

¹²⁷² Neelie Kroes, ‘Speech at BEUC Dinner, Consumers at the Heart of EU Competition Policy’ (The European Consumers’ Association, 22 April 2008) <http://europa.eu/rapid/press-release_SPEECH-08-212_en.htm?locale=en>; Adrien Mexis and John Madill, ‘Consumers at the Heart of EU Competition Policy’ (2009) 1 Competition Policy Newsletter 27, 27, 28.

¹²⁷³ Ioannidou (n 27). 82

¹²⁷⁴ Ibid.

¹²⁷⁵ Recently in *Kone AG Decision* the ECJ reinforced the principles established by *Courage (Case C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.* (n 1189).) and *Manfredi*. The judgement also recognised the right of victims of so called umbrella pricings to claim damages as well. (Umbrella pricing is recognised as one of the possible consequences of a cartel, when due to the situation on the market non-cartel members raise prices as well and overcharge consumers.) see: *C-557/12* (n 1203)., [22]

¹²⁷⁶ European Parliament and European Council (n 971). 1–19

¹²⁷⁷ *Case T-24/90* (n 1106).

supply chain. Despite the fierce opposition of the business sector,¹²⁷⁸ the Damages Directive took into consideration the usual difficulties of indirect consumers, to prove that they have suffered losses and to demonstrate the casual link between damages and actions of an infringer.¹²⁷⁹ In order to facilitate this process, the Directive established a rebuttable presumption of some level of overcharge harms. Recital 47 states that “*it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel.*” It should be mentioned that the presumption of harm is rebuttable, and still require the estimation of the concrete amount of harm by a judge.¹²⁸⁰

5.4.3 The damages suffered without purchasing infringement-related goods and services

In addition to the pass-on defence, there is another problematic issue, related to legal standing. As it was demonstrated, consumers can lodge complaints only when their interests have been directly and adversely affected. In practice, this means that they have purchased goods or services that were object of an infringement.¹²⁸¹ In order for an individual consumer to file a complaint, she will need to pass through several stages. It is necessary to prove a fact of an infringement, unless it is already established by the authority or a court decision. After an infringement is proven, a private enforcer should demonstrate that she has suffered damages and that the latter was a direct result of the infringement.¹²⁸² This casual link is best

¹²⁷⁸ Ioannidou (n 27). 87, note 65

¹²⁸⁰ European Parliament and European Council (n 971). recital 47, Art. 17

¹²⁸¹ European Commission, ‘2004/C 101/05’ (n 1086) 05. recital 37

¹²⁸² Wilman (n 1051). 271; Pedro and others (n 1183). 478

demonstrated in price related violations, especially after the Damages Directive,¹²⁸³ which established overcharge presumption for cartel related cases. EU courts similarly see customers as victims only if they have purchased the goods subject of infringement and paid excessive prices for that.¹²⁸⁴ However, purchasing goods for excessive prices is not the only way consumer interests can be violated.

When market is monopolized or there is a cartel and prices go up, there are two various ways consumers of the affected goods might get hurt. The first type of consumers continues purchasing the goods for a higher price. The excessive amount, they pay above a real price of the goods, constitutes the damage. Eventually, these purchasers can demonstrate a legitimate interest and seek redress via private enforcement. However, there is another group of consumers, which reacts in a different way, after prices of the goods raise, and refuse to continue purchasing the goods and switch to a second-best preference¹²⁸⁵ as a substitute. This decision is not exercising a free choice of a consumer. In fact, if a range of interchangeable goods is already limited on a market, such consumers might be obliged to purchase goods that are not in their taste at all.¹²⁸⁶

While it would be logical to see both types of consumers as victims of the infringement competition law qualifies only one of them as such and totally ignored the violated interests of the other. Definitely in the given cases the problem of proving damage, calculating losses and establishing the causal link is much severer however this does not justify the approach to

¹²⁸³ European Parliament and European Council (n 971).

¹²⁸⁴ C-557/12 (n 1203). [22]

¹²⁸⁵ Daniel A Crane, 'Optimizing Private Antitrust Enforcement' (2010) 63 Vanderbilt Law Review 675, 678–90' (2010) 63 Vanderbilt Law Review 675, 675.

¹²⁸⁶ See a practical example from Georgian, about increased consumption of natural gas, as car fuel prices went up, as a result of the Oil Cartel. See: Chapter IV, Section 5. *Private enforcement in Georgia*

ignore vast part of victims and deprive them from the possibility to take an action. These missed claims are unrealised deterrence that could have benefited to competition law enforcement and the achievement of its public goals, in addition to protecting private rights of consumers.

5.4.4 Access to evidence

Even if a consumer overcomes difficulties related to legal standing, there are still numerous challenges ahead. One of the most severe ones is her limited abilities to collect sufficient evidence against an infringing undertaking.¹²⁸⁷ Unlike public enforcers, consumers do not possess any special authority to conduct investigation or request the necessary data from undertakings.¹²⁸⁸ The Damages Directive recognises the information asymmetry that characterizes the competition law litigation, and determines that “*it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence.*”¹²⁸⁹

The problem to access evidence is particularly severe for stand-alone claims;¹²⁹⁰ however, similar problem are common also in follow-on cases. Even if an infringement is established, a consumer, seeking redress, will require access to the case materials in order to calculate damages. Frequently, a conflict arises when an infringement has been established by the help of leniency program. The primary reasons why the leniency program remains an effective

¹²⁸⁷ Cseres, ‘The Procedural Aspects of the Application of Competition Law. Consumers’ Participation in Competition Law Procedures’ (n 1041). 84, 92, See also: European Commission, ‘Notice on Immunity from Fines and Reduction of Fines in Cartel Cases’, (n 1097). [3]; Hawk (n 269). 48

¹²⁸⁸ Ibid.

¹²⁸⁹ European Parliament and European Council (n 971). Recital 15

¹²⁹⁰ Basedow (n 1124). 261

tool are its offer of amnesty and confidentiality to potential whistle blowers.¹²⁹¹ Therefore, disclosing the materials provided by a whistle-blower will definitely have negative effects and might deter others to blow a whistle, especially when they participate in an infringement themselves. This topic has been discussed by the ECJ, which ruled in *Pfleiderer*¹²⁹² that conflicting interests, of effectiveness of leniency and effective exercise of a right to damages, should be weighed up and decided by national courts.¹²⁹³ However, the Court did not give any instructions on how to perform this balancing exercise. This led to inconsistency, at the national level and kept the issue uncertain, instead of solving it.¹²⁹⁴

Imposing discretion over national courts to conduct a balancing test, without giving any concrete guidelines, did not work very well for consumers. It should be borne in mind that leniency is absolutely the sharpest tool to fight cartels,¹²⁹⁵ therefore neither the Commission nor the courts were willing to question its integrity, in favour of granting access to leniency materials.¹²⁹⁶ At the same time, the current approach does not allow members of a cartel – not even whistle-blowers - to use leniency as part of their defence strategy. The argument was attempted in *Kone*, where the defence argued for protecting leniency materials as a key factor

¹²⁹¹ Jacques Buhart, *Leniency Regimes: Jurisdictional Comparisons* (Sweet & Maxwell 2012) 87; Samantha Mobley and Ross Denton, *Global Cartels Handbook: Leniency: Policy and Procedure* (OUP Oxford 2011) s 7 (1); Simon J Evenett, Alexander Lehmann and Benn Steil, *Antitrust Goes Global: What Future for Transatlantic Cooperation?* (Brookings Institution Press 2000) 101.

¹²⁹² *Case C-360/09, Pfleiderer AG v Bundeskartellamt* [2011] Eur Court Rep 2011 -05161 [30, 31]; *Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others* (n 1220) [34, 39, 43, 49].

¹²⁹³ *Pfleiderer* decision was about materials collected by the NCAs, however as noted by the High Court in the National Grid case, considering the general language of the ruling, it should also apply to the materials produced by the Commission. *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2011] High Court of Justice EWHC 1717; *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2012] High Court of Justice EWHC 869. See also: Gutta (n 1048). 131; Andrea Minuto Rizzo, ‘Disclosure of Leniency Evidence: An Overview of ECJ’s *Pfleiderer* and UK’s National Grid Cases in the Light of the Recently Adopted Damages Directive’ [2015] Italian Antitrust review, N2 124, 126.

¹²⁹⁴ Ioannidou (n 27). 102

¹²⁹⁵ Buhart (n 1289) 135–136.

¹²⁹⁶ Barry Doherty and Anne Fitzpatrick, ‘Courage to Change? The Rocky Road to Directive 2014/104/EU and the Future of Private Competition Law Enforcement in Ireland’ (2015) 18 Irish Journal of European Law 30.

to ensure the effectiveness of public enforcement. Yet, the ECJ ruled that “*that leniency programme cannot deprive individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU.*”¹²⁹⁷ A similar argument was used in *National Grid*, where the Court underlined that there was no ground for the defendant to legitimately expect that leniency materials would not be disclosed. The ECJ referred to the Commission Leniency Notices of 2002 and 2006, which also make it clear that immunity for leniency does not protect an applicant from civil law consequences arising from a violation of Article 101 TFEU.¹²⁹⁸

5.4.5 Calculation of damages

Even when the claimant gains access to materials, another obstacle might arise: the calculation of damage. The problem is that there is no uniform, generally recognized method how it should be performed. There are various approaches, used to make a reasonable assumption of real prices, according to which excessive prices, and therefore the suffered losses can be calculated. During the proceedings usually the assistance of economic experts is required. However, regardless of the qualification of the expert, the final conclusion is always controversial, as far as it is a presumption and therefore always opened to manipulations and questioned by the other party.¹²⁹⁹

¹²⁹⁷ *C-557/12* (n 1203). [36]

¹²⁹⁸ *National Grid Electricity Transmission Plc v ABB Ltd & Ors* (n 1291) [37]; *National Grid Electricity Transmission Plc v ABB Ltd & Ors* (n 1291).

¹²⁹⁹ *Graham* (n 1202). 289, 290

5.4.6 *The litigation culture*

One more barrier on the road to private enforcement is the lack of litigation culture, which is often described as a typical feature of Europeans, and their main distinction from Americans, as Paulis states.¹³⁰⁰ In fact, in the US the court is the place where one goes to solve problems,¹³⁰¹ in the belief that the judge will help defend one's rights, while in Europe courts are viewed as the last place where anyone might want to go. In this sense, litigation is usually the last resort for problem-solving in the EU, and therefore it is fair to say that no excessive usage of private enforcement is expected. So far empirical data support this argument, as the number of private actions remains quite low.¹³⁰²

There are a number of factors that can explain the great development of litigation culture in the US, and the opposite reluctance of Europeans to take actions to protect their rights. The difference is more the outcome of different legal regulations and traditions, less of cultural differences.¹³⁰³ Van den Bergh¹³⁰⁴ identifies such factors in the forbidden multiplier or punitive damages in the EU, while in the US treble damages are used; the possibility of class actions in the US, while the EU focuses on collective actions, still keeping its sceptical stereotypes about the American style class actions and inevitable abuse of attorney

¹³⁰⁰ The speech delivered at the Max Planck Institute for Comparative and Private International Law on April 7 2006, for transcript see: Basedow (n 1124). 7-16

¹³⁰¹ See: Claus-Dieter Ehlermann and Isabela Atanasiu, *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 173.

¹³⁰² Ioannidou (n 27). 120-124; Van den Bergh (n 1044). 13; Cseres and Mendes (n 143). 10, 28

¹³⁰³ Barry Hawk argues that so called phenomenon of 'litigation culture' in the US cannot be explained with cultural differences, but is predominantly an outcome of American corporate law. Ehlermann and Atanasiu (n 1299) 173.

¹³⁰⁴ Van den Bergh (n 1044). 12-34, See also: Rodger and MacCulloch, *Competition Law and Policy in the EC and UK* (n 1154). 75,76

powers;¹³⁰⁵ the prohibition of contingency fees in the EU, which instead are a commonplace in the US; the pre-trial discovery procedure in the US, seen as a beneficial factor for private enforcers, for it allows access to relevant evidence.¹³⁰⁶ Other authors also point to the role of funding in developing a litigation culture. More precisely, a claimant is hesitant to take an action, if in case of losing she will be required to cover the litigation costs for the winning party as well.¹³⁰⁷ Weber refers to the American rule, which may require from parties to cover their own expenses. The much lower financial risk has a beneficial role to encourage a consumer to take an action.

These lists of differences are not exhaustive. More items can be added to it, such as the opt-out model of collective actions in the US, the wider usage of jury trials, and so forth.¹³⁰⁸ However, the primary difference between the systems is not in small details, but in their essence and nature. First of all, in the US public enforcement has never been the driving force in the application of antitrust law. Private enforcement almost fully substitutes it, and serves public goals.¹³⁰⁹ Meanwhile, in the EU public enforcement is the dominant form, and private enforcement has a supplementary role, with no intention to change it. In fact, although the EU has been modernising its enforcement systems for years to encourage private actions, it is

¹³⁰⁵ Van den Bergh blames unfair bad press of American model in the EU. As a result, it is believed that American attorneys act as entrepreneurs, maximizing personal profits and paying not due care to the interests of the members of the class, whom they represent. See: Ibid. See also: Jürgen G Backhaus, Alberto Cassone and Giovanni B Ramello, *The Law and Economics of Class Actions in Europe: Lessons from America* (Edward Elgar Publishing 2012).

¹³⁰⁶ Van den Bergh (n 1044). 12-34

¹³⁰⁷ Weber (n 1098). 35-36

¹³⁰⁸ Jones and Sufrin (n 197). 1085-1086; (155)

¹³⁰⁹ Phillip Louis Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International 2006) 199; Ehlermann and Atanasiu (n 1299) XIII; Hawk (n 269) 391.

intended as a complement to the leading public enforcement.¹³¹⁰ As noted by the Commission, the US and the EU legal contexts are radically different. EU policies are developed out of the European legal culture and traditions, which prefers balanced solutions and avoids over-incentives that can lead to abusive litigation practices.¹³¹¹

Transplanting the US legal system to the EU has never been an option and may not be a workable solution either.¹³¹² Arguably, it might not be enough to introduce a litigation culture in Europe. As demonstrated, there is a wide range of barriers that are responsible for hindering consumers from taking an action, which are not abstract, cultural phenomenon. The EU needs to address these issues, in order to develop a functioning private enforcement system that can effectively complement the dominating public enforcement model. In certain cases, this may even include adopted certain elements from the US model, for example the wider use of opt-out mechanisms for collective actions. Considering these obstacles, Ioannidou suggest that any individual consumer who takes an action deserves to be praised for her effort and struggle. However, the author also argues that the only mechanism that can tackle rational apathy¹³¹³ and allow the effective utilization of private enforcement in the EU is the further development of collective actions system.¹³¹⁴ Individual consumers struggle to coordinate and act collectively. While class actions, organized and taken by law firms, and funded by contingency fees remain vastly a US phenomenon,¹³¹⁵ a common procedure for the

¹³¹⁰ Monti (n 1213). Jones and Sufrin (n 197). 1085-1086; Rodger and MacCulloch, *Competition Law and Policy in the EC and UK* (n 1055). 74;

¹³¹¹ Gutta (n 1048). 45, 56

¹³¹² Ioannidou (n 27). 147-148

¹³¹³ Martin Ebers, André Janssen and Olaf Meyer, *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-Conformity and the Sellers' Right of Redress* (Walter de Gruyter 2009) 142–143.

¹³¹⁴ Ioannidou (n 27). 76-79, 158

¹³¹⁵ Van den Bergh (n 1044). 13

EU is to let consumer organizations bring claims on behalf of consumers. This is yet another reason why consumer law is necessary, as it usually establishes the consumer organizations that are responsible for such actions, and determine their competences.

5.5 Collective actions

Collective actions gained particular significance in the EU, since consumer welfare emerged as one of the primary goals of competition law. They are particularly suitable for consumers, as various factors, such as rational apathy or free riding, make individual litigation unattractive to use. In this perspective, collective actions represent one of the most effective measures to empower consumers, enhance their ability to access justice and obtain compensation. They are more than a mere sum of individual claims. If individual actions are motivated by self-interests of an individual consumer, their objectives are attained once the claimant restores her losses. They fight for the collective consumer interests, which is not a sum of individual consumer interests, but represents consumers as a group.¹³¹⁶

Focusing on the general consumer interests does not necessarily mean that individual consumer interests should be neglected. However, the nature of the infringements, which are typically challenged by collective actions, makes individual interests less relevant. Collective actions are possible in mass harm situations, when the infringement damages the economic interests of all the consumers of certain goods or services. As usual for such situations, individual harms amount to minimum losses, hence individual consumers lack motivation to seek compensation. Even if some consumers litigate successfully, the small amount of

¹³¹⁶ Ioannidou (n 27). 112

compensation will not have a significant deterring effect over an infringer. While individual consumer gain will not change, as it is directly related to one's individual losses, collective action will significantly increase deterring effect. The latter grows proportionally to the number of individual claims, united under a collective action.¹³¹⁷ For this reason, collective actions are primarily directed to deterrence and not compensation. This potential is well understood by the Commission, which has declared that collective redress can be particularly useful in mass harm situations, since *"the possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court."*¹³¹⁸

The special nature of collective actions allows consumers to access enforcement without investing much personal energy, resources and finances, therefore it motivates consumers with low value claims not to neglect the infringements, but to take an action, which otherwise would not take place.¹³¹⁹ Collective redress is a legal measure that can reinforce private enforcement, and turn it into a more attractive, widely used, effective tool, making competition law enforcement accessible for consumers.¹³²⁰ Eventually, allowing consumers to resist and fight anticompetitive practices that damage their interests, will deter infringers, benefit competition law enforcement and ensure the effective functioning of a market. Moreover, collecting multiple claims together avoids the development of an abusive litigation

¹³¹⁷ See: Wrba (n 1098). 125; David Sherwyn and Samuel Estreicher, *Employment Class and Collective Actions: Proceedings of the New York University 56th Annual Conference on Labor* (Wolters Kluwer Law & Business 2009) 62; Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 *Law Quarterly Review* 55, 55–82.

¹³¹⁸ European Council, 'Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law'. recital 9. Another important aspect of the recommendation is that it emphasises significance of consumer protection, as a value and objective for the Union. See: *ibid.* recitals: 1 and 7

¹³¹⁹ Ioannidou (n 27). pp. 108-116

¹³²⁰ Twigg-Flesner (n 877) 421.

culture¹³²¹ and prevents the excessive flow of similar cases to courts. This is a particularly valid argument as national courts, as well as the NCAs, constantly suffer from heavy backlog and distracting them from repetitive cases will have only a negative impact and decrease their effectiveness.

Collective actions can be divided into opt-in and opt-out systems. Opt-in model refers to a system, where victims need to explicitly express their willingness to take part in an action. In the opt-out model the action is brought on behalf of the whole group, with all the undefined victims, with the possibility for them to explicitly express their intention to leave the action, otherwise they will be deemed to be bound by the final judgment, without being required to take any active steps.¹³²²

The Commission supports “opt-in” mechanism, while leaving freedom to Member States to introduce even opt-out systems.¹³²³ Various authors claim that the opt-out system and its quasi mandatory group formation is a superior one. In fact, it is practically more effective, as collective actions aim to encourage consumers to take action without much individual efforts.¹³²⁴ This argument is confirmed by the acquisitions of behavioural studies, which well demonstrate the apathy of consumers and their character to stick to the default rules.¹³²⁵

Moreover, opt-in system performs poorly as a deterrent, as due to the amount of potential compensation, which is usually small, the majority of consumers might not bother to join

¹³²¹ Ibid. recital 15

¹³²² Rachael Mulheron, ‘The Case for an Opt-out Action for European Member States: A Legal and Empirical Analysis’ [2009] 15 Colum. J. Eur. L. 409 n 415.

¹³²³ Van Bael (n 1089). 398, 340

¹³²⁴ Ioannidou (n 27). 118-119

¹³²⁵ Lynda J Oswald, *The Law of Marketing* (Cengage Learning 2010). 299; Mathis (n 837) 199.

it.¹³²⁶ Yet, and despite its superior features, the opt-out model presents controversial elements as well. It can be argued that it is against the individualistic model of litigation, where the claimant retains control over the claim, and thus contrary to Article 6 ECHR¹³²⁷ and Article 47¹³²⁸ CFREU.¹³²⁹

Collective redress for competition law cases is already available in a number of EU Member States. There has been experience of consumer organization claims in the UK, France, Spain, Portugal.¹³³⁰ The Commission is attempting, with its non-binding recommendations, to support a coherent approach to collective redress without harmonizing Member States' regulations.¹³³¹ In spite of that, the number of collective actions remains quite limited. The optimistic explanation would be with the fact that the mechanism is still new for most of the states and therefore expectations should also be kept low for a while.¹³³² Moreover, as

¹³²⁶ (16) 118-119

¹³²⁷ Art. 6 of the European Convention on Human Rights guarantees the right to a Fair trial

¹³²⁸ Art. 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial

¹³²⁹ Ioannidou (n 27). 142

¹³³⁰ So far the most successful experience has been in Portugal, where opt-out model is used. There have been several successful disputes by Portuguese consumer association. One of the most famous was DECO v. Portugal Telecom, where DECO took an action against PT's alleged abuse of a dominant position, for the purpose to increase charges. The dispute was worth for EUR 120 mil. Finally the parties reached settlement and there was difficulty to distribute the money directly to individual consumers, DECO and PT agreed that the latter would grant its customers free telephone calls on Sundays for a period of about three months. Such model for the distribution of damages is quite common, as due to high number of members of the collective action and small amount of compensation, it might be easier and more convenient for everyone to deliver compensation in the form of discounts, or create funds for consumer causes.

ibid. 120-125, 133-134; Strand (n 1051). 200; See also: _Élodie Falla, *The Role of the Court in Collective Redress Litigation : Comparative Report* (Primento 2014).

¹³³¹ Dr Orkun Akseli, Professor Amandine Garde and Professor Willem van Boom, *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Publishing, Ltd 2014) 257; Philip Lowe and Mel Marquis, *European Competition Law Annual 2011 : Integrating Public and Private Enforcement of Competition Law : Implications for Courts and Agencies* (Hart Publishing 2014) 109–113.

¹³³² Cseres and Mendes (n 143). 13

mentioned above, it is not easy for consumers to coordinate and act collectively,¹³³³ especially since there are no rich traditions in the field.

The legal standing to bring a collective action depends on available types of collective redress mechanism, which differ among Member States.¹³³⁴ Collective redress can be in the form of representative actions or brought jointly by the victims.¹³³⁵ The issue of standing is more problematic in case of representative actions. An entity, which can bring the representative action, should be either ad hoc certified entities, designated representative entities that fulfil certain criteria set by law, or public authorities.¹³³⁶ Moreover, the representative entity should be a non-profit organization and be able to prove appropriate administrative and financial capacity to represent the interest of claimants in an appropriate manner.¹³³⁷

The features of representative entity and the manner, claims are transferred is a delicate issue, one that Member States take very seriously. In February 2015 the Higher Regional Court ('Oberlandesgericht') of Düsseldorf dismissed the appeal brought by Cartel Damage Claims SA against a notorious German cement cartel, on the ground of the illegality and immorality of the way how the consumers' claims were transferred to CDC SA.¹³³⁸ According to the Court, the process happened before CDC's registration as a provider of legal services, in violation of the German Act on the Provision of Legal Advice ('Rechtsberatungsgesetz').

¹³³³ Graham (n 1202). 280

¹³³⁴ In certain cases, when infringement directly affects consumers, competition law collective redress might overlap consumer collective redress. See: 'Competition Law' <<https://www.collectiveredress.org/collective-redress/competition-law>> accessed 6 October 2017.

¹³³⁵ Gutta (n 1048). 205

¹³³⁶ Ibid. 196

¹³³⁷ European Council, 'Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law' (n 1316). recitals: 17, 18

¹³³⁸ *Urt v 17122013*, Az [2013] Landgericht Düsseldorf 37 O 200/09 (Kart) U.

Moreover, it unevenly distributed cost risks to the detriment of defendants, which could not have been tolerated.¹³³⁹

The most commonly used representative bodies are consumer organizations. The non-profit nature of these organisations stand in contrast with the profit-maximising law firms and attorneys in the US. In this case, there should not be conflict of interest, unlike the US model where law-firms often bring class actions using contingency fees for their services. Exactly this conditional payment model and clear commercial interest of the participating law firms, caused wide-scale scepticism toward the US model. The EU Commission even recommended Member States not to allow contingency fees for legal services.¹³⁴⁰ However, it will be misleading to claim that in absence of contingency fees, the EU model is risk free and very effective.

The question whether consumer associations should be presumed to be more loyal and faithful for consumers and their interests, in contrast to law firms working for contingency fees is discussed by Van den Bergh.¹³⁴¹ Obviously consumer organizations are less motivated by financial profits, as their gains belong to the organizations themselves and should be spent to achieve the objectives they serve to. However, this does not guarantee that litigation will not be controlled by profit-seeking lawyers. Consumer associations may be established only after an infringement has already occurred; therefore they will have standing on an *ad hoc*

¹³³⁹ See the press release: <http://www.carteldamageclaims.com/wordpress/wp-content/uploads/2014/02/Cement-press-Release-4.pdf>

¹³⁴⁰ European Council, 'Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law' (n 1316). [30]; Despite the given recommendations certain national laws might still allow some forms of financial incentives. For example, German competition law allows consumer associations to keep a portion of the obtained payments. Van den Bergh argues that this is the same as contingency fees, only with another name. See: Van den Bergh (n 1044). 32

¹³⁴¹ Van den Bergh (n 1044). 29-32;

basis. The author argues that such situations are not radically different from the US class actions led by attorneys. There is still possibility that lawyers might “capture” consumer associations and still increase their profit even when working on hourly fee and not on a contingency fee, by inflating the hours of work needed.¹³⁴²

Another critical question raised by Van den Bergh is how effectively members can exercise control over consumer associations. In case of limited control, the associations might get captured or influenced by political parties or groups and their intentions might not be in line with consumers’ economic interest. On top of that there is also a problem of funding, since, in contrast to the US model, where contingency fees cover litigation costs in the EU membership fees should cover such costs, putting higher risks at stake.¹³⁴³

Ioannides also emphasises that it would be wrong to view consumer organizations as a panacea. Usually they are under-resourced and not very effective. Empirical studies demonstrate that their participation is very limited and in fact consumer collective actions constitute only 0.4% of the total competition litigation in Europe.¹³⁴⁴ According to Van den Bergh, one of the reasons why consumer associations are not well developed in the EU is a lack of competition. At a national level we mostly meet consumer associations holding monopolistic positions, while there is no cross-border competition either, due to diverging national regulations.¹³⁴⁵

¹³⁴² Ibid. 22, 29-32; See also: F Stephen, ‘Regulation of the Legal Profession’ in Roger van den Bergh and A Paccès (eds), *Encyclopedia of Law and Economics. Volume 9. Regulation and Economics* (Edward Elgar 2012) 659–663.

¹³⁴³ Van den Bergh (n 1044). 29-32;

¹³⁴⁴ Ioannidou (n 27). 120-124; Van den Bergh (n 1044) 13. Cséres and Mendes (n 143). 10, 28;

¹³⁴⁵ Van den Bergh (n 1044) 29.

Overall, despite the significant developments in the direction of private enforcement of competition law, the EU failed to reform collective actions mechanism and to make it an effectively functioning, widely used tool. The major step in the process of enhancing private actions was the adoption of the Damages Directive.¹³⁴⁶ Unfortunately, it omitted collective actions, and the Commission only managed to issue non-mandatory recommendations regarding it,¹³⁴⁷ favouring the opt-in model, which is less practical for consumers. Ioannidou identifies this failure as the primary reason why consumers' role in private enforcement of EU competition law remains largely theoretical.¹³⁴⁸

5.6 Summary

EU competition law enforcement system is built around a strong and active public enforcement. However, even under such model, public enforcement is not a self-sufficient system, and it needs to be supported. Private enforcement has exactly such complementary role in the EU. It is an extremely significant supportive system that can tremendously benefit to the effectiveness of competition policies and assist to achieve the established public goals along with protecting private interests. As demonstrated, private enforcement is the only mechanism that can allow victims of infringements to get compensation for their losses. While playing a primary compensatory role, it also contributes immensely to attain a deterring effect and this prevents future violations of law.

¹³⁴⁶ (134)

¹³⁴⁷ European Council, 'Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law' (n 1316).

¹³⁴⁸ Ioannidou (n 27). 205

Private enforcement can be functional and effective only when it offers a relatively easy path to litigation for potential enforcers. Unlike the US system, which places enforcement possibilities in the hands of immediate buyers, EU competition law has much trust in the final consumers. It acknowledges the “suffering” of final consumers as the ultimate victims of competition law infringements and stressed about the need for granting them the right to damages. Consumers constitute the majority of private parties on the market and they have huge potential to play an active role in private enforcement. Unfortunately, the current regulations do not allow the full exploitation of this capacity, and hinders it with various legal and practical barriers.

The system makes it often economically irrational for consumers to litigate and seek damages. Moreover, consumers are hindered by various cognitive biases, tempted to remain idle and free ride. Even if an individual consumer has a strong determination and will to act, the barriers in the process dramatically reduce her chances to succeed. Individual actions are extremely complicated, challenging and poorly rewarded. That is why they will never happen massively under the EU legal system. The only solution to make private enforcement actively used in the EU is to develop effective collective actions mechanisms. In recent years the EU has taken important steps in this direction; however the current model is still far from ideal and requires further reformations.

While the EU is slowly but surely developing its enforcement system, Georgia is passively transplanting market monitoring and regulating laws, to the extent required by the obligations taken under the Association Agreement with the EU. Compared to the EU model, the Georgian system is still underdeveloped. While building its competition law enforcement,

Georgia needs to actively study the flaws of its model laws and act pro-actively, introducing the reforms which the EU is only struggling to implement due to its clumsy bureaucracy and long standing practices. The current situation and future perspectives of private enforcement in Georgia will be discussed in the following section, allowing us to compare its level of development to the one reached in the EU.

6. Private Enforcement in Georgia

6.1 The current status-quo

Since the early 1990s, Georgian antimonopoly regulations, and later competition law, has always been moving toward harmonizing with EU law.¹³⁴⁹ This process nowadays is most intensified, as both the current law on competition, as well as the Agency are constructed according to the EU model¹³⁵⁰. Despite its usual recourse to EU solutions trends, Georgia does not seem to actively follow the given tendency of developing an effective private enforcement system. The consumer participation in this process is practically inexistent, in line with Georgian law and its disregard of consumers and their need for empowerment and protection, and availability of self-defense enforcement tools.

It has been demonstrated in the previous sections that consumers have huge potential for private enforcement of EU competition law. As Georgian law is largely built on the same

¹³⁴⁹ Approximation with the EU *acquis* has been a declared goal of all EU-Georgian agreements including: Georgia & EU Partnership and Cooperation Agreement of 1996 (Article 44) and Association Agreement of 2014 (Chapter 10). However, in practice, Georgian law has not always been on the track of harmonizing with EU law, but as discussed in the part, it has even developed in the opposite direction,.

¹³⁵⁰ 'Sofia Competition Forum Newsletter' (n 18) 2; Zukakishvili (n 17) 42; Mariani (n 361).

model, so much as to be potentially considered a legal transplant,¹³⁵¹ private enforcement should have equally high potential in Georgia. As already noted many times, Georgia significantly lags behind to the EU in consumer law

In addition to providing a compensation for consumer losses, the direct involvement of consumers in competition law enforcement is necessary in Georgia as much as it is in the EU. Although public enforcement is the prevalent model, the limited resources available to NCAs decrease their effectiveness and deterrent effect.¹³⁵² This argument is particularly applicable to young authorities, like the Georgian one, which also lack human capital and expertise.¹³⁵³ Obviously, their performance is less effective, therefore it also achieves less deterring effect. In addition to these limitations, Georgian law also makes it hard task for the Agency to ensure deterrence, as fines for competition law violation are much lower than in the EU.¹³⁵⁴ Under such conditions, the development of effective private enforcement mechanisms is a necessity rather than a choice, in order to leverage the consumers' resources and add another layer of financial burden for infringers, in the form of compensation to their victims.

Moreover, granting consumers the right to seek damages is important, as there is no other functional instrument, to ensure protection of their rights and economic interests. However it would be naïve to believe that competition law can alone achieve this goal, without the support of consumer law. The existence of effective consumer protection rules is vital. Georgia needs to take a holistic approach and adopt consumer protection legislation, along

¹³⁵¹ Zukakishvili (n 17). 42, 43; LC (n 371).; 'Sofia Competition Forum Newsletter' (n 18). 3

¹³⁵² See: Chapter IV, Section 2.3 *Limited resources of enforcement authorities and practice of priority setting*; Section 4.4.6 *The litigation culture*

¹³⁵³ Frederic Jenny and Yannis Katsoulacos, *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer 2016) 374. Malinauskaite (n 87).

¹³⁵⁴ Georgian law allows fining an infringer with an amount of no more than 5% of its annual turnover.

with reforming procedural rules of competition law, in order to create a system where consumers actively participate and contribute to the enforcement of competition law and contribute to the effective functioning of the national market.

Another reason why private effective enforcement is vital for Georgia that the national market operated for already a decade without any effective state regulation, and there are numerous signs of anticompetitive actions and abuses.¹³⁵⁵ Many of such anticompetitive practices continue, even after the intervention of the Agency. For example, in the Oil cartel case,¹³⁵⁶ the Agency talks about the artificial barriers established by one of the cartel members, Sun Petroleum, through the leasing of dozens of the petrol stations, later pushed out of the market by the cartel activities. The leasing contracts were extremely one-sided and made the contractors of Sun Petroleum "prisoners" of the contracts, unable to exit and re-enter the market independently, even after the dissolution of the cartel. This well demonstrates that while the Agency fined the cartel members, it failed to achieve remediation of the market and to restore the damaged competition. This argument is even more valid, considering that the Agency also notes how new undertakings do not compete with the former cartel members with lower prices, but to the contrary, they try to take advantage of the established high prices use umbrella pricing instead.¹³⁵⁷

In lack of any statistical data on private enforcement, it is hard to estimate whether any notable tendencies have developed in practice, since the introduction of competition law in Georgia. While there are few cases where undertakings thought redress for competition law

¹³⁵⁵ See: Ketevan Lapachi and Kutivadze (n 22) 30.

¹³⁵⁶ *Order No 81 on the Car Fuel Commodity Market* (n 1180).

¹³⁵⁷ Zurab Gvelesiani, 'The First Cartel Discovered on Georgian Market. Case Comment to the Decision of July 14, 2015 on the Investigation of Car Fuel Commodity Market (Order №81 of the Chairman of the Georgian Competition Agency)' 9 *Yearbook of Antitrust and Regulatory Studies (YARS)* 2016, 173–177.

violations,¹³⁵⁸ I am unaware of any private enforcement cases, initiated by consumers. This is because while Georgian competition law permits private enforcement, there is no specific strategy to encourage it. This situation can be partially explained by the fact that the Agency is still very young, and weighted down with numerous tasks, so that formulating a private enforcement strategy might not be one of its main priorities. However, after reviewing its action plan for 2014-2017,¹³⁵⁹ there is still no sign that the Agency is actually planning to take any steps in this context. This might give the impression that there is no clear understanding of the potential of private enforcement.

Some might argue that the Agency is first of all responsible for the implementation of existing competition law legislation and for public enforcement and it might not be in its priorities to focus on developing private enforcement. However, it is also the authority responsible to work with the legislative and executive institutions of Georgia, as well as with the international organizations, for the purpose of improvement of Georgian competition law and policies.¹³⁶⁰ Therefore, the development of private enforcement should definitely be in its agenda.

The only openly expressed position of the Agency on the matter was made in 2015, stating that the national judges might not be sufficiently prepared to effectively deal with cases based on the new field of competition law. As stated by the Agency, unqualified judges might

¹³⁵⁸ Gvelesiani (n 340) 221, 228, 229.

¹³⁵⁹ The action plan for 2014-2017 years, which was published on Competition Agency website 3 years ago, has not been updated yet; therefore, it is not known whether the Agency might have any plans regarding private enforcement development, for the upcoming years. The current action plan is available from: <http://competition.ge/ge/page2.php?p=1&m=14>

¹³⁶⁰ LC (n 371). Art. 17⁽²⁾(g)

become a burden for the effective performance of competition law.¹³⁶¹ Since then, judicial trainings have been organized a number of times¹³⁶² and presumably their qualification has been enhanced, at least partially.

6.2 Problems of Georgian private enforcement system

Without developed case law and the ability to identify specific enforcement trends, the only available methodology to evaluate private enforcement perspectives in Georgia, is to examine its existing legal rules, and the, availability and accessibility of private actions. Knowing what the offered legal options are, and the possibility of success against barriers on the road of private enforcement, makes it possible to analyse what the key challenges might be for potential private enforcers. According to Article 4 LGC, the Agency is an independent legal entity of public law, responsible for the enforcement and protection of competition law. However, enforcing the law is not exclusively a task of the Agency. On the contrary, there are various other possibilities of taking action without its involvement. Article 28 (2) LGC provides that in the case of a competition law violation, any person¹³⁶³ is entitled to go directly to a court, without applying to the Agency first. Article 28 (2) LGC determines that

¹³⁶¹ A Gugushvili, ‘Speech at the International Competition Network Conference, Held in Sidney from 28.04.2015 to 01.05.2015.’ (Sidney, 28 April 2015) <<http://competition.ge/ge/page4.php?b=270>>.

¹³⁶² The High School of Justice (HSoJ) is an educational institution, which works to institutionalize training for the judges and other court staff. According to the HSoJ website, 2 day training was held for 17 judges from the Tbilisi City Court and the Tbilisi Appellate Court regarding competition law in October 2014. There is no other information available regarding the continuous education of judges in this field. See: http://www.hsoj.ge/eng/media_center/news/2014-12-11-treningi-temaze-konkurenciis,

Moreover, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) organized a number of trainings for the judges. A couple of other educational events have been organized by the help of the EU, Swedish Development Cooperation Agency, OECD and the Competition Agency itself.

¹³⁶³ The notion of “person” is broad and may refer to a natural person or to a legal entity

private claims must be lodged before the Tbilisi City Court giving the latter the exclusive jurisdiction to hear such cases.¹³⁶⁴

In case private interests are violated by the state, mostly by granting unjustified aid to competitors and distorting the natural balance of the market, Article 15 LGC allows the parties, which interests have been violated, to appeal against the state aid.¹³⁶⁵ Moreover, Article 33(2) LGC (*The rule of appealing the decision of the agency*) contains rules of a broader nature. It states that in case of a violation of a competition related legislation, any

¹³⁶⁴ Georgian judicial system is divided into civil, administrative and criminal proceedings. Civil cases include disputes between private parties, while administrative cases deal with disputes against State institutions. Article 28 (3) of the competition law makes it clear, albeit it does not state it explicitly, that Article 28 (1) is applicable to civil disputes – it states that the court will declare the claim as inadmissible, or close an already admitted claim, if insolvency proceedings are opened against the respondent economic agent. From this it can be adduced that such disputes have a civil nature because insolvency proceedings can only relate to private entities, and not to State bodies (the latter are subjects of administrative law). See: Parliament of Georgia, Organic Law of Georgia of 8 Dec. 2009, No. 2257 on Common Courts, Article 1(2) ('Organic Law' is a type of law within Georgian legal system that has a higher hierarchy than (ordinary) law and regulates the issues as provided by the Constitution of Georgia. See: Law of Georgia on Normative Acts (n 764) Art. 7(2,3), 8.

¹³⁶⁵ There is a mechanism related to private enforcement, which is limited to administrative cases only and does not directly award any damages compensation. It can, however, be used as an effective tool against competition distorting actions from administrative bodies, making it possible to claim damages as a result. Article 30(2) of the Constitution of Georgia determines that the State is bound to promote competition and prohibits monopolistic activity. The judicial body ensuring supremacy of the Constitution is the Constitutional Court of Georgia (CCG). Any normative legal act issued by a State body can be appealed to the CCG in order to ascertain its compliance with the Constitution. This presents an effective legal tool to any person who believes that the rights and freedoms recognised under chapter II of the Constitution of Georgia have been violated or might be directly violated.

Although the CCG does not grant compensation, its decision can be used in the manner of follow-on cases before the ordinary courts, if the court has found the act to be infringing the constitutional provisions, guarantying market competition. The position of the CCG will be obligatory for the common courts and therefore shares by them. The ruling of the CCG can be used as proof of competition restriction and illegal aid by a State body. This legal tool has already been used by cargo companies.

Although the case was ultimately closed, because the disputed act was repelled by the issuing body itself, it established a good example of how the CCG might serve the interests of private enforcement. From January 2013, the market of cargo services became a subject of State interference, attempting to let the State-owned Georgian Post monopolize the market. The victimized companies applied to the court, demanding abolition of the disputed acts. After losing the case the government adopted a new resolution, this time attempting to monopolize entire postal services market. The resolution was appealed to the CCG. The Court admitted the case, but before hearing it, the government cancelled the appealed resolution. Eventually, the company filed a civil lawsuit, asking for damages in the amount of 1 500 000 GEL (equivalent to 632 191 EUR) from the State. For more information see: 'New Draft Law on Postal Service: Establishing the Georgian Post Monopoly?'

interested party can directly apply to a relevant state body, or an official, or to take an action to national courts and claim damages.

After adopting the competition law and recognizing certain anti-competitive actions as illegal, it is now possible to also use tort law in order to claim damages suffered due to competition law infringements. Tort law provisions are contained in chapter III of the GCC. According to Article 992 GCC, a person who unlawfully causes damage to another shall compensate that damage. The GCC also establishes joint and several liability, which can be used against infringing parties of anti-competitive agreements and concerted practices. Liability is shared in full, which means that each defendant is deemed liable for the entire damage, regardless of the percentage of its own fault. Liability is shared among the instigators and accessories, as well as those consciously benefiting from the damage caused to another person.¹³⁶⁶

6.2.1 Time limitation to take an action

According to the GCC, the limitation period on damages claims caused by tort is set to three years starting from the moment when the victim became aware of the damage or of the identity of the person liable.¹³⁶⁷ However, the law on competition establishes a stricter rule, which prevails and restricts the limitation period to three years from the moment of the infringement.¹³⁶⁸

¹³⁶⁶ Civil Code of Georgia (n 760). Art. 998

¹³⁶⁷ Article 1008 GCC.

¹³⁶⁸ When there is a conflict between the two equal legal norms, it is necessary to identify which one should apply, according to the hierarchy, as determined by Art. 5 of law of Georgia on Normative Acts. The law on

This specific limitation period established in Article 27 of the law on competition can be considered to be one of the biggest barriers for bringing a private action in a competition case in Georgia. As mentioned, this norm departs from the general rule applicable to damages claims set out in the GCC, where the three/year period runs from the moment when the victim becomes aware of the damage or of the identity of the perpetrator. This means that for competition law infringements, the victim might miss the deadline even without knowing that the time limit is running. While anti-competitive conducts are often secret in nature, private parties do not have any special powers,¹³⁶⁹ and might find it hard to detect them on their own. As Gutta rightfully indicates, antitrust victims are often not even aware of the existence of an infringement, or might learn about it only long after it took place. To start counting the limitation period as early as the date of the infringement means that the actual time for taking action is much shorter, or does not even exist, at least in some cases.¹³⁷⁰

The time limit established by the Georgian competition law goes against modern practice and is based on a model rejected 30 years ago by the ECJ.¹³⁷¹ Private competition law enforcers would thus benefit from the application of the general rule set out by the GCC, they would have more time to act, and there would be less risk of missing the deadline without knowing about the infringement. Yet another advantage of using the GCC standard time limitation provisions would be that if the moment when the victim became aware of the damage is disputable, the burden of proof would lie on the defendant, as ruled by the Supreme Court of

competition is a newer legal act than the GCC, it is also the special act dedicated to regulate competition related issues. while the GCC is not a supreme act to overrule the differences, law on competition will prevail for competition cases, meaning that time limit to take an action is three years and it is calculated from the moment of the infringement (LC (n 371). Art. 27).

¹³⁶⁹ Hüschelrath and Peyer (n 1044). 6

¹³⁷⁰ Gutta (n 1048). 270.

¹³⁷¹ *Case 145/83* (n 1087).

Georgia.¹³⁷² Overall, the motivation behind setting shorter time-limit for competition law cases is neither clear nor justifiable. In practice, this provision might become a significant barrier to the development of private enforcement in Georgia, and in certain cases it might deprive an injured person from the right to bring a claim and get compensation.¹³⁷³

6.2.2 *Collective redress*

Collective redress is unknown for Georgian law. The closest provision lays in the possibility of joint actions, determined by Article 86 of the hereafter, GCPC. A joint action may be lodged by a number of persons together, when the object of the lawsuit is their joint rights, or their claim is based on the same grounds. A joint action is also allowed when claims are similar, even if the previous two conditions are not fully met. However, it lays in the discretion of the judge to allow a joint lawsuit or divide it into several individual ones.¹³⁷⁴

Even if the joint action is allowed, it is not similar to the collective action. Each claimant of the joint lawsuit participates independently in the proceedings.¹³⁷⁵ Hence, their claims can vary and eventually, the resulting judgements might differ depending on the claimant. However, claimants of a joint lawsuit are allowed to grant the power of attorney to one of them, or let the same lawyer represent them all.¹³⁷⁶ Moreover, if the court discusses several

¹³⁷² See: *T v JSC CH* [2014] The Supreme Court of Georgia AS-260-244-2014.

¹³⁷³ Gutta (n 1048).270.

¹³⁷⁴ Ibid. Article 182, 203(C)

¹³⁷⁵ Ibid. Article 86(d)

¹³⁷⁶ Ibid. Article 87(b)

cases similar to one another, the judge can join them *ex officio* or upon a petition of the parties.¹³⁷⁷

The rhetoric of empowering a consumer by granting rights to enforce the law and to take "*the law into his own hands*" is a popular argument, in favour of private actions. However credibility of this argument is questionable if the granted rules do not actually bring any changes for a consumer.¹³⁷⁸ As already discussed when analysing the EU system, individual claims are very rare from consumers, as their damages are usually minimal and not worth for litigating independently. In order to make the rhetoric of empowering consumers actually valid, consumers should be offered easily accessible mechanisms they can actually use. In such case it would be an actual empowerment. As we saw, the EU mechanism that best enables consumers to take an action and actively participate to private enforcement is collective redress.¹³⁷⁹ The need for such a mechanism is absolutely applicable to Georgia, and this once again demonstrates the closes ties between competition and consumer laws, as effective regulation of this issue requires at least existence of the both legal fields, while in Georgia we do not meet a well developed consumer law at all.

An interesting initiative was suggested regarding the possibilities of consumer collective actions. The draft Law on Consumer's Rights Protection introduced a new institute in Georgian law, the Consumer Ombudsman.¹³⁸⁰ Similar bodies exist in other regulated market sectors,¹³⁸¹ however for the general national market this is a novelty. The responsibilities of

¹³⁷⁷ Ibid. Article 182(4)

¹³⁷⁸ Hodges, 'The Consumer as Regulator' (n 779).

¹³⁷⁹ See: Chapter IV, Section 4.5. *Collective actions*

¹³⁸⁰ Draft Law of Georgia on Consumer Rights Protection (n 754). Art. 14 (1)

¹³⁸¹ There are three national regulatory bodies in Georgia. Georgian National Communication Commission (GNCC); Georgian National Energy and Water Supply Regulatory Commission (GNERC) and the National

the Consumer Ombudsmen were supposed to protect consumers' interests, monitor the market and react on violations. The Ombudsman should have also tried to restore the violated rights, and along with other means it could have used ADR methods to settle disputes between consumers and traders.

Article 14 (2) LGC provided that the Ombudsman was entitled to represent one or more consumers before the court for the purpose to stop the violation of consumer rights. Whether damage claims were also within the Ombudsman's responsibilities and, if so, which model of collective actions could have been used for consumer representation (opt-in or opt-out) was not indicated in the law. The institution of a Consumer Ombudsman is one of the best practices from EU Member States and its introduction in Georgia would be very advisable, particularly since there is already experience of using similar institution in other regulated market sectors. However, currently the fate of the draft law is unknown. It was withdrawn for further improvements and until its new version is not presented, not much can be speculated about the prospects of collective consumer actions in Georgian competition law.

6.2.3 Suffering from damages without purchasing infringement related goods and services

The same difficulties an EU consumer faces in private enforcement fully apply to Georgian consumers as well. Some issues have a specific national connotation, though. In certain cases, due to the lack of a developed case law, it is not clear how severe the problem actually is. For example, as noted above, private actions are allowed for any party whose interests has been

Bank of Georgia. More about the bodies, their scope of regulation and their consumer protection divisions will be discussed below, when discussing the institutional design of Georgian enforcement authorities.

damaged by infringement, however it is not clear yet whether this provision can be interpreted as to cover pass-on claims. Since both the Agency, and Georgian judges intensively refer to EU case law and use it for interpreting national competition regulations,¹³⁸² one can only speculate that the passing-on defence can be allowed, as determined by EU courts.

The problem of consumers' legal standing in case of damage claims is fully applicable to Georgian law as well. In fact, there is an interesting example related to the Fuel Commodity Cartel of Georgia. The fuel commodity market was one of the most distorted for years, and in 2015 the Agency disclosed the cartel.¹³⁸³ As the petrol prices were continuously increasing, it became common for drivers to convert their vehicles to propane consumption. For the majority of drivers the only motivation was the lower price of propane, while otherwise its consumption was related to higher risks, the capacity of engines were decreasing, it was also less comfortable and less accessible to purchase it, as there was not very well developed network for gas filling stations. Moreover, drivers were obliged to invest additional money in the conversion of their cars, hoping they would compensate the expenses later by buying cheaper fuel while such modification was decreasing the value of the car. Obviously the consumers who purchased petrol for higher prices are victims, but so are the ones who went through undesirable effort and undertook expenses in order to reduce the negative impact of the cartel. However, the latter group does not have the legal mechanism to seek the damages.

¹³⁸² Zukakishvili (n 17). 42

¹³⁸³ see: *Order No 81 on the Car Fuel Commodity Market* (n 1180).

6.2.4 *Relevance of the EU case law*

The issue of the burden of proof remains a typical challenge for private enforcers in every jurisdiction. It might prove particularly difficult in Georgia, however, considering its lack of developed case law which claimants could use to support their arguments, making it necessary for private parties to interpret the legislative provision. The problem could be remedied by a partial reliance on the rich case law of the CJEU. However, not only does the latter not apply to Georgia directly, it might often not be relevant either. Still, it can be a helpful guide for at least some cases. According to Article 7(5) of the Law of Georgia on Normative Acts, every international agreement of Georgia, which entered into force, takes precedence over domestic normative acts, unless it contradicts the Constitution of Georgia. All of the agreements that Georgia signed with the EU, including the PCA and the Association Agreement, stress that Georgia will approximate its laws with *EU acquis*. The latter term has a wide interpretation including EU case law.¹³⁸⁴ Moreover, even if EU court judgements are not directly binding in Georgia, it is very relevant for the Georgian model, which was constructed according to the EU one. Maus refers to this phenomenon as a ‘dialogue of judges’, which concerns the confirmation, elaboration or rejection of the case law of foreign countries or supra-national courts.¹³⁸⁵ In the absence of national cases and court practice, reliance on foreign best practices, and the interpretations given by famous judges, should not be harmful. Therefore, while training Georgian judges, it is important to educate them about the landmark cases from EU in order to make them more open for sharing

¹³⁸⁴ See: <http://eur-lex.europa.eu/summary/glossary/acquis.html>

¹³⁸⁵ ‘Le Recours Aux Précédents Étrangers et Le Dialogue Des Cours Constitutionnelles (Application of the Case Law of Foreign Courts and Dialogue between Constitutional Courts’ [2009] Rev. fr. dr. const., no 80 675-696.

argumentations based on EU rulings and let them understand and interpret the referred cases correctly. As Zukakishvili indicates, the practice of relying on the interpretations of the EU courts is already widely spread within the agency and among the judges as well.¹³⁸⁶ It will probably remain like this, until Georgia develops its own case-law.

6.2.5 *Competent Court*

While the identification of the court that is competent to hear competition law cases is relatively of minor importance, it is still worth to briefly address the issue, question its rationality and suggest an alternative regulation. The official motivation behind this rule is given in the relevant Governmental Strategy prepared in 2010. The document states that *'the main reason for this decision ... is to safeguard the building up of relevant competence as well as a uniform application and case law in the field of competition law'*.¹³⁸⁷ The justification and proportionality of the chosen approach is controversial, as the necessity to establish a special rule for competition law cases and limit its litigation geographically, is thinly justified.

The argument that that the competent court should be limited to one, in order to develop a uniform enforcement practice and case law is not in line with the CPCG. Article 391 CPCG rules that it is the Supreme Court that is responsible for developing uniform practices. Therefore, there is no need to impose such role over the lowest instance court.

¹³⁸⁶ Zukakishvili (n 17). 42

¹³⁸⁷ Decree on the Approval of the Comprehensive Strategy in Competition Policy (n 356).

One more justification behind the decision could have been related to judges. The Governmental Strategy, which first suggested Tbilisi City Court as the only competent body, indicated also that there was the need to train judges in order to enhance their knowledge and qualification in this field.¹³⁸⁸ The same view has later been repeated by representatives of the Agency.¹³⁸⁹ It is clearly easier and faster to train the judges of a single court than the entire national judiciary. However, this justification would have been valid if the restrictions were only temporary. It is clear that neither the government nor the Agency distrusts judges in general, yet they both indicated the need for certain preparatory works to take place in the initial enforcement phase. It is fair to say therefore that this is a temporary problem which should be duly resolved. Unfortunately, the legal provision that gives exclusive jurisdiction to the Tbilisi City Court is not transitional in nature, and it is not expected to expire, unless the LGC is amended. Moreover, the assigned court is not a special court dedicated to competition law cases, as it happens in some EU Member States,¹³⁹⁰ but an ordinary first instance court merely situated in the country's capital.

Tbilisi is, without doubt, the biggest city in Georgia: it has the largest population and almost 50% of businesses are registered there.¹³⁹¹ However, a huge number of consumers live

¹³⁸⁸ Ibid.

¹³⁸⁹ For more information, see: <http://competition.ge/ge/page4.php?b=270>

¹³⁹⁰ For instance, the Polish Court of Competition and Consumer Protection is a special court working exclusively on the issues of competition and consumer laws.

¹³⁹¹ According to the data of the Population Census of Georgia 2014, 3 729 635 person lives in Georgia – 1 118 035 out of them reside in Tbilisi; For more information, see the preliminary results of the Population Census of Georgia 2014:

http://geostat.ge/cms/site_images/files/georgian/population/agceris%20cinascari%20shedegebi_30.04.2015.pdf

Furthermore, in Georgia, 43.4% of all businesses are registered in Tbilisi see:

http://geostat.ge/?action=page&p_id=241&lang=geo

outside Tbilisi and a number of businesses are active in its various geographic regions.¹³⁹² Considering that Georgia is a relatively small country, limiting the jurisdiction to a single court only might not be an insuperable obstacle. Yet it can still be a barrier, especially for consumers living outside Tbilisi, as using a centralized court would require additional financial and logistical expenditures.

A further problem is that the Tbilisi City Court is already one of the most overloaded courts in Georgia. As stated in an interview by its Chair, the Tbilisi City Court is already working at its maximum capacity, and yet it cannot deal with its current caseload. It neither has enough judges, nor court rooms.¹³⁹³ According to statistical data quoted by the Chair, each of its judges hears between 40-70 cases a month, while some have more than 300 cases assigned to them. At this point in time, the Court hears cases that have been lodged two years ago. In such an environment, it is hard for the judges to even only deal with regular cases. The specific and innovative nature of competition law cases would make this matter far worse, especially considering that the Tbilisi City Court is expected to develop a uniform practice in this new legal branch. In order to do so, its judges would have to ensure a higher than usual quality of their (competition-related) decisions. This expectation is in stark opposition to the recently criticised ‘conveyer-belt’ type of system, which the Tbilisi City Court is said to be currently employing. According to Transparency International Georgia, when rendering their decisions, judges have sometimes failed to be well acquainted with their own cases; they

¹³⁹² When the competition agency was launched, all of the early applications were filed by companies operating in regions other than Tbilisi.

¹³⁹³ See: <http://www.kvirispalitra.ge/justice/23403-ratom-tcianurdeba-saqmeebis-gankhilva-sasamarthloshi.html>

were also said to be more interested in closing a case as fast as possible, than in delivering justice¹³⁹⁴.

Albeit not explicitly stated, another reason behind the decision can be assumption that the number of competition cases will be limited in Georgia, without the practical need to let all first instance courts deal with them. Even regarding this argument the decision seems not proportional, considering that Georgia has in fact 26 separate first instance district or city courts, distributed relatively evenly across the entire country. It is clear that having several courts in each region serves the goal of making the judicial system easily accessible for every person. It would have been fairer to keep a geographical balance and along with the Tbilisi City Court, and assign competition cases to at least one court in west Georgia, analogue to the appellate court system.¹³⁹⁵

6.2.6 Summary

The re-introduction of competition law in Georgia was one of the most important legal developments of recent years. Since its adoption in 2012, Georgia's Law on Competition has been subject to major amendments and has progressed significantly. Despite several remaining criticisms, the positive impact of the recent reform cannot be denied. After years of unregulated market, Georgia has now a modern competition law act and a functioning competition authority. Private parties are granted certain legal guarantees and mechanism to

¹³⁹⁴ Transparency International Georgia, 'Court Monitoring Report of Administrative Cases' 29.

¹³⁹⁵ Georgia is geographically divided into west and east Georgia, by a mountain range. Tbilisi is situated in the central part of east Georgia and therefore is less accessible for the resident of west Georgia. Georgia has two appellate courts, one situated in Tbilisi and another in Kutaisi, the second largest city, located in central west Georgia. The same model could have been used for competition law cases, which would have been a better solution from the point of view of fairness and equal accessibility to courts.

defend themselves and to claim damages. Still, there are a number of challenges which need to be overcome in order to ensure that the recent legal changes will have a noteworthy impact in practice.

Currently private enforcement of Georgian competition law is almost nonexistent in practice. The Competition Agency needs to show some initiative in this perspective and encourage its development. One of the ways it should act is to work on legislative reforms. Considering the potential consumers hold to contribute to private enforcement, the Agency should be occupied with advocating for consumer law adoption, however so far there is no evidence to assume its particular interest in consumers or in private enforcement. The main reason why private actions do not happen in Georgia can be blamed on rational apathy. Considering the current legal framework, it does not make much economic sense for consumers to take an action. In addition to traditional practical difficulties on the road of enforcement, Georgian law largely fails to provide effective tools, allowing consumers easy access to competition law enforcement. Learning from the EU experience, Georgia needs to work toward developing effective collective redress mechanism. However, once again this cannot happen without adopting consumer law and establishing the institute of consumer ombudsman or another special body, entitled to represent and act for consumers.

7. Conclusion

Law enforcement is a vital part of a successful and effective regulation. A good but poorly enforced law does not bring any incentives, and this applies to competition law as well. As it has been demonstrated, there are serious challenges on the road to private actions,

particularly for consumers, and this statement applies both to the EU and Georgia. Obviously competition law enforcement happens also without consumer participation, but the latter has been in the center of the analysis as they are the most interesting and relevant market actors for the purpose of this dissertation.

Consumer can contribute to competition on a daily basis as they act on the market, make choices and purchase goods and services. Their rational behaviour can support the optimal functioning of the market. Apart from that, the consumers' role and potential is vital at the enforcement level of competition law when infringements occur. In this process consumer law support is essential. Self-confident, educated consumers, knowing their rights and seeing the negative effects of anticompetitive actions, can be very active in protecting their personal rights, and in this way support the achievement of public goals and of a high level of deterrence. However, empowering consumers cannot happen without an effective consumer law. In order for this potential to be effectively used, consumers should be given more access to enforcement process.

While the law grants them the possibility to take private actions, we have seen how in practice consumers face hardships that are severe enough to discourage them from doing so. There are several problematic issues regarding both public and private enforcement of competition law. While one of the mantras of academic contributions is that competition law brings significant incentives to consumers, the practice is not that simple and attractive. Claiming damages is often related to the risk of suffering extra damages, mostly in the form of legal costs, with minimum chances of success. Consumers undertake such risk in exceptional cases, when bringing a case to court is more a matter of principle than a rational

decision. However, such a low participation from consumers' side is another defeat for competition law, and a step away from a better functioning market. In this way, competition law not only fails consumers as its ultimate beneficiaries, but it also misses the chance to utilize the immense potential of consumers and direct them toward the goals of effective competition and consumer welfare.

Despite the criticism, it should be also mentioned that there is a tendency of simplifying private actions for consumers and encouraging damage claims, as shown by the Damages Directive (2014/104/EU). Well-regulated competition law should allow consumers to be active and use their skills and power attributed to them by consumer law. Particular attention should be paid to always consider consumer interests in the process of public enforcement. Best practices demonstrate the possibility to offer compensation also through public enforcement. With regard to private enforcement system, collective actions remain one of the unsolved challenges and require further development.

Chapter V. Institutional Design of the Enforcement Authorities

1. Introduction

The main argument of this dissertation is that consumer empowerment and protection is vital to the efficient functioning of market competition. It also has an immense potential to benefit the effective application and enforcement of competition law. Consumer law is responsible for empowering and educating consumers. It also creates a market environment where consumers have the ability to get proper information, compare available choices and make rational selections. As analysed in Chapters II and III, consumers are generally vulnerable market actors. They are the weakest in their abilities, resources, bargaining power, and suffer the most of cognitive biases.¹³⁹⁶ These problems are particularly relevant for low income consumers;¹³⁹⁷ therefore it would be safe to say that consumers in Georgia are particularly weak, due to lack of effective consumer law and widespread poverty.¹³⁹⁸

Overcoming these barriers allows consumers to act freely on a market, and exercise their abilities to make rational purchasing decisions.¹³⁹⁹ Each of such choices supports undertakings that are the most competitive in producing and offering the best goods and services for consumers. Therefore, by allowing consumers to choose rationally, consumer law supports the development of a competitive market, where the best performing undertakings

¹³⁹⁶ See: Chapter II, Section 3. *The notion of consumer in EU consumer law*; Section 4. *The birth and evolution of consumer protection law*; Section 6. *The rationale of consumer protection and contradictory aspects of the notion of consumer*, see also: Chapter III, Section 2. *Consumer Image*

¹³⁹⁷ See: Chapter 3, Section 4. *Vulnerable Georgian Consumer*.

¹³⁹⁸ According to the World Bank Group, since 2010 there is a tendency of poverty decline in Georgia, however around 1/3 of the population still live in poverty. For more details, see: World Bank Group, 'Georgia: Recent Trends and Drivers of Poverty Reduction (FY16 Georgia Poverty Assessment) Poverty and Equity Global Practice' <<http://pubdocs.worldbank.org/en/980951472223098077/Georgia-PPA-FY16-presentation-AUG2016-final.pdf>>.

¹³⁹⁹ Robert S Rycroft, *The American Middle Class: An Economic Encyclopedia of Progress and Poverty* (ABC-CLIO, LLC 2017) 102.

can operate and succeed.¹⁴⁰⁰ A competitive market cannot be sustained without informed, confident and rational consumers. In the ideal version of perfect competition, consumers are fully informed and capable of making rational decisions to maximize their profit and utility. The closer a real-world market can get to this theoretical model, the higher is its competitiveness rate.¹⁴⁰¹ As already underlined, the most effective method to increase consumer awareness and strengthen their skills and abilities to think and purchase rationally is consumer law.

Another benefit of consumer law is to empower consumers and make them a tough prey for businesses. Empowered consumers are self-defensive and can react to law infringements when their economic interests are harmed.¹⁴⁰² However, a paradox of rational consumers is that they estimate their risks before engaging in a legal action, and often such rational estimations hinder them from protecting their rights.¹⁴⁰³ A poor regulation of private enforcement makes it hardly justifiable for a consumer to claim damages arising from competition law infringements. While the amount of consumer losses are rarely worth individual actions, the harmonious cooperation between competition and consumer laws may offer an opportunity for consumers to find other victims of the same infringement, team up with and act collectively.¹⁴⁰⁴

¹⁴⁰⁰ Rajagopal (n 526).

¹⁴⁰¹ Diane M Dewar, *Essentials of Health Economics* (Jones & Bartlett Publishers 2015) 20; Susan J Penner, *Introduction to Health Care Economics & Financial Management: Fundamental Concepts with Practical Applications* (Lippincott Williams & Wilkins 2004) 2015; Charles Rowley, *The Encyclopedia of Public Choice* (Springer 2004). Rexford E Santerre and Stephen P Neun, *Health Economics: Theory, Insights, and Industry Studies* (Cengage Learning 2012) 226, 227; Sampat Mukherjee, *Modern Economic Theory* (New Age International 2002) 377.

¹⁴⁰² Cseres, 'The Controversies of the Consumer Welfare Standard' (n 289) 130.

¹⁴⁰³ See: Chapter IV, Section 4.3. *Consumers as private enforcers*

¹⁴⁰⁴ See: Chapter IV, Section 4.5. *Collective actions*

While the institutions competent to lead collective actions are often established by consumer law, the same discipline should also provide procedural rules to create an environment where such actions will actually occur, instead of remaining nominal.¹⁴⁰⁵ In this process of harmonious cooperation, the design and operation of such institutions is of key importance. In fact, both consumer protection law and competition law are enforced by state authorities and the way these authorities are designed, funded or managed determines how effectively the laws will be applied and enforced, how successfully the established goals will be achieved, and whether consumers will actually get any actual benefits out of them. The degree of engagement of NCAs in consumer related issues, how smoothly consumer and competition laws are implemented and reward consumers, widely depend on their institutional design. Even of private enforcement mechanisms are strongly influenced by the practices of enforcement institutions. As we saw before, their correct functioning is not only important to benefit consumers, but is also of key relevance for competition law enforcement, since an effective market regulation will only occur if the NCA can deal with its assignments – a goal that can be achieved only if it successfully manage to leverage the vast potential of consumers.¹⁴⁰⁶

Good rules remain a dead letter if there is no efficiently run organisation with the processes to implement them – states Lowe in his article on competition policy institutions of the 21st century.¹⁴⁰⁷ All the benefits of competitive markets and the welfare promised to consumers

¹⁴⁰⁵ Ibid.

¹⁴⁰⁶ See: Chapter IV, Section 2.3 *Limited resources of enforcement authorities and practice of priority setting*; Section 2.4 *Rejecting a complaint on the ground of possibility to bring an action before national courts*

¹⁴⁰⁷ Lowe (n 392). 1

by policy makers can become a reality only if it they get effectively enforced.¹⁴⁰⁸ Considering the significance of the task, building an effective model of enforcement, with an efficient structure and management is not a simple task and a one-time operation. Similarly to market competition itself, this is also a process, and its path to perfection is never-ending. There are a number of factors shaping the structure of enforcement authorities which are constantly changing, thus requiring the permanent adaptation of the NCAs' institutional design. They range from market developments to technological changes, evolutions in business organization models and patterns of commerce, and so forth require NCAs to be also dynamic, effective, and always up to the modern demands of the market.¹⁴⁰⁹ Substantive rules are also changing as economic thinking is developing, explaining market functioning in innovative ways and from new perspectives.¹⁴¹⁰

In order to make law enforcement consumer-oriented and to best accommodate all the objectives of the law, along with consumer interests, it is essential to design and construct enforcement institutions properly. A parliament adopting a set of rules is only the first step to market regulation and supervision; logically it should be followed by procedural and institutional developments in order to ensure a smooth and effective enforcement.¹⁴¹¹ The previous chapter discussed the procedural aspects of consumer participation to competition enforcement. Its logical continuation is the analysis of structure and design of the authorities responsible for enforcing the law.

¹⁴⁰⁸ Worth to mention that optimal institutional design is not a remedy for fundamental flaws in the substantive rules. See: *ibid.* 1

¹⁴⁰⁹ Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission' (n 28). 6

¹⁴¹⁰ Lowe (n 392). 3

¹⁴¹¹ *ibid.* 1

2. Defining the scope

This dissertation focuses on the EU and Georgian jurisdictions and advocates for introduction of consumer law in Georgia, as a necessary and essential part of yet partially executed market reform. It is inevitable for Georgia to introduce consumer law. When it happens, the first burning issue to rise will be to how design an authority competent for its enforcement. From our perspective, it is interesting to discuss this not as a stand-alone issue, but in relation with competition law, especially since the enforcement of the two fields of law is already intertwined, and often managed by the same authorities. This dissertation cannot be considered complete without analysing the topic of institutional reform of NCAs, with a particular focus on the lessons that Georgia may learn from the EU and its Member States' experience. Issues such as the separation of the enforcement of consumer protection and competition law between different authorities or their centralization in the hands of a single agency, or the definition of the organizational features and structural arrangements an enforcement authority should have to be effective and successful are key to the smooth and harmonious collaboration of the two bodies of law, in their quest to achieve the shared and separate objectives.

Ensuring a proper institutional framework and relevant administrative capacity to guarantee the effective implementation of competition law was part of the Association Agreement between the EU and Georgia,¹⁴¹² Signed in June 2014 and fully in force from July 1, 2016.¹⁴¹³ It includes provisions that impose the obligation to establish and maintain an

¹⁴¹² 'Association Agenda between the European Union and Georgia' 2.4 *Trade and Trade-Related Matters, Competition*, P. 17 <https://eeas.europa.eu/sites/eeas/files/associationagenda_2014_en.pdf>.

¹⁴¹³ See: European Commission, 'Press Release - EU-Georgia Association Agreement Fully Enters into Force' <http://europa.eu/rapid/press-release_IP-16-2369_en.htm> accessed 7 October 2017.

authority responsible to and appropriately equipped for the effective enforcement of competition laws.¹⁴¹⁴ Increasing its efficiency remains one of the major goals for Georgian Competition Agency.¹⁴¹⁵ Georgia is still an emerging competition jurisdiction,¹⁴¹⁶ and it can be argued that there is ample room to improve the current organisation of the Agency. While it is still unclear whether it might also become an enforcer of consumer law, this chapter will formulate recommendations on the optimal institutional arrangements and institutional redesign Georgia may implement after the adoption of a consumer protection statute. This discussion is based on the assumption that having competition law and lacking a developed consumer protection law is incomplete, one-sided and ineffective, and that Georgia will be able to effectively regulate the market and its competition mechanisms only through a holistic approach and the parallel development of consumer protection regulations.

Transplanting the EU competition system and introducing market regulation is not the final point of the reforms Georgia is called to undertake, as the objectives set by the Association Agreement are yet to be attained. The adoption of a foreign system is often viewed as unwanted, unnecessary measures imposed by international organisation over developing states.¹⁴¹⁷ Yet, while it is true that Georgia amended its competition law in response to the Agreement with the EU, the adoption of market regulations was, or at least should have been, also motivated by the goal to upgrade its economic and productive capacities and enhance its

¹⁴¹⁴ Ibid. Title IV, Chapter 10, article 204(2)

¹⁴¹⁵ The Agency has indicated about its limitations in a number of cases, as well as in public statements. While the Agency is advocating widening its authority, it also works to increase efficiency under the current regulations. Part of this ongoing project was the Order of the Chairman of the Competition Agency N199 of 16 December 2015, On Approval of the 2016-2018 Training Plan for the Agency. See: 'Sofia Competition Forum Newsletter' (n 18) 3.

¹⁴¹⁶ Zukakishvili (n 17) 42.

¹⁴¹⁷ For example, Stiglitz blames the IMF, World Bank and other international organizations for destabilising poor states, by imposing unsuitable neoliberal policies over them. Joseph E Stiglitz, *Globalization and Its Discontents* (Lane Penguin Books 2002).

market competitiveness, before eliminating trade barriers, accessing the Internal Market and establishing free trade relations. This reform is supposed to make the Georgian economic system healthier and its national market more competitive, and to allow taking actual advantages from its liberalized trade relations with the EU. In order to achieve this transformation, the mere adoption of a law is not sufficient, resulting instead in a mere ‘box-ticking’ attitude. Genuine reforms are more complex. As Svetiev argues, legal transplantation is a hybrid process “*at the level of rules, [...and...] even more importantly at the level of procedures and institutions.*”¹⁴¹⁸ Therefore, Georgian competition law reform cannot be properly analysed without considering the design of the enforcing body, especially when discussing the possibility of introducing another market regulatory mechanism, such as consumer law.

Georgia is not an innovator in transplanting rules from another system. As famously stated by Watson, “*most changes in most systems are the result of borrowing.*”¹⁴¹⁹ Watson also believed that there is little correlation between society and legal changes. Being autonomous from the surrounding social context allows laws to be easily transplanted and they can suit equally successfully to new environments.¹⁴²⁰ This theory was strongly criticised by various authors, including Khan-Freund and Freidman, stressing that law is deeply embodied in a nation's life and, as a mirror, it reflects or should reflect the demands of the people on whom it applies.¹⁴²¹ Therefore, a complex and multidimensional process of transplantation requires

¹⁴¹⁸ Svetiev (n 741). 210

¹⁴¹⁹ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974). 94

¹⁴²⁰ *Ibid.* 97, 109; Alan Watson, ‘Comparative Law and Legal Change’ (1978) 37 *The Cambridge Law Journal* 313, 313; Alan Watson, ‘The Evolution of Law: The Roman System of Contracts’ (1984) 2 *Law and History Review* 1, 1.

¹⁴²¹ Khan-Freund (n 15) 1–27; M. Freidman, (n 15) 127–129.

adjustment of the adopted system to the local environment. This argument is not limited to substantive and procedural law, but it very much applies to institutional design as well. According to Sacco, “no people invent all of the legal rules and institutions it actually employs, and some principally use rules and institutions developed elsewhere.”¹⁴²² According to Georgiev, EU competition law itself went through a three dimensional process of tailored transplantation¹⁴²³ in the 2000s, which included substantive, procedural and institutional reforms.¹⁴²⁴

Typically, after transplanting a new law, the major questions are related to its enforcement, whether it is necessary to set up a new state body, reform an already existing one, or grant the enforcement power to another body with relatively similar functions and expertise.¹⁴²⁵ In order to answer the question about designing a modern, optimal and effective institution, capable of enforcing the regulations transplanted from the EU, it will be helpful to review experience of a number of EU Member States, which have recently reorganized their enforcement institutions.

It is practically impossible to generate an institutional model that can be globally optimal.¹⁴²⁶ There are a number of state-specific factors that shape the institutional arrangements adopted by the various Member States. This eventually leads to institutional variety and not

¹⁴²² Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 *The American Journal of Comparative Law* 1, 11.

¹⁴²³ To which Georgiev calls *Americanization*. See: George S Georgiev, ‘Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law’ (2007) 4 *Utah Law Review* 971, 981.

¹⁴²⁴ *Ibid.*

¹⁴²⁵ Sacco (n 1420) Installment II.

¹⁴²⁶ Ramon Xifre, ‘Competition and Regulation Reforms in Spain in 2013: The CNMC - An International Perspective’. 1

uniformity.¹⁴²⁷ The new models and experimental designs used by certain states in the recent years are not universal, but state-specific, or even authority-specific.¹⁴²⁸ However, this does not mean that each country should invent its own, distinct system. Learning lessons from others ‘experiences is a highly recommended approach, before designing one’s own institutions. Any sound reform should be tested against international good practices, and so should Georgia do as well.

That is why this chapter analyses the EU experience more at general level and applies it to Georgian context. Despite substantive competition law is harmonized throughout the EU, procedural and institutional arrangements remain under the competence of Member States, and tend to widely differ.¹⁴²⁹ Due to the scope and size of this study, it is impossible to properly analyse each and every national NCAs. This chapter will focus, instead, on the latest reform trends, studying the authorities which have gone through the most significant modification in the past years, in order to understand what has led to the need of reforming pre-existing systems.

The interrelations between competition and consumer laws have always been part of discussion throughout these reform processes. In many ways, the efforts to redesign the existing authorities were often taken exactly with the objective to find better ways to fully

¹⁴²⁷ Svetiev (n 741).215; Empirical studies demonstrate that similar institutional reforms under different systems deliver different results and knowing the functions and goals of an institution cannot help much to predict its effectiveness, unless taking all other relevant circumstances under consideration. See: Antonina Bakardjieva Engelbrekt, ‘Toward an Institutional Approach to Comparative Economic Law’ in Antonina Bakardjieva Engelbrekt and Joakim Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar Publishing 2009) 213–251; Katharina Pistor, ‘Property Rights: Towards an Integrated Theory of Institutional and System Change’ (2011) 11 *Global Jurist* Article 6.

¹⁴²⁸ Ottow (n 28).

¹⁴²⁹ Jancic Davor, *National Parliaments After the Lisbon Treaty and the Euro Crisis: Resilience Or Resignation?* (Oxford University Press 2017) 74; Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (OUP Oxford 2011) 12.

realize synergies between competition and consumer laws.¹⁴³⁰ In this context, the most frequently discussed question is whether sole-responsibility authorities are more effective than multifunctional ones.¹⁴³¹ Analysing the best practices of institutional design of selected EU Member States and studying their experience of dealing with similar problems will allow collecting some ideas and learn lessons that should be considered when designing the most optimal enforcement authority structure for Georgia.

3. Literature review and research gap

The institutional design of enforcement authorities became a topical and widely disputed issue since the early 2000s. In the last 20 years the world had welcomed at least 40 new NCAs.¹⁴³² The initial catalyst was the fall of the Soviet Union and the collapse of the communist ideology, which established free and competitive market as the most optimal and efficient model worldwide.¹⁴³³ As market globalization moved to the new state and international trade was intensified, the existence of competition laws and their enforcement authorities became a part of free trade agreements. Naturally, this created the need for guidance on how to set up and design a new authority in countries not having previous experience in this respect, as also reflected in the OECD Competition Committee roundtables.¹⁴³⁴

¹⁴³⁰ See: Katalin J Cseres, 'Comparing Laws in the Enforcement of EU and National Competition Laws' [2010] *European Journal of Legal Studies* 3(1) 7.

¹⁴³¹ *Ibid.*

¹⁴³³ Jones and Sufirin (n 197). 3, 4

¹⁴³⁴ The first roundtable on optimal design for authorities was held in 2003. Similar roundtables were held on the interrelations and cooperation between Competition enforcement Authorities and Sectoral Regulators in 2005 and on the Interface between Competition and consumer Policies in 2008. As the topic got even more active,

The issue became relevant in the EU as a consequence of its “big bang” expansion in 2004,¹⁴³⁵ which required new Member States to introduce EU laws and institutional arrangements. However, soon also older Member States started reviewing their authorities for various purposes, in order to enhance their effectiveness, better integrate competition policy with other regulatory policies, or saving resources in period of stagnation. Eventually, a number of NCAs has been redesigned, such as those in Denmark, Netherlands, France, Spain, Portugal, Ireland, Finland and the UK.¹⁴³⁶

According to the interpretation introduced by Fox and shared by Cseres and Balogh, institutional design is a combination of systems, structures, processes, and procedures of law enforcement and application.¹⁴³⁷ The topic of institutional design and structure¹⁴³⁸ of market regulating authorities is discussed by a number of prominent scholars, including Kovacic,

roundtables were held on the two consequential years in 2014 and 2015 on the institutional design of competition authorities. See: Jenny (n 32). 1

¹⁴³⁵ In 2004 the EU was enlarged massively, by adding 10 new Central and Eastern European States, reaching the border of Russia. It was colossal, the largest single expansion and has dramatically transformed the EU. It also had important ideological and political meaning. German Foreign Minister Joschka Fischer stated about the EU's “big bang” expansion that it meant “*the definite end of the Cold War.*” The enlargement wave continued in 2007 with the “little bang” when Romania and Bulgaria joined the EU.

See: Hubert Zimmermann and Andreas Dür, *Key Controversies in European Integration* (Palgrave Macmillan 2016) 213; Laura Chappell, Jocelyn Mawdsley and Petar Petrov, *The EU, Strategy and Security Policy: Regional and Strategic Challenges* (Routledge 2016) 159; Fredrik Soderbaum and Luk Van Langenhove, *The EU as a Global Player: The Politics of Interregionalism* (Routledge 2013) 108; David A Lynch, *Trade and Globalization: An Introduction to Regional Trade Agreements* (Rowman & Littlefield Publishers 2010) 165; Shada Islam, ‘Big Bang Expansion of the European Union’ <<http://yaleglobal.yale.edu/content/big-bang-expansion-european-union>> accessed 7 October 2017. Svetiev (n 741). 212;

¹⁴³⁶ Kovacic and Hyman (n 28).

¹⁴³⁷ See: V Balogh and KJ Cseres, ‘Institutional Design in Hungary: A Case Study of the Unfair Commercial Practices Directive’ (2013) 36 *Journal of Consumer Policy* 343. 345; Eleanor Fox, ‘Antitrust and Institutions: Design and Change’ (2010) 41 *Loyola University Chicago Law Journal* 473, 473.

¹⁴³⁸ In this paper, the terms “institutional design” and “structure” are used as synonyms, however certain authors distinguish them. For example, Crane states: “*Institutional design*” suggests the conscious construction of an apparatus or edifice. [However] the way that the FTC functions in the antitrust arena is a product of its history and development, its interaction with other legal and economic institutions, and its molding by external political, social, and economic forces. [...] Architectural design is only one element of structural integrity, and legislative design is only one element of institutional integrity.” See: Crane, *The Institutional Structure of Antitrust Enforcement* (n 28). 189

Jenny, Lowe, Crane, Fox, Ottow, Hyman, Bakardjieva-Engelbrekt, Cseres, Svetiev. Almost all of them underline the existing lack of academic reflection on the matter.¹⁴³⁹

Kovacic sees the analysis of institutional design as a way of restoring the imbalance in antitrust studies.¹⁴⁴⁰ He argues that academic papers are primarily focused on policy substance, discussing “*fascinating questions of doctrine and high theory*”,¹⁴⁴¹ but theory cannot be “*suspended in air*”, and it will not work in practice unless it is “*grounded in the engineering of effective institutions*”.¹⁴⁴² Crane goes even farther, stating that institutions are equally, if not more, important than substantive rules.¹⁴⁴³ Cseres and Balogh calls institutional design a “*critical dimension*” and a “*cornerstone of credible enforcement*”.¹⁴⁴⁴

There are a number of reasons why the design of enforcement authorities remains a rather neglected topic. According to Lowe, the academic attention is predominantly focused on substantive issues, leaving organizational matters out of sight, mostly due to the fact that competition policy primarily remains a subject for lawyers, and they usually show more interest in substance of the policy.¹⁴⁴⁵ Moreover, the working environment, structure and organisation of enforcement authorities are a hard topic to observe and study for outsiders. There can also be the general assumption that the composition and system of competition authority and other market regulators is not specific and radically different from any other

¹⁴³⁹ See: Lowe (n 392).; Kovacic, ‘The Digital Broadband Migration and the Federal Trade Commission’ (n 28).. Ottow (n 28). 25-43; Cseres, ‘Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law’ (n 28). p.8, 9; Crane, *The Institutional Structure of Antitrust Enforcement* (n 28). Introduction

¹⁴³⁹ Kovacic, ‘The Institutions of Antitrust Law: How Structure. Shapes Substance’ (n 28). Kovacic and Hyman (n 28).

¹⁴⁴⁰ Kovacic, ‘The Institutions of Antitrust Law: How Structure. Shapes Substance’ (n 28).

¹⁴⁴¹ Kovacic and Hyman (n 28). 4, 5

¹⁴⁴² Kovacic, ‘The Digital Broadband Migration and the Federal Trade Commission’ (n 28). 5

¹⁴⁴³ Crane, *The Institutional Structure of Antitrust Enforcement* (n 28). 187

¹⁴⁴⁴ Balogh and Cseres (n 1435). 344

¹⁴⁴⁵ Lowe (n 392). 1

similarly sized public or even private institutions.¹⁴⁴⁶ As argued by Kovacic, there can be more pragmatic reasons as well. For example, papers discussing theories attract more readers and are considered to be more publishable in academic journals, rather than institutional inquiries.¹⁴⁴⁷

The crucial nature of institutional design is not a novel idea, but has been widely discussed in various disciplines. In its seminal work, *Essence of Decision*, Allison demonstrates with a case study on the Cuban missile crisis that policy outcomes are vastly determined by the structure and arrangement of public institutions.¹⁴⁴⁸ Competition law scholars delayed to pay proper attention to institutional choices, while the structure and system of competition authorities have been analysed partially by a number of economists and political scientists.¹⁴⁴⁹ From the perspective of this dissertation, it is important to verify whether our main assumption, which sees consumer law as essential element for the effectiveness of consumer law, finds also confirmation at the level of NCAs, and how exactly the strong link between competition and consumer protection law is reflected in their institutional design.

While competition lawyers try to avoid detailed studies of enforcement authorities, a number of questions remain unanswered or disputed. As there is no model generally recognized as the most optimal or efficient one, various states develop their own authorities, according to their own views and priorities.¹⁴⁵⁰ The lack of guidance from the Commission encourages Member

¹⁴⁴⁶ Ibid.

¹⁴⁴⁷ Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission' (n 28). 5

¹⁴⁴⁸ Ibid. 343-365

¹⁴⁴⁹ Kovacic, 'The Institutions of Antitrust Law: How Structure. Shapes Substance' (n 28). 1020; Stephen Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester University Press 1999).

¹⁴⁵⁰ Similar tendencies are present beyond the EU, as demonstrated during the OECD roundtables. Countries experiment with their authorities' design, but unlike some of the EU Member States, discussed in further details

States to experiment with previously existing designs by adding, removing, combining or separating specific regulatory functions, modernizing existing bodies or establishing new ones.¹⁴⁵¹ On the one hand, such practices allow discovering and testing new forms and structures of enforcement, which triggers evolutionary processes and may generate more efficient and functional designs, but may also cause inconsistency. At the same time, the fact that each state improvises with its enforcement institutions may lead to different substantive outcomes in the regulation of the market – an instance that contradicts the goal to promote the convergence of competition law regimes among the EU Member States and the coherent enforcement of competition law within the internal market.¹⁴⁵²

4. Institutional autonomy of EU Member States and consequential challenges

EU Member States enjoy institutional autonomy, which allow them to construct enforcement authorities and determine their competences independently. Within the context of the internal market and competition policy, this might constitute a serious challenge. EU competition law is determined to ensure that no anticompetitive business practices or government involvement

below, many countries avoid revolutionizing the whole system and instead gradually, but rather frequently, introduce small changes. This demonstrates that institutional design is not a onetime assignment, but a continuous process and aspiration for perfection. As argued by Frédéric Jenny it also demonstrates that “*there is no one-size-fits-all*” and an optimal design differs state by state. See: OECD, ‘Summary Record of the Roundtable on Changes in Institutional Design - Annex to the Summary Record of the 122nd Meeting of the Competition Committee Held on 17-18 December 2014’ 2.

¹⁴⁵¹ Cseres, ‘Comparing Laws in the Enforcement of EU and National Competition Laws’ (n 1428).; Katalin J Cseres, ‘Questions of Legitimacy in the Europeanization of Competition Law Procedures of the EU Member States’ 20.; See also: Chapter V. Section 5. *The wave of redesigning market regulating authorities around the EU*

¹⁴⁵² The need for convergence of competition law regimes, including their enforcement, has wider global perspective, even outside the EU, as intensified interstate trade creates need for coherence. See: Jenny (n 32). 1

will distort the single market.¹⁴⁵³ Moreover, a level playing field is to be achieved throughout the internal market by direct application of the TFEU provisions and a highly harmonized competition rules of national legislations. However, the desired effect of consistency and similar substantive outcomes is hardly attainable if procedural rules and institutional settings remain loosely harmonized. Member States enjoy institutional autonomy and have competence to design their national procedures and enforcement authorities, in accordance with the general principles of law. In application of Article 5 TFEU, the ECJ established in *International Fruit Company II* (1971) that while Member States are required to take measures to fulfil the obligations imposed on them by the Treaty, "*it is for them to determine which institutions within the national system shall be empowered to adopt the said measures.*"¹⁴⁵⁴

Further obligations regarding NCAs were introduced by Article 35 of Regulation 1/2003, which requires Member States to designate the competition authority so as to ensure the effective compliance with the provisions of the Regulation, while remaining free to have a single or several authorities, and to allocate to them administrative or judicial functions. The duty of effectiveness was reaffirmed by the ECJ in *VEBIC*, where it ruled that "*the Member States remain competent, in accordance with the principle of procedural autonomy [...] to*

¹⁴⁵³ See: Margrethe Vestager, 'The Level Playing Field Is Green' (Bruegel, 12 October 2015) <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/level-playing-field-green_en>.

¹⁴⁵⁴ Joined cases 51 to 54-71, *International Fruit Company NV and others v Produktschap voor groenten en fruit* [1971] Eur Court Rep 1971 Page 01107 [3–4].

gauge the extent to which their intervention is necessary and useful having regard to the effective application of EU competition law."¹⁴⁵⁵

As noted by Trebilcock and Iacobucci, substantive laws are mediated through the institutions that are responsible for investigation, law enforcement and application. The impact of institutional design is significant enough to generate different outcomes, even when enforcing similar laws.¹⁴⁵⁶ Substantial law is toothless, unless accompanied by proper procedural rules and effective institutional design. Some Member states enforce competition law more effectively than others, and differences in institutional arrangements can be so big that some scholars even question the compliance of certain Member States with the duty of effectiveness.¹⁴⁵⁷ As a result of these shortcomings, competition law might not be effectively enforced, harming not only the national market, but the whole internal market and consumers' living standard in the EU.¹⁴⁵⁸

A number of authors have indicated the need for a higher degree of harmonization of national procedural rules and institutional arrangements.¹⁴⁵⁹ However, this might be a challenging

¹⁴⁵⁵ *Case C-439/08, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerker (VEBIC) VZW* [2010] [63, 64].

¹⁴⁵⁶ Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate' (2010) 41 *Loyola University Chicago Law Journal* 455–472; David J Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in Josef Drexl, Laurence Idot and Joel Moneger (eds), *Economic Theory and Competition Law* (Edward Elgar Publishing 2009) 20–44.

¹⁴⁵⁷ For example, the Irish Competition and Consumer Protection Commission lacks competence to decide whether TFEU Arts. 101. 102 (or their equivalent national norms) have been infringed and to impose fines over the infringing undertakings. Due to the abovementioned, Lucey questions compliance of the Irish authority with Art. 35 of the Regulation 1/2003. See: Mary Catherine Lucey, 'The New Irish Competition and Consumer Protection Commission: Is This "Powerful Watchdog with Real Teeth" Powerful Enough under EU Law?' 6 *Journal of European Competition Law & Practice* 185.

¹⁴⁵⁸ For example, when Ireland provided so called "sweetheart deal" to Apple, through favourable tax arrangements the impact was maybe positive for the national market, as the country was attracting investments from one of the world's biggest brands, but the measures contradicted the strategy of the single market and harmed its common structure.

¹⁴⁵⁹ Cseres, 'Comparing Laws in the Enforcement of EU and National Competition Laws' (n 1428).; Balogh and Cseres (n 1435). 343-365; Firat Cengiz, 'Regulation 1/2003 Revisited'; Claus-Dieter Ehlermann, Isabela

mission to accomplish, as there is no common model or general agreement on which design could be considered the most optimal. In fact, recent institutional reforms in several Member States demonstrate that they have different visions and approaches on how to structure their authorities. The reforming states seem to have a more experimental approach¹⁴⁶⁰ and various objectives to achieve,¹⁴⁶¹ testing new models that differ nation by nation and do not have much in common.

These reforms will be reviewed in the next sections, with the aim to demonstrate the latest trends of institutional arrangements in the EU, the challenges pushing the reform, the problems yet to be overcome and the objectives to be attained. Moreover, special attention will be paid to the role of consumers and consumer law enforcement within the reforms.

In Georgia, after the adoption of competition law, the Competition Agency became functional in October 2014. While more than two and a half years have already passed, developing the Agency structure is still a work in progress. Moreover, currently there is no consumer law enforcement body as there is no specific law for consumer protection. As already stressed many times, Georgia needs to pay due attention to consumer right protection and this means not only adopting a law, but also building a functional enforcement authority.

Atanasiu and Frederic Jenny (eds), 'Does the Effectiveness of the EU Network of Competition Authorities Depend on a Certain Degree of Homogeneity within Its Membership', *Constructing the EU Network of Competition Authorities* (Hart Publishing 2004) 208–210; Claus-Dieter Ehlermann, Isabela Atanasiu and Celine Gauer (eds), 'Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?', *Constructing the EU Network of Competition Authorities* (Hart Publishing 2004) 187–201.

¹⁴⁶⁰ Kovacic and Hyman (n 28). 2

¹⁴⁶¹ Probably the most common motivator along with other more specific ones were budgetary concerns and goal to save funds. See: Cseres, 'Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law' (n 28). 3; Lucey (n 1455). 187-189; Lachnit (n 210). 8-16;

5. The wave of redesigning market regulating authorities around the EU

Very much like substantive and procedural law, an enforcement authority might be reformed and reorganized if its performance is unsatisfactory, or if there is room for improvement. According to Jenny, the building of competition authorities "*is an art rather than a science*" and it needs to be repeatedly modified over time.¹⁴⁶² He shares Lowe's view that "*institutions must constantly assess and reassess their mission, objectives, structures, processes and performances*" in order to be effective in exercising its competences.¹⁴⁶³ Finding the best solution and determining the best functioning arrangements take time. It might also require experimenting with various forms and models before the final shape of an institution emerges. However, dramatic changes are usually related with confusion and mixed reactions.¹⁴⁶⁴

Reorganizing an established system can also be related to significant costs, but if the new model remains equally effective and more cost effective, restoring the invested finances in time, then bearing one-time expenses might be justified. Generally, rethinking institutional designs and reforming the enforcement bodies makes sense if there is a proven evidence of existing flaws and the new regime promises significant and achievable improvements.¹⁴⁶⁵ It should also be taken into account that the reform might fail and the planned synergies or cohesion might not be fully achieved. Simply reorganizing the institutions for the sake of a reform should never be an objective.¹⁴⁶⁶

¹⁴⁶² Jenny (n 32). 48

¹⁴⁶³ Ibid. Lowe (n 392). 11

¹⁴⁶⁴ Kovacic and Hyman (n 28). 2

¹⁴⁶⁵ Ibid.

¹⁴⁶⁶ Ottow (n 28). 26, 27

Despite all the risks and efforts that need to be taken, developing effective models for institutional design remains an active and challenging topic worldwide.¹⁴⁶⁷ There is a large number of states, inside and outside the EU, that have reformed their enforcement institutions recently. In line with the focus of this dissertation, this section will briefly review the recent developments in the EU. Initially, a closer look will be given to institutional developments inside the Commission itself, as the latter has introduced certain new practices that were fast adopted by a number of NCAs. This analysis will be followed by a short review of national reforms undertaken recently in Denmark, Netherlands, France, Spain, Portugal, Ireland, Finland and the UK.

The major common feature of these national experiences is the importance of the changes in the design of NCAs. However, each of these reforms has been unique in a way. The following sub-sections will not only briefly describe these developments, but will also explore the reasoning and motivation behind the changes, and identify the common trends, if any. Attention will be paid to the role of consumers and consumer law enforcement within the context of these reforms.

5.1 EU Commission and DG COMP

Before moving to the selected national enforcement authorities and analyse their transformation in the recent years, it is worth to take a quick look at the competition authority of the EU, as in certain cases it preceded the subsequent national reform wave, and

¹⁴⁶⁷ Jenny (n 32).; OECD, ‘Summary Record of the Roundtable on Changes in Institutional Design - Annex to the Summary Record of the 122nd Meeting of the Competition Committee Held on 17-18 December 2014’ (n 1448).

influenced it in various ways. Lowe deems it necessary to underline that against the widespread misconception, it is not DG COMP the competition authority of the Union, but the Commission itself.¹⁴⁶⁸ Although DG COMP is a sizable unit, which employs more than 800 staff members,¹⁴⁶⁹ it is still only one of the 53 directorates and executive agencies of the Commission.¹⁴⁷⁰ The final decisions about competition cases, as well as policy documents are adopted by the College of Commissioners, upon the proposal of the Commissioner for Competition. For certain minor issues the Commissioner has the delegated power to act independently and take decisions.¹⁴⁷¹ The Commission has also empowered DG COMP to investigate cases and manage the process.

An effective competition authority has a number of features and qualities, the most vital ones being independence and accountability.¹⁴⁷² Independence means being free from any kind of influence and interference, coming from the government, individual undertakings and so forth.¹⁴⁷³ In this perspective, the Commission's position is rather unique. It is a supranational institution and for its effectiveness, it should remain independent from national interests or influence of single Member States, and avoid capture and control.¹⁴⁷⁴ Its mission is to promote the common interest of the Union and support the single market, without favouring any specific national market or interests of individual undertakings.¹⁴⁷⁵

¹⁴⁶⁸ Lowe (n 392). 1

¹⁴⁶⁹ For the statistical information, visit: http://ec.europa.eu/civil_service/about/figures/index_en.htm

¹⁴⁷⁰ See the full list: https://ec.europa.eu/info/departments_en

¹⁴⁷¹ Ibid.

¹⁴⁷² Note by the UNCTAD secretariat, 'The Benefit of Competition Policy for Consumers'.

¹⁴⁷³ Xifre (n 1424). 2

¹⁴⁷⁴ Matei Lucica and Spyridon Flogaitis (eds), *Public Administration in the Balkans from Weberian Bureaucracy to New Public Management* (Editura Economica 2011) 13; Nikiforos Diamandouros, 'Transparency, Accountability, and Democracy in the EU - , Lecture at the School of Advanced International Studies of the Johns Hopkins University' <<https://www.ombudsman.europa.eu/speeches/en/2006-10-17b.htm>>.

¹⁴⁷⁵ Lowe (n 392). 1

The Commission should correctly identify the EU interests and not abuse its powers, to the detriment of consumers. For example, it cannot use protectionism against global giants, in order to avoid their massive dominance over the internal market, since¹⁴⁷⁶ its role is not to artificially safeguard diversity and boost competitiveness of minor brands, by limiting activities of large-scale undertakings, or favouring inefficient European producers over superior ones from overseas. Its “*mission is to protect competition to the benefit of consumers, not competitors.*”¹⁴⁷⁷ The Commission cannot punish dominant undertakings simply because of their vast market power, unless they abuse their position inasmuch as to distort competition and harm consumers.¹⁴⁷⁸ In a competitive market economy, market power is only a demonstration of the effective satisfaction of consumer needs, which deserves to be rewarded, not outlawed.¹⁴⁷⁹

The Commission used to enjoy a monopoly over the application of Article 81(3) TFEU and

¹⁴⁷⁶ Despite the given rule, the EU has often been blamed for being protectionist and hostile actions against various global brands, dominating international markets. Particularly widely speculated were its cases and investigations against tech giants, such as: Microsoft, Google, Facebook, Apple, Amazon and so forth. See: Hosuk Lee-Makiyama, ‘Protecting Competition, or Competitors? — Europe’s Pursuit of Silicon Valley’ (*OpenNetwork.net*, 5 December 2016) <<http://www.opennetwork.net/protecting-competition/>> accessed 7 October 2017; Murad Ahmed, ‘Obama Attacks Europe over Technology Protectionism’ (*Financial Times*, 16 February 2015) <<https://www.ft.com/content/41d968d6-b5d2-11e4-b58d-00144feab7de>> accessed 7 October 2017; Kelly Couturier, ‘How Europe Is Going After Apple, Google and Other U.S. Tech Giants’ *The New York Times* (13 April 2015) <<https://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html>> accessed 7 October 2017.

¹⁴⁷⁷ European Commission, ‘Press Release - Antitrust: Commission Obtains from Google Comparable Display of Specialised Search Rivals’ <http://europa.eu/rapid/press-release_IP-14-116_en.htm> accessed 7 October 2017; *ibid.* For opposing point of view, see: Graham and Richardson (n 91) 351; Robert T Pitofsky, ‘Antitrust at the Turn of the Twenty-First Century: A View from the Middle’ 583, 586 note. 15; ‘Competition Policy Should Be Focused on Consumers’ (*The Independent*) <<http://www.independent.co.uk/voices/editorials/competition-policy-should-be-focused-on-consumers-9241589.html>> accessed 7 October 2017.

¹⁴⁷⁸ European Commission, ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (n 271) paras 1, 6.

¹⁴⁷⁹ *Competition Authority -v- O’Regan & ors* [2007] The Supreme court of Ireland IESC 22 (2007); European Council, ‘Regulation No 17: First Regulation Implementing Articles 85 and 86 of the Treaty’ 10 Art. 4, 5. See also: European Council, ‘Regulation - Laying down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport’; European Council, ‘Regulation - Laying down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector’; European Council, ‘Regulation - Applying Rules of Competition to Transport by Rail, Road and Inland Waterway’.

the granting of exemptions, assessing only the validity of the potential benefits and their fair share for consumers to allow competition restricting practices.¹⁴⁸⁰ Since Regulation 1/2003, the notification system on the fulfilment of the criteria of Article 81(3) TFEU has been abolished.¹⁴⁸¹ The EU competition law enforcement system has also been decentralized, and now the Commission shares its competence with the NCAs. In order to ensure their close and smooth cooperation, the European Competition Network has also been established.¹⁴⁸² Another important tendency that emerged along with the decentralization was the increased emphasis on consumers and the focus on consumer welfare as an objective. Moreover, the Commission introduced a more economic and effect based approach.¹⁴⁸³

Considering these significant developments, during the first decade of the 21st century, the structure of DG COMP was duly modified. There were two main waves of reorganization in 2003 and 2007, while some significant developments took place in between, as well.¹⁴⁸⁴ As a response to the increasingly economic approach, in 2003 the Chief Competition Economist's position was introduced.¹⁴⁸⁵ The Chief Economist reports directly to the Director General, provides guidance and assess the economic impact of the application of competition rules, at a general- policy level as well as for complex individual cases.¹⁴⁸⁶ During 2003-2004 it was also developed the so-called “*matrix structure*”, where merger units were integrated with

¹⁴⁸¹ (71 Art. 34(1),72)

¹⁴⁸² Alexander Israel, Jan Moritz Lang and Fabian Hübener, ‘A Practitioner’s View on the Role and Powers of National Competition Authorities’ 5.

¹⁴⁸³ Walle (n 1225) 155; E Szyszczak, *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011) 9; Wolf Sauter, *Coherence in EU Competition Law* (Oxford University Press 2016) 6.

¹⁴⁸⁴ Lowe (n 392). 7; The current structure of the DG Competition can be found here:

http://ec.europa.eu/dgs/competition/directory/organi_en.pdf

¹⁴⁸⁵ For more information, see: http://ec.europa.eu/dgs/competition/economist/role_en.html

¹⁴⁸⁶ Lars-Hendrik Röller and Pierre A Buigues, ‘The Office of the Chief Competition Economist at the European Commission’ <http://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf>. See also:

http://ec.europa.eu/dgs/competition/economist/role_en.html

antitrust units in five market and cases directorates, covering the key sectors of the EU economy, such as energy, telecoms, transport, financial services and informational technology.¹⁴⁸⁷

By 2007, the state aid unit was also added to the united antitrust and merger units. Therefore, DG COMP chose the approach of sectoral organization, betting on pooling the market expertise, leading more informed, multidimensional and effective investigations, using its personnel from different units in a more flexible manner to allow the sharing of best practices and experiences. However, the new approach has not completely taken over the instrument-based organization model. For the directorates, where market expertise is less significant than instrumental expertise, the instrumental based approach was kept. This is the case of the cartel directorate, created in 2005, which focuses on law enforcement and policy development exclusively on cartels.¹⁴⁸⁸

In the previous chapter, much was written about the inevitable need for prioritization, for any competition authority, caused by scarcity of resources, including time, monetary and human capital.¹⁴⁸⁹ In order to remain successful under such conditions, it is vital to use the limited human resources effectively. Suffering from the same challenge, the Commission has started a project-based allocation of resources and introduced “*decloisonnement*”¹⁴⁹⁰ practices.¹⁴⁹¹ The latter allows overcoming administrative barriers and assigning staff members to any projects, if recognized as a priority, with an exchange of staff within and across

¹⁴⁸⁷ Lowe (n 392). 7; See also: Peter Nedergaard, *European Union Administration: Legitimacy and Efficiency* (BRILL 2006) 30–33.

¹⁴⁸⁸ Ibid. Gerda Falkner, *The EU's Decision Traps: Comparing Policies* (Oxford University Press 2011) 186–188.

¹⁴⁸⁹ See: Chapter IV, Section 2.3 *Limited resources of enforcement authorities and practice of priority setting*

¹⁴⁹⁰ French word, can be translated as: decompartmentalisation – dividing into categories or compartments

¹⁴⁹¹ DG Competition, ‘Annual Management Plan 2007’ 10.

directorates.¹⁴⁹² The priority projects are headed by case managers, who originally might be a member of any unit and who reports directly to a Director. Therefore, it became a common practice to ensemble teams by bringing together personnel from different directorates, if they are skilled in certain type of investigation, for example antitrust or mergers. If an issue falls into the competence of several DGs, it is possible to set up a project team across Directorates.¹⁴⁹³ For example project teams might include staff of DG COMP and DG Justice and Consumers, responsible for the EU consumer policies.

As a result of these organisational reforms, the Commission has now better tools to functions efficiently, be more flexible in using its human capital and take a broader perspective to every critically important case, before making a decision. The introduction of the Chief Economist for Competition is in line with the shift towards a more effect-based economic approach to competition law enforcement. The current Chief Economist Tommaso Valletti stated that the role of him and his team is to assist in enabling business to operate freely, while consumers get fairness and value out of it. Moreover, whenever concentrations occur, the Chief Economist office should evaluate and allow mergers only if efficiency gains are achieved and can be passed on consumers.¹⁴⁹⁴ Furthermore, the presence of competition economists within DG COMP raises the bar for economic argumentation of the Commission decision. Assumptions regarding consumer harms or benefits should no longer be tolerated, unless backed by strong economic evidence.

¹⁴⁹² Ibid. 9

¹⁴⁹³ Lowe (n 392). 2, 7, 8

¹⁴⁹⁴ Panos Charitos, 'Interview with Tommaso Valletti: EC's Chief Economist for Competition' (*acceleratingnews.web.cern.ch*) <<http://acceleratingnews.web.cern.ch/content/interview-tommaso-valletti-ecs-chief-economist-competition>> accessed 7 October 2017.

5.2 CNMC, Spain's "super-regulator"

Spain has been regulating market competition since 1963, when the Repression of Anticompetitive Practices Act was adopted.¹⁴⁹⁵ After 50 years of experience, it radically transformed its market regulatory system. The reform was based on the act 3/2013, adopted on June 4, 2013 by the Spanish parliament. By October 2013, CNMC¹⁴⁹⁶ the so-called "super-regulator" of Spain, was already opened, consolidating the national competition authority and seven regulatory authorities: the National Energy Commission; the Telecommunications Market Commission ; the Railway Regulatory Committee ; the National Commission for the Postal Sector ; the Commission for the Economic Regulation of Airports; the National Gaming Commission; and the State Council for Audiovisual Media.

Spain's reform was very daring and experimental, as by then there was almost no positive precedent of any country combining its regulatory agencies along with the competition authority.¹⁴⁹⁷ It was argued by the government that in addition to attaining economies of scale,¹⁴⁹⁸ placing various regulators under the same roof would allow better realization of synergies, as it would pool the knowledge, expertise and experience of the previously separated institutions.¹⁴⁹⁹ That would allow the CNMC to internalise debates between the competition authority and the sectoral regulators about complex issues. That could allow

¹⁴⁹⁵ 'Ley 110/63 de Represión de Prácticas Restrictivas de La Competencia'. - Adoption of the act was caused due to Spain's accession to the European Economic Community. See: Xifre (n 1424).

¹⁴⁹⁶ Detailed information about the institution and its activities can be found here: <https://www.cnmc.es/>

¹⁴⁹⁷ Spanish model remains a rather rare in the EU, a similar one can be Estonian model and relatively similar is also Dutch ACM (See the detailed review below).

¹⁴⁹⁸ Pedro Callol Garcia, 'Ever Doubted the Convergence of Competition and Regulation? Spain Integrates Its Sector Regulators and the Competition Authority under a Single Agency Roof' [2013] European Competition Law Review 642. 642

¹⁴⁹⁹ José María Marín Quemada, 'Spain: National Authority for Markets and Competition -The European, Middle Eastern and African Antitrust Review 2017 -' <<http://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2017/1067861/spain-national-authority-for-markets-and-competition>> accessed 7 October 2017.

making more coherent and better grounded decisions, in a more effective and fast manner. Moreover, as the chairman of the new authority, José María Marín Quemada, claimed, the CNMC would be better equipped to push harder and provide more effective regulation in the face of modern challenges, such as the digitalized economy. Overall, the reform was presented as highly effective in combating the crisis and reigniting growth.¹⁵⁰⁰

At the same time, the institutional reform of Spain was highly disputed nationally and at the EU level. Lawyers, experts and even representatives of the competition authority and other sectoral regulators expressed their concerns about the dangerous concentration of power under one roof.¹⁵⁰¹ The Commission raised questions on the challenges of maintaining independence of sectoral regulators and the risks of potential decreases in competition in key markets.¹⁵⁰² The EU Commissioner Neelie Kroes even wrote an official letter to the Spanish government, threatening sanctions if the independence of the new authority would not be safeguarded.¹⁵⁰³

Obviously, the backlog of the new authority might be highly increased, as its scope was vastly widened. The reform practically underlined the policy of achieving more results with fewer staff members and using fewer resources.¹⁵⁰⁴ The prediction was that eventually Spain would decrease its intensity of competition law enforcement.¹⁵⁰⁵ In response to this, the

¹⁵⁰⁰ Ibid.

¹⁵⁰¹ ‘An Interview with Pedro Callol, Jorge Manzarbeitia, Manuel Cañadas and Santiago Roca’ (*Getting The Deal Through*, May 2017) <<https://gettingthedealthrough.com/>> accessed 7 October 2017.

¹⁵⁰² Andrew Ward, ‘Spain’s CNMC: The Story So Far, Competition Policy International’ <<https://www.competitionpolicyinternational.com/assets/Uploads/EUJune14.pdf>>. Garcia (n 1496). 642

¹⁵⁰³ Xifre (n 1424). 16

¹⁵⁰⁴ National Consumer Organisations; Country Profiles – *Spain*, last updated: 24/11/2016. Available from: http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/national_consumer_organisations/index_en.htm

¹⁵⁰⁵ Ward (n 1500).

CNMC declared that it was planning to continue its active fight against cartels and other hard-core infringements.¹⁵⁰⁶ After a decrease in 2014, the CNMC had a record year in 2015¹⁵⁰⁷ in terms of number of fines imposed, amounting to €517.7 million.¹⁵⁰⁸ However, the new authority also became more oriented to alternative methods of enforcement, instead of fining all the infringing parties.¹⁵⁰⁹

The CNMC has consumer related functions, within the sectors of its regulation, but it does not incorporate consumer enforcement authority. The Spanish Agency for Consumer Affairs, Food Safety and Nutrition is the State-wide institution, responsible to promote consumer protection policies, to transpose EU law and to coordinate relations and policies with the DG Justice and Consumers. It depends on the Ministry of Health, Social Affairs and Equality. Its competence is shared with the regional governments of the Autonomous Communities ("Comunidades autónomas") in their respective territories.¹⁵¹⁰

Comparing the Spanish institutional reform to the similar path undertaken in the same period by the Netherlands, Xifre argues that Spanish particularity was that its declared objective was to reopen “*the potential benefits of economics of scale and bringing about stronger “institutional reliability”*”, while in the Netherlands the focus was on consumer welfare.¹⁵¹¹

Consumers were a central concern in the UK as well,¹⁵¹² while Spain seems to lag behind in

¹⁵⁰⁶ Alfonso Gutiérrez and Ana Raquel Lapresta, ‘Spain’ in John Terzaken and Christine A Varney (eds), *The Cartels and Leniency Review Law Business Research* (5th edn, 2017) 286.

¹⁵⁰⁷ Quemada (n 1497).

¹⁵⁰⁸ OECD, ‘Annual Report on Competition Policy Developments in Spain’ 3.

¹⁵⁰⁹ National Consumer Organisations; Country Profiles – *Spain*, last updated: 24/11/2016. Available from: http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/national_consumer_organisations/index_en.htm

¹⁵¹⁰ Ibid.

¹⁵¹¹ Xifre (n 1424). 16

¹⁵¹² Ibid. 6

this perspective. This can be partially justified due to the shared competence of central and regional governments in consumer protection, which creates the need for a political consensus to be reached before any meaningful steps can be taken.

Unlike DG COMP and most of the NCAs, the CNMC also lacks a Chief Economist. As for the promised higher synergies, as argued, since the reorganization, there has been some evidence of them. For example, the request of information from various directorates does not stop the ongoing investigations any more, leading to quicker clearance. In 2016, the chairman of the CNMC assessed the reform as successful.¹⁵¹³ As he claimed, there might be still room for further reinforcement of synergies, but the new institutional authority is already functional and effective.¹⁵¹⁴

5.3 Netherlands – Authority of Consumers and Markets

Netherlands has conducted a reform, somewhat similar to the one in Spain and about in the same period of time. In April 2013, the Dutch legislator created ACM by merging tNMa to CA, along with OPTA.¹⁵¹⁵ The consolidated institutions themselves were rather young.¹⁵¹⁶ The OPTA was established in 1997, having both market regulatory and consumer protection functions. The NMa was launched as a sole-responsibility institution for competition law

¹⁵¹³ It is worth noting that José María Marín Quemada was the first chairman of the CNMC and still remains on the position, therefore he might not be the most impartial party to evaluate the reform impartially. For more information, see: <https://www.cnmc.es/en/sobre-la-cnmc/organigrama>

¹⁵¹⁴ Quemada (n 1497). Ward (n 1500). Xifre (n 1424). Body of European Regulators for Electronic Communications, ‘BEREC Statement on Independence of NRA’s’; ‘The New Spanish Super-Regulator’ <<http://ratinglegis.eu/en/the-new-spanish-super-regulator/>> accessed 10 July 2017.

¹⁵¹⁵ OECD, ‘Roundtable on Changes in Institutional Design of Competition Authorities’. 2

¹⁵¹⁶ Ottow (n 28). 32, 36

enforcement under the Competition Act of 1998. The same year, an independent energy authority was created, responding for the gas and electricity sectors, but was later transferred to the authority of the NMa, where it still remained relatively independent. In 2004, the Transport Chamber was also created, responsible for Dutch railway, public transport and Schiphol airport and was added to the NMa as well.¹⁵¹⁷

As the NMa transformed from a sole-responsibility body into a multi-functional institution, it gained experience in generating synergies from its different chambers. In 2007, the CA was established under the Ministry of Economic Affairs, with the limited mandate to oversee unfair terms of commercial transactions affecting large number of consumers. Along with the OPTA, it has close cooperation with the NMa. One example is Consuwijzer,¹⁵¹⁸ a consumer education platform, providing practical information, tips and advices, which soon became the main tool for consumers to contact the authority and attract their attention to certain problematic issues, without the need to go through the full formal procedure of official complaint. For the ACM the portal is an effective way to keep a finger on the pulse of consumers, learn about the problems that concerns them most, issue warning and statements. The site has also education and consultancy functions, offering free advices and guiding consumers on the market, educating them on their rights and how to exercise them.¹⁵¹⁹ It is a one-stop shop for consumers and represent one of the best practices that should be shared by

¹⁵¹⁷ Ibid. 32

¹⁵¹⁸ See: <https://www.acm.nl/en/about-acm/consumer-education-consuwijzer/>

¹⁵¹⁹ See: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-tasks/>

more EU states.¹⁵²⁰ Moreover, the positive experience of ConsuWijze, demonstrated that there was room for further integration, by keeping effective cooperation.¹⁵²¹

It was partly due to that potential that the ACM was created, in order to ensure smooth cooperation and produce increased synergies and cross-fertilization between the various fields of the agency. However, it should be mentioned that the primary reason behind this reform was financial. In order to achieve higher level of effectiveness and efficiency, the ACM is stated to be more than just the sum of its parts. It should ensure more holistic approach.¹⁵²² Another tagline of the whole reform was the stressed focus on consumers, as within the ACM a full-fledged consumer department was set up, placing consumer in the heart of enforcement. In its mission statement the authority emphasises that „consumers are central”.¹⁵²³ In its strategy document the ACM states that its common objectives are promoting well-functioning markets, ensuring well-organized and transparent market processes, and fair treatment of consumers.¹⁵²⁴ While pursuing these objectives, the ACM always prioritise cases according to the harm they bring to consumers and how effectively the authority can deal with it.¹⁵²⁵ In order to successfully attain its objectives, the ACM currently employs more than 500 professionals.¹⁵²⁶

¹⁵²⁰ Ottow (n 216).

¹⁵²¹ Ottow (n 28).; See also: OECD, ‘Roundtable on Changes in Institutional Design of Competition Authorities’ (n 1513).; Ottow (n 216).

¹⁵²² Ottow (n 28).

¹⁵²³ See: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/>

¹⁵²⁴ The Netherlands Authority for Consumers and Markets, ‘Strategy Document’ 1 <<https://www.acm.nl/en/publications/publication/11993/Strategy-Netherlands-Authority-for-Consumers-and-Markets/>>.

¹⁵²⁵ See: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/>

¹⁵²⁶ Xifre (n 1424). 16, 17; See also: <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/>

5.4 The UK – Competition and Markets Authority

Reorganizing an institution, with visible flaws should not be the hardest decision. However, it was quite surprising when the UK Ministry of Business, Innovation and Skills declared in 2010 the intentions of redesigning the enforcement system. According to Kovacic the UK system already was one of the best in the world.¹⁵²⁷ That was a good example of when a reformer needs to think twice and assess the risks and what might be lost in case of unsuccessful reform. It was also a good example of the fact that having a functioning enforcement system does not mean that there is not a room for improvement.

In May 2012 the UK government issued the Enterprise and Regulatory Reform Bill, which outlined the proposed reforms, significantly modifying the existing competition law enforcement system.¹⁵²⁸ In the two years that followed, CMA, was established, replacing OFT¹⁵²⁹ and CC.¹⁵³⁰

The CMA overtook antitrust, markets and mergers investigatory functions, which were previously divided in phase 1 and phase 2 and were shared between the OFT and the CC. It emerged as a single, independent authority, which can take decisions alone, in a more effective way and more often. Some were concerned that the abolishment of the two-phase

¹⁵²⁷ Kovacic and Hyman (n 28).

¹⁵²⁸ It should be noted that intentions to merge the authorities was not a total surprise, as such ideas were expressed since the 1990s. See: Peter Freeman, 'The Reform of UK Competition Law 1991-2016' (the Regulatory Policy Institute 25th Anniversary Conference, Merton College Oxford, September 2016) <<http://www.rpieurope.org/Beesley/2009/Peter%20Freeman.pdf>> accessed 25 August 2017.

¹⁵²⁹ The OFT was established in 1973 by the Fair Trading Act and was a competition and consumer authority, responsible for the market to work well for consumers. As for the CC, it was established in 1998 by the Competition Act and its role was to ensure healthy competition.

¹⁵³⁰ Considering the ongoing process of Brexit, a number of practitioners based in London argued that after the UK will leave the EU, its large-scale merger deals that currently qualify as having community wide dimension, will no longer be reviewed by the EU Commission and will backlog the CMA that might require additional institutional reform in the UK. See: 'UK: Competitions and Markets Authority Could Require Post-Brexit Reform' (*Irish Legal News*, 30 June 2016) <<http://www.irishlegal.com/4660/uk-competitions-and-markets-authority-could-require-post-brexit-reform/>> accessed 8 October 2017.

system for mergers and market investigations would increase the chances of confirmation bias. However, in order to avoid such risks, the CMA was duly structured, and it also continued to use panels of experts in phase two.¹⁵³¹

The UK reform aimed to simplify public administration and create a single and powerful authority, to reduce the costs derived by having multiple authorities with shared competences, enable a better use of scarce public resources, speed up the decision making process and improve the robustness and quality of the decisions.¹⁵³² Similar to the Netherlands, the reform in the UK was also oriented toward greater consumer protection.¹⁵³³ As stated by the CMA Transition Team, at the time of the ongoing reform, consumer law related powers, within the competences of the new authority, „will complement and reinforce the effect of competition action taken [...] through addressing problems where competition enforcement alone does not, or cannot, make a market work well for consumers.”¹⁵³⁴

The CMA was established with the purpose to intervene „in the context of broader market analysis” and „tackle significant consumer detriment, particularly with regard to emerging threats.”¹⁵³⁵ The CEO-designated of the Competition and Markets Authority, - Alex

¹⁵³¹ Kovacic and Hyman (n 28). 1,2; Freeman (n 1526).; Timothy Lamb and James Aitken, ‘What the New Competition and Markets Authority Means for the UK Market?’ [2012] International Financial Law review. See also, the closed CC and OFT sites, in the UK Government Web Archive: <http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/about-us>;

<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.of.gov.uk/about-the-of/>;

¹⁵³² Ibid. Alex Chisholm, ‘Delivering Choice and Growth through the Competition and Markets Authority (CMA)’ (16 May 2013) <<https://www.gov.uk/government/speeches/delivering-choice-and-growth-through-the-competition-and-markets-authority-cma>> accessed 25 August 2017.

¹⁵³³ While the CMA acts as competition and consumer authority, there is also an independent Consumer Ombudsman institute. See: <http://www.consumer-ombudsman.org/about-us>

¹⁵³⁴ Competition and Markets Authority (CMA), ‘Consumer Protection: Guidance on the CMA’s Approach to Use of Its Consumer Powers Consultation Document’ <http://mbsportal.bl.uk/secure/subjareas/accfinecon/bis/154963guidance_consumer.pdf> Art. 3(2).

¹⁵³⁵ Ibid. Art. 3(7)

Chisholm, stressed in his speech the interrelations between competition and consumer laws, and how informed consumer choices reward businesses that innovate and compete fairly. While talking about the need to maximize the CMA's impact on consumer welfare, he also emphasized that „the need to satisfy demanding UK consumers is the spur to productivity, business competitiveness and export success, which are together so vital to the drive to restore economic growth.”¹⁵³⁶

5.5 Denmark - Competition and Consumer Authority

In August 2010, the Danish Competition Authority and the National Consumer Agency of Denmark merged into the KFST. Along with the merger, the Danish Energy Regulatory Authority, that used to be a part of the competition authority, was separated, following the EU requirements on the independence of energy regulators.¹⁵³⁷ However, the united Competition and Consumer Authority still contains one regulatory agency, the Regulatory Authority for Water and Wastewater supply, founded as part of the Competition Authority in 2009 and currently part of the KFST. Today the KSFT enforces the Danish Competition Act, monitoring mergers on the national market, acts as secretariat for the consumer ombudsman, who is responsible for the supervision of Danish marketing law, and monitors water and wastewater companies.

¹⁵³⁶ Chisholm (n 1530).

¹⁵³⁷ This is similar to the developments of Estonian competition authority which along with the competition law enforcement, was supervising energy, water, heating, post, railway, airport, and telecom markets. Its authority in the telecom sector was not exclusive, but was shared with the Technical Surveillance Authority, which from July 2014 became the sole regulator in the sector. Another similarity between the Danish and Estonian authorities is that Estonian competition authority also lacks institutional independence and operates within the administrative area of the Ministry of Economic Affairs and Communications. See: Jenny (n 32). 16; OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Estonia'.

The reorganization of the enforcement authorities was justified by the need to realize synergies more effectively and to capitalize economies of scale, as well as to transform two separate but closely related bodies into a single, larger scale and stronger institution.¹⁵³⁸ The merger was conducted in a short period of time, and the whole reform was carried out through an administrative process, without any legal changes. The merger was mostly welcomed, and the majority of the KSFT's stakeholders viewed it as a positive change.¹⁵³⁹

While merger of competition and consumer authorities might not seem unique, the Danish enforcement system and its structure still remain quite different from the majority of EU Member States. Quite uncommonly among the NCAs, the KSFT is not an independent executive agency, and remains subordinated to the Danish Ministry of Business and Growth.¹⁵⁴⁰ Its operating budget is determined by the Danish government and the Minister. While this position allows KSFT to have a better access to policy-making and to shape competition policies, its lack of independence might reduce its ability to act autonomously.

¹⁵³⁸ Danish Competition and Consumer Authority employed approximately 275 people by June, 2014. See: Danish competition and consumer authority, 'Danish Competition and Consumer Authority - Profile Brochure: Working for Well-Functioning Markets'.

¹⁵³⁹ OECD, 'Competition Law and Policy in Denmark - A Peer Review'; 'Cartels, 4th Edition - Chapter: Denmark' <<http://www.globallegalinsights.com/practice-areas/cartels/global-legal-insights---cartels-4th-ed./denmark>>; OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Denmark'. Danish competition and consumer authority (n 1536).; Ottow (n 216). 31-33;

¹⁵⁴⁰ Other unusual features of Danish competition law, different from the majority of national laws of the EU Member States, include: Sanctions for competition law infringements are criminal penalties, eventually the procedural rules are vastly governed by criminal law and criminal penalties can be imposed by Danish courts. As a consequence, infringements must be proved to a criminal standard of proof beyond a reasonable doubt in order for fines to be imposed; After the Regulation (EC) No. 1/2003 rejected obligatory system of notification, it was abandoned by the majority of the EU Member States. However, Denmark still kept the system, as a part of its transparency policy. See: OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Denmark' (n 1537).

However, the institution is widely seen as quite powerful, influential and active, thanks to its good relations and connections to the Danish government.¹⁵⁴¹

The Competition Council, which is the KFST's decision-making body, was also reorganized at the same time.¹⁵⁴² If previously it consisted 18 members, out of which nine were recommended by trade organizations, after 2015 it consists of only seven members with expertises in economics, law and consumer affairs. The Council remains an independent body and its members are not subject to instructions from the Minister.¹⁵⁴³

The new authority views its mission as working for well-functioning markets that supports growth and increases consumer welfare.¹⁵⁴⁴ Agnete Gersing, the Director of the KFST, defines a well-functioning market as an environment where undertakings are engaged in active competition on factors such as price, quality and service standards, leading to increased production efficiency, raising quality standards and development of novel and improved goods and services. Consumers are active and behave with ease and confidence.

¹⁵⁴¹ As argued, the agency became even more independent after July 2015, when certain amendments of the law were enforced. For example, the KSFT maintains a programme of conducting market and industry analysis to identify the problems, challenging production efficiently and competitiveness of the market. Before the amendments, such studies could be conducted under the directions of the Minister of Business and Growth, while no the agency can determine the scope of its investigations independently.

See: Jakob Hald and Global Competition Review, 'Denmark: Competition and Consumer Authority', The European, Middle Eastern and African Antitrust Review 2017 (2016)
<<http://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2017/1067832/denmark-competition-and-consumer-authority>>.

¹⁵⁴³ OECD, 'Competition Law and Policy in Denmark - A Peer Review' (n 1537); 'Cartels, 4th Edition - Chapter: Denmark' (n 1537); OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Denmark' (n 1537). Danish competition and consumer authority (n 1536).; Ottow (n 216). 31-33;

¹⁵⁴⁴ Danish competition and consumer authority (n 1536).

Taking advantage of market transparency, they can easily and correctly make choices, best suited for their needs. Consumer welfare is eventually increased.¹⁵⁴⁵

5.6 Finland - Competition and Consumer Authority

KKV began functioning on 1 January 2013, from the merge of the Finnish Competition Authority and the Finnish Consumer Agency. The institutional reform was not accompanied by any amendments of substantive law, and it merely aimed at increasing efficiency and raises the social significance of competition and consumer issues.¹⁵⁴⁶ More specifically, the legislative proposal was justified by the fact that both agencies shared the aim to ensure the effective functioning of the market, and their merger would have allowed a more optimal use of cross-sector specific expertise, increased the expertise in litigation, and strengthen the authority research functions.¹⁵⁴⁷ Prior to the merger, concerns were expressed that placing competition and consumer authorities under the same roof could lead to domination of competition policy, which would take the leading role within the new authority, overshadowing consumer protection. In order to avoid such scenario, the organisational structure was affirmed in legislation so as to ensure the separation of the two policy sectors.¹⁵⁴⁸ While this goal was achieved, it also sacrificed some expected synergies of the merger. For example, materials and evidence gathered during the leniency cannot be shared

¹⁵⁴⁵ Ibid.

¹⁵⁴⁶ Leena Lindberg, 'Finland' in Global Competition Review and Katri Joenpolvi (eds), *The European Antitrust Review* (2014) 105.

¹⁵⁴⁷ OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Finland'. 3;

¹⁵⁴⁸ "The monitoring and control functions of the Competition and Consumer Authority are to be organised, in respect of both competition and consumer affairs, so that the independence and impartiality of the Authority and the Consumer Ombudsman in exercising their monitoring and control functions is guaranteed."

For the detailed structure of the authority, visit: <http://www.kkv.fi/en/about-us/organisation/>

with the consumer ombudsman, who can use them to start and support a class action.¹⁵⁴⁹ It should be mentioned that also the Finnish authority is not an independent institution, but - a separate agency of the Ministry of Employment and the Economy. It employs about 150 specialists.¹⁵⁵⁰

5.7 Ireland - Competition and Consumer Protection Commission

In March 2014 a new legislation was introduced in Ireland, merging the Irish Competition Authority and the National Consumer Agency into CCPC. The changes came into effect by October 31, 2014.¹⁵⁵¹ The new authority was presented by the Minister of Jobs, Enterprise and Innovation as “*a powerful watchdog with real teeth acting to protect and vindicate consumers.*”¹⁵⁵² However, it is important to note that the whole reform was planned and carried out in the context of financial crisis and in the process of “*rationalisation of state agencies.*”¹⁵⁵³

The merger was first announced in 2008 by the Minister for Finance, when discussing the national budget and the need to reduce the number of state agencies and institutions.¹⁵⁵⁴ The fact that it was the Minister for Finance and not the Minister with direct responsibility for competition and consumer policy was a clear indication that the reform was motivated by

¹⁵⁴⁹ OECD, ‘Roundtable on Changes in Institutional Design of Competition Authorities - Note by Finland’ (n 1545).

¹⁵⁵⁰ Ibid.

¹⁵⁵¹ For more information, see: <http://ccpc.ie/about/who-we-are>

¹⁵⁵² Lucey (n 1455). 185

¹⁵⁵³ Ibid.

¹⁵⁵⁴ See: The new authority was presented by the Minister of Jobs, Enterprise and Innovation as “*a powerful watchdog with real teeth acting to protect and vindicate consumers.*” However, important to note that the whole reform was planned and carried out in the context of financial crisis and in the process of “*rationalisation of state agencies.*”

cost-saving purposes.¹⁵⁵⁵ In 2014, a press release proudly announced that approximately 170 000 EUR would be saved annually by saving money from the free for the a Board or the Chairperson, public relations and audit activates.¹⁵⁵⁶ In November 2013, Ireland became the first EU Member State to successfully overcome its bailout, with tough budget constraints. The merger of the competition and consumer authorities was once again proof and demonstration of the government's commitment to its program of saving costs and reducing state institutions.¹⁵⁵⁷

Beyond the financial motivations, the rationale for merging the authorities was to build a single institution with more effective organisation and better equipped to deal with its responsibilities.¹⁵⁵⁸ Its mission was determined as – working to make a market a better place, where consumers are protected and empowered and businesses actively compete.¹⁵⁵⁹ A note by Ireland for the OECD roundtable supports this choice by arguing that the rapid rise of behavioural studies has allowed better understanding how consumers actually act and make decisions in competitive markets.¹⁵⁶⁰ In this perspective, Ireland was an exceptional country, as it paid attention to behavioural studies and used its findings as an argument to justify the reform. As underlined in the OECD note, deregulation experience has proven that it is not self-sufficient measure. Opening up markets for competition creates huge possibilities, but in order consumers to fully benefit from competition, there is necessity to intervene the market. There might still remain behavioural barriers in the market, which lead consumers to make

¹⁵⁵⁵ (106) 3

¹⁵⁵⁶ Lucey (n 1455). 188

¹⁵⁵⁷ Ibid. (106)

¹⁵⁵⁸ (106) 4, para. 16

¹⁵⁵⁹ See: <http://ccpc.ie/about/cooperation/who-we-work>

¹⁵⁶⁰ (106) 4, para. 16

irrational choices. Therefore, the increased awareness regarding behavioural issues “reinforce the logic of having competition and consumer experts working side-by-side. In newly competitive markets there tends to be gaps in understanding among consumers and this confusion can be exploited by firms. This gap can be bridged by co-ordinating consumer and competition policy.”¹⁵⁶¹ There are also operational advantages allowing synergies and a more effective regulation.

Along with the institutional reorganization, there were changes in the substantive law, including the Criminal Justice Act 2011. While the procedural changes enhanced investigation powers of the authority, it did not grant it much decision-making and enforcement power.¹⁵⁶² Lucey underlines that there was the need to reform the competition law enforcement system, to build an effective public enforcement, and to tackle the problem of the low number of cases initiated by consumers, but she remains critical about the outcomes of the reform. The author is unsatisfied by the CCPC’s inability to directly impose administrative fines, a circumstance that leads her to conclude that it is incorrect to call the new agency a “powerful watchdog with real teeth” as it lacks any biting powers.¹⁵⁶³

5.8 Portugal, sole responsibility authorities

Different than the other national experiences, where institutional redesign mostly happened through various forms or merges, AdC was created by in January 2003 as an independent and financially autonomous institution, replacing two agencies integrated within the Ministry of

¹⁵⁶¹ Ibid.

¹⁵⁶² Lucey (n 1455). 188

¹⁵⁶³ Ibid.

Economy: the Directorate-General for Trade and Competition, which was an investigative body, and the Council for Competition, the decision-making institution.¹⁵⁶⁴ The separation of powers between these bodies was confusing and inefficient; therefore, a new single-purpose authority was established with the sole responsibility of competition law enforcement.¹⁵⁶⁵

In May 2012 the new Portuguese Competition Act (Law 19/2012) replaced both the Competition Act of 2003 and the Leniency Act of 2006.¹⁵⁶⁶ Moreover, new Bylaws of the PCA were approved in 2014. Despite these significant legal changes, the design of the authority remained the same. The PCA focuses exclusively on competition matters. Its specialised nature has only been strengthened, while the powers regarding unfair trading practices have been transferred to the Portuguese Economic and Food Safety Authority, in 2013.¹⁵⁶⁷ The latter is responsible for business compliance with public health and trade practice norms. The body responsible for competition policy is Portuguese Directorate-General for Consumer Affairs, under the Ministry of Economy. They are also National Regulatory Authorities. Each of the enforcement and regulatory authorities has its own scopes of duties, with clear separation of responsibilities.¹⁵⁶⁸

¹⁵⁶⁴ See: http://www.concorrenca.pt/vEN/A_AdC/Organization/Pages/Organization.aspx

¹⁵⁶⁵ OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Portugal'; See also: http://ec.europa.eu/competition/ecn/brief/02_2012/pt_act.pdf

For the detailed structure of the PCA, see:

http://www.concorrenca.pt/vEN/A_AdC/Organization/Pages/Organization.aspx

¹⁵⁶⁶ See the brief: http://ec.europa.eu/competition/ecn/brief/02_2012/pt_act.pdf

¹⁵⁶⁷ OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by Portugal' (n 1563).

¹⁵⁶⁸ For detailed information, see:

http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/national_consumer_organisations/docs/national-consumer-organisations_pt_listing.pdf

5.9 France, rejecting a two-pillar model

The redesigning of the competition authority in France took place in 2008, and it was somewhat similar to the Portuguese experience. The changes were delivered by the Modernisation of the Economy Act 2008-776 of 4 August 2008, which was soon followed by Ordinance no. 2008-1161 of 13 November 2008 on the modernisation of competition regulation.¹⁵⁶⁹ The previous two-pillar system, sharing the enforcement powers between an independent agency, the Competition Council (*Le Conseil de la concurrence*), and the Ministry of Economy, was replaced by a single independent authority (*Autorité de la concurrence*),¹⁵⁷⁰ which became operational in March 2009. Moreover, its scope of responsibilities has been widened and the function of merger control has been transferred to it from the government, bringing the French system in line with other EU Member States, while also strengthening the independence of the enforcement institution.¹⁵⁷¹

Consumer law related competences are shared among several authorities. In March 2014 the French parliament adopted a new consumer law, implementing the Consumer Rights Directive.¹⁵⁷² The law granted wide powers to the French Directorate-General for Competition, Consumer Affairs and Prevention of Fraud which is a part of the Ministry of Economy, Finance and Industry.¹⁵⁷³ The *Autorité de contrôle prudentiel et de résolution*, which is a supervisory body for banking and insurance sectors in France, is also responsible

¹⁵⁶⁹ OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by France'. 4

¹⁵⁷⁰ See a statement from the authority: <https://www.concurrences.com/en/auteur/French-Competition-Authority>

¹⁵⁷¹ OECD, 'Roundtable on Changes in Institutional Design of Competition Authorities - Note by France' (n 1567).; Bruno Lasserre, 'The New French Competition Law Enforcement Regime' [2009] *Competition Law International* 15–20.

¹⁵⁷² Parliament of France, 'Act No. 2014-344 on Consumers Rights Implementing the Consumers Rights Directive 2011/83/EU, Which Sets out the Main Rules for Conducting e-Commerce with Consumers.'

¹⁵⁷³ Out-law.com French Consumer Law, (last updated in April 2014) See: <http://www.out-law.com/en/topics/commercial/consumer-protection/french-consumer-law1/>

for consumer protection within its fields.¹⁵⁷⁴ Along with it, the *Banque de France*¹⁵⁷⁵ has certain functions regarding consumer protection, designing to this end rules and strict protocols for financial services.

5.10 Common tendencies

The note by France at the OECD roundtable concludes that institutional reform is a continuous and gradual process, and also underlines the need for competition regulations to adapt “*to evolution in the behaviour of economic operators, the emergence or reshaping of certain markets, and the expectations of both public authorities and consumers.*”¹⁵⁷⁶ In the EU, a number of enforcement authorities have been reshaped and reorganized within a rather short period of time, spanning from the last years of 2000s to the first half of the 2010s. The landmark event that played a decisive role in reshaping new enforcement authorities was the global and EU financial crises.

Despite the significant differences between the national reforms, one of the most common features for the majority of them is the budgetary concerns behind the reorganizations. The institutional restructuring happened as a result of political decisions,¹⁵⁷⁷ in some cases even without any legislative involvement.¹⁵⁷⁸ While some states did not shy away, demonstrating their financial concerns, they were not always explicitly stated, and other secondary grounds

¹⁵⁷⁴ For more information, see: <http://acpr.banque-france.fr/en/acpr/tasks.html>

¹⁵⁷⁵ <https://www.banque-france.fr/en>

¹⁵⁷⁶ OECD, ‘Roundtable on Changes in Institutional Design of Competition Authorities - Note by France’ (n 1567). 11, para. 55

¹⁵⁷⁷ Cseres, ‘Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law’ (n 28). 3

¹⁵⁷⁸ See above the case of Denmark

were used for declaratory purposes. In certain cases the desire to demonstrate the government's devotion to cost saving policies was so intense that the objective of the reforms was to merely reduce the funding for authorities, without concerns for the broader picture, and taking into consideration only the potential economic advantages that would not be realized due to the shortcomings of the reforms.¹⁵⁷⁹ In other states, emphasis was put on other arguments, such as the need to reach an overall improvement of the effectiveness of enforcement system, which became a common justification for several national reforms, even for opposite measures. Merging authorities was justified on the basis of the need of raising effectiveness and synergies, while the separation of certain functions was said to reduce the complexity of the enforcement system.¹⁵⁸⁰

Cseres shares the position that the changes were often introduced without studying their potential impact. Eventually the reorganization were often more experimental rather than programmatic.¹⁵⁸¹ Governments tried various model and combinations, merging competition authorities, adding consumer law enforcement powers and sector regulatory functions, or separating the agencies, with strict division between their responsibilities. Still, despite the differences, the stronger trend was to accommodate enforcement authorities under the same roof.

This choice has some clear advantages. The two fields of law share the goals to achieve consumer welfare, maintain a well-functioning, competitive market, and ensure the right to choice for consumers, while enabling them to take rational decisions. They are

¹⁵⁷⁹ Lucey (n 1455). 188

¹⁵⁸⁰ See above the cases of: Netherlands, Denmark, Finland, Ireland

¹⁵⁸¹ Cseres, 'Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law' (n 28). 5

complementary and reinforcing each other, and none of them can function well unless both fields are effectively applied and enforced. While each field approaches these objectives from different perspectives, for competition law focuses on the supply side, while consumer law addresses the demand side, their coordination is necessary and essential for their success.¹⁵⁸²

Practically, their coordination and realization of synergies can be effectively managed when the enforcement of both fields is housed within one authority, which can gather a wider perspective of a market and its problems, and can choose the most suited forms of intervention. Pooled expertise and knowledge of the market allows a more comprehensive and this better understanding of its core challenges. Moreover, each competition or consumer policy can be supported with corresponding measures in another field, making their enforcement more coherent and productive.

Dual purpose authority can also offer practical, everyday benefits, by simplifying communication, making the enforcement process faster. It should be borne in mind that these are the opportunities which can be realised in case of effective management, whereas the mere merging of enforcement authorities is not a guarantee for the effective coordination between of the two legal fields. In certain cases, such unification may even lead to further problems, such as the domination of one field over another¹⁵⁸³ and unnecessary rivalry.¹⁵⁸⁴ It is also possible to coordinate two single-function institutions. However, this form is less

¹⁵⁸² OECD, 'The Interface between Competition and Consumer Policies' (n 368). 8

¹⁵⁸³ This was an actual concern when combining competition and consumer authorities in Finland. See above the case of Finland.

¹⁵⁸⁴ Kovacic and Hyman (n 28). 8

spread¹⁵⁸⁵ and a clear trend is to attempt to realise potential synergies, offered by the uniform enforcement of competition and consumer law.

Otto suggests that it is not only a European phenomenon to merge enforcement authorities, but rather a worldwide trend. Competition agencies are moving away from being single-function bodies, and becoming multifunctional ones.¹⁵⁸⁶ As argued by Lachnit, the tendency is to merge and limit down the size of enforcement authorities as good practice of modern enforcement institutions.¹⁵⁸⁷ It is becoming a common challenge for the institutions to do more job with reduced funding. Assuming that organizational flaws leads to ineffective enforcement, it might not be totally unrealistic to conclude that an equal amount of work, if not more, can be done with less resources if effectively distributed to a well-designed authority. In this process, switching to an optimal design may significantly improve performance and avoid the need for excessive funding. There is no readymade receipt or one-size-fit-all solution on how to achieve the objective. However, it is possible to use the experience of the EU and its Member States to identify best practices and generate lessons for Georgia. The following sections will be dedicated to this purpose.

6. Design of enforcement and regulatory authorities in Georgia

After reviewing a number of EU Member States and their institutional framework for market supervision and regulation, the given section is dedicated to describe the current legal framework of regulating market in Georgia and its institutional structure. A short historic

¹⁵⁸⁵ OECD, 'The Interface between Competition and Consumer Policies' (n 368). 10

¹⁵⁸⁶ Ottow (n 28). 25

¹⁵⁸⁷ Lachnit (n 210).

review will be followed by presentation of the current Georgian enforcement and market regulatory system. As Georgia is the primary jurisdiction to be discussed in this part, it will be more scrutinized than the brief reviews of selected EU Member States offered in the previous sections. The chapter will proceed to the assessment of the effectiveness of the current institutional framework of Georgia, and verify which changes can be required or recommended.

6.1 Brief historic review

As discussed in the previous chapters, Georgia has been regulating competition since early 1990s.¹⁵⁸⁸ The first regulations, introduced in 1992 by the State Council,¹⁵⁸⁹ had dual-purpose approach and aimed to establish competitive environment on the market and protect the interests of consumers.¹⁵⁹⁰ The Anti-Monopoly Department was created within the Ministry of Economy, which was assigned to protect consumers, as well.¹⁵⁹¹ Therefore, it can be argued that from the early beginnings competition and consumer rights regulations were bundled together and were developing hand in hand, in Georgia. That tendency was kept until 2005, as Georgian anti-monopoly policy used to include consumer rights protection and advertising regulation.¹⁵⁹² In the same manner, when the Constitution of Georgia was adopted in 1995, the provisions guarantying free competition and consumer rights protection were

¹⁵⁸⁸ Udesiani (n 317) 10.

¹⁵⁸⁹ By the end of 1991, a military *coup d'état* occurred in Georgia. After overthrowing the government and seizing the power, an interim government - the Military Council was formed in the beginning of Jan. 1992. By March 1992, the latter was reconstituted into a State Council.

placed together, in the same article.¹⁵⁹³ Existence of these common links was once more stressed by the Law on Monopoly Activity and Competition adopted a year later.¹⁵⁹⁴ Article 1(1) of the law determined that the goal of the law was to promote entrepreneurship, to create legal framework for competitive environment and to protect consumer rights. The law on Protecting Consumer Rights was adopted a few months earlier.¹⁵⁹⁵ By 1998 the Law on Advertising was also adopted, including provisions regarding consumer protection from misleading advertising.

By the Presidential Edict, a charter and structure of the antimonopoly service was determined in 1996 that imposed over the authority an obligation to protect consumer rights. The Authority was established as the Legal Entity of Public Law under the Ministry of Economy, Industry and Trade. The first part of the first article of its charter stated that Georgian State Antimonopoly Service is a monitoring-regulatory body, responsible for the enforcement of anti-monopoly, consumer rights protection and advertising legislation. The charter norm was in line with Art. 20 of the Law on Monopoly Activity and Competition which also determined that the Antimonopoly Service was responsible to protect consumer rights and regulate advertising, along with its responsibilities to support competition enforce the antimonopoly law. Thus the initial antimonopoly law of Georgia was very clear about recognizing consumer protection as one of its major objectives.

In June 2005 Georgia took a U-turn when it deregulated the market and shut down the Antimonopoly Service. This reform harmed consumers not only by leaving market free from

¹⁵⁹⁴ Law of Georgia on Monopoly Activity and Competition (n 329).

¹⁵⁹⁵ The Law on the Protection of Consumers' Rights (n 330).

any state monitoring and intervention, allowing anticompetitive practices and abuse of dominance to take place. It was also the institution responsible for consumer rights protection and it was merely replaced with the agency that did not have any similar functions. After being decreased to a nominal law, the Law on Consumer Right Protection was abolished in May 2012. It was declared invalid by Product Safety and Free Movement Code, which partially replaced it,¹⁵⁹⁶ mostly regulating the issues related to product safety. The latter law was adopted as product safety was identified by the EU recommendations as a problematic area.

While following the EU recommendations in a pure formalistic manner, a new law was adopted which regulates only a small portion of the consumer related issues, while creating a black hole in the sphere of consumer protection at general level. Product safety is an issue relevant for consumers, but consumer law is much larger than that. Currently Georgia does not a law specifically dedicated to consumer rights protection, however certain general provisions are scattered in various legal acts. A little better is the situation in the regulated sectors of the nation economy.

6.2 Georgian Competition Agency

The Georgian Competition Agency started functioning in October 2014. The Agency is an independent authority, and unlike its “ancestor”, the Antimonopoly Service, it is not subordinated to any ministry.¹⁵⁹⁷ The Prime Minister appoints the Chair, who is accountable

¹⁵⁹⁷ Law of Georgia on Competition (n 18). Art. 4

before the Prime Minister and the society. The law grants the Agency full freedom in its activities and decisions.¹⁵⁹⁸ The principles inspiring the Agency's activities are independence, non-discrimination, unbiasedness, transparency and accountability.¹⁵⁹⁹ Competition Agency is a sole-responsibility authority, which is dedicated to enforce competition law. It is divided into four departments: legal and methodological support, economic analysis, competition, administration. It currently employs 40 people and is planned to increase the number in the future. It is a member of the International Competition Authority, and regularly participates in its working groups and annual conferences. The Agency is also member of the Sofia Competition Forum.

While the Competition Agency has no competence with regard to consumer law, unlike the Antimonopoly Service in 1990s, its functions still include certain issues, which can be considered to be on the borderline between competition and consumer law. More specifically, Article 11(3) LGC prohibits unfair actions/competition from undertakings, defined as any action that “*contradicts the norms of business ethics and infringes the interests of competitors and consumers*”. The law also offers a non-exhaustive exemplificative list, which includes misleading consumers through information transfer by any means of communication (including, through improper, unfair, unreliable or apparently false advertising); concealing of the actual purpose of the deal; misappropriation of the competitor's or third person's form of goods, their packaging or appearance; subornation of the buyer, supplier, employee or person with decision-making authorities to neglect consumers' interests. These actions are capable of deceiving and harming consumers, while also restricting competition. Since no

¹⁵⁹⁸ Ibid. Art. 16(3)

¹⁵⁹⁹ Ibid. Art. 17(1)

practice has been established on the matter nor national courts have interpreted it further, it can be only presumed that Art. 11(3) LGC will be only enforced when acts of deceiving consumers restrict competition, and not only harm consumers. The same conclusion can be drawn by looking at the experience of some EU Member States. For example, Hungarian law had similar approach, and the case law has confirmed that the competition authority would be concerned about violation of such restrictions only when they distorted competition.¹⁶⁰⁰

7. Issues to be considered regarding institutional design

When discussing institutional design of enforcement authorities, there are a number of critical issues that cannot be omitted. Usually they represent dilemmas between two or more number of options and the right choice is far from being obvious, as it depends on many circumstances and might differ according to the jurisdictions. In certain cases, it is hard to support strictly one model or another, but in light of the recent experiences and thoughts of various scholars¹⁶⁰¹ it may be possible to identify the general features a good enforcement authority should have. One of the most disputed issues regarding institutional design is the topic of independence and accountability, which are often viewed as somewhat conflicting concepts. Ideally, the authority should be independent and proactively accountable at the same time. However, there is some tension between these features, as will be demonstrated below.

¹⁶⁰⁰ Balogh and Cseres (n 1435). 354

¹⁶⁰¹ Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015).

In order to ensure independence, there are a number of factors that should be taken into consideration. Structural independence is vital. The authority should be a stand-alone entity, and not a subordinated unit to another institution. However, formal structural arrangements do not always realize themselves in reality. We might meet structurally independent authorities, which acts under the important influence of the government, while in other cases the contrary is true, as in the example of the Danish Competition and Consumer Authority, which remains subordinated to the Ministry of Business and Growth, but enjoys wide autonomy. The case of Denmark also demonstrates the positive side of keeping closer ties with the government. Maintaining autonomy is vital, however the authority should not alienate itself. Being impartial does not necessarily entail being isolated, as this would make the authority lose potentially important sources of information, as well as - the informal instruments to influence legislative or executive branches of the government, when it advocates for certain legal changes and their implementation through governmental policies.¹⁶⁰²

The chair of the authority, appointed for a fixed term without the possibility of being removed but for a good reason, is yet another factor of independence. It grants the authority head the necessary freedom to act for the interests of market and consumers, instead of being worried about pleasing certain institutions or officials. Another way to manipulate the authority is through the control of its financial resources. This issue is becoming even more relevant, as proven by the recent reforms across the EU, which shows how the enforcement authorities are massively encouraged to limit down their spending. This is why authors stress the importance of funding and recommend that the authority's budget is not dependent on the

¹⁶⁰² Lowe (n 392). 1, 2

approval of a ministry or parliament. Such an arrangement may place even a structurally independent authority under the influence of the body entitled to determine its financial resources.¹⁶⁰³ However, the other side of the coin is that making the budget of the authority subject of approval by another institution can be a useful tool to ensure accountability.

Autonomy does not mean that the authority should not be accountable before any other state body or an official, even when they do not directly control its performance. It is important that the authority is open about its activities and ensure transparency by publishing reports regularly, revealing the data pro-actively, sometimes even if not strictly required by law, explaining policies, their rationale, and the objectives to be attained. Moreover, a good authority should clarify to the wider public how its measures contribute to consumer welfare, support business and the market. As stressed by Lowe, any competition enforcer should be able to clearly explain how its general performance or concrete actions benefit the wider public interest and consumer welfare.¹⁶⁰⁴ At the same time, accountability should not become a burden for the institution, since if the authority spends too much time or disproportionately vast resources on responding, explaining and educating others about its activities, it will hardly manage to remain effective in achieving its goals.¹⁶⁰⁵

The issue of independence of the authority is closely linked to the question how the institution is governed. Having a unitary executive has its benefits, for example quick decision making, especially when in certain cases prompt responses on the market developments are essential. However, in case of multi-member board, there is the advantage

¹⁶⁰³ Ibid.

¹⁶⁰⁴ Lowe (n 392). 2

¹⁶⁰⁵ Ibid. 5,6

of diversified expertise, broader view in decision making and stronger resistance to be captured by exterior forces, public or private. Speed of decision making in this case is obviously slower and in certain cases the board might be unable to reach agreement at all.¹⁶⁰⁶

A good authority should also have a clear role, values, mission and objectives. According to Kovacic, “*everything an agency does, flows from clear the development of a clear statement of what the agency is about and what it means to do*”¹⁶⁰⁷ Definiteness is essential, but this does not mean that the goals and mission is eternal and never change. On the contrary, they should be continuously debated and re-assessed. The debate allows a constant recalibration of the goals, creating a strategy that should be broken down to concrete operations, which on their side should be well planned, enforced and monitored closely. The authority should not be merely case-oriented, but problem-oriented; not brag about the number of cases it has completed, but demonstrate its effectiveness with the problems it has dealt with successfully.¹⁶⁰⁸

Moreover, to ensure effectiveness and quality of its performance, the authority should not be a closed, self-sufficient system. In addition to keeping ties with different branches of government, it should also be in dialog with itself and with academics, should listen to consumers, and should follow and learn from international experience.¹⁶⁰⁹ Such wider engagement and long-term planning are essential features of an effective policy-making. This is what differentiates a good authority from lazy legislators, who are usually oriented to “*pick the low hanging fruit*”. As Kovacic describes with an analogy, what policy makers should

¹⁶⁰⁶ Ibid. 6

¹⁶⁰⁷ Kovacic, ‘The Digital Broadband Migration and the Federal Trade Commission’ (n 28). 8

¹⁶⁰⁸ Ibid.

¹⁶⁰⁹ Ibid. 5-6

really be doing instead is planting trees, but these trees need time to grow before they give any fruit, which obviously outruns the term of the officials, making such measures rather unattractive.¹⁶¹⁰

One more significant feature for a good authority is its constant search for improvement. Enforcement institutions should be always in the process of self-assessment and analysing their performance that will allow them to move forward, reform, introduce innovations and keep developing. Young and emerging jurisdictions often offer the most creative and interesting ideas, as they are free from “*the path dependency and preconditions that tend to beset older systems and limit their capacity to embrace innovations.*”¹⁶¹¹ This is potential potentially relevant issue and an opportunity for Georgia to turn its weakness of lack of experience into strength and be creative and innovative. However, for this purpose Georgia will need to be more enthusiastic about the reform, instead of remaining reactionary to the recommendations and suggestions of the EU.

Finally, none of the abovementioned will be available without skilled professionals. The biggest asset for the authority is its people and it should invest in building and maintaining human capital, as a basis for the whole structure.¹⁶¹² No substantive law or institutional design can handle market failures, unless there are professionals able to use legal powers and deal with them. This task is complicated even further by the fact that public institutions, with their limited funding, are in heavy competition with the private sector. Law firms hunt for the brightest brains, offering them better salaries and conditions for work than public offices.

¹⁶¹⁰ Ibid. 7-9

¹⁶¹¹ Kovacic, ‘The Digital Broadband Migration and the Federal Trade Commission’ (n 28). 15-16

¹⁶¹² Ibid. 5

Human capital is one of the most valuable assets for enforcement authorities and they need to invest much to form a highly qualified and skilled team and maintain it.¹⁶¹³

Agencies rise and fall according to how well they understand market and commercial developments. Kovacic compares investments in intellectual capital as R&D of public institutions. He brings the example of what happens to a pharmaceutical company if its CEO fires all the scientists, closes its laboratories, abandons plans for developing new drugs and simply decides to focus only on producing already existing products. This is the perfect recipe for going out of business, and the same logic applies to agencies.¹⁶¹⁴ The successful agency of the future is the one that invests heavily in building knowledge and refreshing its intellectual capital today.¹⁶¹⁵

Another typical dilemma is whether enforcement institutions should have a single or multiple objectives and functions, including only the enforcement of competition law, or also consumer protection and other regulatory functions. Multifunctional models include certain risks, but offer valuable benefits in return, as it will be shown below with reference to the modernization of the Georgian Competition Agency.

¹⁶¹³ Ibid. 5-6

¹⁶¹⁴ Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission' (n 28). 15

¹⁶¹⁵ Ibid.

8. Designing future Georgian enforcement authority of competition and consumer laws

Legal transplantation is a complex and multidimensional issue, which always requires adjustment of the transplanted law and system to the local environment.¹⁶¹⁶ This very much applies to institutional design.¹⁶¹⁷ After transplanting a new law, it is necessary to determine its enforcement mechanisms, and therefore to decide whether to set up a new state body, reform an already existing one, or grant enforcement rights to another body with relatively similar functions and expertise. There is no general answer to this question, as much as there is no single response on what is the best institutional design for market regulating bodies.

Georgia already has an independent enforcement authority for competition law enforcement. However, as typical for transplanting states that conduct reforms predominantly due to external factors,¹⁶¹⁸ Georgia demonstrates strong passiveness towards the development of market regulatory policies further on its own initiative¹⁶¹⁹ and extend the reform to consumer policy. As this dissertation argues for the necessity of adopting consumer law in Georgia, it should also address the question of how this law should be enforced. As suggested by Svetiev, in the process of domestication of a transplanted foreign legal body, institutional arrangements play significant role.¹⁶²⁰

¹⁶¹⁶ Khan-Freund (n 15) 1–27; M. Freidman, (n 15) 127–129.

¹⁶¹⁷ Sacco (n 1420) 11.

¹⁶¹⁸ Svetiev (n 741). 209

¹⁶¹⁹ Georgia's lack of interest to develop effective competition policy was recognized in the Global Competitiveness Index 2017-2018 Edition, which assessed effectiveness of anti-monopoly policy in Georgia extremely poorly. See: World Economic Forum, *Global Competitiveness Forum, 2017-2018*. 124-125. Available from: <http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017-2018.pdf>

¹⁶²⁰ Ibid.

Attributing the enforcement of consumer protection law to a separate, new authority or to an existing institution is not an easy decision. Each model of functional organization offers potential benefits and contains certain risks; therefore it will be wrong to fully opt out one of the models. Yet, we maintain that a multifunctional model of enforcement authority would be the best option for Georgia, for a number of different reasons.

As Lachnit indicates in her recent book, there is a noticeable tendency of good enforcement authorities merged and kept limited in size.¹⁶²¹ This is a topical and widely supported argument in Georgia nowadays. Already for several years there have been continuous talks about the necessity to reduce the huge bureaucratic apparatus of the country, in order to save limited budgetary resources. Georgian ministries are in the process of reducing their spending, and when necessary the number of personnel, abolishing non-essential positions and even certain structural units.¹⁶²² Therefore, even the idea of introducing a new regulatory body for the market is contradictory to this tendency, and might become a very unpopular measure.¹⁶²³ Similar trends, as we saw, are visible among a number of EU Member States, and many of them actually redesigned and merged their enforcement authorities, in the attempt to cut down spending and avoid oversized institutions.

¹⁶²¹ Lachnit (n 210).

¹⁶²² See: ‘Prison Minister Supports Merging Ministries to Save Money’ (*Democracy & Freedom Watch*, 18 February 2016) <<http://dfwatch.net/prison-minister-supports-merging-ministries-to-save-money-40267>> accessed 8 October 2017; ‘Georgia Decides to Save on Ministers’ (*Vestnik Kavkaza*) <<http://vestnikkavkaza.net/news/Georgia-decides-to-save-on-ministers.html>> accessed 8 October 2017; ‘Georgian Government to Cut Spending as Lari Drops Rapidly’ (*Democracy & Freedom Watch*, 24 February 2015) <<http://dfwatch.net/georgian-govt-to-cut-spending-as-lari-drops-rapidly-33921>> accessed 8 October 2017.

¹⁶²³ Business sector in Georgia did not welcome with enthusiasm the idea of opening a competition authority, back in 2014. It can be argued that opening yet another market regulatory body will cause similar reaction and might lead to strong lobbying against the reform, while imposing additional functions to an existing body can attract less unwanted attention. See: Lekvianidze (n 721).

More generally, and under the current conditions, it is a strategically correct choice to house the consumer law enforcement authority together with the competition authority. As debated at the OECD roundtable, for countries where market regulation and supervision is new, governments are usually sceptical towards consumer policies, and often translate itself into an inadequate budget for consumer authority.¹⁶²⁴ This can be relevant for Georgia, which is in search of ways to reduce spending.¹⁶²⁵ As a remedy to this problem, the OECD recommends dual function authorities, while also underlining that unlike the governmental scepticism, the public is usually more familiar and favourable to consumer policies, and while it might struggle to properly understand and appreciate competition policies. Therefore, for emerging competition jurisdictions, making consumer law enforcement a competence of competition authority might also help gaining public support and interest.¹⁶²⁶

There are a number of economists who claim that nothing should be regulated by competition law and by its enforcing authority, unless it is an economic issue, because they are not best suited to achieve public policy goals.¹⁶²⁷ Against this view, this dissertation argues that competition authorities should be consumer-oriented. Aiming for consumer welfare already incorporates a number of social and public policy goals that are not strictly economic. Yet, assisting and protecting consumers as the weakest market actors and remedying market asymmetry has, as we saw in Chapter 3, a strong economic rationale. Similarly, consumer empowerment, which enhances their rationality and intensifies their participation in competition law enforcement have economic objectives and offer a significant contribution to

¹⁶²⁴ OECD, 'The Interface between Competition and Consumer Policies' (n 368). 10

¹⁶²⁵ 'Prison Minister Supports Merging Ministries to Save Money' (n 1619); 'Georgia Decides to Save on Ministers' (n 1619); 'Georgian Government to Cut Spending as Lari Drops Rapidly' (n 1619).

¹⁶²⁶ OECD, 'The Interface between Competition and Consumer Policies' (n 368). 10

¹⁶²⁷ Motta (n 226) 26.

market competition and effective competition law enforcement, along with the benefits delivered for consumers. The same can be said, as seen before, for the decision of placing competition and consumer enforcement authorities under the same roof.

There is no consensus among scholars whether keeping market regulating authorities independent and in competition with one another is a good idea, or it is better to place them under the same institutional umbrella. Separate authorities might be harder to be captured, they have better possibilities to specialise and grow expertise in certain field. Moreover, they perform better in establishing themselves as a brand, which contributes to motivate them to work harder, in order to maintain the reputation they built. However, there is also a concern that a competition between state institutions may create unhealthy and undesired rivalry, which may incentivize them to focus more on their inter-institutional competition instead than on the pursuance of public interest goals.¹⁶²⁸ In this sense, Kovacic argues that institutional multiplicity is a serious problem, as the institutions do not easily recognize their common cause and the necessity to work hand in hand. On the contrary, “*cooperation across public institutions with overlapping authority rarely comes easily.*”¹⁶²⁹

Keeping consumer and competition law enforcement under the same roof definitely brings certain benefits; it pools and increases the regulator’s knowledge of the market, and facilitates the sharing of intelligence and research analyses. At the enforcement stage, the staff is more effective and more flexible to use various policy instruments. Multiple purpose authorities

¹⁶²⁸ Kovacic and Hyman (n 28). 8

¹⁶²⁹ William Kovacic, ‘Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement’ 266–268.

have better tools to realize potential synergies and to keep the operational costs low¹⁶³⁰ Obviously, all these elements cannot be guaranteed by merely merging two independent authorities. Yet, the multi-functional approach undeniably entails huge potential and a number of opportunities, which are usually problematic for separate, single-function institutions. This is particularly true vis-a-vis today's complex and multi-dimensional market. As argued by Cseres, a number of sectors are experiencing market-wide problems, involving both competition and consumer law issues. In order to tackle these complex issues, the traditional division between the two legal bodies might not be that useful. They may require, instead, a more integrated approach merging both legal and economic knowledge from competition law and consumer protection.¹⁶³¹

Moreover, no substantive law or institutional design can handle market failures, unless there are professionals able to use legal tools and deal with them. Authorities require staff with very specific knowledge and experience.¹⁶³² This issue is particularly relevant for jurisdiction with little experience in market regulation, such as Georgia. The lack of specialized lawyers or economists is well recognized by the Georgian Competition Agency, which is actively trying to train its personnel regularly on the most-topical issues and to raise their qualifications. In this perspective, the Agency is the best staffed institution, with relevant qualifications and ability to understand and enforce consumer law, particularly as

¹⁶³⁰ Lowe recalls EU commission experience despite its inner divisions of mergers, state aid, antitrust, cartels etc. According to him, the best practice was to create case teams for the prioritized cases, where team included professionals from various divisions, widening its scope and abilities to consider all the relevant issues. See: Lowe (n 392). 8, 9

¹⁶³¹ Cseres, 'Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law' (n 28). 12-14

¹⁶³² Kovacic, 'The Digital Broadband Migration and the Federal Trade Commission' (n 28). 5

qualification enhancement is an ongoing process and they can get further training in specific directions, while new personnel can be added to the existing human resources.

Considering the existing institutions in Georgia, if consumer law is adopted, there can be only two candidates to enforce it, unless a new institution is specially established: the Competition Agency and Food Safety Agency.¹⁶³³ The latter is topically close to consumer rights, but with competences limited to food safety issues. Its personnel are mostly composed of biologists, which are surely unsuitable to enforce consumer law. The Competition Agency already enlists professionals with suitable skills to this end. Moreover, the Agency already has consumer-related functions under its competence, albeit not actively used yet. In light of such, this seems to be the best suited authority to enforce consumer law in a manner that would not only benefit consumers, but also contributes the effectiveness of the Agency itself, and more generally the effective market regulation in Georgia.

¹⁶³³ See: <http://nfa.gov.ge/en/>

Conclusion

This dissertation is dedicated to explore the interrelations and interdependence of competition law and consumer law, with a particular focus on the EU and Georgian legal systems. More specifically, it examines the necessity of effective consumer protection legislation and enforcement mechanism, in order to ensure the efficient market functioning and development, a high level of competitiveness and the effective enforcement of competition law. The analysis is not conducted in order to give a short affirmative or negative answer, but also to examine the potential of realizing synergies between the two legal bodies, look for new means and methods to improve their cooperation, and suggest recommendations to deal with the existing challenges.

Chapter one analysed the objectives of competition law and determined the three major goals of EU competition law, that are market integration, competition process and consumer welfare. The primary challenge for competition law objectives was identified in their lack of definiteness and obscurity, with particular regard to the abstract concept of consumer welfare. The new Georgian competition law sets as objectives the fostering of free market and free trade, the concept of consumer welfare is present here as well, and the attention to consumer benefits or harms is an essential part of consumer policy. The chapter also reviewed the historic background of the legal transplant of EU competition law, identifying in the process of Europeanization the primary drive for the development of competition law in Georgia. The strong presence of external factors and the lack of local readiness to extend the reforms further were analysed, in order to illustrate the current challenges faced for other market-related regulations.

Chapter two examined the notion of consumer in consumer law and competition law, comparing their mutual consistence and their compatibility with the rationales of their respective legal bodies. As competition law defines consumer as a synonym of customer, concerns were expressed on whether such a simplistic approach might hinder competition law from attaining consumer welfare objectives, as it might fail to identify the most vulnerable group of end-users. As for consumer law, the historical analysis methodology was used to better demonstrate its economic rationale. On this basis, EU consumer law was criticized for employing an extremely narrow definition of consumer, lacking economic sense and artificially limiting down the protection to a smaller group, while allowing market failures. For instance, transactions involving non-human market actors, such as small enterprises. However, the chapter also underlined that there is a tendency of widening the notion of consumer and the scope of consumer protection in certain cases, which can also be viewed as a process of approximation, at a certain level, distinct consumer definitions within competition and consumer laws.

Chapter three focused on the new discoveries of behavioural studies, with regard to the image of consumer. The chapter tested the validity of the notion of consumer and the mainstream consumer image established in EU law vis-a-vis the nature and features of an actual consumer. These findings reinforced the vulnerable and weak image of consumers, with their bounded rationality and biases. The drawn conclusions supported the argument that consumers are often subjected to abuse and manipulation by the business sector due to their vulnerability, and they also fail to make reasonable decisions due to their bounded rationality.

In a nutshell, consumers were found to be unable to perform the important role competition law attributes to them, unless empowered and protected by consumer law.

Chapter four explored the procedural and institutional aspects of competition and consumer laws. It discussed consumers' access and participation in competition law enforcement process, as well as the most optimal institutional arrangements for competition and consumer law enforcement authorities. Initially, it demonstrated that public and private enforcement of competition law are not perfect substitutes, and that due to the specific features of public enforcement, consumers need to have some access to it. While consumers have the legal possibility to participate in public enforcement, the actual reality was determined to be rather harsh, as various challenges hinder consumers and push them to protect their rights through private enforcement. The analysis of private enforcement and the possibility of claiming damages by consumers highlighted various challenges common for consumers, which make individual damage claims rather unattractive and impractical legal instrument for the majority of cases. Particular attention was paid to collective actions, which was argued to suit better to the specific nature of consumers and to their limited damage claims. Despite certain developments, collective actions remained a problematic and an unsolved challenge in the EU, and their potential could not be fully utilized. The chapter also discussed the specific challenges of competition law enforcement in Georgia, as well as the absence of various effective enforcement mechanisms, which weaken the already vulnerable Georgian consumers, by limiting their participation possibilities in competition enforcement process.

Chapter five explored the topic of institutional design which, despite being a topical issue, remains relatively unpopular and analysed only by a few scholars. This chapter did not aim to

fill this gap, but to analyse the topic due to its significance for the main question of this dissertation. The need of consumer law for competition law is not limited to substantive and procedural rules: at an institutional stage, it translates into the necessity to properly structure and design enforcement authorities, in order to ensure the coordination between the two bodies of law, their coherent enforcement, and the realisation of possible synergies, reviewing Chapter four analysed different national experiences and recent reforms of enforcement authorities in nine EU Member States, and identified common trends and features of modern enforcement institutions. A well visible tendency is to reduce spending and enhance effectiveness of enforcement authorities.

One of the ways to achieve this goal is to merge competition and consumer authorities. Housing competition and consumer enforcers under the same roof offers wider possibilities for effective coordination and coherent enforcement. As a result of pooling market knowledge and expertise, sharing experiences and enforcement tools, authorities can have a better perspective of the market, gain a deeper understanding of problems and use a wider range of instruments to deal with them. Even the EU Commission has introduced practices of exchanging staff across directorates, while at the national level several EU Member States fully merged their competition and consumer authorities. In addition to its practical advantages, the close cooperation between competition and consumer law at the institutional level is inevitable, due to the emergence of progressively more complex and multidimensional problems in modern markets. The traditional strict division between the two fields seems to be getting gradually relaxed, as the need for more integrated approaches becomes pressing.

Within this context, the current Georgian legal and institutional framework is rather inconvenient, and is missing vast potential and opportunities offered by consumer law. The chapter analyses the past and current design of enforcement and regulatory authorities in Georgia, emphasising how the Georgian Competition Agency is a single purpose authority, and how no authority is responsible for consumer rights protection, except for sectoral agencies with limited competences.

This dissertation maintains that Georgia cannot hope to actually develop its market and turn into a well-functioning and competitive system without introducing a modern and effective consumer law. In line with this point, Chapter 5 argued that Georgia will also benefit if it uses the dual-function institutional model and attributed to the Competition Agency. Arguments in favour of this approach can be found in international and EU practices, within the national history and traditions of market regulations, in budgetary concerns and in the wide range of opportunities offered by it, which can significantly enhance the governmental abilities to effectively intervene on the national market and attain the objects of both competition and consumer law.

However, the mere adoption of consumer law cannot ensure its adequate implementation, the effective regulation of the market and the harmonious interplay between consumer and competition laws. The idea supported throughout this dissertation is that consumer empowerment and protection is a vital part for the efficient functioning of market competition, as well as for effective application and enforcement of competition law. While consumer law is absolutely needed in order to achieve the stated objective, a more active consumer participation in the law enforcement process should also be supported through the

procedural rules of competition law. In order to make the law enforcement consumer-oriented and to best accommodate all the objectives of the law, along with consumer interests, it is essential to design and construct enforcement institutions duly. A parliament adopting a set of rules is only the first step, which should be logically followed by procedural and institutional developments to ensure the smooth and effective enforcement of the law.

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