

Public Goods & Governance

RECENT CHANGES IN GOVERNING PUBLIC GOODS & SERVICES

Volume 5

Issue 1

2020

Journal of the MTA-DE Public Service Research Group

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

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

Introduction

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

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

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

* DOI 10.21867/KjK/2020.1.4.

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

1. The consumer in the SGI market

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

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

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

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

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

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

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

2. Consumer protection in specific SGEI sectors

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

2.1. Electronic communication

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

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

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

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

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

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

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

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

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

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

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

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

One of the most important objectives of the latest regulatory reform was, as pointed out by the Commission in the Digital Single Market Strategy for Europe in 2015, to ensure effective protection for consumers. The new European Electronic Communications Code (EECC) replaces the current telecommunication framework of the EU, together with the Universal Services Directive from 21 December 2002 [Directive (EU) 2018/1972]. The new rules aim at strengthening all the three dimensions of consumer protection. One of the main results brought by EECC is the extension of the scope of universal services (beyond public telephone) to voice telephone and broadband internet access. The extension of USO also impacts the scope of social rights as the directive obliges Member States to take appropriate measures to ensure affordable retail prices for adequate broadband internet access and voice communications services to consumers with low-income or special social needs, including older people, end-users with disabilities and consumers living in rural or geographically isolated areas. It means that Member States may require providers of internet access and of voice communications services to offer tariff options and/or packages different from those provided under normal commercial conditions.⁵ In

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

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

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

2.2. Postal services

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

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

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

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

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

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

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

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

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

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

2.3. The electricity and gas sectors

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

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

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

⁷ For more details, see Bordás, 2020.

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

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

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

2.4. The role of regulatory authorities in consumer protection

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

3. Changes in the 'EU SGI Policy'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

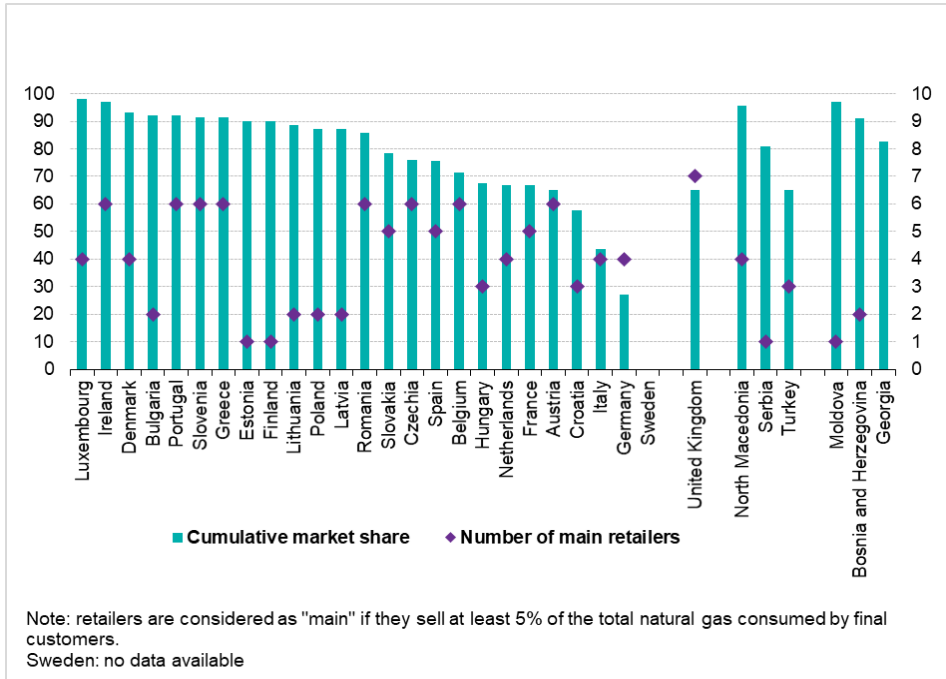
Although the *Federutility* judgment is generally seen as largely reducing Member States’ powers in price regulations, some notes should be taken in this regard. Firstly, the CJEU has not defined its position on the legality of the Italian legislation but left the final decision to the national court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

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

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

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

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



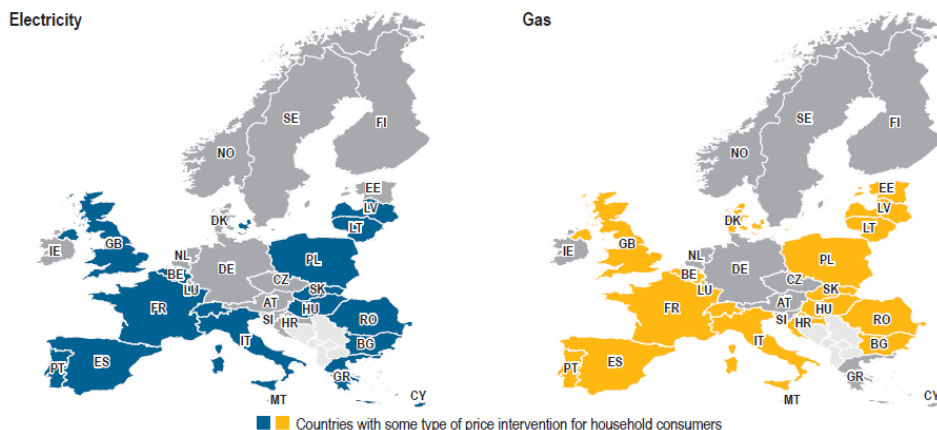
Source: Eurostat

When evaluating the impact of subsequent energy packages and relevant CJEU case-law from a consumer perspective, one must consider the development of retail electricity and gas markets in recent years. A high number of suppliers and low market concentration is viewed as the indicators of a competitive market structure. CEER (Council of European Energy Regulators) data of 2014 show that retail electricity and gas markets for households were still highly concentrated in more than 2/3 of the EU Member States (EC 2016) and the situation has remained largely unchanged in the last few years. In 2019, Hungary, Lithuania, Croatia and Luxembourg recorded the highest values (between 95% and 100% concentration rate) (ACER & CEER 2020, 44). *Figure 1* illustrates the number as well as the cumulative market shares of main natural gas retailers¹² to final (not only household) costumers for 24 EU Member States and the

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

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

Figure 2: Existence of price intervention in electricity (left) and in natural gas (right) in 2019¹³



Source: ACER & CEER 2020, 10

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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